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One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank

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Introduction

*“The Israeli residents living in the West Bank are subject to extensive parts of Israeli law, in addition to special legislation by the military commander that applies solely to the Israeli residents. The Palestinian residents living in the very same territories are subject to Jordanian law and to legislation by the military governor that applies to them [...] **This outcome creates a regime in which different sets of laws apply in one territory.**”¹*

One of the most prominent and disturbing characteristics of Israeli military rule in the West Bank² is the creation and development of an official and institutionalized legal regime of two separate legal systems, on an ethnic-national basis. The long-standing residence of citizens of the State of Israel, the occupying power, in settlements at the heart of the occupied territory – which contravenes international law in and of itself – has led to systematic discrimination that is anchored in legislation and rulings that affect every aspect in the lives of Palestinian residents of the West Bank. This dual system of law is the focal point of this report.

¹ HCJ 5666/03 **Kav LaOved v. Jerusalem Labor Court**, 62(3) 264, para. 25 of the judgement of Justice Rivlin (2007) (hereinafter: the **Kav LaOved** case).

² For the purpose of this report, the reference to “the West Bank” does not include East Jerusalem, which Israel annexed after occupying it in 1967 and then applied its sovereignty to it. This act of annexation contravenes international law, and therefore East Jerusalem is still considered to be an occupied territory under international law and is perceived as such by its Palestinian residents and by most of the world's countries. However, as a result of this annexation and the application of Israeli law to East Jerusalem, its residents are not subject to military rule, and the phenomenon described in this report – of subjecting the Palestinian residents to a separate and different system of laws than the one applied to Israelis – is not directly relevant to them. The violations of the human rights of the Palestinian population of East Jerusalem are abundant, but the normative framework for reviewing them is different.

With the occupation of the West Bank in 1967, military rule was established in the area: the military commander declared himself as the sovereign of the territory and assumed governance and legislative powers. Over the years, the military commander has introduced far-reaching changes to the law applying in the West Bank, through proclamations and orders. The military rule, and the laws legislated under its authority, ostensibly apply to all persons found in the area, including Israelis, whether they are visiting the area or residing in it. However, in a de facto manner, and parallel to the development of the military legal system, Israeli lawmakers applied extensive sections of Israeli law to Israelis living in the West Bank - on a personal and extraterritorial basis. This included criminal law, National Health Insurance Law, taxation laws, laws pertaining to Knesset elections and more. The military commander further subjected the settlements and their residents to a long line of Israeli legislative articles in various civil areas, through different orders that were only applied to Jewish communities in the area. Thus, **two types of communities were created in the West Bank: Palestinian cities and villages, which are subject to Jordanian law and Israeli military orders, and Jewish local and regional councils, which are subject to Israeli law and enjoy the benefits and budgets granted by Israeli legislation.** This state of affairs established a new legal system, which Prof. Amnon Rubinstein dubbed already 25 years ago as **“enclave-based justice.”**³

³ Amnon Rubinstein, “The Changing Status of the ‘Territories’ (West Bank and Gaza): From Escrow to Legal Mongrel,” *Tel Aviv University Studies in Law* 8, p. 59-79 (1988) (hereinafter: Rubinstein, “From Escrow to Legal Mongrel”). See also: Eyal Benvenisti, *Legal Dualism: The Absorption of the Occupied Territories into Israel*, Westview Press (1989). Benvenisti describes the manner in which – through extensive military legislation, extraterritorial application of Israeli legislation and Israeli court rulings – Israeli law was applied to Israelis in the territories and to the areas of Israeli settlements. According to Benvenisti, the 1967 borders had already been erased 25 years ago, from a legal perspective, with regards to almost any objective reflecting Israeli

Judicial bodies in Israel, particularly the High Court of Justice (HCJ), enshrined the separation between the two legal systems in their rulings, by applying Israeli law to Israelis whenever they deemed it possible. The HCJ did this not only when the law required it, but also when the law granted discretion to the Court, and sometimes even extended the applicability of Israeli law to Israelis on its own initiative. The courts regard settlements in the territories as “**Israeli islands,**” upon which common sense demands the application of Israeli law.

Hence, in a gradual process that stretched over four decades, the Israeli legal system was applied to settlers in the West Bank almost in its entirety, while the Palestinian residents living in the same territory remained subject to the military legal system. The duality of laws under the Israeli rule in the West Bank has far-reaching implications with regards to the rights of the Palestinian residents and to their daily lives. **As a general rule, the military legislation they are subject to is far more severe than the Israeli legislation applied to settlers, and this discrimination touches upon almost every aspect of life.**

Criminal law is one of the areas in which the differences between the two legal systems are most apparent, and its implications for basic rights, particularly the right to liberty, are extremely significant. The national identity of a suspect or defendant determines which law will apply to them and who will have legal authority over them. In every stage of the legal proceedings – from the initial detention to the trial to the verdict – Palestinians are discriminated against when compared to Israelis. The above holds true with regard to both adults and minors. The systems enforcing **traffic laws** are also separate for Palestinians and discriminate against them, both in the

interests. By contrast, with regard to the interests of the Palestinian population, the legal borders remained intact.

extent of the enforcement and in the severity of the penalties.

The basic right to **freedom of expression** is of utmost importance to Palestinians: lacking representation within the sovereign body that rules over them (the military commander) and without an opportunity to influence the decisions that determine their daily reality, voicing their protest is a central channel for them to realize their autonomy, as well as numerous other rights. However, from a legal and practical perspective, the freedom of expression of Palestinians in the West Bank is virtually nonexistent. Military laws define Palestinian vigils and demonstrations as illegal assemblies, army and police forces treat them as a threat, and the vast majority are violently dispersed by security forces, sometimes resulting in fatal consequences. On the other hand, the authorities' attitude toward demonstrations organized by Israelis in the territories exhibits an extensive acknowledgment of their freedom of expression and right to protest. Aside from the right to protest, military legislation further prohibits and restricts various other forms of expression that are permitted under Israeli law.

In the realm of **planning and building**, there is a legislative and institutional separation between the planning systems for Israelis and Palestinians. This separation enables a policy that encourages construction in settlements while freezing it in Palestinian towns and villages. Israelis enjoy a significant representation of their interests in planning institutions, and they are full partners in planning procedures pertaining to them. The majority of West Bank settlements have detailed and updated outline plans, which facilitate the expansion of settlements and the issuance of building permits. By contrast, Palestinians are completely left out of the planning process and have no influence over planning procedures. Construction in most Palestinian villages is restricted by means of freezing the planning situation that was in place more than four decades ago, in a manner that does not enable building or development. The policy guiding planning enforcement and

demolition of structures constructed without a permit is also far stricter with regards to the Palestinian population than the Israeli population.

Freedom of movement, which is strictly protected in Israeli law, is an essential condition for the realization of most basic rights. In the West Bank, a person's ability to move freely is derived from this person's nationality. For more than a decade, movement restrictions have been imposed upon Palestinians residents through checkpoints, roadblocks, the Separation Barrier and movement prohibitions. These restrictions hinder their movement between different areas of the West Bank and within each area. Contrary to that, the movement of Israelis is permitted with almost no restrictions in most of the West Bank. Indeed, due to the significant improvement in the security situation, the situation of Palestinians in the West Bank has been alleviated in terms of freedom of movement in the past few years; yet their movement is still considerably restricted as compared to Israelis. Moreover, restrictions on passage between Gaza and the West Bank and on relocating to the West Bank violate the right of Palestinians to choose their place of residence and to realize their right to family life.

The following report describes the dual and discriminatory legal regime practiced in the West Bank. The first chapter will provide background information and chronicle the development of the two separate legal systems in the West Bank. The subsequent chapters will present a comparative review of the separate laws applied to Israelis and Palestinians in different areas: criminal law, traffic laws, freedom of expression and protest, planning and building, freedom of movement and immigration or the freedom to choose one's place of residence. The eighth and final chapter will discuss the normative flaws of this situation, and the manner in which the duality of laws and the discrimination stemming from it undermines the principle of equality, violates human dignity and contravenes the provisions of international humanitarian law.

It should be noted from the outset that this report will not deal with the legal system maintained by the Palestinian Authority in parts of the West Bank. In the framework of the Interim Agreement (the Oslo Accords),⁴ Israel transferred part of its sovereign responsibilities in certain areas of the West Bank to the Palestinian Authority.⁵ Consequently, the degree in which Palestinian residents are subjected to the Israeli military legal system is different from one area to the next. The residents of the urban centers (known as Area A) are less influenced by military law as compared to Palestinian living in rural areas (Area C), which are directly controlled by the military commander in almost every aspect of their lives. At the same time, since Israel did not relinquish its overall control over the West Bank area, the residents of both areas remain under the sovereignty of the military commander, which continues to maintain and execute ruling powers, including jurisdiction, even in Area A.⁶ Moreover, the Israeli

⁴ Law of the Application of the Interim Agreement Regarding the West Bank and Gaza Strip (Jurisdiction Authorities and Other Orders) (Law Amendments) 5756-1995. In the West Bank, the agreement was adopted through the *Proclamation Regarding the Application of the Interim Agreement (Judea and Samaria)*, No. 7, 5756-1995.

⁵ The Oslo Accords divided the West Bank into three areas: A, B and C. Israel continues to exercise full civil and security control over Area C, which constitutes approximately 60% of the West Bank. In Area B, Israel retains security control and the Palestinian Authority has civil responsibility. In Area A, which constitutes approximately 18% of the West Bank and is where the majority of the Palestinian population resides, the Palestinian Authority was granted civil and security responsibility, except over aspects in which the military commander continues to exercise his authorities. It should be noted that the Palestinian Authority was granted judicial authority only over Palestinians, even in Area A. The authority over Israelis in the territories remains solely in the hands of Israel. See: Celia Wasserstein Fassberg, "Israel and the Palestinian Authority: Jurisdiction and Legal Assistance," *Israel Law Review* 28, p. 318 (1994).

⁶ The Oslo Accords stipulated that security legislation will apply in its entirety to Areas B and C and that military courts will be authorized to adjudicate all offences in these territories. In Area A, the Oslo Accords

military's complete control over the rural areas influences all residents of the territories – in an indirect but significant manner.⁷ The establishment of the Palestinian Authority and the transfer of some judicial powers to it indeed made the scheme of laws applying to Palestinians in the West Bank more complex, but did not change the manner in which Israel conducts a dual system of laws **under its rule**

kept in place the jurisdiction of the military commander over security offences that harmed or intended to harm the area (Article 10 (f) of the *Order Concerning Security Provisions*). In 2007, the military courts' jurisdiction over Area A residents was extended to offences related to theft of Israeli motor vehicles (Article 10 (g) of the *Order Concerning Security Provisions*, which was added in Amendment no. 96). In other words, security legislation fully applies to Areas B and C, whereas in Area A its application is restricted to security and auto theft offences.

For a discussion of the judicial authorities of the military courts in the West Bank, see:

Sharon Weill, "The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupies Territories," 89 *International Review of the Red Cross*, p. 405-406 (June 2007).

For a discussion of the judicial authorities of the military courts over Area A, see: Appeal (Judea and Samaria) 3942/06 **Sa'di v. Military Advocate General** (published in Nevo, 17 October 2007).

An example of prosecuting an Area A resident for motor vehicle theft: Appeal (Judea and Samaria) 111/00 **Sari v. Military Advocate General** (published in Nevo, 1 August 2000).

⁷ Due to the manner in which the division of the areas was planned under the Oslo Accords, the populated Areas A and B are surrounded by Area C territories. This division creates fragmentation, which imposes restrictions on freedom of movement and makes it more difficult to adequately conduct life in the Palestinian domain. It should be noted that the definition of Areas A, B and C created an administrative division along artificial geographic lines, which do not reflect how Palestinians perceive the space in which they live, yet create various constraints imposed upon them. For example, most of the land reserves for construction and development are located in Area C. Therefore, even though the planning and building authorities over Areas A and B were transferred to the Palestinian Authority, the key to the development of the West Bank for the benefit of its Palestinian residents is found, to a large extent, in the hands of Israel. See more on this subject in the fifth chapter of this report.

in the territories. When required to face the military's judicial or enforcement authorities, a Palestinian residing in Area A and a Palestinian residing in Area C will be equally discriminated against – compared to an Israeli citizen residing in the West Bank.

Chapter 1: The Development of Two Legal Systems

This chapter will briefly review the development of the two law and court systems in the West Bank, from its occupation in 1967

until present day. As will be described below, with the start of the occupation, Israel established military rule in the West Bank and the military commander declared himself as the sovereign of the territory. By the power of this regime, the military legal system in the West Bank was founded. Parallel to the development of this system, a policy of applying Israeli law to Israeli settlements and settlers in the area was developed and implemented – both in the criminal sphere and in a variety of civil domains.

1. The Establishment of the Military Court System in the West Bank

Immediately after the occupation of the West Bank, on 7 June 1967, the military commander published the *Proclamation Concerning the Takeover of Administration by the IDF*,⁸ which established military rule in the area, and the *Proclamation Concerning Administrative and Judiciary Procedures*,⁹ in which the military commander declared himself as the new sovereign of the area and assumed all authorities of “governance, legislation, appointment and administration with regards to the area or its residents.” It was further established in this proclamation that the law existing in the area prior to its occupation will remain in

⁸ *Proclamation Concerning the Takeover of Administration by the IDF* (No. 1), 5727-1967.

⁹ *Proclamation Concerning Administrative and Judiciary Procedures (West Bank)* (No. 2), 5727-1967.

effect, subject to the proclamations and orders of the military commander. This decree, intended to ensure that a legal void would not be created in the territory, is a requirement under customary international law, which stipulates that the military commander of an occupied territory must uphold the local law that was in force in that territory prior to the occupation.¹⁰ In addition to the two aforementioned proclamations, the military commander published another proclamation and several orders, which established criminal law and a system of military courts.¹¹ These orders and proclamation were aggregated in 2009 in the *Order Concerning Security Provisions [consolidated version] (Judea and Samaria)* (hereinafter: *Order Concerning Security Provisions*).¹²

The military rule and the laws legislated by virtue of it have been applied to the entire territory of the West Bank and its residents, so that the Israeli settlers in the area, like the rest of its inhabitants, were subjected to the authority of the military commander and military legislation. As stated by Justice Moshe Landau in the **Elon Moreh** case:

“[...] The basic norm upon which the structure of Israeli rule in Judea and Samaria was built in practice, is, as stated, to this day a norm of military administration and not

¹⁰ Regulation 43 to the *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 (hereinafter: the Hague Regulations),.

¹¹ *Proclamation Concerning the Entry into Force of the Order Concerning Security Provisions (West Bank Area)* (No. 3), 5727-1967; *Order Concerning Security Provisions*, 5727-1967; and *Order Concerning the Establishment of Military Courts (West Bank Area)* (No. 3), 5727-1967.

¹² *Order Concerning Security Provisions [consolidated version] (Judea and Samaria)* (No. 1651), 5770-2009 (hereinafter: *Order Concerning Security Provisions*).

application of Israeli law, which carries with it Israeli sovereignty.”¹³

2. The Application of Israeli Law to West Bank Settlers

A. The Application of Israeli Law to Israelis in Israeli Legislation

Ostensibly, the military rule and the laws legislated under its authority apply to all persons found in the area, including Israelis, whether they are visiting it or residing in it. However, it appears that in the eyes of the Israeli authorities, the matters of the area's Jewish residents should be arranged under Israeli law, as would be the case had they lived within the State of Israel and not in the occupied territory. Therefore, Israeli lawmakers and the military commander acted to gradually apply Israeli law to settlers and to remove them, in practice, from the jurisdiction of military law. The basic assumption that guided Israeli authorities was that, as a rule, civilians should be subject to civil law and tried before civil courts, and that military law cannot administer their lives, certainly not in the long run. According to this position, the Palestinian residents of the West Bank are the exception to the rule. As they are under military rule in accordance with the provisions of international law, which prohibits the application of Israeli law to them, there is supposedly no choice but to subject them to the military justice system.

In accordance with this approach, and because the Israeli legislator cannot apply Israeli law to the territories in

¹³ HCJ 390/79 **Muhammad Mustafa Duweikat v. Government of Israel et al.**, PD 34(1) 4, 12 (1979) (hereinafter: the **Elon Moreh** case). See also HCJ 1661/05 **Gaza Shore Regional Council v. Knesset** (published in Nevo, 9 June 2005) (hereinafter: the **Gaza Shore** case).

a territorial manner without contravening international law's prohibition on annexation, the Knesset applied Israeli laws to settlers on a personal and extraterritorial basis, through the *Defense (Emergency) Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)*¹⁴ (hereinafter: "Regulations for Adjudication of Offenses"). These regulations, which are extended and amended every few years,¹⁵ apply to Israeli citizens living in the West Bank, as well as to Jews to whom the Law of Return applies and who live in the area, even if they are not Israeli citizens.¹⁶ The regulations apply **Israeli criminal law to Jewish residents of the West Bank**, even for offenses they committed in the West Bank area, **alongside 17 additional laws that are listed in the annex to the regulations**, including laws pertaining to entry to Israel, national health insurance, national insurance, taxation and more.¹⁷

During a discussion in the Knesset's Constitution, Law and Justice Committee on 18 February 2002, concerning the proposed bill to amend and extend the regulations, the Attorney General at the time, Meni Mazuz, explained the bill's purpose:

“These regulations were originally legislated in 1967, immediately following the Six Day War. Their

¹⁴ *Defense Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)*, 5727-1967.

¹⁵ *Law for Extending the Validity of the Defense Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)*, 5772-2012.

¹⁶ *Supra* note 14, Regulation 6B.

¹⁷ The 17 laws listed in the annex to the regulations include the Entry to Israel Law, 5712-1952; the Defense Service Law [Consolidated Version], 5746-1986; the Income Tax Order; the Population Registry Law, 5725-1965; the National Insurance Law [Consolidated Version], 5728-1968; the Traffic Ordinance [New Version], 5721-1961; the National Health Insurance Law, 5754-1994; the Succession Law, 5725-1965; and the Legal Capacity and Guardianship Law, 5722-1962.

main purpose is to synchronize Israeli law with the activities of the State of Israel in territories in which a different law applies. The matter expanded when Israeli settlement in the territories began. **One of the main purposes of these regulations today is to arrange the status of Israeli settlers in the territories, who are on one hand Israelis and on the other hand live in a place to which Israeli law does not apply. The intention is to apply Israeli law to Israelis living in the territories, and first and foremost the major laws such as the Defense Service Law, the Income Tax Order, the Population Registry Law, the National Insurance Law, the National Health Insurance Law, the Traffic Ordinance and more.**"¹⁸

Over the years, the Knesset has amended various laws in order to enable their application to settlers living in the West Bank, among them laws pertaining to income tax, consumer protection and more.¹⁹ Amendment No. 2 to the Knesset Elections Law from 1970 stipulated that Israelis residing in territories held by the Israeli army are permitted to vote in the Knesset elections in their place of

¹⁸ Protocol of Meeting No. 488 of the Constitution, Law and Justice Committee, 18 February 2002 (emphasis added):

<http://www.knesset.gov.il/protocols/data/rtf/huka/2002-06-18.rtf> [Hebrew].

¹⁹ Law to Amend the Income Tax Order (No. 32), 5738-1978; Value Added Tax Law (Amendment No. 3), 5739-1979; Supervision of Products and Services Law (Amendment No. 12), 5742-1982; Property Tax Law (Land Appreciation and Purchase) (Amendment No. 15), 5744-1984; Consumer Protection Law (Amendment No. 11), 5741-1981; the Council for Higher Education Law (Amendment No. 10), 5755-1995; and others.

residence.²⁰ This amendment constitutes an exception to the principle under which there is no voting outside of the borders of Israel, except for representatives and envoys of the state.²¹ It should be noted that this amendment means that Israeli settlers in the West Bank are allowed to participate in electing representatives for the institutions governing this territory as an occupying power, while Palestinians – the original residents of the same territory, who are also subjected to the actions and decisions of these institutions – cannot participate in electing representatives and influencing their conduct.

By extending the application of Israeli laws to West Bank settlers, the Israeli legislator granted the legal system in Israel with an authority comparable to that of the military legal system with regards to these residents. The result achieved is that, despite the military commander being the sole sovereign in the West Bank, many of its residents are subject to an external legal system, and he does not exercise his authorities over them. Not only that, but the military commander himself has extensively acted over the years to apply Israeli law to settlers, as will be illustrated below.

B. The Application of Israeli Law to Israelis in Military Legislation

In the late 1970s and early 1980s, the military commander significantly extended the application of Israeli civil and administrative laws to the Israeli residents of the West Bank, by means of orders that were only applied to Israeli settlements in the territory. The two main orders are the ones arranging the administration of Israeli local councils: the *Order Concerning the Administration of Local*

²⁰ Knesset Elections Law (Amendment No. 2), 5730-1970. This was included as Article 147 of the Knesset Elections Law [Consolidated Version], 5729-1969.

²¹ Article 6 of the Knesset Elections Law.

*Councils*²² and the *Order Concerning the Administration of Regional Councils*.²³ These orders and the *Regulations for Regional Councils*²⁴ (hereinafter: the Regulations), which were issued in accordance with them, **created two types of communities in the West Bank: Palestinian cities and villages, which are subject to Jordanian law and Israeli military orders, and Jewish local and regional councils, which are subject to Israeli law and enjoy the benefits and budgets granted by Israeli legislation.** This legislation widened the immense gaps between the Palestinian cities and villages and the Israeli councils in terms of budget allocation, services, infrastructure and so on.

The Regulations for Regional Councils, which were published in 1981, arrange the lives of Israeli settlers residing in the West Bank. They arrange the administration of the local councils and their authority to legislate by-laws, collect taxes, issue licenses under the Business Licensing Law, hold local elections and so on. The legal arrangements included in the two orders and in the Regulations are largely based on the municipal legislation that applies to local councils in Israel, and were mostly copied in full from the parallel legislation in Israel, with the necessary changes.²⁵

The Regulations also ordain the establishment of rabbinical courts and **courts for local affairs**, which were founded in order to attend to municipal matters pertaining to Israeli settlements in the West Bank.²⁶ While reviewing

²² *Order Concerning the Administration of Local Councils (Judea and Samaria)* (No. 892), 5741-1981.

²³ *Order Concerning the Administration of Regional Councils (Judea and Samaria)* (No. 783), 5739-1979.

²⁴ *Regulations for Regional Councils (Judea and Samaria)*, 5741-1981 (hereinafter: the Regulations).

²⁵ CA 287/95 **Noam Federman v. Legal Advisor to the Commander of Judea and Samaria**, PM 5755(3) 177, 182 (1995).

²⁶ AA (Ariel) 6/07 **Ariel University v. Council for Higher Education Judea and Samaria** (unpublished, 24 March 2008).

the purpose of establishing courts for local affairs in the West Bank, the Israeli High Court of Justice determined that they are intended to enable the authorities to adequately function and to facilitate a proper way of life for settlers within the councils' jurisdictions. The HCJ further noted that the reason for establishing these courts was two-faceted: "On one hand, helping the population of litigants who require the services of the court; on the other hand, **maximal equalization between proceedings in the area court and proceedings in courts in Israel.**"²⁷

Article 126 of the Regulations for Regional Councils authorizes the courts for local affairs to deliberate a long list of civil and criminal matters, according to both military legislation and Israeli legislation. The main civil matters that the courts for local affairs are authorized to deliberate according to military legislation are **planning and building,**²⁸ **traffic,**²⁹ **labor law**³⁰ and **local authorities.**³¹ In addition, the Article significantly expands the Israeli law applying to settlement residents, through annexes 1-12 to the Regulations, which include 12 areas in which Israeli laws were applied to the settlements and the local courts were granted jurisdiction over them: **welfare law, statistics law, family law, education law, health law, labor law, agriculture law, condominium law,**

²⁷ H CJ 336/99 **Delta Investments and Commerce (Karnei Shomron) Ltd v. Court for Local Affairs in Ariel**, PD 55(3) 246, 259 (2001) (emphasis added).

²⁸ *Order Concerning the Law for Planning Cities, Villages and Buildings (Judea and Samaria)* (No. 418), 5731-1971.

²⁹ *Order Concerning the Traffic Ordinance (Judea and Samaria)* (No. 56), 5727-1967; *Order Concerning Transportation (Traffic Arrangements) (Judea and Samaria)* (No. 399), 5730-1970.

³⁰ The authority over labor law is granted to the local courts with regards to both military legislation and Israeli legislation. The military legislation included in the annex is the *Order Concerning Issuing Permits for Works in Territories Seized for Military Needs (Judea and Samaria)* (No. 997), 5742-1982; and the *Order Concerning Employing Workers in Specific Locations (Judea and Samaria)* (No. 967), 5742-1982.

³¹ Article 126(b) of the Regulations, *supra* note 24.

environmental law, consumer law, trade and commerce, communication law and religious law. The courts for local affairs are further authorized to deliberate **small claims**³² and **execution proceedings**.³³

Article 126 of the Regulations even authorizes the courts for local affairs to deliberate **criminal offenses that are derived from each of the aforementioned legislation items and that were committed in the area to which the Regulations apply.** The Regulations explicitly stipulate that the authority of these courts in criminal matters stands only when the defendant is a resident or citizen of Israel.³⁴

The court for local affairs also serves as a **juvenile court**.³⁵

In addition to that, in 1996 the supervision over the Jewish authorities in the West Bank was transferred from the Israeli Communities Supervisor in the Civil Administration to the Ministry of Interior. Thus, while Palestinian authorities in Area C are supervised by the Civil Administration, the supervision over Israeli settlements is identical to that of local authorities within Israel.

As can be seen from all of the above, the chief part of Israeli legislation has been applied to the Israeli residents of the West Bank. This state of affairs created a new legal system, which has been dubbed by Prof. Amnon Rubinstein “enclave-based justice.”³⁶

³² Article 138 of the Regulations.

³³ Article 137 of the Regulations.

³⁴ Article 136 of the Regulations.

³⁵ Article 138 of the Regulations.

³⁶ Rubinstein, *supra* note 3, p. 450.

C. The Application of Israeli Law to Israelis through Israeli Court Rulings

The courts in Israel preserve the separation between the legal systems in the West Bank by applying Israeli law to settlers whenever they deem it possible. They do so not only when the law requires it, but even when the law grants them discretion, and sometimes even extend the applicability of Israeli law to settlers on their own initiative. The courts regard the settlements in the territories as an "Israeli island," to which Israeli law must be applied.³⁷ The courts' position on this matter is also manifested in the words of Justice Elyakim Rubinstein:

"The 'enclaves' are a sort of 'islands' to which Israeli laws were applied by legal means, under the assumption that there is no real difference between the law applying in Israel and the one that should apply in these enclaves. It seems that in this context, an appropriate outcome will lead to the forging of uniformity, inasmuch as possible, between the law applying within those enclaves and the law arranging their existence and authorities. **The matter at hand concerns Israeli citizens, and the assumption is that the gist of their lives should be as close as possible to that of the rest of Israeli citizens.**"³⁸

³⁷ Iris Canor, "Israel and the Territories: The Interplay between Private International Law and Public International Law," [Hebrew] *Mishpat Umimshal* 8 (2005).

³⁸ HCJ 10104/04 **Peace Now S.A.L. Educational Enterprises v. Supervisor of the Jewish Settlements in Judea and Samaria** 61(2) 93 (2006), p. 14 of the judgement (emphasis added).

C.1. The Application of Israeli Law to Civil Disputes between Israelis and Palestinians

Many civil disputes between the Palestinian residents of the West Bank and Israeli citizens residing there are brought before the courts in Israel. When resolving these disputes, the courts must determine which law to apply to them. A review of rulings from recent years reveals that the courts distinctly tend to prefer the application of Israeli law to such disputes.³⁹ In other words, the main primary method in which the courts in Israel have extended the application of Israeli law is using the choice of law rules of private international law.

With regards to labor disputes between Israelis and Palestinians, the Supreme Court has consistently ruled that the applying law is Israeli law. In 2004, in a judgment granted in the **Yinon** case,⁴⁰ the Court again stated that – despite the fact that under the rules of international law, Jordanian and military laws apply to the West Bank territory – the choice of law rules of private international law could determine that Israeli law applies to a specific dispute.⁴¹ The Court then reviewed the choice of law rules in tort law, and ruled that based on the territorial principle, the law that applies to a tort dispute is the law applying in the territory in which the wrong was committed (*ex loci delicti commissi*, “law of the place where the delict was

³⁹ See Michael Karayanni, *Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories* (Oxford, 2014). See also: Canor, *supra* note 37, p. 556; Michael Karayanni, “The Quest for Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts towards the Palestinian Territories,” 29 *Michigan Journal of International Law* 665 (2008).

⁴⁰ CA 1432/02 **Yinon Food Manufacturing and Marketing Ltd v. Qaraan**, PD 59(1) 345 (2004) (hereinafter: the **Yinon** case). The Supreme Court deliberated which law applies to a dispute between a Palestinian resident of the West Bank and her employer, an Israeli company, in the context of a workplace accident that happened in that territory.

⁴¹ *Ibid.*, p. 356.

committed”). However, the Court noted that in cases when “there exists another country with a significantly stronger affinity to the delict,” one must deviate from the rule of *ex loci delicti commissi*.⁴²

When seeking to implement the rule and its exception, the Court considered whether there is reason to apply the rule of *ex loci delicti commissi*, which is Jordanian law, or whether it should deviate from this rule and apply the exception, which is Israeli law. The Court determined that in this case, “the exception begs implementation,” because in light of the personal and extraterritorial application of wide sections of Israeli law to Israelis residing in the West Bank, the principles of *ex loci delicti commissi* are not in effect. The Court further ruled that:

“The legal character, from the point of view of internal Israeli law, of the Israeli settlement as an 'enclave' – which is not *de facto* subject to the law applying in that territory – is what renders the connection between the delict and the country whose law would normally have been the law of the place of its perpetration – to coincidental. The affinity between private legal actions taking place in those communities in the territories and between the Jordanian country has no standing in this case. This is reflected in the expectations of the Israeli residents.”⁴³

⁴² Ibid., p. 373-374.

⁴³ Ibid., p. 378.

In 2005, one year after the judgment in the **Yinon** case, the Supreme Court – sitting as the High Court of Justice – again ruled on the matter of the law applying to civil disputes between Israelis and Palestinians.⁴⁴ The Court deliberated the question of which law applies to the employment relations between Palestinians working in settlements and their Israeli employers. Similar to its ruling in the **Yinon** case, in the **Kav LaOved** case the Court also determined that the territorial principle loses its power when dealing with Israeli settlements in the West Bank, in light of the existence of “a regime in which different sets of laws apply in one territorial unit.”⁴⁵ After reviewing the other connections, the Court ruled that the law applying to employment relations in this case should be Israeli law.⁴⁶

⁴⁴ The **Kav LaOved** case, *supra* note 1.

⁴⁵ *Ibid.*, p. 26.

⁴⁶ The Court approached the analysis of the question in a similar method to the one it employed in the **Yinon** case. The Court opened its statement by concluding that, while public international law determines which law will apply to a given territory, the rules of private international law determine which law will apply to a concrete private dispute. In reviewing the choice of law rules of private international law, the Court upheld that labor law is a specific instance of contract law, and therefore it clarified that, contrary to its ruling in the **Yinon** case regarding the territorial principle, contract law calls for greater flexibility. Therefore, no specific connection should be given preference in advance, and instead “in each and every case, the entirety of connections should be reviewed according to their nature and relative weight under the circumstances of the case,” *ibid.*, p. 16. However, the Court determined that the accepted test for choice of law in contract law is the agreement of the parties, and lacking such agreement – the test of “majority of connections,” *ibid.*, p. 19. The Court further concluded that the choice of law rule in labor law is influenced both by the agreement between the parties and by the cogent nature of labor law; hence, when there is no agreement between the parties as to which law shall apply, the test of “majority of connections” will be employed, and the weight afforded to each connection will be adjusted to this nature. When seeking to rule on the matter brought before it, and without agreement between the parties as to the law applying to their relations, the Court examined the question using the “majority of connections” test. In accordance with its judgement in the **Yinon** case, the Court ruled that the territorial principle loses its power when dealing with

It is important to note that in many cases, the application of Israeli law to Israeli employers of Palestinians employees benefits the workers and facilitates a better realization of their rights, due to the protections provided by Israeli labor laws and protective laws.⁴⁷ However, the examples presented below will illustrate how legal rules are being used in order to employ a legal rule in a certain area based on convenience and purpose, contrary to other rules that apply in that area by virtue of the laws of occupation.

C.2. The Explicit Application of Israeli Law Only to Israelis through Interpretation of the Basic Laws

The extended application of Israeli law to settlers and the increased separation between them and the Palestinians living in the occupied territories were further manifested in the Supreme Court's ruling in the judgment concerning the plan to dismantle the settlements of the Gaza Shore Council and evict their residents (the Disengagement Plan).⁴⁸ A long list of petitions raised claims about the unconstitutionality of the law through which the Disengagement Plan was formulated. In reviewing these claims, the Court sought to begin by examining the application of the Basic Laws to Israeli settlers in the territories, as these are territories held in belligerent occupation by the State of Israel.⁴⁹ In this context, it is worth noting that even though the state's position was that "there are several indications to the fact that the Basic Laws are territorially applied" – particularly when the military commander is acting by virtue of

Israeli settlements in the West Bank, in light of the existence of "a regime in which different sets of laws apply in one territorial unit," *ibid.*, p. 26.

⁴⁷ Michael Karayanni, "Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs," 5 *Journal of Private International Law* 1 (2009).

⁴⁸ The **Gaza Shore** case, *supra* note 13.

⁴⁹ *Ibid.*, paragraph 76 of the judgement of President Aharon Barak.

international law and not legal authorization – the state simultaneously claimed that for the purpose of hearing these petitions it is willing to assume that the Basic Law: Human Dignity and Liberty applies to the petitioners. The state further argued that there is no need to settle the question of the direct applicability of the Basic Laws to that area, and that the basic principles of the Israeli legal system are sufficient for ruling on these petitions.⁵⁰ The Court was not content with the state's consent to deliberate the petitions as if there is no dispute regarding the application of the Basic Laws in this context, and decided that, in light of its intent to order the annulment or diminution of some of the legal stipulations under dispute, it must make a ruling concerning the personal-extraterritorial application of the Basic Laws to Israeli residents of the territories:

“In our opinion, the Basic Laws grant rights to every Israeli settler in the evacuated territory. This application is personal. It is derived from the control of the State of Israel over the evacuated territory. It is engendered from the position that to Israelis found outside of the state but in an area under its control by way of belligerent occupation apply the Basic Laws of the state with regards to human rights.”⁵¹

In a long line of rulings in recent years, the Supreme Court reiterated the rule regarding the application

⁵⁰ Ibid., paragraph 78 of the judgement of President Aharon Barak.

⁵¹ Ibid., paragraphs 79-80 of the judgement of President Aharon Barak (emphasis added).

of the Basic Laws to Israelis living in the territories.⁵² Yet, alongside this explicit statement, the Court chose to leave as “requiring further review” the wider question of the territorial application of the Basic Laws to Palestinians found in a territory controlled by Israel.⁵³ The Court sometimes applies the Basic Laws to Palestinians in the framework of hearings aimed against the decisions and actions of the military commander in the area. However, in these cases it is sometimes done due to the position that the military commander, being part of the Israeli rule, has certain obligations under the Basic Laws – and not under the notion that the Palestinian population has rights by virtue of the Basic Laws. This is even stated by the Court:

“Israeli law indeed has no direct application to the area, but this Court applies its basic principles to the military commander in the area and his subordinates by virtue of the personal authority, as they are part of the state's authorities and are operating there in its service.”⁵⁴

In the same spirit, the military courts, in which mostly Palestinians are tried, also repeatedly determined that they are not subject to the Basic Laws of the State of Israel, but rather to international law applying in the area,

⁵² See, for example: HCJ 7597/04 **Maraaba v. Prime Minister of Israel**, PD 60(2) 477 (2005); HCJ 4101/10 **Akiva Hacoheh v. Commander of IDF Forces in Judea and Samaria** (published in Nevo, 21 December 2009); and HCJ 8222/08 **Davka Ltd. v. Commander of IDF Forces** (published in Nevo, 21 December 2009).

⁵³ See, for example: HCJ 8276/05 **Adalah – The Legal Center for Arab Minority Rights v. Minister of Defense**, Takdin Elyon 2006(4) 3675, 3686 (2006).

⁵⁴ HCJ 3940/92 **Ghassan Jarrar V. Commander of Judea and Samaria Area**, PD 47(3) 298, 305 (1993).

although the “spirit” of the Basic Laws hovers over their rulings.

In conclusion, over the years a clear distinction has been created between the law applying to Israeli settlers in the West Bank and the Law applying to the Palestinian residents of the area. This was done through the personal application of various provisions of Israeli law to the residents of the settlements – by means of Knesset legislation, military legislation and Israeli court rulings.⁵⁵ Prof. Rubinstein describes the result of the unique legal system created in this manner:

“A resident of Ma'ale Adumim, for example, is ostensibly subject to the military rule and to the local Jordanian law, but in fact he lives according to Israeli laws, both in terms of personal law and in terms of the local authority in which he resides. The military rule is nothing but a remote control, by means of which the Israeli law and rule operate.”⁵⁶

We reviewed the manner in which the legal regimes applied by Israel to Israelis and Palestinians in the West Bank had been separated. In the following chapters we will examine some of the areas in which a separate legal regime applies, fully or partially, to Israelis and Palestinians living in the same area: criminal law, traffic law and planning and building law. In addition to that, we will seek to point out the differences in the recognition of the right of Israelis and Palestinians to freedom of movement and freedom of protest, and the ability of Palestinians to realize these rights. In most cases, the differences we will

⁵⁵ Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, vol. 2, p. 927-928 (2005).

⁵⁶ Rubinstein, *supra* note 3, p. 456.

describe stem from the written law. Wherever we refer to the separate enforcement policy of various laws with regards to Israelis and Palestinians and to its implications, we will explicitly state so.

Chapter 2: Criminal Law

Two residents of the Hebron area have an altercation within the territory of the West Bank and both are arrested. One

of them, a Jewish resident of Kiryat Arba, is taken to a nearby police station, is immediately interrogated by a police officer and is brought within 24 hours to a hearing before the Jerusalem Magistrates Court. In this hearing, the judge decides to order his release on condition of bail; this is not a very severe case, and the defendant pleads self-defense. The second person, a Palestinian resident of Hebron, is arrested for 96 hours before being brought before a military judge. He is *de facto* interrogated only once during this period of time, under suspicion of committing an assault based on nationalistic motivations, which is deemed as a security offense, and he is tried before a military court, where he faces a penalty of extended incarceration.

This is not an imaginary or theoretical scenario, but rather the state of affairs in the West Bank, where there are two different and separate criminal justice systems – Israeli and military. The identity of the suspect or defendant determines which law will apply to them and who will have judicial authority over them. A resident of a settlement, who is accused of committing a criminal offense, will be tried under Israeli criminal law and before a court in Israel; a Palestinian resident of the West Bank (and as will be described below, sometimes also an Arab citizen or resident of Israel) accused of committing a similar offense, will stand trial under military law and before one of the military courts.

1. The Separation in Criminal Law – The Legislative Framework

Immediately after the establishment of military rule in the West Bank and the assuming of administrative authorities by the military commander, military law was applied to the residents of the West Bank, and the military courts were authorized to adjudicate their affairs – by virtue of the Order Concerning Security Provisions (West Bank Area), 5727-1967. This order was later amended and consolidated with other orders in the Order Concerning Security Provisions.⁵⁷

Ostensibly, the application of military law to the West Bank area is territorial and applies to all residents of the area, including its Israeli residents. But despite that, there is an almost absolute separation in the West Bank between the criminal justice systems. As described above, the *Defense (Emergency) Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)* (hereinafter: “Regulations for Adjudication of Offenses”) **extended the application of Israeli criminal law on a personal basis to the Israeli residents of the West Bank**, and granted the courts in Israel jurisdiction over Israelis who committed offenses in the West Bank territory – **“the said Israeli authority extends to both the question of the law and the question of the judge.”**⁵⁸ In the words of Justice Shlomo Levin:

“It was the legislative intent of the regulations to equalize the justice of an Israeli who committed an offense in the 'area' to the justice of an Israeli who committed a similar offense in Israel, based on distinctly personal principles; **as though the**

⁵⁷ Order Concerning Security Provisions, *supra* note 12.

⁵⁸ CrA 163/82 **David v. State of Israel**, PD 37(1) 622, 631 (1983) (hereinafter: the **David** case).

Israeli carries with him among his belongings, once entering the area, the Israeli law.”⁵⁹

The regulations granted the Israeli courts a **parallel authority** to that of military courts to adjudicate Israelis residing in the occupied territories. As will be detailed below, under the policy of the State Attorney, settlers who commit offenses within the territory of the West Bank are brought to trial only before the courts in Israel.

A. The Separation in Criminal Law – The Policy of the State Attorney

Israelis residing in the West Bank are formally subject to two criminal law systems – military, which applies to them as it is the territorial law applying in the area; and Israeli, which was applied to them on a personal basis through the judicial regulations for offenses. Yet, despite the option to adjudicate Israelis under military law, the policy of the State Attorney is not to do so. The policy of the State Attorney's Office not to bring settlers to trial before military courts is not anchored in written regulations, but official documents indicate that it exists and is being passed along.⁶⁰ Law enforcement officials have been regarding this policy as an obvious matter for years. For example, this is how the IDF Spokesperson replied, on 12

⁵⁹ CrA 831/80 **Tsoba v. State of Israel**, PD 36(2) 169, 174 (1982) (hereinafter: the **Tsoba** case) (emphasis added).

⁶⁰ See for example the summary of a meeting at the State Attorney's Office, dated 14 February 1992, on the subject of “The arrest of residents of the territories who committed an offense in Israel and the arrest of residents of Israel who committed an offense in the territories,” p. 3. On file with ACRI.

November 2007, to the draft of a report compiled by the organization Yesh Din concerning this issue:

“Indeed, the military courts have a territorial authority to try any person who committed an offense within their jurisdiction. However, **since the early 1980s, the Attorney General dictated, as a policy, that citizens of the State of Israel will not stand trial before a military tribunal.**”⁶¹

The report of the Shamgar Commission of Inquiry into the Massacre at the Tomb of the Patriarchs pointed to the position which is the foundation of this policy:

“Although there is a parallel authority to the military courts and the courts in Israel to try Israelis, the policy, as a rule, is to file an indictment against Israelis who are residents of the area, or residents of Israel, who committed an offense in the area, only to the courts in Israel; although in the past there have been cases in which Israelis were brought to trial before military courts. **The reason for the policy preferring the adjudication in Israel stems,** as was explained to us by Brigadier General Ilan Shiff, the Chief Military Advocate

⁶¹ Lior Yavne, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories*, Yesh Din, December 2007 (hereinafter: *Backyard Proceedings*), p. 43 (emphasis added). The English version of the full report can be found here: <http://www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>.

General, **from the constitutional position**, which is also the basis for the law to extend the validity of the said emergency regulations, **according to which 'in an enlightened state, when things are not absolutely unbearable, and when there is no highly, highly unique situation, and thank God we haven't reached such a situation, the one who deals with civilians [...] is the entire civil system, including the investigative system.'**"⁶²

As a result of the amalgamation between the judicial regulations for offenses and the State Attorney's policy, the criminal norms that apply to settlers living in the West Bank are identical to those applying to citizens living in Israel.⁶³ The only cases in which the matters of settlers are deliberated by military judges are when settlers appeal administrative orders issued against them, including administrative detentions which are sometimes imposed on

⁶² Commission of Inquiry into the Massacre at the Tomb of the Patriarchs, The Commission's Report, p. 160 (5754-1994) (hereinafter: the Shamgar Commission Report) (emphasis added).

⁶³ Court rulings rejected the limiting approach established in the **Tsoba** case, according to which offenses with a specific local-Israeli connection shall not apply if they were committed in the West Bank ("the concrete approach"). In the **David** case, an expansive approach was established, under which any act or misstep that took place in the West Bank constitute an offense in Israel had they taken place in it, through a hypothetical conversion of the factual data. Hence, if there is a parallel offense in Israeli law, Israelis can be tried for offenses committed in the West Bank ("the conceptual approach"). In DRCr 2762/08 **Yehuda Landsberg v. State of Israel** (published in Nevo, 6 April 2008) the conceptual approach was applied and it was ruled that the courts in Israel are authorized to hear cases of Israelis entering a closed zone in the West Bank.

them by means of the security legislation (and not by the *Emergency Authority Law (Detentions)*, 5739-1979, which establishes the authority to impose administrative detention on Israeli citizens).⁶⁴ In such cases the military court, or a source acting on its behalf, is the authority responsible for judicial review.⁶⁵

B. The Separation in Criminal Law – The Policy of the Military Advocate General

Article 10 of the *Order Concerning Security Provisions [consolidated version] (Judea and Samaria)* (No. 1651), 5770-2009 grants military courts in the occupied territories the territorial and extraterritorial authorities to adjudicate any person who committed an offense, within the territories or outside of them, be this person's nationality whatever it may be – Israeli, Palestinian or other: “A military court is authorized to deliberate any offense defined in security legislation and in the law.” However, the guidelines of the Chief Military Prosecutor concerning “the indictment of persons who are not residents of the area” state that **the default is to bring Israeli citizens and residents to trial in the civil courts in Israel.**

⁶⁴ See for example: HCJ 2612/94 **Shaer v. IDF Commander in Judea and Samaria**, PD 48(3) 675 (1994).

⁶⁵ According to Article 287 of the Order Concerning Security Provisions, judicial review of an administrative detention must be conducted by a military court judge whose rank is Major or higher. Judicial review of restriction and supervision orders must be conducted by an appeals committee, which is appointed by the President of the Military Court of Appeals and includes at least one member whose rank is Major or higher (Article 296(c) of the Order Concerning Security Provisions).

However, **when the majority of connections of the accused and the related offense are to the West Bank, the prosecution may decide to try this person in a military court, even if he or she is a citizen or resident of Israel.** The “majority of connections” test examines the degree of connection between the suspect and Israel and what the center of his or her life is, in practice, as well as additional data, including the nature of the offense and its severity and the existence of accomplices from the area.⁶⁶

The legislation and policy of the prosecuting bodies do not differentiate between different citizens of Israel and are seemingly egalitarian. However, an examination of their implementation on the ground reveals that there is a distinction between Jewish and Arab citizens of Israel: since the 1980s, **all Israeli citizens brought to trial before the military courts were Arab citizens or residents of Israel.**⁶⁷ In practice, the military prosecution avoids indicting settlers in military courts, but does so in the case of Arab citizens of Israel, both in security offenses and in other criminal offenses,⁶⁸ while employing the “majority of connections” test only with regards to the latter.

⁶⁶ Guidelines of the Chief Military Prosecutor, *Indicting Persons Who Are Not Residents of the Area* (6 January 2005), last update: August 2009. On file with ACRI.

⁶⁷ In the 1970s, Israeli demonstrators from left-wing organizations were brought to trial before the military courts, and in the 1980s, demonstrators who protested the evacuation of the Sinai Peninsula were brought to trial in these courts. *Backyard Proceedings* (*supra* note 61), p. 42.

⁶⁸ AA 1121/11 **Muhammad Raghadat v. The Military Prosecution** (published in Nevo, 31 January 2011); AA (Judea and Samaria) 3166/06 **Omar Alkam v. The Military Prosecutor** (published in Nevo, 15 September 2006).

The “majority of connections” test is not implemented at all with regards to defendants who are Jewish Israelis, even when, on the face of the matter, its implementation could have led to their indictment in the military courts, for example in cases where settlers committed offenses against Palestinians in the West Bank territory.⁶⁹ In such cases, the only connection between the offense and the person who committed it and between the State of Israel is the defendant's citizenship.

By contrast, in cases where Arab citizens of Israel stand trial before a military court and raise arguments concerning lack of jurisdiction and requests to transfer the hearing to a court in Israel, the position of the Military Prosecution Service or the State Attorney's Office is that the “majority of connections” test leads to the conclusion that the military court is the appropriate place to conduct the legal proceedings against the detainee or defendant. This, even in cases where the only connection to the territories of the West Bank is that the offense was committed there.⁷⁰

The decisions made by the prosecuting bodies are under limited supervision, if at all. The High Court of Justice more than once expressed its position that intervention with the discretion of the prosecuting bodies

⁶⁹ CrC 149/93 **State of Israel v. Shkolnik** (unpublished, 28 April 1994); Felony Case 5034/02 **State of Israel v. Yarden Morag** (published in Nevo, 17 September 2003).

⁷⁰ AA (Judea and Samaria) 2120/08 **Alaa Abu Hanieh v. The Military Prosecution** (2 April 2008); AA (Judea and Samaria) 2197/05 **Anan Naghib v. The Military Prosecutor** (published in Nevo, 24 July 2005); AA 1675/11 **Walid Moussa v. The Military Prosecution** (published in Nevo, 5 June 2011).

should seldom occur.⁷¹ Moreover, the military court has ruled that as a court adjudicating a criminal proceeding, it is not at all authorized to review the prosecution's discretion.⁷² In accordance with these positions, and as of the writing of this report, no judgment was found in which the request of an Arab citizen to transfer his case from a military court to a court in Israel – was accepted.

2. Detention Laws

Article 88 of the Order Concerning Security Provisions stipulates that “a military court may instruct, in any matter of legal proceedings that has not been explicitly established by this order, the legal proceedings it deems most appropriate for delivering justice.” In some issues, the military courts adopt the legal proceedings that are practiced in Israel, whether in order to fill in the numerous lacunae in the Order Concerning Security Provisions or to interpret existing instructions.⁷³ However, the application of Israeli instructions concerning legal proceedings is executed as a matter of discretion and not always uniformly, and regardless – it is not expressed in written law.⁷⁴

Some of the most significant differences between the two legal systems have to do with search and detention

⁷¹ HCJ 3634/10 **Agbaria v. Attorney General of Israel et al.** (published in Nevo, 9 December 2010).

⁷² AA 4662/07 **Mehamd Aljawad v. The Military Prosecution** (2 December 2007).

⁷³ Netanel Benichou, “On Criminal Law in the Area of Judea, Samaria and the Gaza Strip: A Window and Trends” [Hebrew], *Mishpat VeTzava* 18 (2004), p. 293, 302-304.

⁷⁴ Aharon Mishnayot, “Law and Jurisdiction in Judea and Samaria: Between the Current Situation and the Desirable Situation” [Hebrew], unpublished, available on: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504358.

procedures. The law applying to Palestinians in the West Bank is characterized by very wide search and detention powers and less judicial review than common in Israel. Its provisions severely violate the freedom of movement of Palestinian suspects and defendants and their rights to liberty, privacy and dignity.⁷⁵

A. Authority to Search

The separation of laws is concretely manifested when comparing the legislation regarding search powers over Israeli citizens, which are established in the *Criminal Procedure Ordinance (Arrest and Search)*, 5729-1969 (hereinafter: CP Ordinance), whereas the powers over Palestinians are established in the Order Concerning Security Provisions. Generally, conducting a search in the home of a settler requires a search warrant or meeting very restrictive conditions. Similarly, conducting a body search of a settler requires a relatively high level of suspicion with regards to this person. More recent and specific legal procedures in Israeli law – such as the *Criminal Procedure Law (Enforcement Powers – Body Searches and Collecting Means of Identification)*, 5756-1996 – which establish very severe conditions and procedures for body searches, also do not apply to Palestinians.⁷⁶ By contrast, searching the homes or bodies of Palestinians does not require a warrant, and the conditions for conducting the search are minimal. The following table summarizes the differences:

⁷⁵ Benichou (*supra* note 73), p. 306-308.

⁷⁶ It should be noted that recently, the explicit authority to take DNA samples from suspects, defendants and convicted persons in various offences in the territories was added to the Order Concerning Security Provisions – see Articles 69a-69m of the order.

	Israelis (CP Ordinance)	Palestinians (Order Concerning Security Provisions)
Search Warrant for a Place	The powers afforded to police officers to search places are generally conditioned upon obtaining a search warrant (Articles 23-24).	A search warrant is not required, and any army officer, or soldier who was authorized by an officer, has the power to conduct a search of any place (Article 67).
Causes for Searching a Place	<p>A search of a place can be conducted without a warrant under exceptional circumstances, for example a place where there is reason to believe that a crime is being committed or was recently committed (Article 25).</p> <p>The causes for searching a place under a judicial order are more extensive.</p>	The causes for conducting a search are extensive and include, in addition to the suspicion of an offence, the suspicion of endangering public safety or the security of IDF forces or disrupting public order, and the suspicion that the place might be accommodating a person who violated the provisions of the order or an item that is expected to be seized under the Order Concerning Security Provisions (Article 67).
Causes for Searching a Person	<p>Searching the body of a person without a warrant is permitted only in specific cases, such as:</p> <ol style="list-style-type: none"> 1. While conducting a search of this person's house, provided that he or she is found in the searched place or its vicinity and that there is a reasonable suspicion that the person is hiding an item that is illegal to hold or an item that there is a search for (Article 29). 2. In the process of an arrest (Article 22). 	Any soldier is allowed to search a person, and reason for suspicion that this person is carrying an item that is expected to be seized under the Order Concerning Security Provisions – is sufficient (Article 68).

	3. In concrete situations where a person is suspected of committing a specific offence, such as illegally carrying a weapon or drugs. ⁷⁷	
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B. Authority to Detain

The detention procedures that apply to Israeli citizens (adults), including those living in the territories, are established in the *Criminal Procedure Law (Enforcement Powers – Detentions)*, 5756-1996 (hereinafter: the Detentions Law) and in the *Criminal Procedure Law (Detainee Suspected of Security Offenses) (Temporary Order)*, 5766-2006 (hereinafter: the Security Offenses Law). The detention procedures that apply to Palestinians are found in Section C of the Order Concerning Security Provisions. The provisions established by these procedures are different and discriminate against Palestinians.

As detailed in the following table, the Order Concerning Security Provisions, as opposed to the Detention Law in Israel, does not condition the use of the extreme measure of detaining a suspect or a defendant upon the existence of a cause for detention such as that

⁷⁷ Recently, in the **Ben Haim** case, the Supreme Court clarified that these restrictions cannot be bypassed by relying on a person's "consent," unless it is being clearly explained to that person that he has the right to refuse the search and that this refusal will not hurt him. In this context, President Dorit Beinisch clarified that: "Reviewing the different orders related to the power to conduct a search of a person's body without a judicial warrant reveals that this power is conditioned upon the existence of a reasonable suspicion that this person is carrying an item which is illegal to carry or which is the subject of a search by the police." ACrA 10141/09 **Avraham Ban Haim v. State of Israel**, paragraph 16 of the judgement of President Beinisch (published in Nevo, 6 March 2012).

the suspect is considered dangerous or that there are concerns for evading trial. In a key ruling from 1995, the Military Court of Appeals ruled that the Order Concerning Security Provisions established a negative arrangement, which means that the gravity of the offense, in and of itself, can constitute sufficient grounds for detention. At the same time, it is worth noting that since the previous decade, military courts began, in practice, to base their rulings on the causes for detention established by the Detention Law.⁷⁸ However, there has been no formal change in the written law and the application of the detention regulations that are practiced in Israel is performed subject to the discretion of the judges – and there are also those who do not support it.⁷⁹

	Israelis (Detentions Law)	Palestinians (Order Concerning Security Provisions)
Detention without a Warrant	Detention without a warrant is only possible when there is “reasonable cause for suspicion” that an offense has been committed, which is not a misdemeanor, and contingent on the existence of one of six conditions established in Article	Any offence or suspicion of an offence violating the provisions of the order constitutes cause for detention and grants the soldier the authority to detain without a detention order (Article 31(a)).

⁷⁸ A notable example for this can be found in AA (Gaza Strip Area) 157/00 **Military Prosecutor v. Abu Salim** (published in Nevo, 6 November 2000), where it was established that “although there is no dispute that the stipulations of the Criminal Procedure Law (Enforcement Powers – Detentions), 5756-1996 do not apply to the Area, as a rule we guide ourselves to act in accordance with the principles that were outlined by that law.” See also Benichou (*supra* note 73), p. 314-318.

⁷⁹ Benichou (*supra* note 73), p. 308.

	<p>23(a), whose essence is that there is reason for concern that the suspect himself is dangerous or that he might obstruct justice or evade trial.</p>	
<p>Pre-Charge Detention</p>	<p>A detention order before the filing of an indictment is restricted to cases where there is reasonable suspicion that an offense has been committed, which is not a misdemeanor, and contingent on one of three grounds:</p> <ol style="list-style-type: none"> 1. Reasonable cause for concern that the release will lead to obstruction of justice; 2. Reasonable cause for concern that the suspect is dangerous; 3. The investigation proceedings necessitate the detention (Article 13). 	<p>The Order Concerning Security Provisions does not establish any restriction on pre-charge detentions.</p>
<p>Remand until End of Proceedings</p>	<p>After the filing of an indictment, the court may instruct remand until end of proceedings if there are purported evidences to prove guilt, and contingent on the existence of one of two grounds:</p> <ol style="list-style-type: none"> 1. Reasonable cause for concern that the release will lead to obstruction of justice or evasion of trial. 2. Reasonable cause for concern that the suspect will endanger the safety of a person, public or the state (Article 21). 	<p>There are no restrictions on remand until end of proceedings (Article 43 of the Order).</p>

C. Detention Periods

The separation of laws applying to Israelis and Palestinians in the West Bank has severe implications with regards to the periods in which the latter are held in detention. The maximum detention periods established in military legislation are significantly longer than those established in Israeli legislation, and as a result – Palestinians are placed in detention for much longer periods than Israelis accused of committing the same offenses and are therefore exposed to a harsh and grave violation of their rights.

These issues were discussed in two High Court petitions filed in 2010: One submitted by the Palestinian Prisoners Ministry and the other by the organizations Association for Civil Rights in Israel (ACRI), Yesh Din and the Public Committee against Torture in Israel.⁸⁰ ACRI's petition argued that the detention periods established in military legislation, which apply solely to Palestinians, are significantly longer than the detention periods applying to Israelis living in the territories; that they are not proportional; that they infringe the rights of Palestinians to due process, dignity and liberty; and that they constitute unlawful discrimination. Following these petitions, the maximum detention periods applying to Palestinians were shortened, but even after this change they are still longer than those established in Israeli law.⁸¹ It should be noted

⁸⁰ HCJ 3368/10 **Palestinian Prisoners Ministry v. Minister of Defense**; HCJ 4057/10 **Association for Civil Rights in Israel v. Commander of IDF Forces in the Judea and Samaria Area** (partial judgment published in Nevo, 6 April 2014) (hereinafter: the **Detention Periods** case).

⁸¹ See update announcements from the State Attorney's Office concerning the **Detention Periods** case – dated 9 January 2011, 1 June 2011, 6 February 2012, 16 December 2012 and 29 October 2013. The judicial documents are available on ACRI's website:

that these petitions are still pending, and on 6 April 2014 a partial judgment has been granted.⁸²

The following table summarizes the different detention periods applying to Israelis and Palestinians, as well as the changes introduced to military legislation following the petitions filed by the Palestinian Prisoners Office and the Association for Civil Rights in Israel:

	Procedure for Israelis (Detentions Law and Security Offences Law)	Previous Procedure for Palestinians (Order Concerning Security Provisions)	The New Procedure for Palestinians (and Date of Implementation)
Initial Detention Period until Being Brought Before a Judge	<p><u>Detentions Law</u>: 24 hours, and in exceptional cases 48 hours</p> <p><u>Security Offences Law</u>: Up to 96 hours in very exceptional cases, pending the</p>	8 days	<p><u>Regular offences</u>: 48 hours, and in exceptional cases 96 hours</p> <p><u>Security offences</u>: 96 hours, with an option to extend by an additional period of</p>

<http://www.acri.org.il/he/2664> [Hebrew]. Some of the changes pertain to the detention periods of minors, which will be separately discussed below.

⁸² In its partial judgement from 6 April 2014, the HCJ instructed the state to reconsider three issues and to submit updates concerning these issues by 15 September 2014: the detention periods applying to Palestinian minors; the detention periods before the filing of an indictment applying to adults suspected of offences that are not defined as security offences; and the periods of detention until the end of proceedings.

	authorization of senior officials		48 hours, and in exceptional cases up to 6 or 8 days [1 August 2012]
First Judicial Extension of Detention for Purpose of Investigation	<u>Detentions Law</u> : 15 days <u>Security Offences Law</u> : 20 days	30 days	20 days [6 October 2013]
Overall Detention Period for Purpose of Investigation	A judge can extend the detention for additional periods of 15 days each, up to 75 days overall (after 30 days – or 35 days in security offences – the authorization of the Attorney General is required). The law includes an article that allows the Supreme Court to extend the detention beyond this, for periods of up to 90 days each, but we have no knowledge of this authority being employed in the framework of detention for the purpose of investigation.	A military judge can extend the detention for additional periods of 30 days each, up to 90 days overall. A Military Court of Appeals judge can extend the detention beyond this, for additional periods of up to 90 days each, per the request of the legal advisor for the Area.	A military judge can extend the detention for additional periods of 15 days each, up to 75 days overall. [6 October 2013]. A Military Court of Appeals judge can extend the detention beyond this, for additional periods of up to 90 days each, per the request of the Chief Military Advocate General, and without any restriction on the number of extensions [6 October 2013].
Detention Period between End of	5 days	No parallel procedure	8 days [1 June 2012]

investigation and the Filing of an Indictment			
Detention Period between Filing of Indictment and Beginning of Trial	30 days, unless the defence attorney or the defendant requested otherwise	No parallel procedure	60 days [1 August 2012]
Remand until End of Proceedings	9 months, and additional periods of 90 days (or under certain circumstances 150 days), if ordered by the Supreme Court.	Two years, and additional periods of 6 months under the authorization of the military court of appeals.	One year, and in security offences 18 months [1 August 2012]. Additional periods of 6 months under the authorization of the Military Court of Appeals.

As the above table illustrates, even subsequent to the amendment of the legal procedures established in military legislation, Palestinians can be held in detention for much longer periods than the parallel periods applying to Israelis living in the territories. The gap in the initial period of detention, prior to being brought before a judge, is an extreme manifestation of the difference in approaches at the foundation of Israeli law and military law concerning the importance of ensuring human rights in the framework of criminal law. In the explanatory notes of the amendment to the Detentions Law from 1995, which reduced the period of detention prior to being brought before a judge from 48 hours to 24 hours, it was stated that the amendment is proposed:

“In order to protect human rights, to ensure that a person is detained only when detention is a necessary measure and to grant the court supervision authority over the interrogative actions that took place prior to the defendant being brought before it.”⁸³

By contrast, it appears that according to the Military Prosecution's position, the purpose of the initial detention of Palestinians, prior to being brought before a judge, is to **formulate reasonable suspicion** against the detainee, and that judicial review **disrupts** the proper execution of the investigation:⁸⁴

“When a person is detained and the investigation is only in its beginning or in progress, then setting a hearing for the request to cancel the initial orders of detention (which grant detention powers for a period of eight days) – will annihilate, in effect, the existence and execution of the investigation [...] If a resident of the area, who is suspected of committing an offense, will be brought to a hearing already during the initial detention period of eight days, when the investigative actions

⁸³ Proposed Bill Criminal Procedure (Enforcement Powers – Holding, Detention and Release), 5755-1995 (Amendment No. 1), *Proposed Bills 5755 No. 2366* (8 February 1995), p. 316-317 (emphasis added).

⁸⁴ This, in stark contrast to the High Court's assertion, which clarified that the purpose of the initial detention cannot be the formulation of a reasonable suspicion, and that judicial review constitutes part of the improvement of cause for detention in the first place. See H CJ 3239/02 **Marab v. IDF Commander in Judea and Samaria**, PD 57(2) 349 (2003).

are in progress – on one hand, the investigation will be concretely damaged and disrupted, and on the other hand the existence of the hearing (in light of the stage of the investigation) will contribute nothing and substantive judicial review could not take place.”⁸⁵

Thus, for example, in the case of suspicions against a resident of Kiryat Arba for unlawfully using a firearm, the suspect was brought to the Jerusalem Magistrates Court as required, less than **24 hours** after his arrest. After the prosecution submitted its statement the court ordered the conditioned release of the suspect, four days after his arrest (following the suspect's indictment, the court ordered house arrest).⁸⁶ By contrast, a Palestinian resident of Ni'lin was arrested during a demonstration against the Separation Barrier on suspicion of entering a closed military zone and assaulting a public servant. This had taken place before the changes that were introduced to military legislation following the detention periods appeals. Only after being held in detention for **seven days** was he brought before the military court, which agreed to release him after posting bail.⁸⁷

Another significant gap illustrated by these figures is the one between the periods of remand until the end of proceedings. Israeli legislation limits remand until the end of proceedings to **nine months**, whereas the period of remand until the end of proceedings in military legislation, after the amending of the order, is **one year** and in security offenses **a year and a half**. Already in 1993, the State

⁸⁵ Appeal of the Military Prosecution in DR 620/09 (Judea) **Military Prosecutor v. Abd El Karim**, paragraph 14 (unpublished, 29 December 2009). On file with ACRI.

⁸⁶ DRCr 10534/08 **State of Israel v. Ze'ev Braude** (published in Nevo, 14 December 2008).

⁸⁷ Hearing in case 3990/08 **Military Prosecution v. Muhammad Amirah** dated 14 August 2008. On file with ACRI.

Comptroller criticized the incarceration periods of Palestinian detainees until the end of proceedings.⁸⁸ Observations conducted by the organization Yesh Din in the criminal courts over a period of several years, before the amendment of the order, showed that the average period of time from the indictment and the decision to remand until the end of proceedings and until the beginning of trial (the reading of the indictment) was 61 days – **twice** the maximum period permitted by the Israeli Detentions Law (Article 21 of the Detentions Law).⁸⁹ The annual reports of the Military Courts Unit show that at the end of 2010, 13 percent of Palestinian detainees remanded until the end of proceedings were being held in detention for more than a year.⁹⁰ We do not have figures regarding detentions after the amendment of the law. In practice, most of the offenses that Palestinians are accused of are security offenses,⁹¹ for which they can be

⁸⁸ State Comptroller, *Annual Report No. 43* (April 1993), p. 871.

⁸⁹ The figures provided by Yesh Din are relevant for the years prior to 2007. We have no knowledge of updated figures.

⁹⁰ *Backyard Proceedings* (*supra* note 61), p. 100.

⁹¹ The definition of security offences in military legislation is wide and includes offences for which the parallels in Israeli law are considered civil criminal and not security-related. In 2012, as a result of the deliberations in the **Detention Periods** case, the list of security offenses – which is detailed in the third addition to the Order Concerning Security Provisions – has been amended and reduced by about one third. See the Order Concerning Security Provisions (Amendment No. 26) (Judea and Samaria) (No. 1712), 5772-2012; and a reference to this amendment in the update announcement on behalf of the respondents, dated 16 December 2012: <http://www.acri.org.il/he/wp-content/uploads/2012/12/hit4057idkun1212.pdf> [Hebrew].

However, even after this amendment, the list still contains a variety of sections that are not reasonably linked to longer detention periods. For example, this list still includes offenses such as throwing objects (including throwing stones at property – a violation of Section 212 of the Order Concerning Security Provisions); organizing a demonstration without a permit (a violation of Section 10(a) of the Order Concerning the Prohibition of Acts of Incitement and Hostile Propaganda); violating a closed military zone order (a violation of Section 318 of the Order Concerning Security Provisions); and more. See a reference to this matter

detained for a period of a year and a half until the end of proceedings without need for special authorization (as stated above, under Israeli law extending detention beyond a period of nine months requires the approval of a Supreme Court Justice).

In addition to all of the above, the Detentions Law stipulates that when the established maximum period of detention is exceeded, the default is the automatic release of the detainee (before filing an indictment, between the time of indictment and the beginning of trial and when there is no verdict until the end of the period for remand until end of proceedings). By contrast, the Order Concerning Security Provisions does not include a similar arrangement. This means that once the maximum period of detention established by law is concluded, there is no clear obligation to release the Palestinian detainee, and his or her release from detention is granted to the discretion of a military court of appeals judge.⁹² It should be noted that in many cases, the lengthy detention periods lead the Palestinian defendants to end the trial with a plea bargain merely to avoid the continued detention. Hence, the discrimination in detention periods violates not only the right to liberty during the detention period itself, but also

in the petitioners' response in HCJ 4057/10, dated 17 February 2013: <http://www.acri.org.il/he/wp-content/uploads/2013/02/hit4057otrim0213.pdf> [Hebrew].

⁹² In HCJ 3687/10 **Mohamed Khaj v. Military Court of Appeals in Ofer** (published in Nevo, 1 November 2010), a Palestinian defendant requested to overturn the decision of the Military Court of Appeals to extend his detention until the end of proceedings even though two years had passed and his detention was not extended on time. The High Court of Justice left for further review the question of the application of the Detention Law to an arrest under Order Concerning Security Provisions with regards to the relevance of the expiration of a defendant's detention period. In the framework of the **Detention Periods** case (*supra* note 80), the stipulation concerning the release of a defendant from detention before the beginning of trial was amended, and it was explicitly established that this will be granted to the discretion of the military court of appeals judge. See Article 43(a) of the Order Concerning Security Provisions.

the right to due process, and consequently – again and more so – the right to liberty in the long run.

3. The Right to Due Process

The discrimination resulting from the separation of Israeli and Palestinian residents of the West Bank into two different legal systems is also reflected in the right of defendants to due process. The Israeli legal system champions the protection of a defendant's right to due process, which the Supreme Court acknowledged as having a constitutional status stemming from the defendant's rights to liberty and dignity.⁹³ The right to due process comprises a long list of rights and protections, both substantive and procedural, including granting the defendant a real opportunity to defend himself or herself against the charges. As a result of the status of the right to due process, various provisions were established in Israeli law in order to ensure this right. Therefore, as a rule, settlers standing trial in courts in Israel enjoy the protections afforded under these provisions.

Palestinians standing trial before the military courts are not afforded the same protection, because the military legal system does not grant the right to due process and the rights derived from it a similar status. Many of the provisions that are found in Israeli law and pertain to the right to due process are lacking from military law. The military courts occasionally initiate the expansion of these rights, but not necessarily in a uniform or binding manner. Below we will present a few examples that reflect the violation of the right to due process in the military courts.

⁹³ CrA 5956/08 **Sliman al 'Uqa v. State of Israel**, paragraph 10 of the judgement of Justice Neal Hendel (published in Nevo, 23 November 2011).

A. Preventing Meetings with an Attorney

“The right of every person to receive legal services, including **the right to legal counsel** and the right to be represented by this counsel, **is a basic right**, which realizes the freedom granted to him to appoint a representative as he sees fit, as well as his right to due process.”⁹⁴

Under military legislation, the investigating sources are authorized to prevent a Palestinian detainee's meeting with an attorney for **96 hours**,⁹⁵ as opposed to a maximum period of **48 hours** under the Israeli Detentions Law.⁹⁶ If a person is suspected of security offenses, and only then, the Detentions Law permits to prevent a meeting with an attorney for a period of up to **21 days**. During the first ten days this extensions requires the authorization of the person in charge of the investigation, and after that an order from the president of a District Court and the authorization of the Attorney General are required.⁹⁷ By contrast, military legislation had established (prior to the aforementioned amendment) that in security offenses listed in the annex to the Order, the investigating sources are authorized to prevent a meeting with an attorney for a period of 30 days; a military court is authorized to prevent the meeting for an additional 30 days; and the president or deputy president of the military court is authorized to extend this by 30 more days.⁹⁸ In this manner, a Palestinian detainee could be prevented from meeting an attorney for **90 consecutive days**. In February 2012, the Order was amended so that in security offenses listed in the annex to the Order, the investigating sources are authorized to prevent a meeting with an attorney for a

⁹⁴ HCJ 1437/02 **Association for Civil Rights in Israel v. Minister of Public Security**, PD 58(2) 746, paragraph 2 of the judgement of Justice Esther Hayut (2004) (emphasis added).

⁹⁵ Article 56(e) of the Order Concerning Security Provisions.

⁹⁶ Article 34 of the Detentions Law.

⁹⁷ Article 35 of the Detentions Law.

⁹⁸ Articles 58-59 of the *Order Concerning Security Provisions*.

period of **30 days**, and a military court is authorized to prevent the meeting for **an additional 30 days**.⁹⁹ In this manner, a Palestinian detainee can be prevented from meeting an attorney for **60 consecutive days**. The following table summarizes the differences:

	Israelis	Palestinians
Regular Offences	48 hours	96 hours
Security Offences	Up to 21 days	Up to 60 days

B. Obstructing Representation – Incarceration Within the Territory of the State of Israel

Israel does not maintain incarceration facilities in the West Bank, except for the Ofer Prison, which is designated for security detainees and prisoners.¹⁰⁰ Therefore, many Palestinians tried in military courts are detained and imprisoned in incarceration facilities within the territory of the State of Israel. The holding of Palestinians in incarceration facilities within Israel has several ramifications, including making it difficult for attorneys of detainees and prisoners to visit them.

Many of the defense attorneys representing detainees and defendants in military courts are themselves Palestinian residents of the West Bank. Despite their power to appoint defense attorneys funded by the state, the military courts depend on those lawyers, as a

⁹⁹ Ibid.

¹⁰⁰ See the Israel Prison Service website:
<http://ips.gov.il/Web/En/Prisons/DetentionFacilities/Central/Ofer/Default.aspx>.

replacement of sorts to public defense. The courts tend to routinely refer unrepresented defendants to Palestinian NGOs that provide legal representation, and even turn to lawyers that happen to be in the courtroom, asking them to represent the detainee being brought before the court.¹⁰¹ The Palestinian lawyers, including the ones asked by the court itself to represent defendants, are subject to the same regulation of entry into Israel as the rest of the Palestinian residents of the West Bank, and very few of them hold entry permits into the state. Therefore, the majority of defense attorneys find it difficult to visit clients who are held in incarceration facilities in Israel, even over the course of their trial, and in practice – in many cases the Palestinian detainees do not enjoy adequate representation and due process.

In 2009, the organization Yesh Din – together with ACRI and HaMoked: Center for the Defence of the Individual – filed a petition to the High Court against the holding of Palestinian residents of the West Bank in incarceration facilities in Israel. The petition was rejected, while noting that: “In this context, of an adequate and fair opportunity to be represented by attorneys in the detention proceedings, the state is obliged to maintain proper arrangements that will ensure adequate representation for the detainees, and we assume that this claim will be reviewed by the respondents on an individual basis should they be presented with requests relating to this matter.”¹⁰²

It should be noted that with regards to the issue of incarceration within Israel, there is ostensibly a unification

¹⁰¹ *Backyard Proceedings* (supra note 61), p.78-79. See also: No Legal Frontiers, *All Guilty! Observations in the Military Juvenile Court April 2010 – March 2011*, July 2011, chapter 6 [Hebrew] (hereinafter: *Observations in the Military Juvenile Court*). For an English summary of this report: <http://nolegalfrontiers.org/reports/77-report-juvenile-court?lang=en>.

¹⁰² HCJ 2690/09 **Yesh Din – Volunteers for Human Rights v. Commander of IDF Forces in the West Bank** (published in Nevo, 28 March 2010).

of the systems handling Palestinians and Israelis, as both are held in the facilities of the Israel Prison Service, which are supposed to be operated under unified standards. But the geographic location of the incarceration facilities and the restricted physical access significantly violate the rights of a Palestinian prisoner compared to an Israeli prisoner, as explained above. Moreover, the majority of Palestinian prisoners incarcerated in Israel are classified by Israel as security prisoners and severe restrictions are imposed on the conditions of their arrest – restrictions that are not necessarily imposed on Jewish prisoners who are classified as security prisoners.¹⁰³

C. Obstacles to Due Process – Language and Translation

For dozens of years, the persons being brought before the military courts are only detainees and defendants whose native tongue is Arabic, and only some of them are fluent in the Hebrew language. In spite of this, the majority of court personnel, from those standing at its gates to the military prosecutors and judges, do not speak Arabic.

The Order Concerning Security Provisions contains a provision entitled “interpreter for the defendant” (Article 116 of the Order). This provision asserts that the court

¹⁰³ The policy of the Israel Prison Service (IPS) with regards to Jewish prisoners that are classified as security prisoners is to conduct an individual evaluation, which is based on their personal characteristics and not only on their classification as security prisoners. See: Physicians for Human Rights – Israel, Adalah and Al Mezan, [The Inhuman Conditions of Arrest of Palestinian Prisoners Classified as Security Prisoners in Prisons in Israel](#), July 2012 [Hebrew]. At the end of April 2014, the IPS held 5021 Palestinian security detainees and prisoners, 373 of them [residents of the Gaza Strip](#). In addition, at the end of that month, 1333 Palestinians were held in IPS facilities for illegally staying in Israel, 21 of them from Gaza. These persons are classified by the IPS as criminal detainees and prisoners. These figures are taken from the B'Tselem website: http://www.btselem.org/statistics/gaza_detainees_and_prisoners.

must appoint an interpreter for a defendant who does not speak Hebrew, and also allows the court to order the translation of evidence which is not “in Hebrew or another language that is customary to the court and the litigants.” However, in practice – indictments, investigation materials and evidence have not been translated to Arabic throughout the years.¹⁰⁴

In April 2011, several Palestinian attorneys who appear before military courts filed a petition to the HCJ, requesting it to require the military commander and the military prosecution to translate to Arabic the investigation materials, indictments, hearing protocols and court decisions in military court proceedings, as well as to amend the Order Concerning Security Provisions to this effect. Following the petition, the state agreed to translate indictments, and the court ruled that the petition has been exhausted and that the other documents in the proceedings do not require translation.¹⁰⁵

Thus, investigation materials and written evidence are not at all currently translated to Arabic, but rather handed to the defendant and defense attorney solely in Hebrew. Even the protocols of military court hearings, as well as court decisions – including verdicts – are written only in Hebrew and are not translated to Arabic.¹⁰⁶ The ability of the Palestinian defense attorneys to use the interpreters found in the court is limited,¹⁰⁷ and in any event the translation is carried out in problematic conditions. The interpreters that are stationed in the military courts are mostly conscripted soldiers, who know Arabic and Hebrew from home, and who undergo a brief training in the courts

¹⁰⁴ *Backyard Proceedings* (*supra* note 61), p. 70; the petition in HCJ 2775/11 **Atty. Khaled el-Arej v. GOC Central Command**, paragraph 14 (published in Nevo, 3 February 2013).

¹⁰⁵ **Atty. Khaled el-Arej v. GOC Central Command** (*supra* note 104).

¹⁰⁶ Information provided by Atty. Smadar Ben-Natan, who represents Palestinian suspects in military courts, April 2013.

¹⁰⁷ *Backyard Proceedings* (*supra* note 61), p. 70-71.

themselves.¹⁰⁸ Beyond the lack of professional training in court interpretation, the interpreters lack any legal training and do not undergo professional training in court interpretation, and therefore they are not proficient in legal terms and in the essence of the procedures that they are interpreting. They do not know the roles of the persons present in the courtroom, nor are they aware of the professional ethical rules.

The lack of translation of the indictment, investigation materials and evidence, together with the inadequate interpretation during the hearing itself and the fact that the protocols are written in Hebrew, severely undermine the ability of the defendants and their attorneys to thoroughly comprehend the events taking place in the courtroom, and as a result – the right of the defendants to a fair trial and their right to liberty. The Supreme Court noted the impairment of the defendant's understanding of what is said regarding his or her case:

“When we are sitting in justice. From time to time we encounter cases in which the defendants do not fully understand what is being claimed and stated during the hearing [...] due to inadequate

¹⁰⁸ Shira Lipkin, “[Norms and Ethical Rules among Military Court Interpreters: The Yehuda Court as a Test Case](#)” [Hebrew] (hereinafter: “Military Court Interpreters”), Master's thesis, Bar-Ilan University Department of Translation and Interpreting Studies, December 2006, p. 66 and 88. Aside from the lack of professional training and legal education, the performance of the interpreters in military courtrooms is hindered by the responsibility delegated to them under the Standing Orders for Interpreters. According to these orders, interpreters are responsible for a long list of administrative roles in the courtroom, which they are to perform **alongside** the interpretation of events. These responsibilities, which include courtroom cleanliness and maintaining order, are perceived by the interpreters as the main part of their work (p. 82-85). See also: *Backyard Proceedings* (*supra* note 61), p. 68, 70, 112-113; Daphna Golan, [The Military Judicial System in the West Bank](#) [Hebrew], B'Tselem, November 1989, p. 19 and 34.

interpretation or lack thereof. In this state of affairs, there is almost no real significance to the defendant's presence in the hearing, and in my opinion it is an infringement of the rights of defendants that cannot be accepted."¹⁰⁹

It should be stated that the problem of language accessibility and the problem of physical accessibility for the attorneys (due to the incarceration within Israel) do not directly stem from the existence of a dual system of laws. These are systemic problems, which stem from the structure of the Israeli occupation in the West Bank and the policy chosen by Israel in these contexts, and they could have existed even had both populations been subjected to one single system of laws. However, giving the existence of two separate legal systems, these obstacles enhance the gap between Israelis and Palestinians in the criminal process, and we therefore saw fit to address them in this chapter.

4. Substantive Law – The Definition of Offenses and Extent of Penalties

The separation between the legal systems is also manifested when comparing the provisions of substantive criminal law in both systems. First, there are offenses that are included in military legislation but not in Israeli legislation. Among those are stone-throwing, assaulting a soldier (which under military law is more severe than a simple assault), threatening a soldier, causing harm to a soldier due to negligence, membership in a group committing illegal acts, violating an appearance order and

¹⁰⁹ CrA 8974/07 **Lin v. State of Israel**, paragraph 3 of the judgement of Justice Yoram Danziger (published in Nevo, 3 November 2010).

violating curfew. It should be emphasized that these are not minor offenses, and that the minimum penalty established for them is a five-year prison term.

Second, in some of the offenses that exist both in military law and Israeli law there are differences between the two systems with regards to the definition of the offense and the penalty it carries. In most cases, the penalties set forth in military legislation are far more severe than those set forth in the Penal Law. The differences in maximum sentences were also noted by the criminal court of appeals:

“It is no secret that the military legislator saw fit to establish higher maximum penalties than those accepted in Israel. Hence, we find that while in Israel a maximum penalty of twenty-year imprisonment has been established for the offense of manslaughter, in the Area the maximum penalty is a life sentence.”¹¹⁰

Thus, for example, Article 209(a) of the Order Concerning Security Provisions establishes a **death penalty** for “intentional killing” or an attempt to do so, and Article 210(a) establishes a **life sentence** for “manslaughter.”¹¹¹ By contrast, the Penal Law establishes a penalty of **life sentence** for the offense of “murder”

¹¹⁰ Appeal (Judea and Samaria) 99/79 **Shmasna v. Military Prosecutor** (published in Nevo, 29 September 2005).

¹¹¹ According to Article 165 of the *Order Concerning Security Provisions*, a defendant in a military court will not be sentenced to death unless the panel was composed of three judges whose rank is not lower than Lieutenant Colonel and the verdict was unanimous. In addition, there is an automatic appeal of a death sentence (Article 156). It is important to note that, in practice, a death penalty has never been issued for a defendant in the military courts and the policy of the military prosecution today is to not require such a penalty.

(Article 300 of the Penal Law), **twenty-year imprisonment** for attempted murder (Article 305 of the Penal Law) and **twenty-year imprisonment** for “manslaughter” (Article 298 of the Penal Law).¹¹² Furthermore, security legislation stipulates that the penalty for offenses of “attempted solicitation” will be identical to the one established for the offense itself (Article 206 of the Order), whereas criminal law stipulates that the penalty for such offenses will be half the penalty established for the greater offense (Article 33 of the Penal Law).

Another example of discrimination can be seen in the “assault” offense. Under Article 379 of the Penal Law, the penalty for simple assault is a **two-year sentence** (Article 379 of the Penal Law) and for battery a **three-year sentence** (Article 380). By contrast, the Order Concerning Security Provisions establishes a **five-year sentence** for simple assault, a **seven-year sentence** for battery (Article 211(a) of the Order) and a **ten-year sentence** for assaulting a soldier (Article 215(b) of the Order).

In weapon-related offenses, there is also a significant gap in terms of penalties. According to Article 144 of the Penal Law, the penalty for unauthorized possession of a weapon is a **seven-year sentence**, for carrying a weapon – a **ten-year sentence**, and for unauthorized manufacturing of a weapon – **fifteen years**. By contrast, Article 230 of the Order Concerning Security Provisions establishes a penalty of **life sentence** for the unauthorized carrying, possessing or manufacturing of a weapon. It should be noted that the *Defense (Emergency) Regulations, 1945*, which also apply to Israelis, establish highly extreme penalties, sometimes even more severe

¹¹² In HCJ 3450/06 **Dweib v. The Military Commander**, Palestinians appealed to the High Court of Justice after a military court sentenced them to life for intentional killing, due to their involvement in a terrorist attack at a coffee shop. In their petition, they claimed that their accomplice, a resident of East Jerusalem, who was tried in a civil court in Israel, received a 22-year sentence, even though his involvement in committing the offense was greater.

than those established in security legislation, but they are rarely employed and then usually against Palestinians.

Petitions filed to the High Court of Justice against the penal policy of the military courts in the West Bank compared to the one common in courts in Israel were rejected, on the grounds that: “This matter stands, of course, at the foundation of the discrepancies between the penalties set in Israeli law and the penalties set in the military legislation existing in the Area, and it stems from confronting the circumstances of the Area.”¹¹³ This assertion does not confront the fact that the settlers living in the “Area,” who are ostensibly subject to the military rule applying in the “Area,” are not subject to the same law even in cases of security offenses, and that the discrepancies in penalties exist also with regards to criminal offenses that are not related to “the circumstances of the Area.”

5. Minors

The separation between settlers and Palestinians in the criminal procedure does not skip even the minors who enter the gates of this procedure: Two children, one Jewish and one Palestinian, who are accused of committing the same act, such as stone throwing, will receive a substantially different treatment from two separate legal systems. The Israeli child will be afforded the extensive rights and protections granted to minors under Israeli law. His Palestinian counterpart will be entitled to limited rights and protections, which are not sufficient to ensure his physical and mental wellbeing and which do not sufficiently

¹¹³ HCJ 1073/06 **Masalmeh v. Military Court of Appeals in the Judea and Samaria Area** (published in Nevo, 26 March 2006). See also: HCJ 10416/05 **Al-Harub v. Military Court in Judea** (published in Nevo, 24 May 2007); HCJ 7932/08 **Drar Al-Harub v. Commander of the Military Forces in Judea and Samaria** (published in Nevo, 29 December 2009).

meet his unique needs as a minor. Moreover, in many cases the criminal law applying to Palestinian minors is stricter and even more severe than the one applied to Israeli adults.

International¹¹⁴ and Israeli¹¹⁵ law have not long ago recognized the need to provide a different treatment to minors in criminal proceedings – treatment that is based on placing the principles of child's best interest and his or her rights to equality, participation in the procedure, survival and development.¹¹⁶ For this purpose, minors are granted a long line of rights and protections, and at the same time restrictions and obligations are imposed upon law enforcement agents with regards to the manner in which juveniles are to be arrested, interrogated, adjudicated and treated.

Military legislation arranges the treatment of minors in the criminal procedure in the Order Concerning Security

¹¹⁴ International law includes several documents that pertain to the rights of the child in general and in the criminal procedure in particular. The main two are the Convention on the Rights of the Child (1989), which was ratified by the State of Israel on 2 November 1991; and the “[Beijing Rules](#),” which establish ground rules regarding juveniles in the criminal procedure: UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, 29 November 1985. For a comprehensive review of the rights of juvenile persons in the criminal procedure under international law, see: Naama Baumgarten-Sharon, [No Minor Matter: Violation of the Rights of Palestinian Minors Arrested by Israel on Suspicion of Stone-Throwing](#) (hereinafter: *No Minor Matter*), B'Tselem, July 2011, p. 7-9.

¹¹⁵ *The Youth Law (Trial, Punishment and Modes of Treatment)*, 5731-1971 (hereinafter: the Youth Law) consolidates the rules concerning the treatment of minors in the criminal procedure. In 2008, this law was comprehensively amended following the conclusions of the Committee for Reviewing the Fundamental Principles in the Area of the Child and the Law and Their Implementation in Legislation, headed by Judge (ret.) Saviona Rotlevi: Israeli Ministry of Justice, [Report of the Subcommittee on the Minor in the Criminal Procedure](#) (2003) [Hebrew] (hereinafter: the *Rotlevi Report*).

¹¹⁶ The *Rotlevi Report* (Ibid.), p. 32-35.

Provisions. Unlike Israeli law, and the Youth Law in particular, military legislation is not founded on the position that the regulations of the criminal procedure should be adjusted to the unique situation of minors, and it does not include a unique order detailing the regulations applying to Palestinian minors in the different stages of the criminal procedure.

For nearly forty years of military rule, the only protections afforded to Palestinian minors in the territories were certain restrictions on the duration of their incarceration and consideration of their age in sentencing. Many of the minors did not enjoy even these scant protections, as the age of majority was, until 2011, only 16 years (as opposed to 18 years in Israeli law¹¹⁷). Although in recent years several amendments concerning minors were introduced to military legislation, the comparison of a few central principles and arrangements in Israeli law and military legislation demonstrates that the positions at the foundation of the treatment of minors in the two systems are still far apart, and that the protections afforded to minors under military legislation, and the practices derived therefrom, are far inferior to those afforded to minors under Israeli law.

This fact has not escaped the eyes of the military court judges, who chose more than once to extend the protections afforded to Palestinian minors in criminal proceedings in the territories – by applying the spirit of the Israel Youth Law to some of the areas where the military legislation is found lacking. For example, this is what the President of the Military Court of Appeals wrote in the **Abu Rahma** case:

“Notwithstanding the fact that the provisions of Amendment No. 14 of

¹¹⁷ Article 1 of the Youth Law.

the Youth Law do not apply in the Area, we cannot ignore their spirit and the principles upon which they are founded, of protecting the rights of a minor, even if he is suspected of committing offenses, and granting a dominant weight to the supreme principle of the best interest of the minor, as stated in the proposed bill. Ultimately, **a minor is a minor is a minor**, whether he lives in a place where Israeli law fully applies or whether he lives in another place, to which Israeli law indeed does not fully apply, but it is subject to the effective influence of the Israeli justice system”¹¹⁸

The trend of extending the protections afforded to Palestinian minors in criminal proceedings in the territories through military court rulings creates an increasing gap between military legislation and the binding rulings of the courts that are charged with implementing this legislation. This state of affairs is undesired, from a normative perspective, as it leaves the application of protections for minors to the court's discretion and undermines the legal certainty of the suspects and defendants. As long as the protections are not enshrined in military legislation, their validity is limited and the judicial review of their implementation cannot be undertaken. Therefore, in this chapter we will mostly address the state of the rights of

¹¹⁸ Detention Appeal (Judea and Samaria) 2912/09 **Military Prosecution v. Nashmi Abu Rahma** (published in Nevo, 31 August 2009) (emphasis in the original). Amendment No. 14 to the Israeli Youth Law enshrines extensive protections in the interrogation, adjudication and sentencing of minors. See *Youth Law (Trial, Punishment and Modes of Treatment) (Amendment No. 14)*, 5768-2008.

minors in the criminal process as manifested in military legislation.

A. Age of Majority

Under Israeli criminal law, a “minor” is a person who has not yet turned 18. By contrast, for dozens of years and until 2011, under military legislation minors had been divided into three age groups: “child” – under the age of 12; “juvenile” – between ages 12 and 14; “young adult” – between ages 14 and 16. In other words, a person over the age of 16 was deemed an adult according to military legislation. The 2011 amendment to the Order Concerning Security Provisions changed the definition of “minor,” solely for the purpose of adjudication proceedings, and now this category includes those who have **not yet reached 18 years of age**. However, for the purpose of other proceedings – arrest, detention and interrogation – the age of majority is still 16.¹¹⁹

B. Arrest and Interrogation

In 2013, the monthly average of Palestinian minors held in detention was 199.¹²⁰ Military legislation does not grant unique rights to minors, except for the obligation to

¹¹⁹ *Order Concerning Security Provisions (Amendment No. 10) (Judea and Samaria)* (Order No. 1676), 5771-2011 (hereinafter: the Order to Amend the Age of Majority). The order amended the definition of “minor” in Chapter 5, Section 7 – Adjudication of Juveniles (Standing Order) – of the Order Concerning Security Provisions. The general definitions of “minor” and “young adult” in the definitions chapter of the Order Concerning Security Provisions still stand, and therefore for the purpose of proceedings other than adjudication, the age of majority is still 16, as noted above.

¹²⁰ For Military Court Watch figures regarding the number of adults and minors held in Israel as security prisoners, see: “[Statistics](http://Militarycourtwatch.org),” *Militarycourtwatch.org*.

notify a parent or other relative of the minor about the arrest, an obligation added in the 2011 amendment. The lack of rights and protections for minors has concrete manifestations, as will be detailed below.

Many reports provided by human rights organizations and United Nations agencies point to a military practice of arriving at the family home during the late hours of the night and arresting the minor, who is sleeping in his bed.¹²¹ According to the stipulations of Israeli law, the arrest of a minor shall only be carried out as a last resort and for the shortest period of time required,¹²² and hence, as a rule, the Youth Law does not permit night-time arrests, other than in very exceptional cases. Furthermore, military legislation does not impose any restriction on the time of interrogation of a minor; this, as opposed to Israeli law, which stipulates that, as a rule, minors are not to be interrogated during night-time.¹²³ In addition, despite the obligation to notify the parents of a minor about his arrest and interrogation, the Palestinian minor is not granted the right to consult with his parent prior to his interrogation, or to have the parent present during the interrogation – rights granted to minors under Israeli law.¹²⁴

The comparison between military legislation and Israeli law demonstrates that even where it appears, on the surface, that Palestinian minors were afforded identical rights to those of their Israeli counterparts, that is not the case. For example, the article concerning the right to consult with an attorney prior to the interrogation. Military legislation obliges the minor to provide the details of a defense attorney on his own;¹²⁵ it is highly doubtful whether

¹²¹ *No Minor Matter* (*supra* note 114), p. 26-27. See also: UNICEF, [Children in Israeli Military Detention: Observations and Recommendations](#) (February 2013), p. 10.

¹²² Article 10(a) of the Youth Law (*supra* note 114).

¹²³ *Ibid.*, Article 9j.

¹²⁴ *Ibid.*, Articles 9f, 9g, 9h.

¹²⁵ Article 53(c) of the Order Concerning Security Provisions.

a minor, who is sometimes barely over the age of 12, is capable of providing the details of an attorney, certainly not when he does not have the right to speak with his parents. By contrast, Israeli law stipulates that prior to interrogating a minor, the interrogator must notify the minor's defense attorney of the interrogation, and in absence of an attorney – the interrogator shall notify the Public Defender's Office of the above.¹²⁶

Palestinian minors, similar to adults, are held in detention and imprisonment facilities in Israel, and therefore their relatives are prevented from visiting them. For minors, who could be separated from their parents for years, this is a particularly grave injury. In the framework of the aforementioned proceedings concerning the discrimination in detention periods applying to Palestinians in the territories,¹²⁷ the State Attorney's Office announced changes in the detention periods established in Israeli legislation, also with regards to minors. But as in the case of adults, there still remains a significant gap between the detention periods of Palestinian and Jewish minors living in the West Bank.

The following is a summary of the different detention periods applying to Jewish and Palestinian minors, as well as the changes made in military legislation following the petitions:

	Israeli Law	Military Legislation before the Change	Current Military Legislation
Detention Period before	<u>Minors over the age of 14: 24 hours – and</u>	8 days	<u>In offences that are not security offences:</u>

¹²⁶ Article 9i(b) of the Youth Law.

¹²⁷ The **Detention Periods** case (*supra* note 80).

<p>Being Brought Before a Judge</p>	<p>under exceptional circumstances 48 hours.</p> <p><u>Minors under the age of 14</u>: 12 hours – and under exceptional circumstances 24 hours.</p>		<p>Ages 12-14: 24 hours, with an option to postpone judicial review for up to 48 hours in special cases.</p> <p>Ages 16-18: 96 hours, with an option to extend by up to 48 hours and in exceptional cases by up to 6 or 8 days.</p> <p><u>In security offences:</u></p> <p>Ages 12-14: 24 hours, with an option to postpone judicial review for up to 48 hours in special cases.</p> <p>Ages 14-16: 48 hours, with an option to postpone judicial review for up to 96 hours in special cases.</p> <p>Ages 16-18: 96 hours, with an option to extend this by an additional 48 hours, or an additional 96 hours (up to 8 days) in exceptional cases.</p>
<p>First Judicial Extension of</p>	<p>10 days</p>	<p>30 days</p>	<p>15 days</p>

Detention for Purpose of Investigation			
Overall Detention Period for Purpose of Investigation	<p>A judge can extend the detention for additional periods of 10 days each, up to 40 days overall (after 20 days, the authorization of the Attorney General is required).</p> <p>The law includes an article allowing the Supreme Court to extend the detention beyond this, for periods of up to 45 days each, but we are unaware of cases in which this authority was employed in the context of the detention of minors for the purpose of investigation.</p>	<p>A judge can extend the detention for additional periods of 30 days each, up to 90 days overall.</p> <p>A military court of appeals judge can extend the detention beyond this, for additional periods of up to 90 days each, per the request of the legal advisor for the area.</p>	<p>A judge can extend the detention for additional periods of up to 10 days each, up to 40 days overall.</p> <p>A military court of appeals judge can extend the detention beyond 40 days, for additional periods of up to 90 days each, per the request of the Chief Military Advocate General.</p>
Remand until End of Proceedings	<p><u>Minors over the age of 14:</u> 6 months, which can be extended from time to time by 45 days each time, under order from the Supreme Court.</p> <p><u>Minors under the age of 14:</u> Cannot be</p>	<p><u>Minors over the age of 12:</u> Two years, which can be extended from time to time by 6 months each time, under order from the military court of appeals.</p>	<p><u>Minors over the age of 12:</u> One year, which can be extended from time to time by 6 months each time, under order from the military court of appeals.</p>

	remanded until the end of proceedings.		
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C. Proceedings

In 2009, a considerable step was made concerning the rights of minors in military legislation, with the decision to establish military juvenile courts.¹²⁸ However, the Juvenile Court Order applies only to the principal proceedings, and hearings regarding detention and release are still held before the regular military courts. In addition to establishing juvenile courts, the order also enshrined the status of the adjudicated minor's parents, and stipulated that the minor's parent may file with the court any request that the minor himself may file and may also interrogate witnesses or make arguments in place of the minor or together with the minor.¹²⁹

A significant gap between the laws concerning minors pertains to the protection of their privacy. Under Israeli law, criminal proceedings concerning minors are conducted in camera,¹³⁰ and therefore publication of the hearing is prohibited without the permission of the court.¹³¹ Israeli law also prohibits the publication of the name of a minor who has been brought before the court.¹³² Military legislation includes only a general provision regarding hearings in camera, according to which a military court

¹²⁸ *Order Concerning Security Provisions (Standing Order) (Amendment No. 109)* (No. 1644) (29 July 2009) (hereinafter: the Juvenile Court Order).

¹²⁹ Article 46L(b) of the Order Concerning Security Provisions.

¹³⁰ Article 9 of the Youth Law.

¹³¹ Article 70(a) of the Courts Law [Consolidated Version], 5744-1984.

¹³² Article 24(a)(1)(a) of the Youth Law (Treatment and Care), 5720-1960.

may order to conduct a hearing in camera, among other reasons in order to protect the matter of a minor.¹³³ And indeed, in recent times military courts tend to conduct deliberations on the matters of minors in camera. At the same time, there is no restriction imposed on publishing the name of the defendant, the details of the indictment or the course of the proceedings, and military court judgments are published with the full names of defendants who are minors.

D. Sentencing

Israeli legislation concerning minors in the criminal procedure emphasizes the minor's rehabilitation and return to a normative and regular course of life, and therefore obliges the juvenile court to review diverse modes of punishment and treatment before issuing a sentence. If the court concludes that the minor committed the offense, it should note so in the verdict but not convict the minor, and request that review be submitted. Subsequent to receiving the review, the court may convict the minor and sentence him or her, order certain measures or modes of treatment, or exempt the minor from punishment and treatment.¹³⁴ In the case of the latter two alternatives, the court is authorized to not convict the minor and rather settle for the conclusion that the minor committed the offense. According to data provided by the Israel Police, **In 2010,¹³⁵ 59.7% of the minors regarding whom it was concluded that they had committed the offense were adjudicated without a conviction**, 20.6% were convicted and received a prison sentence and 19.7% received other punishments.

The option to conclude that a minor committed the offense but refrain from convicting, as well as the option to refer a minor to diverse treatment alternatives, are not

¹³³ Article 89(b) of the Order Concerning Security Provisions.

¹³⁴ Articles 24-25 of the Youth Law.

¹³⁵ Israel Police, *Annual Report 2010* (2011), p. 37.

available in military legislation, except for the option to request a review after convicting a minor,¹³⁶ which is rarely employed.¹³⁷ In practice, the military juvenile court has only two options: to convict the minor or to acquit him. Observations conducted in juvenile military courts show that **the conviction rate of minors is nearly 100%**,¹³⁸ similar to the conviction rate in regular military courts.¹³⁹ Issuing a prison sentence is the “high road” in punishing minors in the military courts, including prison sentences for minors under the age of 14. Contrary to Israeli law, which prohibits the imprisonment of persons who are not yet 14 years of age,¹⁴⁰ military legislation enables the issuing of a prison sentence of up to 6 months to a “juvenile” (a person who is over the age of 12 but not yet 14) and up to one year to a “young adult” (a person who is over the age of 14 but not yet 16). The restriction concerning the maximum prison term for a “young adult” does not apply if the minor committed an offense punishable by a five-year sentence or more.

The words of military juvenile court judge Sharon Rivlin-Ahai are appropriate for this matter:

“The military courts have more than once voiced their opinion that every effort must be made, subject to the unique circumstances of the Area, in order to equalize, inasmuch as possible, the situation concerning minors in the Area to the situation in Israel. Obviously, it is not easy to devise rehabilitation tools in the Area, especially when dealing with

¹³⁶ Article 46(m) of the Juvenile Court Order.

¹³⁷ *Observations in the Military Juvenile Court* (*supra* note 101), p.

33.

¹³⁸ *Ibid.*, p. 6; *No Minor Matter* (*supra* note 114), p.16.

¹³⁹ *Backyard Proceedings* (*supra* note 61), p. 52.

¹⁴⁰ Article 25(d) of the Youth Law.

offenses that are often committed for ideological reasons and supported by the society surrounding the minor. Regardless, it is my opinion that the legislator in the Area cannot avoid approaching the matter and finding creative ways that will enable the treatment of young offenders not only within the frame of actual imprisonment.”¹⁴¹

In summary, criminal law is an area in which the discrepancies between the two legal systems in the West Bank are highly apparent, and their implications on basic rights, and the right to liberty in particular, are the most significant. The national identity of the suspect or defendant determines which law will apply to them and who will have legal authority over them. In every stage of the procedure – starting with the initial arrest, through the indictment and ending with the sentence – Palestinians are discriminated against compared to Israelis. This holds true for both adults and minors.

¹⁴¹ 3905/10 **Military Prosecution v. Muhammad Omar** (published in Nevo, 17 January 2011).

Chapter 3: Traffic Law

In accordance with the policy of separation of legal systems between Israelis and Palestinians in the West Bank, the systems for the enforcement of traffic laws are also separate.¹⁴² Israelis who commit traffic violations in the West Bank are tried before an Israeli court, under the Israeli Traffic Ordinance;¹⁴³ Palestinians are tried in military courts, under the procedures that are mostly established by the *Order Concerning Traffic (Judea and Samaria)* (No. 1310), 5752-1992 and by regulations laid down by the head of the Civil Administration (*Traffic Regulations (Judea and Samaria)*, 5752-1992). These items of legislation generally adopted the provisions of the traffic laws practiced in Israel. However, in spite of the fact that the substantive laws applying to the two populations in the West Bank are similar, the separation between the judicial systems perpetuates and enhances the discrimination between settlers and Palestinians in the West Bank. Furthermore, the penal policy is different and stricter with regards to Palestinians.

The Israel Police is charged with enforcing traffic laws applying to settlers and Palestinians. The discrimination in the enforcement of traffic laws begins already with the different enforcement measures afforded to the police with regards to each of the population groups: Military legislation authorizes police officers to execute a long list of enforcement actions that are not granted to them by Israeli law. For example, “any local resident who commits a traffic violation is required to post a cash bond in order to ensure his appearance in court;”¹⁴⁴ Israeli law

¹⁴² State Comptroller, *Annual Report 52a for 2001* (2002), p. 188 (hereinafter: State Comptroller's Report 2001).

¹⁴³ *Traffic Ordinance (New Version)*, 5721-1961.

¹⁴⁴ Doron Israeli, Head of the Traffic Division of the Judea and Samaria Region, from the protocol of session no. 277 of the Knesset's Committee on Internal Affairs and Environmental Protection (8 November

does not stipulate the requirement of such a bond. Moreover, if police incidentally happen upon a driver who is late in paying a traffic ticket, military legislation authorizes them to confiscate his driver's license and even vehicle registration certificates.¹⁴⁵ Military legislation further authorizes them to suspend a driver's license and even confiscate a vehicle when a traffic ticket is issued to a person who has not yet paid a previous fine.¹⁴⁶ There are no parallel provisions in Israeli law.

The discriminatory approach of the judicial system towards Palestinian drivers is also demonstrated by the very appearance of the traffic tickets. As required under Israeli law, Palestinians are also issued two types of traffic tickets: a fine option order and a summons. Yet, the phone numbers of police stations and traffic courts are written on traffic tickets issued to Israeli drivers, so that they can find out further details. Such phone numbers are missing from traffic tickets issued to Palestinian drivers in the West Bank.¹⁴⁷ While this might appear to be merely a technical difference, it points to the gap between the different judicial systems that apply to Israelis and Palestinians in the West Bank: one of them welcomes questions and enquiries, while the other makes it clear that it is not its duty to be at the service of the resident and undermines his or her ability to seek information.

Each year, some 3,000 Palestinians stand trial in the military courts for traffic violations.¹⁴⁸ Many drivers do not appear at the hearings concerning their case and are reprimanded for this by the court, even though – as noted

2010), p. 4: <http://www.knesset.gov.il/protocols/data/rtf/pnim/2010-11-08-01.rtf> [Hebrew].

¹⁴⁵ Haya Ofek, “[The Guide for the Perplexed: The Conduct of Israel Police in the Occupied Territories](#)” [Hebrew], *Machsom Watch*, December 2010 (hereinafter: *Guide for the Perplexed*), p. 33.

¹⁴⁶ Article 29g of the *Order Concerning Traffic (Judea and Samaria)* (No. 1310), 5752-1992.

¹⁴⁷ *Guide for the Perplexed* (*supra* note 145), p. 29.

¹⁴⁸ *Ibid.*, p. 37.

above – they were never provided with the relevant phone numbers so that they can find out if and where their trial will take place.¹⁴⁹ When the sentence is issued not in the presence of the defendant, the latter must obtain the decision on his own, which entails considerable difficulties;¹⁵⁰ this, as opposed to Israeli drivers, who are sent judgments and payment vouchers by mail. The State Comptroller even noted that the judgments granted to Palestinians in traffic violations are not entered into the police computer system, which makes it difficult to keep track of judgments and payments of fines.¹⁵¹ Failure to pay a fine on time could lead to the revocation of an entry permit to Israel for a period of several months,¹⁵² which could severely undermine a person's ability to work for a living.

The penalties for traffic violations in military courts are also stricter than those imposed by the courts in Israel for parallel violations. In a discussion held by the Knesset Committee on Internal Affairs and Environmental Protection on 8 November 2010, regarding the enforcement of traffic violations in the territories, the Head of the Traffic Division of the Judea and Samaria District stated that **“the local Arabs are tried in the military court, and the sentences they get there are among the most severe there are, much more than you get in Israel.”**¹⁵³ In this context, it is worth noting that even when the fines imposed on Palestinians are similar to those imposed in Israel, the fact still constitutes structural discrimination in light of the significant gaps in income levels between the West Bank and Israel.¹⁵⁴

¹⁴⁹ Ibid.

¹⁵⁰ Ibid., p. 38.

¹⁵¹ State Comptroller's Report 2001 (*supra* note 142), p. 189-190.

¹⁵² *Guide for the Perplexed* (*supra* note 145), p. 25.

¹⁵³ Protocol of Meeting No. 277 of the Knesset Committee on Internal Affairs and Environmental Protection (*supra* note 144).

¹⁵⁴ According to the Central Intelligence Agency (CIA), in 2008 the GDP per capita in the West Bank was estimated at USD 2,900 and in Israel

Chapter 4: Freedom of Expression and Protest

Human rights law grants extensive protections to freedom of expression and the right

to demonstrate and protest. Freedom of expression, as well as its derivative the right to demonstrate, are considered to be basic rights under international human rights law, rights that have tremendous intrinsic value in addition to being an essential tool for the realization of other rights. These rights are enshrined in the Universal Declaration of Human Rights and in Article 19 of the International Covenant on Civil and Political Rights.¹⁵⁵ The right to peaceful assembly is also established in the International Covenant on Civil and Political Rights, together with the obligation of the state to acknowledge this right and enable its realization.¹⁵⁶

This obligation is now considered as a norm of customary international law.¹⁵⁷

The Israeli Supreme Court has more than once asserted the importance of the right to demonstrate in controversial contexts:

– USD 29,300:

http://www.indexmundi.com/israel/gdp_per_capita_%28ppp%29.html.

¹⁵⁵ Articles 19-20 of the *Universal Declaration of Human Rights* (1948); Articles 19 and 21 of the *International Covenant on Civil and Political Rights* (1966), which was ratified by Israel in 1991.

¹⁵⁶ Article 21 of the *International Covenant on Civil and Political Rights*.

¹⁵⁷ John Quigley, “The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?” 12 *Boston College International and Comparative Law Review* 13 (1989), p. 23-24.

“This Court has asserted many times in the past that freedom of expression and protest are not only the freedom to express things that are agreed upon, cordial or pleasant to the ear. The freedom to march is not only the freedom of children holding flower wreaths in their hands to march in the streets of a city, but also the freedom to march of people whose [...] marching irritates and provokes anger [...] The former as well as the latter are entitled to march, and this right does not hinge upon the extent of affection or anger that they evoke.”¹⁵⁸

And indeed, freedom of expression and demonstration were intended to protect not only popular and applauded opinions, but also – and this is the core test of freedom of expression – opinions that could be or appalling or infuriating.¹⁵⁹ The authority granted to the regime to restrict the freedom of expression of its citizens is limited and reserved only for exceptional cases. The accepted position in democratic countries is that restricting freedom of expressions, including restricting or preventing demonstrations, is a last resort, which, as a rule, should be employed only when it is necessary for the protection of public order, public safety or basic rights, and this while

¹⁵⁸ H CJ 153/83 **Levy v. Southern District Commissioner of Police**, PD 38(2) 393, 411 (1984) (emphasis added).

¹⁵⁹ H CJ 8988/06 **Yehuda Meshi Zahav v. Jerusalem District Police Commander**, paragraph 9 of the judgement of Supreme Court President Dorit Beinisch (published in Nevo, 27 December 2006).

utilizing the strict test of “near certainty” of harm to one of those.¹⁶⁰

Indeed, under military occupation the status of freedom of expression is different, and the occupying power generally has the authority to restrict freedom of expression, including freedom of protest, to the extent that it is required for the protection of public order and of safety in the territory.¹⁶¹ However, according to our position, freedom of expression – including the right to protest – currently applies in the West Bank both by virtue of international humanitarian law and by virtue of human rights laws, and therefore the military commander is obligated to acknowledge this right and to enable its realization.¹⁶² The authority of the occupying power to restrict freedom of expression is founded on the assumption that the occupation is a temporary situation, and in any event, it should be balanced with the military commander's duty to care for the interests of the local population, which is protected, to respect its manners and customs and to safeguard its rights.¹⁶³ In the context of a protracted occupation, as is the situation in the West Bank, this duty to ensure the welfare of the protected population is all the more imperative. The Palestinian residents have no representation among the sovereign that controls them (the military commander) and they have no ability to influence the decisions that determine their daily lives. Therefore, protesting is a central channel for them to

¹⁶⁰ H CJ 399/85 **Kahane v. Board of the Broadcasting Authority**, PD 41(3) 255, paragraphs 7-8 (1987).

¹⁶¹ Regulation 43 of the Hague Regulations (*supra* note 10); and Article 70 of the *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1949) (hereinafter: the Fourth Geneva Convention).

¹⁶² Raghad Jaraisy and Tamar Feldman, *The Status of the Right to Demonstrate in the Occupied Territories*, Association for Civil Rights in Israel (position paper, October 2014) (hereinafter: *The Status of the Right to Demonstrate in the Occupied Territories*).

¹⁶³ Regulation 43 of the Hague Regulations (*supra* note 10) and Article 27 of the Fourth Geneva Convention (*supra* note 161).

realize their autonomy and to struggle for the realization of other rights, such as the rights to life, liberty, property, family life, livelihood, freedom of movement and others. Furthermore, considering the length of the occupation and the fact that there is no armed conflict in the West Bank for many years now, the security justification for restricting freedom of speech is undermined.

However, in practice the freedom of expression of Palestinians in the West Bank is almost nonexistent. Palestinian vigils and demonstrations are defined as illegal assemblies, military and police forces regard them as a threat and the majority of them are dispersed with use of violence, which sometimes leads to fatal consequences. On the other hand, the attitude of the authorities towards demonstrations held by Israelis in the territories expresses extensive recognition of their freedom of expression and right to demonstrate.

1. Demonstration Laws

The provisions of Israeli law with regards to holding demonstrations reflect the acknowledgment of freedom of expression and afford it protection. The *Police Act [New Version]*, 5731-1971, which consolidates the main part of the provisions concerning the right to demonstrate, establishes as a starting point that assemblies do not require authorization in advance. According to the Act, a permit for an assembly is only required when the assembly takes place in the public space, has fifty or more participants and includes a political speech or movement from one place to another.¹⁶⁴

Formally, the Police Act was not personally applied to Israelis in the West Bank. Yet in practice, on all matters concerning demonstrations and protest events – Israeli law

¹⁶⁴

Articles 83-84 of the *Police Act [New Version]*, 5731-1971.

is applied to Israelis. Israelis holding unauthorized demonstrations in the territories are tried in the civil courts of the State of Israel, according to the penal code and norms of Israeli law, including the customary standards in Israel with regards to freedom of expression and demonstration.¹⁶⁵ To the best of our knowledge, the only case in which military legislation was used in the context of the freedom of expression of Israelis in the territories was in 2008, when the Israeli military tried to prevent the organization Breaking the Silence from conducting tours of Hebron.¹⁶⁶

In complete contradiction to the approach of Israeli law applying to settlers with regards to freedom of expression and demonstration, military legislation treats the demonstrations and assemblies of Palestinians as a security threat and severely restricts their freedom of expression. As will be presented below, the regime's position concerning the freedom of expression of Palestinians in the West Bank, as reflected in military legislation and the actions of the army, is that this population must not be allowed to realize its freedom of expression and right to demonstrate.

The provisions pertaining to demonstrations in the territories are established in the *Order Concerning Prohibition of Acts of Incitement and Hostile Propaganda (Judea and Samaria)* (No. 101), 5727-1967; its name already illustrates the attitude of the military commander to freedom of expression under his rule. A review of the provisions of this order shows that there is an almost absolute ban on holding demonstrations, and that most

¹⁶⁵ An example for this can be found in the indictments issued against Israeli protesters against the Disengagement Plan, for example: Appeal (Be'er Sheva) 20240/05 **State of Israel v. Yehuda Namburg** (published in Nevo, 21 February 2005).

¹⁶⁶ HCJ 4526/08 **Breaking the Silence v. Commander of IDF Forces in the West Bank** (published in Nevo, 10 January 2011).

other forms of expression are also restricted and require obtaining a permit in advance.¹⁶⁷

Military law requires a permit for every demonstration of more than ten people when it includes speeches on a political subject or a subject that could be construed as political, even if it is held in a **private space**. Hence, an assembly without a permit, of ten or more people, who are discussing a politically-related matter, in any place – including the private home of a person, is in effect prohibited and constitutes an offense that carries a maximum penalty of ten years in prison. The order even defines a “demonstration” (assembly, procession or vigil) in much broader terms than the definition established in Israeli law.¹⁶⁸ The following table summarizes the differences between the laws:

Israeli Criminal Law	Military Law
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¹⁶⁷ The demand to require a permit reflects an unrealistic expectation that the local residents, residents of an occupied territory, will seek the authorization of the military commander – who represents a regime that from their point of view is illegal and illegitimate – in order to demonstrate against the very existence of this regime. It should be noted that even had the Palestinians been interested in requesting a permit from the military in order to protest, there are currently no military regulations defining the process and conditions for obtaining such a permit: there is no order specifying to which source a request for such a permit should be submitted; when it should be submitted; what information should such a request include; or how to appeal the military's decision concerning the issuance of a permit. See: *The Status of the Right to Demonstrate in the Occupied Territories* (*supra* note 162).

¹⁶⁸ According to data published by the organization B'Tselem, the use of this order, which was very common during the First Intifada, decreased following the initiation of the Oslo process – but increased again since early 2010: Naama Baumgarten-Sharon, “[The Right to Demonstrate in the Occupied Territories: Position Paper](#),” B'Tselem (position paper, July 2010).

Gathering	An assembly of <u>fifty people</u> or more; <u>under the sky</u> in order to hear a speech or a lecture; on a subject of <u>political interest</u> . <i>(Article 83 of the Police Act)</i>	An assembly of <u>ten people</u> or more; <u>in any location (even private)</u> where a speech is heard or a discussion takes place; <u>on a political subject or a subject that could be construed as political</u> . <i>(Article 1 of the Order Concerning Prohibition of Acts of Incitement)</i>
Procession	<u>Fifty people</u> or more who are walking together. <i>(Article 83 of the Police Act)</i>	<u>Ten people</u> or more who are walking together. <i>(Article 1 of the Order Concerning Prohibition of Acts of Incitement)</i>
Vigil	<u>No permit is required</u> for any assembly that is not a gathering or a procession.	An assembly of <u>ten people</u> or more <u>for a political purpose or a matter that could be construed as political</u> . <i>(Article 1 of the Order Concerning Prohibition of Acts of Incitement)</i>
Protesting Without Authority	An assembly of three or more people, who are acting in a manner that raises a reasonable cause for concern that they will carry out an act that will disrupt order, as well as holding a demonstration that requires a permit – without a permit or in contravention of its terms – <u>one year of imprisonment</u> . <i>(Article 151 of the Penal Law)</i>	Organizing a procession, gathering or vigil without a permit, or participating in one – <u>ten years of imprisonment</u> and/or a fine. <i>(Article 10 of the Order Concerning Prohibition of Acts of Incitement)</i>

In 2010, the Knesset passed the *Termination of Proceedings and Deletion of Records Related to the Disengagement Plan, 5770-2010*.¹⁶⁹ This law instructed to cease the execution of judgments and delete criminal records of any person convicted of an offense “related to opposing the Disengagement Plan,” unless a prison sentence that was not converted into community service was imposed upon this person. The law also thwarted the filing of additional indictments for those offenses. This law is a typical example of the attitude of the State of Israel towards political demonstrations held by Israelis in the territories and of the broad recognition of their right to demonstrate in the territories, which is in complete contradiction to their attitude towards demonstrations and protest events held by Palestinians.

In addition to the restrictions established in military law, security forces also use another legislative measure to curb the right to demonstrate in the West Bank – a closed military zone order. According to military regulations, “a military commander will declare a closed military zone when security needs or the need to maintain public order require the closing of the area.”¹⁷⁰ In several cases documented by the Association for Civil Rights in Israel, closed military zone orders were issued in order to disperse nonviolent demonstrations as they were taking place, without reviewing all of the relevant considerations.¹⁷¹

¹⁶⁹ The proposed bill and explanatory notes were published in the [Knesset Proposed Bills 2008 No. 252](#) [Hebrew], p. 440.

¹⁷⁰ Document titled “[Main Highlights – Closing an Area](#),” [Hebrew] sent to ACRI on 8 March 2010 by the Legal Advisor of the Judea and Samaria Division.

¹⁷¹ See, for example, ACRI's letter to the Commander of the Judea and Samaria Division and the Commander of the Judea and Samaria Border Police, dated 5 September 2011, concerning the “illegal use of a closed military zone order to restrict legal protest – the village of At-Tuwani”: <http://www.acri.org.il/en/wp-content/uploads/2011/11/closed-military-zone-letter-050911-ENG.pdf>.

Occasionally, an area is declared as closed in advance, in order to prevent demonstrations. For example, in November 2012, four military orders were issued, declaring the lands adjacent to the villages of Bil'in, Ni'lin, Kafr Qaddum and Nabi Saleh – four central sites of demonstrations in the West Bank, where demonstrations are held every Friday – as a closed military zone to any person who is not a resident of the place.¹⁷² The orders were even delivered to the homes of Israeli activists who are regular participants in these demonstrations. The issuing of these orders and their delivery were intended to sweepingly prevent the weekly demonstrations in these villages, as is clear from the Judea and Samaria District Police's response to an article about this matter:

“In the course of an activity of the Judea and Samaria Division, closed military zone orders were issued in four centers of agitation – Bil'in, Ni'lin, Nabi Saleh and Qaddum. In these locations, left-wing activists, anarchists and Palestinians demonstrate on a regular basis and create a provocation and break the law. The order talks about any person entering the area for which the order was issued. The orders were handed to 16 left-wing activists who act illegally every Friday in the field of disturbing public order, and it was personally delivered to them as part of an approach of initiated offensive action led by the commander of the district. This, in order to prevent

¹⁷² See ACRI's letter regarding this matter to the Chief Military Advocate General, dated 12 November 2012: <http://www.acri.org.il/en/2012/11/13/closed-military-zone-orders-delivered-to-activists/>.

arrival and illegal activity under the claim of not knowing that the places are a closed military zone. This is part of the daily activity of the Judea and Samaria District against the perpetrators of public order disturbances that are nationally motivated from any political side [...].”¹⁷³

The attitude of the military justice system towards the freedom of expression and demonstration of Palestinians in the West Bank is also demonstrated in the case of Abdallah Mahmoud Muhammad Abu Rahmah, who was accused and convicted of several offenses – the core of which was activity against public order and incitement – due to his participation in demonstrations against the Separation Fence. In a hearing regarding the conditions of his detention, the Military Prosecution objected to any change in the terms of his release, among other things citing the claim that **“the residents of the Area are not at all entitled to the right to demonstrate.”**¹⁷⁴ Among the factors relevant for determining the sentence, the defense requested leniency in light of the fact that, lacking the right to protest against the regime by way of voting, the only channel open for Palestinians to do so is through demonstrations.

The court left as “requiring review” the question of the right to demonstrate of the Palestinian residents of

¹⁷³ Joshua Breiner, [“The IDF against Bil'in Demonstrators: Received Deterrence Orders' to Their Homes,”](#) [Hebrew] *Walla! News*, 11 November 2012.

¹⁷⁴ See the hearing protocol dated 10 April 2006, concerning the conditions of release of Mohammed Abu Rahmah in: AA (Judea and Samaria) 1913/06 **Abu Rahmah v. Military Prosecutor** (published in Nevo, 10 April 2006).

the West Bank,¹⁷⁵ and even determined that “indeed, the defendant of course does not have representation in the Knesset, for he is not an Israeli citizen, nor does he have direct representation by the sovereign in his place of residence, the commander of the Area. However, this does not lead to the conclusion that the defendant, or his agents, cannot have influence over the actions and decisions of the commander of the Area.”¹⁷⁶ The court’s assertion that Palestinians have alternative means to express protest, such as writing a letter to the military commander or filing a petition to the High Court of Justice, adequately reflects the military commander’s restrictive – and in effect nullifying – approach towards the freedom of expression of Palestinians in the West Bank.

The attitude of the military rule towards the right of Palestinians to demonstrate in the territories is also reflected in the conduct of the military forces on the ground. Military sources have noted more than once that Order 101 is not sweepingly implemented in practice, and that as a matter of policy the military permits demonstrations in the West Bank, *ex gratia*, so long as they are not violent and do not disrupt public order or pose a threat to the security of the public or the Area.¹⁷⁷ This state of affairs – of restrictive legislation that is supposedly not implemented on one hand and of the absence of a clear and uniform rule concerning its implementation on the other hand – leaves the military commander in the field with enormous discretion to determine which demonstrations pose a threat to public order and whether,

¹⁷⁵ AA (Judea and Samaria) 1913/06 **Abu Rahmah v. Military Prosecutor** (published in Nevo, 10 April 2006).

¹⁷⁶ 3206/05 **Military Prosecution v. Abu Rahmah** (published in Nevo, 20 July 2010).

¹⁷⁷ Statements made to ACRI representatives during meetings with senior military officials on several occasions. See also, for example: Hanan Greenberg, “[IDF in Message to Palestinians: Calm Down the Demonstrations](#)” [Hebrew], *Ynet*, 14 April 2010.

when and to what extent to allow the realization of the right to demonstrate in the West Bank.¹⁷⁸

Military forces often use great force to disperse demonstrations and protest events in the West Bank,¹⁷⁹ and in exceptional cases even use lethal measures. The excessive use of force contravenes the rules of law enforcement that bind military forces whenever they are required to confront unarmed civilians in the occupied territory.¹⁸⁰ It is important to note that these are not sporadic events; over the years, human rights organizations have documented many cases of excessive use of crowd control means.¹⁸¹ This pattern of behavior

¹⁷⁸ For more on this matter, see ACRI's position paper *The Status of the Right to Demonstrate in the Occupied Territories* (*supra* note 162).

¹⁷⁹ Naama Baumgarten-Sharon, "[Show of Force: Israeli Military Conduct in Weekly Demonstrations in a-Nabi Saleh](#)," *B'Tselem* (September 2011).

¹⁸⁰ *The Status of the Right to Demonstrate in the Occupied Territories* (*supra* note 162).

¹⁸¹ See for example several letters written by the Association for Civil Rights in Israel (ACRI) concerning this matter: ACRI letter dated 20 June 2011 to the Commander of the Border Police in Judea and Samaria, following the violent and illegal dispersal of the weekly demonstration that took place in the Palestinian village of a-Nabi Saleh: <http://www.acri.org.il/he/16493> [Hebrew]; ACRI letter dated 21 March 2012 to the Commander of the Judea and Samaria Division, demanding to cease the illegal practice of using dogs to attack civilians in general and protesters in particular: <http://www.acri.org.il/he/protestright/24078> [Hebrew].

One example of inappropriate use of crowd control weapons is the common use, by military and police forces in the territories, of rubber-coated metal bullets ("rubber bullets"). The organization B'Tselem has documented many cases of injuries to civilians as a result of illegal and unsupervised shooting of rubber-coated bullets. Since 2000, these bullets have killed at least 19 Palestinians, including 12 minors, and many more have been injured. See: Sarit Michaeli, "[Crowd Control: Israel's Use of Crowd Control Weapons in the West Bank](#)," *B'Tselem* (December 2012). See also the letter sent by ACRI and B'Tselem on 30 July 2013 to the Deputy State Attorney for Special Matters, concerning the "illegal firing of

reflects the military's position that demonstrations of Palestinians in the West Bank, by their very nature and existence, constitute a disruption of public order.

2. Additional Restrictions Imposed on Expressions and Publications

The freedom of expression of Palestinians in the West Bank is further restricted by the provisions of military legislation, which prohibit and restrict various expressions allowed under Israeli law:

1. **Incitement Offense:** The “incitement” offense is defined by military law in very broad terms, and includes any incident in which a person **attempts** to influence public opinion in a manner that **could harm public safety or public order**.¹⁸² The penalty for this offense is ten years of imprisonment. The incitement offense is used by the military courts to adjudicate Palestinians in offenses that concern, inter alia, hanging posters or writing slogans against the occupation.

Under Israeli law, conversely, the incitement offense relates only to incidents in which a person **published something intended to incite to violence or terrorism**,¹⁸³ and under the condition that there is **a concrete possibility** that this publication will lead to the committing of the act of

rubber-coated metal bullets by soldiers and Border Police officers during the dispersal of demonstrations and protest events in the territories”:

<http://www.acri.org.il/en/2013/08/02/acri-btselem-rubber-bullets/>.

¹⁸² Article 7 of the *Order Concerning Prohibition of Acts of Incitement and Hostile Propaganda* as well as Article 251(b)(1) of the *Order Concerning Security Provisions* (emphasis added).

¹⁸³ Article 144d 2 of the Penal Law.

violence or terrorism.¹⁸⁴ The penalty for these offenses is five years of imprisonment.

2. **Publications:** The order prohibiting incitement **prohibits the dissemination of publications of any kind that “contain material that has political significance” without the authorization of the military commander.**¹⁸⁵ The Order further prohibits the possession, raising or display of national symbols without authorization from the military commander.¹⁸⁶ The penalty for violating these provisions is a ten-year prison sentence and/or fine. Israeli law, conversely, does not prohibit the dissemination of publications of any sort and there is no need to acquire a permit for them, except for cases in which these publications could constitute sedition or when they are intended to incite to violence or terrorism.¹⁸⁷

¹⁸⁴ A similar condition can be found in the article prohibiting incitement to racism (Article 144b of the Penal Law).

¹⁸⁵ Article 6 of the *Order Concerning Prohibition of Acts of Incitement*.

¹⁸⁶ Article 5 of the *Order Concerning Prohibition of Acts of Incitement*.

¹⁸⁷ Article 144d 3 of the Penal Law.

Chapter 5: Planning and Building

In the West Bank, there are two separate planning systems, for Israelis and Palestinians: Israelis enjoy the significant representation of their

interests in different committees, and they are full partners in planning procedures that pertain to them, the issuing of permits and construction supervision. By contrast, Palestinians are completely excluded from the planning system and have no influence over the outline plans for their places of residence. This situation was created through gradual military legislation, which altered the Jordanian Planning Law that had applied in the West Bank before its occupation. As will be illustrated below, these changes undermined substantial parts of the law's principles and rendered it, on one hand, an instrument for restricting Palestinian construction, and on the other hand, an efficient tool for planning construction in Israeli settlements.

In 1976, there were approximately 3,200 Israeli citizens living in the West Bank. Today, there are approximately 341,000 Israelis¹⁸⁸ in the West Bank (not including East Jerusalem, for which Israeli law was applied), living in about 130 state-recognized settlements and approximately 100 outposts that were established without official authorization.¹⁸⁹ The settlements were established on West Bank lands using three main

¹⁸⁸ The Central Bureau of Statistics, *Annual Statistical Report*, “[Table No. 215: Population according to Region, District and Religion](#)” [Hebrew].

¹⁸⁹ See the [database of settlements and outposts in the West Bank](#), published by the organization Peace Now. See also: Eyal Hareuveni, [By Hook and by Crook: Israeli Settlement Policy in the West Bank](#), B'Tselem, July 2010 (hereinafter: *By Hook and by Crook*).

methods:¹⁹⁰ requisition of land “for military needs;” declaration or registration of land as “state land,” when the policy is not to allocate state land to Palestinians but to Israelis and to the promotion of Israeli interests;¹⁹¹ and expropriation of land for “public needs.” Through the allocation of public land, as well as through the planning channels applying to the two populations, Israel has gained control of approximately half of the West Bank territory¹⁹² and guaranteed the expansion of settlements on one hand and restriction of the development of Palestinian communities on the other hand.¹⁹³

It should be noted that following the Oslo Accords, planning authorities in Areas A and B were transferred to the Palestinian Authority. The military commander maintains planning authority over Area C, which constitutes approximately 60% of the entire territory of the West Bank. In practice, the military planning system in

¹⁹⁰ Ibid., p. 21.

¹⁹¹ According to data provided by the Civil Administration, since 1967, **only 8,600 dunams (2125 hectares) have been allocated to Palestinians – about 0.7% of state land in Area C.** By contrast, the Civil Administration has allocated **approximately 51%** of state land in Area C to Israeli sources: about 400,000 dunams (approximately 31% of all state land in Area C) to the World Zionist Organization (WZO), which develops settlements; about 103,000 dunams (approximately 8%) to Israeli mobile phone companies and to the municipal authorities of settlements (local and regional councils); and about 160,000 dunams (approximately 12%) to government ministries and Israeli utility companies such as Bezeq (phone company), the Electric Company and Mekorot (Israel’s national water company). These figures were revealed following a freedom of information petition filed by ACRI and Bimkom – Planners for Planning Rights. AA 40223-03-10 **Bimkom – Planners for Planning Rights v. Civil Administration in the West Bank** (published in Nevo, 9 January 2012). For further information about this petition and the data revealed, see: <http://www.acri.org.il/he/?p=2463> [Hebrew].

¹⁹² *By Hook and by Crook* (*supra* note 189), p. 21.

¹⁹³ Orna Ben-Naftali, Aeyal Gross, and Keren Michaeli, “Occupation, Annexation, Discrimination: On the Legal Structure of the Occupation Regime,” [Hebrew] *Theory and Criticism* 31, p. 15, 23 (2007) (hereinafter: “Occupation, Annexation, Discrimination”).

Area C continues to influence the construction options of some of the residents of Areas A and B, as well.¹⁹⁴

1. Separation in Planning Institutions

Following the occupation of the West Bank, the planning authority in the area was transferred to the military commander. In 1971, the military commander issued the *Order Concerning the Law for Planning Cities, Villages and Buildings* (No. 418) (hereinafter: the City Planning Order), which amended the Jordanian law and established the legislative foundation for the planning system for Palestinians in the West Bank. This order altered the structure of the planning institutions in the West Bank: It abolished the district and local planning committees, in which Palestinian residents of the West Bank enjoyed representation, and transferred their powers to the High Planning Council¹⁹⁵ and its subcommittees, which were established by the military commander and in which Palestinians are currently not represented.¹⁹⁶ Hence, in a deliberate manner, the representation of the Palestinian population of the West Bank was completely eliminated from the planning authorities in charge of the area.

¹⁹⁴ Due to the manner in which the division of the areas was planned under the Oslo Accords, according to which the inhabited Areas A and B are surrounded by Area C territories, in a large part of the West Bank the land available for construction is located in Area C. Therefore, in practice, Israel continues, to a large extent, to control the development options of Palestinian communities Areas A and B, as well.

¹⁹⁵ Article 2(2) of the City Planning Order. The regional committee was the most important body among the planning institutions, as it had the authority to approve detailed outline plans, by virtue of which building permits can be obtained.

¹⁹⁶ The handful of Palestinians who were members of the subcommittees were not a real part of the planning system after 1971, and after the Interim Accord even those few disappeared altogether from the planning institutions. Thus, today Palestinians do not have any representation at all in the planning system of Area C.

The City Planning Order also changed the composition of the High Planning Council, which until then was composed of representatives that reflected a wide range of interests of the local population (including, *inter alia*, the supervising minister, a representative of the local authorities, the Director-General of the Ministry of Public Works, the General Secretary of the Jordanian Building Commission, the Chair of the Engineering Association and the Director-General of the Ministry of Health). The Order stipulated that the Council will be appointed by the area commander and include **only representatives of the central Israeli administration**. The High Planning Council is currently composed of seven representatives of the Civil Administration, a representative of the Ministry of Defense and the Legal Advisor for Judea and Samaria or his representative.

In 1975, the City Planning Order was amended,¹⁹⁷ and it was determined that the area commander may appoint “special local planning committees” for a defined area and to grant them the authorities afforded to local and regional planning committees.¹⁹⁸ The area commander's power to appoint special local planning committees does not apply to the city and village councils to which all Palestinian communities belong. Therefore, special planning committees can only be established, in effect, for settlements.¹⁹⁹ Based on this provision, the military administration defined the Jewish local councils in the West Bank as special local planning committees, which are authorized to submit detailed and local outline plans to the High Planning Council and to issue building permits to their residents.

The amendment to the order authorized the High Planning Council to establish subcommittees and to

¹⁹⁷ Amendment No. 2 (Order No. 604).

¹⁹⁸ Article 2a of the City Planning Order.

¹⁹⁹ Israeli municipalities in the West Bank, such as Ariel and Ma'ale Adumim, are also municipally defined as a “local council.”

delegate its powers to them.²⁰⁰ By virtue of this authority, the High Planning Council founded the Settlement Subcommittee and authorized it to decide on the depositing of outline plans and detailed plans for the settlements and to validate these plans. The settlers are full partners in those planning procedures; moreover, the settlements themselves are responsible for issuing building permits and supervising the construction.

By contrast, as stated above, the Palestinians lack representation in the High Planning Council. Even in the Local Planning and Licensing Subcommittee, which is responsible for authorizing construction in Palestinian communities and approving plans for the villages, there is no representation for Palestinians.²⁰¹ The City Planning Order also eliminated the possibility to appoint a village council as a Local Planning Committee, as was customary under Jordanian law. Instead, the order includes a theoretical option, which has not been implemented for dozens of years, to establish “Village Planning Committees” that function within the framework of the Civil Administration and are appointed by the military commander.²⁰²

In 2011, the village council of Dirat-Rfai’ya and human rights organizations petitioned the High Court of Justice, asking it to instruct the Minister of Defense, the military commander, the head of the Civil Administration

²⁰⁰ Article 7a of the City Planning Order.

²⁰¹ Nir Shalev and Alon Cohen-Lifshitz, [The Prohibited Zone: Israeli planning policy in the Palestinian villages in Area C](#), Bimkom – Planners for Planning Rights (June 2008) (hereinafter: *The Prohibited Zone*), p. 39-45.

²⁰² Article 2(4) and Article 4 of the City Planning Order. The Village Planning Committees have not been in existence for years, though they had been established by Order 418 even before the Oslo Accords. There are a Local Planning Subcommittee, an Inspection Subcommittee and a Licensing Subcommittee. The Inspection Subcommittee is authorized to discuss permit requests and has the powers of both a local committee and a district committee.

and the High Planning Council to reinstate the local and district planning committees in accordance with Jordanian law. According to the petition, the abolition of the local and district committees by way of amending the Jordanian law was executed without authority and contravened the clear principles of the laws of occupation. It was further argued that there is a positive obligation to reinstate the committees in light of the accumulating and ongoing planning failure that is caused, inter alia, by their abolition and which harms the civilian population of an occupied territory. The petition also argued that revoking the planning powers of the local population and transferring them to the occupying population, while establishing local planning committees for settlements, constitutes “institutionalized and systematic [discrimination] that separates the populations solely on the basis of national identity, while depriving the local population of any representation and planning power.”²⁰³ The petition is still standing.

2. The Outcome: Lack of Outline Plans for Palestinian Communities, Lack of Building Permits for Palestinians

The legislative and institutional separation between the planning systems of Israelis and Palestinians enabled Israel to actualize a policy encouraging construction in settlements and freezing it in Palestinian communities. The majority of the settlements in the West Bank have detailed and updated outline plans, which facilitate development, expansion and issuance of building permits. By contrast, the construction in most Palestinian villages is restricted by

²⁰³ The petition in H CJ 5667/2011 **Dirat-Rfai’ya Village Council v. Minister of Defense**, paragraphs 5-9. See: <http://rhr.org.il/eng/2011/08/planning-authority-of-the-palestinians-in-area-c/>.

freezing the planning situation that was in place over four decades ago.

Indeed, between the years 1989-1995, the Civil Administration prepared “Special Outline Plans” for approximately 400 Palestinian villages and towns. However, instead of facilitating the development of these villages, the outline plans served mainly for the delineation of the limits of their construction. In most cases, the delineation lines of the plans were drawn adjacent to the built-up area, and so, as a rule, they enable construction only in open areas within the built-up area of the villages, which means an extreme increase in density and an essential change in the building pattern. In some cases, buildings that had already existed when the plans were approved were left outside of their delineation, thereby reinforcing their “illegality.” Furthermore, the entire area that these plans have approved for legal constructions by Palestinians in Area C amounts to 18,000 dunams, which are only approximately 0.5% of Area C.²⁰⁴ Much of this land is already built-up, and there is no real option to continue building there. As a result, Palestinians are not currently allowed to build in Area C even on their privately-owned land, if it is located outside the area designated by the plans as a permitted building area. For the benefit of settlements, on the other hand, 26% of Area C has been approved for planning.²⁰⁵

According to data provided by the organization Bimkom – Planners for Planning Rights,²⁰⁶ since 2009 the Civil Administration did not deposit any new plan for a

²⁰⁴ [“The Failure and Neglect of Planning in Area C 1972-2013”](#) [Hebrew], *Rabbis for Human Rights*, slide 3 (hereinafter: “The Failure and Neglect of Planning”).

²⁰⁵ *Ibid.*, slides 4 and 5.

²⁰⁶ Provided to the Association for Civil Rights in an email from Bimkom, dated 3 November 2013, and in an email exchange dated 22 June 2014.

Palestinian village, other than amendments to existing plans. Nine plans that had been prepared by the villages themselves were deposited and only two of those were approved. By contrast, dozens of outline plans have been deposited, approved and published for settlements throughout the West Bank (such as Eli, Ofra, Itamar, Sansana, Nofei Prat and the Bruchin outpost).²⁰⁷

During the same years, 8746 construction commencements were approved for Israelis in settlements.²⁰⁸

In addition to all of the above, the Civil Administration recently changed its interpretation of the mandatory outline plans. These plans, which were prepared by the British mandatory authorities in the 1940s and encompass the entire area of the West Bank, continue to apply. These plans, of course, do not provide a response to the changing needs of the Palestinian population, but in the past individual building permits could be issued by virtue of them – and thousands of such permits were issued every year. Today, the interpretation of these plans by the Israeli planning authorities barely allows building permits to be issued by virtue of them.²⁰⁹

The restrictive and outdated planning policy of the Israeli regime does not meet the needs of the population, thereby leading to high residential density in Palestinian

²⁰⁷ The planning procedure comprises three stages: depositing the plan for public review and submission of objections; approving the plan for validation; and publishing the plan for validation.

²⁰⁸ According to the figures of the Central Bureau of Statistics quoted in: Chaim Levinson, "[A Ten-Year Record in Construction Commencements in the Territories; 123% Jump Compared to 2012](#)" [Hebrew], *Haaretz*, 3 March 2014.

²⁰⁹ For example, although the mandatory plans permit construction for residential needs and public infrastructure in the agricultural zones that constitute most of Area C according to these plans, the planning institutions of the Civil Administration prevent this possibility. See: *The Prohibited Zone* (*supra* note 201), p. 47-59.

villages. A family that has grown cannot expand its house or build adjacent units for its sons and daughters, who marry and raise families of their own. In many cases, young couples are forced to leave their village and move to other Palestinian communities, which are located in Areas A or B.²¹⁰ Those who choose to stay and build, despite the prohibitions, face the threat of demolition – as will be detailed below.

3. Separation and Discrimination in the Area of Enforcement

Under the Jordanian planning law, the body responsible for executing most of the enforcement against illegal construction is the local committee. As stated above, the majority of settlements have local committees (titled special planning committees), while the local planning committees of the Palestinian communities were abolished by the City Planning Order of 1971. In practice, the Civil Administration, through the Inspection Subcommittee, is responsible for enforcement in the West Bank – in relation to both settlers and Palestinians. The Order also granted powers of enforcement – in relation to construction in settlements – to the local committees that operate in the framework of the local councils of settlements; however, to the best of our knowledge they do not employ these powers.

The Inspection Subcommittee has also chosen to use its enforcement authority over settlements in a limited manner. According to the Opinion Concerning Unauthorized Outposts: “In 1998, the Commander of the Area decided to limit the Inspection Subcommittee’s scope of inspection. It was allowed to not supervise communities within areas in which a valid detailed plan is in force. However, **in contravention of this instruction, the**

²¹⁰ *The Prohibited Zone* (*supra* note 201), p. 7.

Inspection Subcommittee 'stretched' the inspection limitation much further beyond this release, and ceased to supervise Israeli settlements in Judea and Samaria altogether [...].²¹¹

According to the official figures, between 1996 and 2000, 3,449 cases were opened following building without a permit in settlements, but only in 3% of them (107 cases) enforcement measures were taken.²¹² Civil Administration data indicates that in recent years, there has been greater enforcement of Israeli construction without permits.²¹³ But an analysis of enforcement data from the last three decades indicates that the Civil Administration's Inspection Subcommittee implements a more stringent enforcement policy towards the Palestinian population, compared to the Israeli population, both in terms of the number of demolition orders issued for illegal construction and in terms of the execution of these orders, i.e. the extent of the demolitions in practice. According to figures presented by the organization Rabbis for Human Rights, between the years 1987-2013, 12,570 demolition orders were issued for Palestinian structures and 6309 for Israeli illegal construction; in practice, 2445 Palestinian structures were demolished (approximately 20% of all illegal construction), compared to 524 Israeli structures (approximately 8% of all illegal construction). In other words, the extent of enforcement toward Palestinians is 2.5 times higher than the extent of enforcement toward Israelis living in settlements.²¹⁴

²¹¹ Atty. Talia Sasson, *Opinion (Interim) Concerning Unauthorized Outposts* [Hebrew], p. 37-38 (2005).

²¹² *By Hook and by Crook* (*supra* note 189), p. 26.

²¹³ Data from a presentation by the Coordinator of Government Activities in the Territories (COGAT) in the Knesset's Foreign Affairs and Defense Committee, April 2014. The relevant slides are on file with ACRI.

²¹⁴ "The Failure and Neglect of Planning" (*supra* note 204), slides 6 and 8. The information in this presentation is based on an analysis of GIS layers of illegal construction, which were obtained following freedom of information requests filed to the Civil Administration by the organization

Chapter 6: Restrictions on Freedom of Movement

Freedom of movement, which is strictly protected under Israeli law, is an essential condition for the realization

of most basic rights. Without the opportunity to move around, an individual finds it difficult to make a living, receive an education and healthcare services, have a family life and so on. As stated by Justice Theodor Or in the **Horev** case:

“In Israel, freedom of movement is guaranteed as a basic right [...] It also encompasses a person’s freedom to move freely throughout and across the State of Israel [...] This right is essential to individual self actualization.”²¹⁵

Yet in the West Bank, a person's ability to move around is derived from this person's nationality.

For more than a decade, the movement of Palestinians in the West Bank has been restricted in a manner that severely damages their ability to live an adequate life in their places of residence, their land and homes. The restrictions imposed on Palestinians include,

Bimkom, and on figures provided by the Civil Administration to Mr. Dror Etkes. Detailed figures concerning demolitions and the issuance of demolition orders can be found in the weekly reports published by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA): <http://www.ochaopt.org/reports.aspx?id=104>.

²¹⁵ HCJ 5016/96 **Horev v. Minister of Transportation**, PD 51(4) 1, 95. (2007).

among other things, checkpoints, roadblocks, a separation fence and movement prohibitions; those hinder the residents' movement both between different areas of the West Bank and within each area. Indeed, in light of the considerable improvement in the security situation, in recent years some of the restrictions on the movement of Palestinians in the West Bank have been lifted: checkpoints and roadblocks within the West Bank have been removed or opened, and the movement of Palestinians on certain roads has been allowed again. However, the movement of Palestinians throughout the West Bank is still significantly restricted compared to that of Israelis, particularly in the "Seam Zone" west of the Separation Fence, in areas adjacent to settlements and in areas that were defined as firing zones and nature reserves. In the city of Hebron, severe movement restrictions are also still in place.²¹⁶ By contrast, the movement of Israelis is permitted almost without any restrictions in most of the West Bank area.²¹⁷

The policy regarding freedom of movement, as reflected in the situation on the ground, is that the free and safe movement of settlers must be secured and they should be enabled to lead adequate and normal lives – even at the expense of their Palestinian neighbors. As with other areas of life described in this report, the position which is at the foundation of decision-making concerning freedom of movement is that Palestinian should be separated from settlers inasmuch as possible, and that violating the basic rights of Palestinians is an unavoidable by-product of this separation. The movement restrictions

²¹⁶ For background and continuous updates about movement separation in Hebron, see the page "Hebron City Center" on the B'Tselem website: <http://www.btselem.org/topic/hebron>.

²¹⁷ The order of the military commander prohibits the entry of Israelis into Area A territories in the West Bank. These territories constitute some 18% of the West Bank area and only include Palestinian cities. In most of the West Bank territory – Areas B and C – the movement of Israelis is permitted without any restrictions.

imposed on Palestinians are manifested in a string of orders and regulations that distinctly apply **only to Palestinians**, as will be detailed below.

1. Separation in Roads

As part of the settlement enterprise, and based on the policy of separation between settlers and Palestinians, many traffic routes were paved between the settlements themselves and between the settlements and Israel. On these roads, which are allowed for unrestricted use by Israelis, wide movement restrictions have been imposed on Palestinians since the beginning of the Second Intifada, at the end of the year 2000.²¹⁸ The vast majority of restrictions are not entrenched in orders; rather, they are implemented by soldiers and Border Police officers based on commands and verbal instructions. As of February 2014, Israel designates 65 kilometers of West Bank roads for the exclusive, or almost exclusive, use of Israelis, and first and foremost – West Bank settlers.²¹⁹

The movement of Palestinians on West Bank roads is also restricted by checkpoints, fixed and temporary, and various road obstructions. In recent years, the Israeli military has decreased the number of fixed checkpoints deployed in the West Bank, but many still remain in place; in February 2014, there were 99 of those.²²⁰ In addition,

²¹⁸ H CJ 3969/06 **Al-Kharub, Head of Deir Samit Village Council v. Commander of IDF Forces in the Judea and Samaria** (published in Nevo, 22 October 2009); H CJ 2150/07 **Abu Safiyeh v. Minister of Defense** (published in Nevo, 29 December 2009).

²¹⁹ B'Tselem website, "[Checkpoints, Physical Obstructions and Forbidden Roads](#)," last updated 11 March 2014 (hereinafter: "Checkpoints and Forbidden Roads").

²²⁰ Ibid. 59 of those are internal checkpoints located well within the West Bank, far from the Green Line. This figure includes 17 checkpoints in Area H2 in Hebron, where there are Israeli settlement enclaves. 32 of all internal checkpoints are regularly staffed.

according to UN figures for 2012, approximately 410 temporary, ad-hoc (“flying”) checkpoints are deployed on average every month.²²¹ Apart from that, Israel blocked the access roads to some of the main roads in the West Bank using hundreds of physical obstructions, including dirt embankments, concrete blocks, iron gates and trenches. The number of obstructions frequently changes, depending on political and security circumstances; at the close of 2012, there were an average of approximately 445 physical obstructions a month.²²²

Parallel to restricting the movement of Palestinians on roads designated for settlers, and ostensibly as an alternative created for them, Palestinians prevented from using many roads, the Civil Administration paved separate roads for Palestinians, referred to as “fabric of life” roads and totaling approximately 49 kilometers.²²³ These roads, for the paving of which large portions of land privately owned by Palestinians have been appropriated,²²⁴ perpetuate the exclusion and expulsion of Palestinians from the main network of roads in the West Bank. Hence, whereas Israelis travel on fast roads in the upper levels, Palestinians are forced to travel on separate, low-quality roads in the lower level.

²²¹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), [West Bank Movement and Access Update](#), September 2012, p. 32.

²²² “Checkpoints and Forbidden Roads” (*supra* note 219).

²²³ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), [“West Bank Movement and Access Update,”](#) My 2009, p. 6.

²²⁴ Anat Barsella, [Ground to a Halt: Denial of Palestinians' Freedom of Movement in the West Bank](#), B'Tselem (August 2007), p. 87-89.

Route 443 as an Example

Until it was banned for Palestinians in 2002, Route 443 served as a main traffic route between the city of Ramallah and the villages to its west. In 2007, six Palestinian villages situated along Route 443 petitioned the High Court of Justice, requesting it to order the lifting of the ban prohibiting Palestinians from driving on this road. In late 2009, the HCJ accepted the petition and ruled that closing the road to Palestinians was executed without authority and that it is not proportional.²²⁵ Despite that, the HCJ afforded the military commander extensive discretion as for the implementation of the judgment, to an extent that rendered it meaningless. In practice, Palestinians were only allowed to enter the road from two points and to exit it from two other points, while its main historical purpose – entry to Ramallah – remained prohibited. Furthermore, the checkpoints deployed in the entry points to the road are not continuously operated and the inspections are lengthy and stringent, which prevents the *de facto* use of the road by Palestinians. At the same time, an alternative road network was paved, solely for Palestinians, leading from villages in the area to Ramallah. The drive through the alternative route takes place on rickety and dangerous internal roads and takes a long time.

2. Denying Entry into Settlements

In 1997, the commander of IDF forces in the West Bank published an order declaring all municipal areas of settlements as a “closed military zone” to Palestinians. The order, which was sweepingly formulated, stipulated that “the orders of this proclamation do not apply to Israelis” and included, under the term “Israeli,” all citizens and residents of Israel, Jews who are entitled to immigrate to Israel under the Law of Return and also any person who is

²²⁵

The **Abu Safiyeh** case (*supra* note 218).

not a resident of the area and holds a valid entry permit to Israel.²²⁶ Hence, any tourist entering Israel or any Jewish person are allowed to freely enter settlements, whereas Palestinians, the original residents of the area, need a special permit from the commander of the area in order to enter settlement territories.

A. "Special Security Areas" Forbidden for Palestinian Entry

The prevention of Palestinian access to settlement territories was expanded in the last decade by an additional obstacle, intended to prevent movement in large areas surrounding the settlements. In 2002, following the events of the Second Intifada, the military announced the establishment of "barrier zones" surrounding the external boundaries of some of the settlements and designated to create a security zone for them. These areas, termed "Special Security Areas" (SSAs, or *shabamim*), were demarcated by fences, patrol paths, electronic sensors and cameras.²²⁷ The SSAs were declared as a closed military zone, and entry to the demarcated area between the fences was barred. Yet, despite the fact that they were supposed to serve as a vacated "deterrence zone," the SSAs are open for the free access of settlers, without any supervision.²²⁸

²²⁶ *Order Concerning Security Provisions (Judea and Samaria)* (No. 378), 5730-1970, *Proclamation Concerning the Closure of a Territory (Israeli Settlements) (Judea and Samaria)*, 5757-1997 (hereinafter: Area Closure Order).

²²⁷ Ofir Feuerstein, [Access Denied: Israeli Measures to Deny Palestinians Access to Land around Settlements](#), B'Tselem (September 2008) (hereinafter: *Access Denied*). See also the definition of a "Special Security Area" on the website of the Military Advocate General: <http://www.law.idf.il/338-en/Patzar.aspx>.

²²⁸ *Access Denied* (*supra* note 227).

As of September 2008, the military declared official barrier zones around 12 settlements left east of the Separation Fence. These areas cover approximately 5000 dunams (about 1235 acres), and more than half of them encompass agricultural land that is privately owned by Palestinians. Together with the closure of these areas, a procedure was devised to enable Palestinians who own agricultural lands trapped within this area (as well as their nuclear families and employees), to enter in order to cultivate their land, pending prior coordination with Civil Administration bodies. Palestinian farmers seeking to access their land are required to prove ownership of the land and to coordinate their time of entry with the Civil Administration.

B. Prohibitions in the Seam Zone Applying Only to Palestinians

In 2003, Israel began to implement a wide and institutionalized separation regime in the areas known as the “Seam Zone” – the lands trapped between the Separation Fence and the Green Line. These areas were declared a closed zone,²²⁹ and every Palestinian – even if he or she had lived there their entire lives – needs a personal permit or a Seam Zone resident certificate in order to pass through, live or work in this area. By contrast, Israelis and tourists have a general permit to stay in these areas.²³⁰ The result is additional separation, both physical and legal, between Palestinians and Israelis, as well as severing the living areas of the Palestinian population only and isolating entire villages.

²²⁹ *Proclamation Concerning the Closure of Area No. 03/2/O (Seam Zone) (Judea and Samaria)*, 5764-2003.

²³⁰ *General Permit for Entering the Seam Zone and Staying Therein (Judea and Samaria)*, 5764-2003.

In order to obtain permits for staying in the Seam Zone, the Palestinian residents are forced to face a complicated bureaucratic mechanism.²³¹ Each permit is granted for a limited period and requires renewal once it is no longer valid, and every time anew the applicants must prove their connection to the land, according to a closed list of causes (managing a business, trade, employment, agricultural work and a small number of additional roles and activities).²³² These bureaucratic restrictions are established in a collection of standing orders that **only applies to Palestinians** and is referred to as “Collection of Standing Orders for the Seam Zone.”²³³

The decision to grant or deny a permit is made under the exclusive discretion of the Civil Administration, in violation of the right to due process: without reasoning, a hearing, documentation or an actual opportunity to appeal. The bureaucratic procedure of the permit regime begins with the filing of a request with the Palestinian DCL (District Coordination and Liaison) to obtain a permit; the DCL is supposed to forward the request to the Civil Administration, which returns its decision to the Palestinian DCL, whence the decision is passed on to the applicant. The applicant does not receive any documentation of the filing of the request with the DCL, and the requests frequently fail to reach their destination. The bureaucratic procedure can

²³¹ Aelad Cahana and Yonatan Kanonich, [The Permit Regime: Human Rights Violations in West Bank Areas Known as the “Seam Zone.”](#) HaMoked – Center for the Defence of the Individual (March 2013) (hereinafter: *The Permit Regime*). See also: Eyal Hareuveni, [Arrested Development: The Long Term Impact of Israel's Separation Barrier in the West Bank](#), B'Tselem (October 2012), p. 25-41.

²³² These are listed in Annex A of the *Regulations Concerning Entry Permits to the Seam Zone and Staying Therein*, 5764-2003.

²³³ The standing orders updated as of January 2014 are published on the website of the COGAT (Unit for Coordination of Government Activities in the Territories): http://www.cogat.idf.il/Sip_Storage/FILES/2/4392.pdf [Hebrew].

sometimes take months, during which the individual has no opportunity to follow the status of the request.

It should be emphasized that receiving an entry permit to the Seam Zone does not grant the option to freely move in and out of the area: access to agricultural land located over the Separation Fence is channeled through 74 gates, the majority of which (52) are only open during the olive harvest season, from October to December.²³⁴ The permit issued to each farmer is limited to **entry and exit through one gate only**.²³⁵ Most of these gates are not always open, but rather during limited hours. As a rule, Palestinians are not allowed to sleep inside the Seam Zone, and therefore, aside from the limitation imposed on their range of movement, their daily routine is also restricted. Entering the Seam Zone in a vehicle requires a special permit, even for the permanent residents of the closed area, and a special permit is also required for farmers with a permit, who wish to transport their produce or cultivate their land using an agricultural vehicle.

Relocating one's place of residence to a Palestinian village trapped within the Seam Zone is also subject to the Civil Administration's discretion: Only if the Civil Administration believes that a Palestinian has sufficient reason to relocate, he might be granted a permit to do so. The application for a "new resident" permit in the Seam Zone must be filed by both the applicant and "the relative

²³⁴ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "[The Humanitarian Impact of the Separation Barrier](#)" (July 2013) (hereinafter: "The Humanitarian Impact – July 2013").

²³⁵ *Regulations Concerning Crossing the Seam Zone and Staying Therein*, 5764-2003.

(a permanent resident of the Seam Zone).²³⁶ This means that relocation to the Seam Zone is contingent on the one and only cause of “family reunification,” as though this had been immigration to another country. By contrast, every Israeli, Jew to whom the Law of Return applies or even tourist is free to move to a settlement located within the Seam Zone without requiring any permit.

The “permit regime” has turned the Palestinians in the Separation Fence enclaves into illegal residents in their own homes and land, and it severely violates their basic rights – first and foremost their freedom of movement, their right to earn a living and to a dignified existence and their right to a family life. According to the figures of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), in the areas declared by Israel as the Seam Zone resided, in July 2012, some 7500 people in 12 Palestinian communities. According to the estimates, when the construction of the Separation Fence is completed, approximately 23,000 Palestinians will find themselves trapped in similar enclaves.²³⁷ An even greater number of Palestinians – about 150 communities – depend on the permit regime to cultivate their lands, which are located in the Seam Zone.²³⁸

The permit regime leads to the systematic expulsion of Palestinian residents from their land in the Seam Zone. Research conducted by OCHA, regarding 67 communities

²³⁶ Under Section B of the *Annex to the Orders Concerning a Permanent Resident Permit for the Seam Zone (Judea and Samaria)*, 5764-2004.

²³⁷ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), “[The Humanitarian Impact of the Separation Barrier](#)” (July 2012).

²³⁸ OCHA, “The Humanitarian Impact – July 2013” (*supra* note 234).

in the West Bank, found that only about 18% of those who used to cultivate land in the closed area before the construction of the Separation Fence were issued a permit to continue doing so. In other words, by means of the Separation Fence and the permit regime, Israel has denied access from approximately 80% of the people who had cultivated their land and their families' land in that area.²³⁹ Similar figures are provided in state responses to petitions filed by the Association for Civil Rights in Israel and HaMoked – Center for the Defence of the Individual in 2004 against the permit regime. According to these responses, the number of permits for staying in the Seam Zone has drastically diminished over the years:²⁴⁰

	Permanent Agricultural Permit	Temporary Agricultural Permit	Total
2007	9977	1487	11464
2008	2601	2308	4909
2009 (until July)	1640	2445	4085

These figures show that between the years 2007 and 2009, there has been a decline of more than 80% in

²³⁹ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "[Special Focus: The Barrier Gate and Permit Regime Four Years on: Humanitarian Impact in the Northern West Bank](#)," (November 2007), p. 2.

²⁴⁰ HCJ 9961/03 **HaMoked – Center for the Defence of the Individual v. Government of Israel** (published in Nevo, 5 April 2011); HCJ 639/04 **Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria** (published in Nevo, 5 April 2011) (hereinafter jointly referred to as: the **Permit Regime** case).

the number of farmers entitled to a permanent permit for the Seam Zone and a 65% decline in the total number of permits (permanent and temporary).²⁴¹ Despite these grave figures, in 2011 the High Court rejected the petitions and ruled that, pending several changes to the arrangements, the decision to close the area and implement the permit regime within it is proportional.²⁴²

²⁴¹ In addition to the permits for a permanent farmer and a temporary farmer, 9935 work permits (for workers or relatives of farmers, usually for short periods of one to six months) were issued in the year 2009. The number of work permits issued in 2007 was similar – 9309 permits.

²⁴² HCJ 639/04 **Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria** (published in Nevo, 5 April 2011).

Chapter 7: Immigration Policy and the Freedom to Choose a Place of Residence

Israel's immigration policy in the West Bank is to decrease the local population of

the West Bank, and more than that – to transfer its own population into these territories. This, despite Israel's obligation, under international law, to maintain the situation that had existed in the occupied territory prior to its occupation. This policy is manifested in limiting the ability of Palestinians to live within the West Bank area and to hold a family life there as they see fit, whereas Israelis are free to relocate and reside in the area without any limitations, and even enjoy various benefits and incentives to do so.

This separate policy began with the occupation of the West Bank, when the Israeli military issued an order that declared the entire West Bank as a closed zone²⁴³ and decreed that entry into this area be contingent on military authorization.²⁴⁴ Therefore, Palestinians seeking to move to the West Bank are required to receive a permit from the military. This policy was also applied to approximately 270,000 Palestinians who resided in the West Bank or Gaza before 1967, but were not present in the area when the military commander conducted a census of the Palestinian population – whether because they escaped during the war or because they were staying abroad for study, work, or other reasons. Israel did not include these persons in the population registry and shortly afterwards prevented many of them, including all males between the

²⁴³ *Order Concerning Closed Zones (West Bank Area) (Amendment) (No. 34)*, 5727-1967.

²⁴⁴ Article 2 of the Order Concerning Closed Zones.

ages of 16 and 60, from returning to the territories, claiming that they are not eligible to file a request for residency status.²⁴⁵ The military commander even eliminated from the registry thousands of Palestinians who had left the West Bank or Gaza and stayed abroad for a prolonged period. Since 1967, Israel cancelled the residency of some 130,000 Palestinians – thereby preventing them from living in this territory as legal permanent residents.²⁴⁶

Over the years, Israel has introduced stricter policies with regards to movement between Gaza and the West Bank and vice versa. In 1972, the military published orders declaring a “general exit permit” from Gaza and the West Bank²⁴⁷ and allowing residents of the occupied territories to enter Israel solely for the purpose of passage from Gaza to the West Bank and vice versa. Israel enabled the residents of the territories to relocate from one area to the other with relative ease, subject to changing their address in the population registry run by the Civil Administration. In February 1991, Israel changed the legal situation and any resident of the territories seeking to enter Israel was required to obtain an individual exit permit. In 1993, Israel placed a “general closure” on the territories, which continues to this day. Passage from Gaza to the

²⁴⁵ Human Rights Watch, [Forget about Him, He's Not Here](#) (February 2012), p. 17-20.

²⁴⁶ The response of the Legal Advisor to the Judea and Samaria Area to a petition filed by HaMoked – Center for the Defence of the Individual under the Freedom of Information Law, concerning “the freezing of registration in the population registry of the occupied territories” (AdmPet 28741-02-11 **HaMoked – Center for the Defence of the Individual v. Coordinator of Government Activities in the Territories**), dated 30 March 2011: http://www.hamoked.org/files/2011/114221_eng.pdf.

²⁴⁷ *General Exit Permit (No. 5) (Judea and Samaria)*, 5732-1972.

West Bank was restricted and conditioned upon individual permits.²⁴⁸

With the outbreak of the Second Intifada, Israel decided **to freeze the updating of addresses between the Gaza Strip and the West Bank, as part of a general trend to separate the two territories.** The information listed at that time in the copy of the population registry held by Israel was frozen, without any possibility to change or correct it or to dispute its veracity. In 2007, Israel even began to treat Palestinians who live in the West Bank but are listed in the registry under a Gaza address – as “illegal stayers” in the West Bank, unless they are holding a staying permit issued by the military. Pursuant to this policy, the military commenced the forced transfer of Palestinians from their homes in the West Bank to the Gaza Strip, based on their erroneous address in the population registry. Furthermore, in 2009 the Coordinator of Government Activities in the Territories (COGAT) published a procedure that very nearly prevents the option to relocate from Gaza to the West Bank. This procedure stipulates that Palestinians from Gaza will be allowed to “settle” in the West Bank only in extreme and exceptional humanitarian cases, and only after meeting very strict criteria.²⁴⁹

²⁴⁸ See the page “Travel between the West Bank and the Gaza Strip” the website of HaMoked – Center for the Defence of the Individual: http://www.hamoked.org/Topic.aspx?tID=sub_30.

²⁴⁹ HaMoked – Center for the Defence of the Individual, “[Israel Continues to Pursue Its Policy of Separation between the West Bank and the Gaza Strip](#)” (update dated 1 November 2013). In 2010, HaMoked, together with other human rights organizations including ACRI, filed two petitions of principle to the High Court of Justice against Israel’s policy to separate and segregate the West Bank and Gaza. One petition, aimed against the “settlement procedure” that prevents passage from Gaza to the West Bank, was rejected in May 2012 (HCJ 2088/10 **HaMoked – Center for the Defence of the Individual v. Commander of West Bank Area** (unpublished, 24 May 2012)); the other concerned the updating of

Additionally, **in 2000 Israel stopped accepting new requests for family reunifications, suspended the processing of existing requests and refused to allow the implementation of requests that had already been approved.**²⁵⁰ Hence, for more than a decade, a Palestinian in the West Bank does not have the opportunity to legally have a family life in the territories if his or her partner is not also a resident of the area, barring exceptional cases in which the High Court of Justice intervenes.²⁵¹

In April 2010, the restrictions imposed by Israel on the realization of the right of Palestinians to live in the West Bank were tightened, this time through amendments to the Order for the Prevention of Infiltration (Amendment 2) and to the Order Concerning Security Provisions (Amendment 112). The amendment to the Order for the Prevention of Infiltration stipulates that any person found in the West Bank without a permit from the military commander or the Israeli authorities shall be deemed as an infiltrator and face imprisonment, even if this person's permanent place of residence is the West Bank. The wording of this order enables its application to both Israelis and Palestinians, but the IDF Spokesperson clarified, upon the publication of the order, that it will not be used against Israelis.²⁵²

addresses and was withdrawn in April 2013 (HCJ 4019/10 **HaMoked – Center for the Defence of the Individual v. Commander of West Bank Area** (unpublished, 21 April 2013)).

²⁵⁰ HaMoked – Center for the Defence of the Individual, “[Update](#)” (2 October 2008).

²⁵¹ For example, pursuant to a string of petitions filed regarding family reunifications, the State of Israel announced that it will review a limited number of requests as a gesture. In this framework, 32,000 requests were approved, but this process was halted in February 2009. See the page “Family Unification in the OPT” on HaMoked's website: http://www.hamoked.org/topic.aspx?tid=sub_46.

²⁵² Amira Hass, “[IDF order will enable mass deportation from West Bank](#),” *Haaretz*, 11 April 2010.

The amendment turned tens of thousands of Palestinians living in the West Bank into offenders despite themselves. In light of Israel's "freezing" policy with regards to reviewing family reunification requests, they cannot obtain a permit for staying in the West Bank, and they could be banished from it even if they had lived there for many years or if they had moved there in order to be united with their partners or parents.

The non-registry in the population registry and the withholding of permits to reside in the West Bank have severe ramifications on human rights: this policy undermines the ability of Palestinians to choose their place of residence, move freely, travel abroad, have a family life, realize their right to health and education services and more.

By contrast, an Israeli citizen who chooses to move into the occupied territory does not face any obstacles; quite the opposite: throughout the years, Israelis have been receiving economic and other incentives to relocate to the West Bank. With the occupation of the West Bank, the military commander granted a general entry permit into West Bank territories to Israeli residents.²⁵³ An order published in 1970 stipulated that Israelis seeking to change their place of residence to the West Bank are required to carry a personal permit;²⁵⁴ yet, in practice, not one of the hundreds of thousands of settlers who moved to the West Bank over the years was required to carry such a permit. The policy that has guided the Israeli authorities since the occupation of the West Bank was to allow the free and unrestricted passage of Israelis to the West Bank, without any need for a special permit, as though Israel and the

²⁵³ *Order Concerning Closed Zones (West Bank Area) (Amendment)* (No. 34), 5727-1967 (General Entry Permit No. 2).

²⁵⁴ *General Entry Permit (No. 5) (Israelis and External Residents)* (Judea and Samaria), 5730-1970.

West Bank had been one territorial unit.²⁵⁵ In this way, the West Bank has become a territory that is closed to Palestinians but open to Israelis.

²⁵⁵ Response of the IDF Spokesperson, dated 25 October 2010, to a freedom of information request submitted by HaMoked with regards to permits for Israelis: <http://www.hamoked.org.il/files/2010/113142.PDF> [Hebrew].

Chapter 8: The Illegality of the Separation of Legal Systems

In one territorial unit and under the same regime, two populations live side by

side and are subject to two separate legal systems. Those who belong to one population enjoy human rights and civil liberties, while those who belong to the other population are not entitled to them, or entitled to them to a much lesser extent. Israelis living in the West Bank live their lives, in almost every aspect, like the residents of Israel. On the other hand, their Palestinian neighbors have been living for decades under a regime of military occupation and are subject to legislation that fails to meet international standards or even Israeli standards.

The review presented in this report described the development of the regime of separation and discrimination in the West Bank and its ramifications, as well as the support and authorization granted to this regime by the Israeli legal system. The particular severity illustrated by this review is that this not specific or technical discrimination, or individual decisions, but rather **a system that entrenches institutionalized discrimination through legislation and governing institutions.**

It is important to clarify that the military rule in the West Bank contravenes provisions established by international humanitarian law and human rights laws, in the areas reviewed in this report and in other areas, even without any connection to the existence of two legal systems and the discrimination embedded in them. For example, the detention periods applying to Palestinians in the territories are incompatible, in our opinion, with the

international standard – even without comparing them to those applying to Israelis living in the territories. Similarly, the lack of planning for Palestinian villages and the prevention of Palestinian development in Area C violate, in and of themselves, Israel's obligations under international law – even when ignoring the accelerated development of the settlements. Furthermore, some of the violations mentioned in this report would have probably existed even had Palestinians and Israelis been subject to one legal system under the Israeli rule in the territories. For example, the problem of language accessibility that was mentioned above:²⁵⁶ Since the system speaks Hebrew and does not ensure adequate translation to Arabic, Palestinians suffer from hindered accessibility and structural inferiority in relation to the system, and they would have similarly suffered even had Israelis been adjudicated by the very same system.

However, the structural discrimination described in this report enhances and exacerbates the violation of the rights of Palestinians, and in some cases it constitutes the cause of the violation. For example, when the access of Palestinians to their land is prevented as a result of the existence of settlements and of preferring the needs of the Israelis living in those settlements. Moreover, the dual and discriminatory legal system is, in itself, a violation of international law, because its very existence contravenes the basic principles of modern law and severely undermines equality and human dignity as moral and legal principles, as will be detailed below.

²⁵⁶

See chapter 2, section 3c above.

1. Violating the Principles of Equality and Human Dignity

The existence of the separate legal systems, which discriminate against the Palestinians in almost every aspect of life is a clear violation of the principle of equality from both a moral and legal perspective, and it contravenes the prohibition on discrimination enshrined in various international treaties.

The State of Israel has signed the International Covenant on Civil and Political Rights (1966) and even ratified it. Under this Covenant, Israel obliged:

“[To] respect and to 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁵⁷

The State of Israel also signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Article 1 of this Convention stipulates that:

“In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction

²⁵⁷ Article 2 of the Covenant on Civil and Political Rights (emphasis added).

or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁵⁸

Despite its obligations, Israel implements a regime of separation and discrimination in legal systems, based on national-ethnic origin. Although the items of legislation are usually worded in an indirect manner, most of them distinguish between Palestinians and Jews (Israeli citizens

²⁵⁸ Emphasis added. It should be noted that according to Article 3 of the Convention, “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” There are those who claim that the dual legal system upheld by Israel in the West Bank also contravenes this obligation, because at least elements of apartheid and even of colonialism – which are prohibited under international law - can be identified in it. One notable example is the 2007 report of the United Nation's Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967: John Dugard, *Human rights situation in Palestine and other occupied Arab territories*, UN Human Rights Council, 29 January 2007, A/HRC/4/17, p. 3, 23: <http://unispal.un.org/UNISPAL.NSF/0/B59FE224D4A4587D8525728B00697DAA>.

The prohibition on apartheid is enshrined in the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) and in the Rome Statute of the International Criminal Court (1998), although the definition of “apartheid” is somewhat different in each of those documents. Israel is not party to those conventions, but the prohibition on apartheid is considered today customary international norm, binding on all states. This report will not address the question of if and to what extent the Israeli rule over the West Bank meets the legal definition of “apartheid,” because in our opinion, the debate over this question shifts the focus from the essence of the issue that is extensively discussed in this report.

and residents, alongside Jews to whom the Law of Return applies²⁵⁹). In some cases, the latter are joined by tourists holding a valid entry permit to Israel, thereby isolating the Palestinians and distinguishing between them and all other persons, in terms of the rules of the law.

For example, the military legislator ordered the closure of settlements in the West Bank to anyone who is not “an Israeli” as defined by the order. This definition includes: resident of Israel; citizen of Israel; “entitled under the Law of Return;” and any person who is not a resident of the area and holds a valid entry permit to Israel.²⁶⁰ Similarly, the “Seam Zone” area was closed only to Palestinians.²⁶¹

According to the International Covenant on Civil and Political Rights, in time of public emergency a State Party may indeed take measures derogating from its obligations under the Covenant, to the extent strictly required by the exigencies of the situation, “provided that such measures [...] do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”²⁶² It should be emphasized that the existence of discrimination is determined by the discriminatory **outcome** and not by the motive. In other words, even if Israel would claim that the different justice systems applying to Palestinians and Israelis living in the territories were not meant to discriminate against Palestinians on the ground of their national or ethnic origin, but to protect its safety or the interests of its citizens, then the outcome of the separation

²⁵⁹ Article 6b(a) of the *Defense (Emergency) Regulations (Judea and Samaria – Adjudication of Offenses and Legal Assistance)*, 5727-1967.

²⁶⁰ Area Closure Order (*supra* note 225).

²⁶¹ *General Permit for Entering the Seam Zone and Staying Therein (Judea and Samaria)*, 5764-2003.

²⁶² Article 4 of the Covenant on Civil and Political Rights.

regime is clearly discriminating on the ground of national and ethnic origin, and therefore it is wrongful.²⁶³

It should be noted that the official position of the State of Israel is that the human rights treaties it has ratified do not apply outside of its sovereign territory and therefore do not oblige it in relation to its actions in the occupied territories. This viewpoint was rejected by UN commissions responsible for implementing the provisions established in these conventions,²⁶⁴ as well as by the International Court of Justice in The Hague.²⁶⁵ According to the leading approach among international bodies and in the legal literature, the human rights treaties also apply to territories that are subject to the effective control of a State Party, even if they are outside its sovereign territory, including occupied territories.²⁶⁶ The HCJ has also applied

²⁶³ See, for comparison: HCJ 953/87 **Poraz v. Mayor of Tel-Aviv-Jaffa**, PD 42 (2) 309, 333 (1988).

²⁶⁴ For more on the dispute between Israel and the UN on this issue, see: Orna Ben-Naftali and Yuval Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories," *Israel Law Review* 37(1), p. 17-118 (2003-2004) (hereinafter: "Living in Denial").

²⁶⁵ In the ICJ's advisory opinion regarding the Separation Fence. See: [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), advisory opinion of 9 July 2004, 43 I.L.M. 1009, paragraphs 108-111.

²⁶⁶ Orna Ben-Naftali and Yuval Shany, *International Law Between War and Peace* (2006), p. 216 [Hebrew]. It should be noted that, aside from the question of territorial application, there is also the question of the material application of human rights laws in a situation of an armed conflict or an occupation. In this context, the common opinion today in both the professional literature and court rulings is that human rights norms always apply, not only in times of peace, and therefore shall also apply during an armed conflict and certainly during a belligerent occupation. See: **Al-Skeini v. United Kingdom**, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011). The current debate in professional literature shifted from the question of the application of human rights laws under an occupation to the question of the scope of the application and the relationship between the two branches of law, particularly when they contradict each other. See: Noam Lubell, "[Human Rights Obligations in](#)

stipulations established by international human rights laws in several rulings concerning the territories, and the Court even explicitly asserted that these laws apply alongside international humanitarian law and complete it where it is lacking.²⁶⁷ Moreover, the principle of the prohibition of discrimination is considered to be a rule of customary international law²⁶⁸ and the prohibition of racial discrimination even enjoys the status of *jus cogens*, i.e. a peremptory norm from which no derogation is permitted.²⁶⁹ Therefore, these laws are part of Israeli law and they bind Israel and its representatives in all of their actions in Israel and abroad.

The sweeping assertion that the Palestinian residents of the territories are all deserving of a separate legal system – which is significantly and systemically inferior to the one applied to the Jewish residents of the West Bank – gravely violates not only their right to equality, but also **their right to dignity**. This assertion incorporates a wrongful basic assumption that **they are less entitled than others to a strict protection of their rights**.

[Military Occupation](#),” *International Review of the Red Cross* 94(885), p. 317, 337 (2012). The question of the relationship between the two bodies of law is complex and under dispute, but the common assumption is that the longer an occupation persists, the more the justification and need for a wider application of human rights laws increases. See: Orna Ben-Naftali and Yuval Shany, “Living in Denial” (*supra* note 264), p. 100-105.

²⁶⁷ HCJ 769/02 **The Public Committee against Torture in Israel v. State of Israel**, PD 62(1) 507, paragraph 18 of the judgement of President Barak (2006).

²⁶⁸ “Customary international law” is those rules and obligations that have been established as customary in the practice of states in the international arena, as opposed to “treaty law,” which refers to the obligations that State Parties take upon themselves through international conventions. There are conventions that codify customary law which predated them and there are rules that became customary consequent or subsequent to their establishment in conventions.

²⁶⁹ Ben-Naftali and Shany, *International Law Between War and Peace* (*supra* note 266), p. 199, 217.

The Court has reiterated, in recent years, that the separation between persons on the grounds of collective belonging related to race, religion, ethnicity, nationality and so forth contravenes the principle of equality and injures human dignity. For example, on the matter of the separation of Israelis of Ethiopian origin in the education system, the High Court ruled that it “entails inequality that borders on humiliation and degradation that injures human dignity.”²⁷⁰ The High Court similarly ruled with regards to the separation of girls on the ground of ethnic origin at the Beit Yaakov school in Immanuel: “The different treatment of equals, discrimination and separation all indicate an arbitrary custom of double standards which has no justification. The separation gnaws at the core of human relationships. The feeling of discrimination leads to the destruction of the fabric of relationships between peers.”²⁷¹

In light of these words, it seems peculiar that the Israeli Court tends to accept the existence of separate and discriminatory justice systems in the West Bank as an indisputable fact, and the application of Israeli law to settlers – as obvious. This is how Justice Eliezer Goldberg explained the application of Israeli law to the settlements:

“Thus, the reality on the ground necessitated Knesset legislation that leads to the distinction between the personal law applying to Israeli settlers in the

²⁷⁰ HCJ 7426/08 **Tebeka – Advocacy for Equality and Justice for Ethiopian Israelis v. Minister of Education** (published in Nevo, 31 August 2010).

²⁷¹ HCJ 1067/08 **Noar KeHalacha v. Ministry of Education** (published in Nevo, 6 August 2009).

Area [...] and the law applying to the local residents. And this reality is what compelled [the commander of IDF forces in Judea and Samaria] to adapt the military legislation to it with regards to the Israeli settlement in all aspects of its life [...] Another option did not stand before [him] [...], when he could not leave a 'legislative vacuum' concerning the Israeli settlement in the Area."²⁷²

A review of court rulings indicates that the Court prefers to avoid deliberating the illegality of the policy that dictates this separation. Instead, the Court only examines the decision or action at the core of the petition brought before it and ignores the entirety of the situation. Moreover, despite the grave manifestations of the separation in justice systems, the Court often refrains altogether from deliberating claims concerning discrimination and inequality.

For example, in the judgment concerning the closing of Route 443 to Palestinian drivers, the claim of discrimination, which was extensively discussed in the petition, was not deliberated at all. The only reference to this claim was found in the opinion of President Beinisch, and even that did not relate to the claim itself, but rather criticized its quality and the manner in which it was presented by the petitioners.²⁷³ President Beinisch voiced

²⁷² H CJ 5808/09 **Jerusalem Economic Corporation v. Commander of IDF Forces in Judea and Samaria**, PD 49(1) 89, 97 (1995) (emphasis added).

²⁷³ The **Abu Safiyeh** case (*supra* note 218), paragraph 6 of the the judgement of President Beinisch.

this criticism again in another judgment, on the matter of the Seam Zone.²⁷⁴

In the rare cases in which the Court chooses to deliberate claims concerning discrimination, it tends to do so from one of two points of departure. One point of departure is the state's argument that settlers and Palestinians belong to two different equality groups, between which there is a relevant difference, and therefore their different treatment does not constitute wrongful discrimination. Thus it is claimed that the relevant difference between the groups stems from the security threat that lies in individuals from the Palestinian group.²⁷⁵ The argument that a characteristic of a certain number of individuals, who belong to a group comprising millions of people, constitutes a characteristic that establishes relevant difference between groups and justifies their different treatment, is invalid and does not meet the accepted standard of equality. Attributing the potential risk that lies in a certain number of Palestinians to the entire Palestinian population of the West Bank, solely on the ground of their belonging to the same national group, constitutes wrongful discrimination on the ground of national origin.

The danger of a generalizing attitude towards a group of people was noted by Justice Ayala Procaccia in her (minority opinion) judgment on the matter of the Citizenship Law:

“We must beware of the lurking danger that is inherent in a

²⁷⁴ The **Permit Regime** case (*supra* note 240), paragraph 44 of the judgement.

²⁷⁵ HCJ 3969/06 (*supra* note 218); The **Permit Regime** case (*supra* note 240).

sweeping violation of the rights of persons who belong to a particular group by labeling them as a risk without discrimination, and of the concern involved in using the security argument as a ground for a blanket disqualification of a whole sector of the public. There are cases in history in which this happened, and later constitutional thought recognized the mistake in this, a mistake that is clear on the face of it. It is sufficient to mention one example of this from the well-known case of *Korematsu v. United States*, in which United States residents and citizens of Japanese origin, who lived in the United States, were placed in detention camps in their own country during the Second World War, when the United States was at war with Japan. There were individuals in that population group who were suspected of disloyalty to the state. In consequence, a general sanction of detention was imposed on a whole sector of the public. These sweeping measures were approved by a majority in the United States Supreme Court. The minority thought otherwise.”²⁷⁶

²⁷⁶ H CJ 7052/03 *Adalah – The Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* (published in Nevo) (2006), paragraph 21 of the judgement of Justice (Emerita) Ayala Procaccia (emphasis added).

However, the position presented by Justice Procaccia is not prevalent in Supreme Court rulings concerning the discrimination between Palestinian residents of the West Bank and settlers. In most cases, the Court is willing to accept the argument that the danger posed by a small number of individuals in a group justifies the restrictions on the entire group.

The second point of departure used by the Court when reviewing claims of discrimination against Palestinians in the territories is that the distinction between settlers and Palestinians is permissible because the legislative framework arranging their affairs is different.²⁷⁷ This position justifies the concrete manifestation of discrimination deliberated in that petition, based on the basic separation and discrimination between the legal systems that apply to Israelis and Palestinians in the West Bank, but does not review their legality in itself. At the basis of this position is the assumption that the separation regime is an inevitability and that its existence is not a relevant part of the discussion:

“The order does not unlawfully discriminate, but rather relies on an existing and relevant distinction between the populations: the Israeli settlements in the Judea and Samaria area have been arranged, from their inception, through a legal framework that is fundamentally different than that of the Arab communities in the area, for this reason there was no

²⁷⁷ HCJ 548/04 *Amana – The Settlement Movement of Gush Emunim v. Commander of IDF Forces in Judea and Samaria*, paragraph 4 of the judgement of Justice Dalia Dorner (published in Nevo, 26 February 2004).

impediment to establishing unique provisions for the continuation of planning procedures in these settlements. Hence – the legislation of the said order is not an exceptional and extraordinary act of legislation; to the same extent that previous government decisions concerning the establishment of Israeli settlements and their development momentum had not been an exceptional act that could be encompassed by the term discrimination, as they had been an implementation of the government policy at the time.”²⁷⁸

Thus, the Court accepts the separation of laws as an obvious fact and ignores the legal question standing before it: What is the legality of the policy that, “from its inception,” distinguishes between the Jewish and Arab communities in the West Bank? By avoiding this question, the Court legitimizes the discriminatory implementation of the separation regime in the area. The legitimacy granted by the High Court of Justice to the dual legal regime existing in the West Bank is also manifested in its willingness to face the results of this anomaly and to arrange the questions arising from it: What law shall apply to a Palestinian employed in the settlements?²⁷⁹ What law applies to a tort suit filed by a Palestinian who was injured

²⁷⁸ HCJ 4400/92 **Kiryat Arba Local Council v. Prime Minister Yitzhak Rabin**, PD 48(5) 597, 613 (1994) (emphasis added).

²⁷⁹ The **Kav LaOved** case (*supra* note 1).

in a settlement?²⁸⁰ What are the authorities of the Courts for Local Affairs in the settlements?²⁸¹

To international bodies, the State of Israel has presented the position that the discrimination between Palestinians and settlers in the West Bank is not wrongful, as it is **a permissible distinction between the citizens of the state and those who are not its citizens**. The UN Committee on the Elimination of Racial Discrimination (CERD) criticized this position in the framework of its concluding observations concerning Israel, published in March 2007.²⁸²

The claim that the separation regime is not unlawful, because it is based on a permissible distinction between the citizens of Israel and those who are not its citizens, is **invalid in several ways**. First, this is in any case not distinction on the ground of citizenship but on the ground of **national origin**. As extensively detailed above, in a long list of legislation items the Palestinians are distinguished not only from Israeli citizens and residents, but also from Jews entitled under the Law of Return and tourists. Second, this distinction is **irrelevant in relation to human rights** (as opposed to civil liberties). Israel indeed refuses to acknowledge the application of human rights treaties to the occupied territory, but, as noted above, its

²⁸⁰ The **Yinon** case (*supra* note 40).

²⁸¹ H CJ 336/99 **Delta Investments and Trade v. Court for Local Affairs in Ariel** (published in Nevo, 5 March 2001).

²⁸² The argument was presented by Israel in the framework of its report to the CERD, which monitors the implementation of the International Convention on the Elimination of all Forms of Racial Discrimination by its State Parties: UN Committee on the Elimination of Racial Discrimination (CERD), *Consideration of reports submitted by States parties under article 9 of the Convention: Israel*, 14 June 2007, CERD/C/ISR/CO/13, Article 32. Available at: <http://www.refworld.org/docid/467bc5902.html>.

position is not accepted by the international community and not even by the Israeli High Court of Justice. The different civil status of Israelis and Palestinians living in the West Bank is irrelevant to the discriminating treatment of the latter in all aspects of civil life, including the services and infrastructure provided to them, and it does not justify the gaps in the legal standards applied to the two populations. In particular, given the status of the Palestinian population as a protected population, which is entitled to special protections under the laws of belligerent occupation. We will elaborate on that in the next section.

2. Violating International Humanitarian Law

The existence of the two separate justice systems, for settlers and Palestinians, is further wrongful according to international humanitarian law, which obliges a state occupying a territory to protect the interests and rights of the original population of the occupied territory, unless security needs demand otherwise.

Under Article 43 of the Hague Regulations,²⁸³ the authority of the occupying power is limited to taking “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.” The prevalent interpretation of Article 43 is that the occupying state is required to administer the occupied territory to the benefit of the interests of the local population,²⁸⁴ and to

²⁸³ The Hague Regulations (*supra* note 10).

²⁸⁴ “Occupation, Annexation, Discrimination” (*supra* note 193), p.

maintain the situation that had existed in the territory on the eve of its occupation.²⁸⁵ Article 43 permits a balance between the needs of the local population of the occupied territory and the security needs of the occupying power **in the occupied territory itself**.²⁸⁶ The scope of security considerations that the military commander is authorized to weigh has been noted by (former) President of the Supreme Court Aharon Barak, in the judgment on the **Askan** case:

“The considerations of the military commander are ensuring his security interests in the Area on one hand and safeguarding the interests of the civilian population in the Area on the other. Both are directed towards the Area. **The military commander may not weigh the national, economic and social interests of his own country, insofar as they do not affect his security interest in the Area or the interest of the local population.** Even military necessities are his military needs and not the needs of national security in its broad sense.”²⁸⁷

²⁸⁵ Yaffa Zilbershats, “IDF Control over the West Bank and Gaza: Belligerent Occupation or Prohibited Colonialism” [Hebrew], *Bar-Ilan Law Studies* 20 (2004), p. 547, 556.

²⁸⁶ “Occupation, Annexation, Discrimination” (*supra* note 193), p. 19.

²⁸⁷ HCJ 393/82 **Jamait Askan Alma’almoun Altaounia Almahdouda Almasaoulia v. Commander of IDF Forces in the Area of Judea and Samaria**, PD 37(4) 793, 785 (1983) (hereinafter: the **Askan** case), p. 794 (emphasis added).

It should be noted that Israel's position is that as a rule, the West Bank is subject to the international laws of belligerent occupation, first and foremost the Hague Regulations of 1907 that represent customary international law.²⁸⁸ The status of the Geneva Convention in Israeli law is more complex: Israel is a party to the Convention, but its official position is that this Convention does not apply to the area of Judea and Samaria.²⁸⁹ At the same time, Israel has unilaterally declared that it respects the humanitarian provisions of the Convention, without clarifying what these provisions are, in its opinion.²⁹⁰ The High Court of Justice has also deliberated the legality of Israel's actions in the territories in light of the stipulations of the Geneva Convention.²⁹¹ Israel's position concerning the material

²⁸⁸ “Belligerent Occupation or Prohibited Colonialism” (*supra* note 289), p. 551; Orna Ben-Naftali and Keren Michaeli, “The Call of Abraham – Between Deportation and Assigned Residence: A Critique of the Ajouri Case” [Hebrew], *Hamishpat* 9 (2004), p. 107, 110; the **Gaza Shore** case (*supra* note 13), paragraphs 76-77 of the judgement of President Barak (2005). See above an explanation about the binding status of customary international law above in note 268.

²⁸⁹ Because, according to Israel, the condition established by Article 2(2) of the Geneva Convention is not fulfilled – that the occupied territory is “the territory of a High Contracting Party.” According to Israel, the fact that Jordan was not the legal sovereign in the West Bank absolves Israel from the obligation to apply the Convention to these territories. See: Ben-Naftali and Shany (*supra* note 266), p. 139; Zilbershats (*supra* note 285), p. 551.

²⁹⁰ Meir Shamgar, “The Observance of International Law in the Administered Territories,” *Israel Yearbook on Human Rights* 1, p. 262, 266 (1971).

²⁹¹ The HCJ's position is that the Convention as a whole does not constitute a part of customary international law, and therefore without internal legislation that absorbs the Convention into Israeli law – it is not internal law that can be enforced by the HCJ. At the same time, according to the Court, some of the stipulations of the Convention represent customary international law – and those can be enforced by the Court. In practice, the HCJ has applied the Convention to a long list of rulings concerning the territories. See, for example: HCJ 7015/02 **Ajuri v. Commander of IDF Forces in the West Bank**, PD 56(6) 352, 364 (2002); HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel**, PD 58(5) 807, 827 (2004); HCJ 7957/04 **Zaharan Yunis**

non-application of the Geneva Convention to the territories has been rejected by the international community and the majority of international jurists working in this field, and the accepted position today is that the Geneva Convention fully applies to the territories under Israeli control.²⁹²

According to our position, the regime administered by Israel in the West Bank violates the provisions of international law. This regime, which distinguishes between the Palestinian and Israeli residents of the West Bank and systematically prefers the needs of the latter, contravenes the duty of the military rule to act in favor of the interests of the Palestinian residents.

Whereas the settlement enterprise is the foundation of the separation between the legal systems on the West Bank, it should be reemphasized that the very existence of the settlements constitutes, in and of itself, a separate violation of the provisions of international humanitarian law. In the framework of international humanitarian law's view of the occupation as a temporary situation, and in accordance with the obligation of loyalty of the occupying power towards the occupied territory and its residents, the occupying power is explicitly prohibited from transferring parts of its own population into the territory it occupied.²⁹³ This prohibition is intended to prevent the colonization of

Muhammad Mara'abe v. Prime Minister of Israel (published in Nevo, 15 September 2005). For a critical analysis of the HCJ's application of the laws of occupation see: David Kretzmer, "[The Law of Belligerent Occupation in the Supreme Court of Israel](#)," 94 *International Review of the Red Cross*, p. 207 (2012).

²⁹² Ben-Naftali and Shany (*supra* note 266), p. 140. See, for example, the opinion of the International Court of Justice regarding the legality of the Separation Fence: [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), advisory opinion of 9 July 2004, 43 I.L.M. 1009, paragraphs 108-111.

²⁹³ Article 49 of the Geneva Convention (*supra* note 161).

the occupied territory by the occupying power, by means of changing the demographic situation therein,²⁹⁴ whether directly or indirectly.²⁹⁵

Absurdly, Israel, which violated the provisions of international law when it established the settlements, uses the provisions of international law itself in order to justify this violation from then on. The establishment of settlements, and the seizure of land in the West Bank to this end, have been justified in the 1970s and 1980s as necessary security measures, as the security needs of the occupying power are a factor that the military commander in the occupied territory is allowed to consider.²⁹⁶ From that time forward, Israel maintains the claim that the security needs of the state also include the protection of the safety of the settlers and settlements and their interests and justify the violation of the rights of Palestinians. Hence, the Palestinians are harmed twice: by the very establishment

²⁹⁴ Jean S. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva: International Committee of the Red Cross (1956), p. 283.

²⁹⁵ The State of Israel has more than once expressed its position that the establishment of the settlements does not violate Article 49(6) of the Fourth Geneva Convention, which prohibits the transfer of the occupying power's population to the occupied territory, as it was not undertaken by the state itself and rather was an independent initiative of private citizens. This argument cannot be accepted. The State of Israel has granted – and is still granting – a long list of benefits and incentives to settlement residents and facilitates their establishment and development by allocating land. Moreover, the legitimization afforded to the settlements in retrospect by the State of Israel is enough to determine that this is a violation of the provisions of international law. The interpretation of Article 49 of the Fourth Geneva Convention as prohibiting the indirect transfer of the population of the occupying power into the occupied territory was further validated by the Rome Statute (1998), which established the International Criminal Court.

²⁹⁶ For more on the claim of a security need for establishing the settlements, see: Menachem Hofnung, *Israel: Security Needs vs. the Rule of Law, 1948-1991* (1991); Leon Sheleff, “The Green Line Is the Border of Judicial Activism: Queries about Supreme Court Judgments in the Territories” [Hebrew], *Tel Aviv University Law Review* 17(2), p. 757-809 (1993).

of settlements at the heart of the occupied territory; and by the measures taken to protect the safety and way of life of the settlers.²⁹⁷

The Court, which accepted the regime of separation between the legal systems as an inevitability – as described above – took an additional step in legitimizing this separation when it accepted the above position of the state. For example, in the **Bet-El** case, the Court ruled that private land in the West Bank may be expropriated for the purpose of establishing a civilian settlement, as long as it is not done for military needs and by the military.²⁹⁸ The Supreme Court has declared that it intentionally avoids deliberating the legality of the settlements, and determined that the question of their legality does not affect the obligation of the state and the military to protect their residents.²⁹⁹ The Court thereby shirks its duty to protect the Palestinian population of the territories. Accepting the position according to which the military commander must weigh, in addition to the benefit of the Palestinian population and security needs, also the needs of the settlers, contravenes international humanitarian law, under which the military rule in an occupied territory must balance between only two factors – the benefit of the protected population and the security needs of the occupying power – and blurs the distinction between protected persons and the citizens of the occupying country.³⁰⁰

²⁹⁷ “Occupation, Annexation, Discrimination” (*supra* note 193), p. 28.

²⁹⁸ HCJ 606/78 **Ayub v. Minister of Defense**, PD 33(2) 113 (1979).

²⁹⁹ HCJ 7957/04 (*supra* note 291), p. 18.

³⁰⁰ Aeyal M. Gross, “Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?” *European Journal of International Law*, Vol. 18 (1), p. 1-35 (2007).

The Palestinians are defined as “protected persons,” for they have found themselves under the rule of an occupying power. By contrast, Israelis and foreign citizens are not entitled to the special protections granted by international humanitarian law to the original residents of the occupied territory. As defined by Article 4 of the Fourth Geneva Convention:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. [...] Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

In other words, insofar as there is a relevant difference between the two populations, it is as follows: that one is “protected” according to international law and the other is not. Therefore, in areas in which the humanitarian law imposes stricter obligations on the occupying power than the obligations stipulated under Israeli law or international human rights law,³⁰¹ the military commander should give precedence to the humanitarian law and afford maximum protection to the Palestinian

³⁰¹ Yael Ronen, “Blind in Their Own Cause: The Military Courts in the West Bank,” *Cambridge Journal of International and Comparative Law*, (2)4, p. 756-760 (2013).

residents under his rule. Regarding the rights and needs of the settlers as having precedence over the needs of the Palestinians creates a distorted mirror image of one of the most fundamental principles of international humanitarian law.³⁰²

³⁰²

Ibid. See also: "Human Proportions" (*supra* note 300).

Conclusion

The review presented in this report reveals an official and comprehensive regime of separation between the laws applying to settlers and those applying to Palestinians in the West Bank, based on an ethnic-national distinction. Despite Israel's claims that the territories are held under belligerent occupation without being annexed, in practice the settlements have become Israeli "islands" for nearly all intents and purposes, and the subjection of settlers to the military rule is nothing but fiction. The separation between the laws that apply to the two populations is accompanied by a clear discrimination against Palestinians in all aspects of life: they are subject to much stricter criminal procedures, which violate their basic rights; they are not entitled to participate in planning and building procedures that pertain to them and the enforcement in this area is stricter with regards to them; they are dispossessed of their land by means of the permit regime; their freedom of movement is violated; and their freedom of expression is restricted. This discrimination before the law contravenes the basic norms of the modern justice system, the laws of belligerent occupation and international human rights law.

The separation of laws is the product of an ongoing process of adding layer upon layer of orders and laws, which selectively apply to only one of the two populations residing in the West Bank. This process has been led by the military commander, who has legislative and judicial authorities over the occupied territory, by means of orders that regulate the civil life of settlers and exclude them from the legal arrangements pertaining to Palestinians. The Knesset has also been fully complicit in this process by amending Israeli laws for the purpose of applying them to the Jewish residents of the West Bank and by continuing to extend the provisions that establish a separation in the criminal law and judicial authorities applying to Palestinians

and not to settlers. The Israeli courts have regarded the two legal systems created in the West Bank as an inevitable outcome of the presence of Israeli citizens in the West Bank, and they tend to avoid deliberating claims of discrimination and claims concerning the illegality of the policy separating the legal systems.

The two legal systems existing in the West Bank are a unique, harmful and particularly severe characteristic of the protracted Israeli occupation. The gravity of this discrimination is manifested in the extent of its legal institutionalization. The principles of equality and human dignity, basic constitutional principles upon which the Israeli justice system is founded, are deeply undermined when the very same system establishes and maintains a parallel and discriminatory legal regime based on ethnic and national origin. This policy tarnishes all of the state's legal institutions.

The immense gap between the legal arrangements applying to settlers and those applying to Palestinians clearly illustrates the illegality and the inherent aberrations that the ongoing Israeli control over the West Bank entails. While it is obvious to all that it is inappropriate to apply to settlers the military arrangements that characterize a military regime and restrict human liberties, these arrangements – which were designed to address a temporary situation of military occupation – have continued to apply to Palestinians in the West Bank for almost five decades.

Annex: Summary of the Separation in the Legal System

	Israeli Settlers in the West Bank	Palestinians in the West Bank
<p>Applicable Laws</p>	<p>Emergency Regulation (Adjudication of Offences):</p> <ul style="list-style-type: none"> Israeli Criminal Law Entry to Israel Law Defense Service Law Income Tax Order National Insurance Law The Traffic Ordinance National Health Insurance Law And more <p>Legislation Amendments:</p> <ul style="list-style-type: none"> • Knesset Elections Law • Value Added Tax Law 	<p><u>Military commander orders</u></p> <p>Order Concerning the Administration of Local/Regional Councils (Judea and Samaria):</p> <p>Establishing courts for local affairs and rabbinical courts in the settlements</p> <p>Adopting approximately 80 Israeli laws in the areas of:</p> <p>welfare law, statistics law, family law, education law, health law, labor law, agriculture law, condominium law, environmental law, consumer law, trade and</p> <p>Military law and Jordanian law</p>

	<ul style="list-style-type: none"> • Population Registry Law • Supervision of Products and Services Law • And more 	commerce law, communication law and religious law	
Basic Laws	Apply (interpretation by the High Court of Justice)		Left as “requiring further review”
Judicial Authority in Criminal Matters	Civil courts in Israel		Military courts
Judicial Authority in Traffic Law (Area C)	Courts for local affairs in the settlements		Military courts
Planning and Building	<p>Special local planning committees only for settlements</p> <p>The High Planning Council: only Israeli representatives</p>		<p>Abolition of the district and local planning committees, which represented Palestinian interests</p> <p>Transferring most of the authorities to the High Planning Council</p>
Permit Regime in the Seam Zone	General entry permit to the Seam Zone for Israeli citizens, Jews and tourists		No entry to the Seam Zone without a permit
Freedom of	Wide recognition of freedom of expression and		No recognition of

<p>Expression and Protest</p>	<p>material protection of the right to demonstrate, even when demonstrating without a permit</p>	<p>the right to freedom of expression</p> <p>Demonstrations are perceived as riots that may be restricted and dispersed subject to the discretion of the military commander</p>
<p>Immigration into the West Bank</p>	<p>Free immigration of Israelis and of any Jew entitled under the Law of Return</p>	<p>Special permit required</p>