

The Status of the Right to Demonstrate in the Occupied Territories

The Association for Civil Rights in Israel (ACRI)

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Introduction

In the West Bank, which was occupied by Israel 47 years ago, the Palestinian residents are not the masters of their fate.¹ They have no representation among the sovereign that controls them, and they have no ability to influence its decisions, which determine their daily reality. Therefore, demonstrations are a central channel for them to actualize their autonomy, to give voice to their grievances and to protest against the occupation and against the numerous and continuous violations of their rights – starting with the rights to property, water, and shelter, to freedom of movement, the right to dignity, and the right to self-determination.

With the onset of the occupation, a widespread popular struggle movement was established in the West Bank. As the occupation continued, and particularly over the last decade, organized and regular demonstrations became a significant tool in this struggle. The demonstrations gained momentum and gradually spread throughout the West Bank. In many villages, they became a common sight, taking place every Friday. These demonstrations turned into an ongoing center of conflict between demonstrators and the military. The Israeli military takes various measures, while frequently using excessive force, in order to disperse, restrict, and sometimes even prevent these demonstrations before they commence.

This reality raises questions with regards to the application of the right to protest in the West Bank, both on the normative level and on the practical level, and requires a re-examination of the legal framework pertaining to it. Hence, this position paper examines what the legal status and scope of

¹ . For the purpose of this position paper, the reference to the “West Bank” does not include East Jerusalem, to which Israel applied its sovereignty after occupying it in 1967. 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 the international community. However, as a result of this annexation and the application of Israeli law to East Jerusalem, its residents are not under military rule, and what is stated in this paper is not directly relevant to them.

application of the right to demonstrate should be in a territory under protracted occupation, and in the West Bank in particular, and sheds light on the gap between the desired situation and the actual reality.

We will open this position paper by detailing the normative framework applying to a state of occupation and analyze the interaction between the laws of occupation and human rights laws in this context. Subsequently, we will discuss the status of the right to demonstrate and its boundaries, both under human rights laws and under the laws of occupation, and analyze the desired normative status of the right to demonstrate in the West Bank today. Following that, we will describe the reality of what is customarily practiced in the West Bank and examine whether it conforms to the standard required under international law that applies to occupied territories. Finally, we will present a brief summary and conclusions.

The Normative Framework Applying in the West Bank

The Laws of Occupation

The West Bank is a territory held under belligerent occupation. As such, it is subject to the provisions of international humanitarian law pertaining to occupation – first and foremost the Hague Regulations of 1907 (hereinafter: “the Hague Regulations”) and the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (hereinafter: “the Fourth Geneva Convention”).² Israel's position concerning the application of the laws of occupation to the Occupied Palestinian Territories is that it is subject to Section III of the Hague Regulations which represents customary law. But Israel asserts that it is not similarly subject to the Fourth Geneva Convention concerning the protection of civilians in times of war or occupation.³ This is due to the fact that the Convention does not constitute customary international law and because the condition established in Article 2(2) of the Geneva Convention – that the occupied area is “the territory of a High Contracting Party”⁴ – does not apply. However, Israel declared that it pledges *ex gratia* to implement the humanitarian provisions of the Convention in the territories.⁵ Over the years, the Israeli High Court of Justice refrained from determining the question of the application of the Geneva Convention to the occupied territories, yet routinely applied the provisions of the Convention to them and reviewed the legality of the army's actions in accordance with these provisions.⁶ The international community and the

² . *Annex to the Hague Convention (IV): Regulations Concerning the Laws and Customs of War on Land (1907)*; and *The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949)*.

³ . H CJ 1661/05 **Gaza Shore Regional Council v. Knesset**, para. 4 (published in Nevo) (9 June 2005).

⁴ . Meir Shamgar, “Legal Concepts and Problems of the Israeli Military Government: The Initial Stage,” in: M. Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967-1980*, Vol. 1, Hebrew University of Jerusalem (1982), p. 13, 33-34.

⁵ . Meir Shamgar, *The Observance of International Law in the Administered Territories*, Tel Aviv University (1971), p. 266.

⁶ . H CJ 2690/09 **Yesh Din – Volunteers for Human Rights et al. v. Commander of IDF Forces in the West Bank**, article 6 of the ruling (28 March 2010).

majority of international jurists working in this field do not accept this position asserted by Israel, and today there is almost no dispute that the Fourth Geneva Convention is part of customary international law and that it applies to the West Bank.⁷

International Human Rights Laws

Much has been written about the application of international human rights law to an occupied territory alongside humanitarian law, and this is not the place to review the elaborate debate on this matter. For the purpose of this position paper, suffice it to say that, contrary to Israel's repeated claim that human rights law does not apply to its actions in the territories,⁸ the common opinion today in both the professional literature and court rulings is that human rights norms constantly apply, not only in times of peace. Thus, human rights norms also apply during an armed conflict and certainly during a belligerent occupation.⁹

Therefore, the gist of the current legal debate does not revolve around the question of the application of human rights laws in a situation of armed conflict or occupation, but rather around the question of the **scope** of their

⁷ . Orna Ben-Naftali and Yuval Shany, *International Law Between War and Peace*, Ramot – Tel Aviv University (2006), p. 140-141 [in Hebrew] (hereinafter: “*International Law Between War and Peace*”). See also the advisory opinion of the International Court of Justice in The Hague concerning the legality of the Separation Fence (hereinafter: “Advisory Opinion of the ICJ): *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*”, advisory opinion of 9 July 2004, 43 I.L.M. 1009, para. 95-101. See also: *Declaration of the Conference of the Parties to the Fourth Geneva Convention* (2001).

⁸ . Israel asserted this position in several reports filed to United Nations Committees charged with the implementation of human rights covenants. See, for example: Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Israel, Economic and Social Council E/1990/6/Add.32 16 October 2001, para. 5; also: Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Second Periodic Report, Addendum: Israel, Human Rights Committee CCPR/C/ISR/2001/2, 4 December 2001, para. 8.

⁹ . **Al-Skeini v. United Kingdom**, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011). The rejection of Israel's position by the UN Committee on Economic Rights: Concluding Observations of the Committee on Economic, Social and Cultural Rights – Israel, 23 May 2003, Economic and Social Council, E/C.12/1/Add.90, para. 15.

application and the relation between the two legal branches – human rights law and humanitarian law.¹⁰ Among jurists, there are several approaches with regards to the desired relation between these two bodies of law, particularly in situations where there is a clash between the rules each one of them establishes.¹¹

One approach is the *Lex Specialis* approach, which asserts that when there is a contradiction between a provision of human rights laws and a provision of humanitarian law, the latter always prevails, because it is more specific and particularly tailored to a situation of occupation or armed conflict.¹²

A second approach is the complementary approach, which views the two law systems as complementary and seeks to settle the contradictions between them by *preferring the more suitable provision* for a specific situation in question.¹³

A third approach combines the first two approaches and offers a new interpretation for using the rule of *Lex Specialis*. According to this approach, the implementation of the *Lex Specialis* principle does not necessarily lead to preferring the humanitarian law over human rights laws in every situation, but rather to preferring the more specific provision for a given situation, whether enshrined in the provisions of humanitarian law or part of human rights laws. However, in addition to choosing the more specific provision, this approach asserts that the specific provision should be interpreted in the spirit of the other provision.¹⁴

¹⁰ . Noam Lubell, “Human Rights Obligations in Military Occupation,” *International Review of the Red Cross* 94(885), p. 317, 337 (2012) (hereinafter: Human Rights Obligations in Military Occupation); International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (2005), para. 216.

¹¹ . 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*”).

¹² . Advisory Opinion of the ICJ (*supra* note 8).

¹³ . Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005), para. 143.

¹⁴ . UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, (2004), para. 11.

The implementation of the three aforementioned approaches also depends on the context; the longer an occupation persists, the more the justification and need for a wider application of human rights laws increases.¹⁵ Similarly, the more the occupying power handles tasks of ensuring public order – i.e., law enforcement tasks – the more the local law and human rights laws play a central role in determining the standards applying to it, while the laws of war become less relevant.

Even when conditions that are defined as an armed conflict exist in the occupied territory, this does not rescind the military commander's obligation to maintain public order, first and foremost by means of law enforcement.¹⁶

As stated by the Military Advocate General in the position paper submitted to the Turkel Commission on his behalf:

“From both a legal and practical perspective, the relationship between the military administration and the residents of a territory that is under a belligerent occupation is closer to that existing between the state and its citizens – than it is to that existing between a state which is party to an armed conflict and the citizens of the opposing side in that conflict. Accordingly, when the military administration is forced to deal with hostile elements acting from within the population under its control, or with manifestations of violence on behalf of the latter (which fall short of the threshold of intensity required to register an armed conflict between itself and those elements), it does so by virtue of its aforementioned powers and responsibility – and within this framework it functions in a similar fashion to that in which the state acts in similar situations – that

¹⁵ . *Living in Denial* (*supra* note 12).

¹⁶ . For more on this matter, see the [position paper submitted by ACRI on 28 March 2011](#) to the Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice (ret.) Jacob Turkel, p. 12.

is, by employing the tools of 'law enforcement' ...
[emphasis added in the original document].¹⁷

Furthermore, as within the area of the state, so in a territory that is under belligerent occupation – “enforcement” activity takes place mostly on the ground where military forces conduct patrols, arrests and searches, staff checkpoints and roadblocks, enforce curfews and disperse riots. These types of activities, from a practical perspective, are considered to be “operational activity” for all intents and purposes. Yet, from a legal perspective, they are similar to police activities within the area of the state. Such activity is, as a rule, aimed at civilians and not combatants, and as such the restrictions imposed upon it are much more stringent than those imposed upon belligerent acts.¹⁸ Hence, it is subject to limitations concerning the use of lethal force that is only permitted under exceptional circumstances, such as self-defense.¹⁹

In light of the above, and without choosing between the different approaches concerning the relation between human rights laws and the laws of occupation, the assumptions at the basis of this report are: First, that human rights laws apply alongside international humanitarian law and particularly alongside the laws of occupation. And second, that the scope of application of the rights and obligations derived from both bodies of law should be interpreted according to the context, and in this case the context of a prolonged belligerent occupation and the unique challenges generated by it.

¹⁷ . Position paper submitted by the Military Advocate General [in Hebrew], General Avichai Mandelblit, on 19 December 2010, to the Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice (ret.) Jacob Turkel, p. 33.

¹⁸ . Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers,” *European Journal of International Law* (September 2005) 16 (4): 661-694. Article 3c (hereinafter: “Legislation and Maintenance of Public Order”).

¹⁹ . Public Commission to Examine the Maritime Incident of 31 May 2010, Second Report: “Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law” (2013), chapter A, para. 58.

Military Legislation

Under the laws of occupation, the occupying power is required to maintain the local system of law that was in force in the occupied territory, unless security needs demand otherwise or if the welfare of the local residents requires it.²⁰ In such situations, the military commander is allowed to pass the relevant military legislation which must conform to the rules and principles of international law applying in the area, including the laws of occupation and human rights laws.

Thus, immediately after the occupation of the West Bank on 7 June 1967, the Israeli army published the *Proclamation Concerning the Takeover of Administration by the IDF* which established military rule in the area, and the *Proclamation Concerning Administrative and Judiciary Procedures*, in which the military commander declared himself the new sovereign of the area and assumed all authorities of “governance, legislation, appointment and administration with regards to the area or its residents.”²¹ It was further established in this proclamation that the law existing in the area prior to its occupation will remain in effect, subject to the proclamations and orders of the military commander.

In addition to these two proclamations, the military commander published another proclamation and several military orders that established criminal law and a system of military courts.²² These orders and proclamation were aggregated in 2009 into the *Order Concerning Security Provisions [consolidated version] (Judea and Samaria)*.²³ In addition to this security legislation, over the years of the occupation military commanders have

²⁰ . Regulation 43 of the Hague Regulations.

²¹ . *Proclamation Concerning the Takeover of Administration by the IDF* (No. 1), 5727-1967; and *Proclamation Concerning Administrative and Judiciary Procedures (West Bank)* (No. 2), 5727-1967.

²² . *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.

²³ . *Order Concerning Security Provisions [consolidated version] (Judea and Samaria)* (No. 1651), 5770-2009.

issued thousands of orders and proclamations that arrange almost every aspect of Palestinian lives, including traffic, movement, taxation, commerce, planning and building and environmental protection, as well as the arrangement of demonstrations, processions and protest events. Hence, military legislation is currently the dominant local law in the occupied territories, and particularly in areas that are under full Israeli security control.²⁴

Israeli Law

International law prohibits the occupying state from applying its laws to the occupied territory and to the protected population under its control, as the application of the local laws of the occupying power would signify the annexation of the territory – an act that is prohibited under the rules of international law.²⁵ However, the rules of Israeli administrative law apply to Israeli authorities, including the army, police and other bodies that operate in the territories, and their actions are subject to the judicial review of the Israeli High Court of Justice. As noted by Justice Aharon Barak, every Israeli soldier in the territories “carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law.”²⁶

Moreover, Israeli law often serves as a model for appropriate conduct, procedurally or substantively, particularly where there is a lacuna in

²⁴ . 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 (1994), p. 318(94)94.

²⁵ . *Charter of the United Nations*, Article 2(4).

²⁶ . HCJ 393/82 **Jamait Askan Alma’almoun v. Commander of IDF Forces in the Judea and Samaria Area**, PD 37(4) 785, 810 (1983) (hereinafter: “the Askan case”).

military law or when its directives fail to meet the standards of international law. Military courts also frequently turn to Israeli law in order to draw rules and principles.²⁷

In light of the above, despite the fact that Israeli law does not apply to the Palestinian residents, we will refer to it in this position paper, where relevant, for the purpose of comparison. In particular, we will treat High Court rulings as an interpretive source, insofar as they refer to the general principles or interpretation of international law.

The Law Applying to Israelis in the Territories

Ostensibly, the military administration and the laws it has enacted apply to the entire West Bank area and its residents, including Israelis who are residing or present in that area. However, in practice, parallel to the development of the military legal system, a policy of applying Israeli law to Israelis living in settlements in the West Bank has been developed and implemented, both through Knesset legislation and military legislation. Eventually, through a gradual process that has stretched over five decades, the Israeli legal system has been applied, almost in its entirety, to settlers in the West Bank, while the Palestinian residents living in the same territory have remained subject to the military legal system.

Legal rulings in Israel, particularly those of the High Court of Justice, enshrined the separation between the legal systems applying to Israelis and Palestinians. The courts regard the settlements in the territories as “Israeli enclaves,” upon which common sense demands the application of Israeli law.²⁸

The separation between the legal systems has also influenced the application, scope and manner of realization of the right to demonstrate in the occupied territories. Thus, for example, while settlers holding unauthorized demonstrations in the territories are detained and tried, as a

²⁷ See, for example, DA (Detention Appeal) Judea and Samaria 2912/09 **Military Prosecution v. Nashmi Abu Rahma** (published in Nevo on 31 August 2009).

²⁸ . HCJ 10104/04 **Peace Now S.A.L. Educational Enterprises v. Supervisor of the Jewish Settlements in Judea and Samaria** (published in Nevo) (14 May 2006), p. 14 of the judgement.

rule, under the penal code and norms of Israeli law,²⁹ Palestinians who hold demonstrations in the same area are subject to military legislation, with its stringent requirements and restrictions, as will be detailed below.

²⁹ . An example for this can be found in the indictments issued against Israelis who protested against the Disengagement Plan, for example: Appeal (Be'er Sheva) 20240/05 **State of Israel v. Yehuda Namburg** (published in Nevo) (21 February 2005).

The Right to Demonstrate: The Normative Framework

The Right to Demonstrate according to Human Rights Laws

Freedom of expression, as well as its derivative - the right to demonstrate - are considered basic rights under international human rights law. These are rights that have tremendous intrinsic value in addition to being

an essential tool for the realization of other rights. Human rights law grants extensive protections to expressions and acts of protest, and the obligation to respect and protect freedom of expression and the right to demonstrate has become a norm of customary international law.³⁰

The basic right to freedom of expression is enshrined in Article 19 of the Universal Declaration of Human Rights³¹ and in Article 19 of the International Covenant on Civil and Political Rights, which was ratified by Israel in 1991.³² The right to peaceful assembly is also established in the International Covenant on Civil and Political Rights, in Article 21, together with the obligation of the state to enable acts of demonstration and protest. As stated therein:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

³⁰ . 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 (hereinafter: “The Relation Between Human Rights Law and the Law of Belligerent Occupation”).

³¹ . *Universal Declaration of Human Rights*, 10 December 1948.

³² . *International Covenant on Civil and Political Rights*, 16 December 1966. Israel signed the Covenant on 19 December 1966 and ratified it on 18 August 1991. The Covenant took effect in Israel on 3 January 1992.

Three main justifications for freedom of expression can be identified in court rulings and professional literature.

The first rationale, which is the most common, is the protection of democracy.³³ According to this rationale, which ties together freedom of expression and self governance, freedom of expression is the central tool with which individuals in a society take an active part in shaping their shared, interactive and collective lives, both those expressing themselves and as listeners exposed to a wide range of opinions. The citizens must be able to express themselves freely and hear the opinions and positions of others in order to be able to participate in the public discourse, vote in an informed manner and subsequently control their political fate.³⁴ This argument is based on two central pillars: the need to ensure that all relevant information be available to the population of voters in a democratic regime and the need to ensure that the voters' will is regularly brought to the knowledge of the regime that is meant to serve them.³⁵

This rationale is obviously not applicable to occupied territories where there is a military regime that is undemocratic and which does not afford the residents under its control the basic rights that are vital to the existence of any democratic regime, such as the right to elect and to be elected, the right to represent their interests in government institutions and the right to influence their future.

However, democracy is not the only justification for freedom of expression and protest. The lack of a democratic regime does not automatically negate the application of these rights to a certain territory, and at times can even intensify the need for their realization.

³³ . HCI 10203/03 **"The People's Voice" v. Attorney-General**, PD 62(4) 715, para. 22 of the judgement of Justice Naor (2008).

³⁴ . Ilana Dayan, "The Democratic Model of Freedom of Expression," *Iyunei Mishpat* 20(2), December 1996, p. 381 [in Hebrew] (hereinafter: "The Democratic Model of Freedom of Expression").

³⁵ . Frederick Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University Press (1982), p. 35-46.

A second justification for freedom of expression is founded on the desire to expose the truth.³⁶ According to this rationale, the liberty to exchange ideas, doubt and voice criticism is a prerequisite for the existence of an effective process of truth-seeking.³⁷ Demonstrations and public protest activities are a tool for ensuring the existence of a wide and extensive public debate on different issues, with the objective of ascertaining the truth.³⁸ There is no doubt that such a process is important not only under a democratic regime, but also during an occupation. This is mainly because of the need to monitor the very wide discretion afforded to the occupier in administering the occupied territory. It should be noted that this argument has been heavily criticized, among other reasons because of its fundamental principles: that there is an objective or reachable “truth;” that exposing it is necessarily desirable; and that people are rational enough to discover it.³⁹

A third justification for freedom of expression and the right to demonstrate, and perhaps the most significant, is based on the principle of autonomy – the free will and self-realization of human beings. According to this rationale, freedom of expression is important not as a means to achieve the collective good, but due to its value for the individual and because of the damage that will be suffered by the individual as a result of its restriction.⁴⁰ There are two possible interpretations for this justification: the first views freedom of expression as a value in and of itself, which relates to the actualization of the individual's wishes and liberties,⁴¹ that is

³⁶ . Avihay Dorfman, “Freedom of Expression: Between Linguistic Representation and Misconception,” in: M. Birnhack (ed.) *The Legal Culture of Freedom of Expression in Israel*, Ramot – Tel Aviv University (2006), p. 422-477 [in Hebrew] (hereinafter: “Freedom of Expression: Between Linguistic Representation and Misconception”).

³⁷ . “The Democratic Model of Freedom of Expression” (*supra* note 35), p. 379.

³⁸ . Helen Fenwick, “The Right to Protest, the Human Rights Act and the Margin of Appreciation,” *The Modern Law Review*, Vol. 62. (July 1999), p. 492 (hereinafter: “The Right to Protest, the Human Rights Act”).

³⁹ . “The Democratic Model of Freedom of Expression” (*supra* note 35), p. 380.

⁴⁰ . *Ibid.*

⁴¹ . “Freedom of Expression: Between Linguistic Representation and Misconception” (*supra* note 37).

– as part and parcel of actualizing the autonomy of free will.⁴² The second interpretation views autonomy (and the freedom of expression that is bound with it) as a tool for achieving other benefits, such as the existence of an effective democratic regime.⁴³

According to the third justification, the right to demonstrate is granted all the more import when demonstrations and protest events constitute the sole tool at the disposal of disadvantaged minority groups to express their opinions and give themselves a voice before the regime, for lack of other tools of expression or direct channels to the sovereign governing the territory. Helen Fenwick wrote, in this context:

“One of the most significant justifications underpinning public protest is that it provides a means whereby the free speech rights of certain groups can be substantively rather than formally exercised. Disadvantaged and marginalized groups, including racial or sexual minorities and groups following 'alternative' life-styles, may be unable to exercise such rights in any meaningful sense since they cannot obtain sufficient access to the media. At the same time the media, particularly the tabloid press, may tend to misrepresent them. However impoverished members of such groups may be, they are able to band together to chant slogans, display placards and banners and demonstrate by means of direct action. By these means they may be able both to gain access

⁴² . Ronald Dworkin, *A Matter of Principle*, Harvard University Press (1985), p. 386. In this context, see also Alon Harel's words about the value of autonomy and self realization of human beings that are hidden behind the right to freedom of expression: “In fact, the concern with freedom of expression is no more than the fetishism of expression, for the expression itself has no value but the autonomy that is realized through the expression. The real value behind the right – autonomy or self realization – should, at the end of the day, determine which rights are protected and how vigorously they must be protected.” Alon Harel, “Rights and Values: Critical Comments about the Thesis of the Priority of Values over Rights,” *HaMishpat* 18 (2013), p. 95 [in Hebrew].

⁴³ . “The Democratic Model of Freedom of Expression” (*supra* note 35), p. 381.

to the media through publicity and to persuade members of their immediate audience to sympathise with their stance. As Barnum puts it, 'the *public* forum may be the *only* forum available to many groups or points of view.'⁴⁴

Furthermore, with regards to the types of expression protected under the freedom of expression, there is an agreement in the literature and in legal rulings that the more the protected expression realizes the objectives and the rationales underlying freedom of expression, the more its protection is enhanced. Hence, it is agreed that political expression, as opposed to other types of expression such as commercial expression, is afforded particularly broad protection under the protection of freedom of expression and the right to demonstrate, as the rationales for freedom of expression apply in the highest degree to political expression.⁴⁵

The rationales at the basis of the right to freedom of expression and the right to protest, and particularly the third rationale, therefore provide a strong foundation for the application of the right in a situation of protracted occupation.

Of course, freedom of expression is never absolute and there are exceptions that allow its restriction. International human rights law lists three exceptions to the protection of freedom of protest: (1) when the realization of this right threatens national security or public order; (2) when this right is realized in a manner that could deny other protected rights; (3) in a state of emergency.⁴⁶

Use of **the first exception** can only be made in cases where the violation of the right or its restriction is necessary. The High Court of Justice ("HCJ") adopted this exception in the context of the realization of freedom of expression and protest in the State of Israel when it established a

⁴⁴ . "The Right to Protest, the Human Rights Act" (*supra* note 39).

⁴⁵ . HCJ 5432/03 **Shin – For Equal Representation of Women v. Council for Cable and Satellite Broadcasting**, PD 58(3) 65, 81, para. 13 to the judgement of Justice Dorner (2004).

⁴⁶ . "The Relation Between Human Rights Law and the Law of Belligerent Occupation" (*supra* note 31), p. 17.

stringent test for violating or restricting this right – the test of **near certainty of real and severe** damage to public safety. The HCJ further determined that even when these conditions exist, the restriction of freedom of expression must be executed to the minimal extent necessary for achieving the purpose and must meet the other requirements of proportionality and reasonability.⁴⁷ Yet, the HCJ did not apply the test of near certainty in the context of demonstrations and protest events in the occupied territories. Moreover, even international law does not clearly establish a relevant test for restricting the right to freedom of expression in the context of an occupation in general and of a protracted occupation in particular.

It could be argued that the test of near certainty is not applicable in a situation of belligerent occupation, mainly because under such circumstances there could be a high level of hostility of the local population towards the military rule, which could increase the need for concrete military actions to maintain public order. Later on in this position paper we will refer to this issue and discuss its implications in the specific context of the West Bank.

The second exception is meant to prevent misuse of the right to protest in a manner that could deny the realization of other rights. This exception restricts hate speech,⁴⁸ for example, and its application obviously does not depend on the nature of the regime under which it is applied and is not limited to a situation of military occupation.

As for **the third exception**, which permits the violation of the right to protest in a state of emergency that threatens the existence of the state, there is doubt as to its applicability to occupied territories. A public state of emergency has been interpreted as a real threat to the entire nation, and not as a vague possibility that a certain situation could lead to such a threat.⁴⁹ In this sense, there must be a real threat to the occupying country

⁴⁷ . HCJ 6226/01 **Indor v. Mayor of Jerusalem** PD 57(2) 157, 164 (2003).

⁴⁸ . Article 13 of the *American Convention on Human Rights*, Organization of American States, Official Records, OEA/ser. K.IXVI./1.1, doc. 65 rev. 1, corr. 1 (1970).

⁴⁹ . “The Relation Between Human Rights Law and the Law of Belligerent Occupation” (*supra* note 31), p. 25-26.

and not only to its control over the occupied territory. The fact of the existence of an occupation does not necessarily meet the criteria for what constitutes a state of emergency, particularly in the case of a prolonged occupation with a low-intensity conflict, as is currently the case in the West Bank.⁵⁰

Even in a situation that meets the threshold for a “state of emergency,” it might apply only to a specific area of the occupied territory. In other words, not every exceptional event in a certain area or a certain village could automatically lead to declaring a state of emergency in the entire occupied area and justify the sweeping application of this exception. Furthermore, the use of this exception during a state of emergency must be temporally restricted: a state of emergency could justify a temporary infringement on the right to demonstrate, but it does not justify the complete extraction of the essence of this right for an extended period of time.

It should be remembered that under human rights law, the sovereign may restrict demonstrations or protests only on the basis of the aforementioned exceptions⁵¹. Even then, any violation of the right or its restriction thereof may only be performed to the extent necessary in that particular situation.⁵²

Moreover, the occupying power must contend with manifestations of violence during demonstrations – and even outright riots – only by employing the rules of law enforcement. Unlike the situation of an armed conflict, the use of force within the framework of law enforcement activity, and particularly the use of lethal force, must remain an exception to the rule, even in an occupied territory.⁵³

A common mistake, in this context, is to assume that the legality of a demonstration under the rules of international law depends upon its nature

⁵⁰ . Ibid., p. 26.

⁵¹ . Ibid., p. 28.

⁵² . Ibid., p. 27.

⁵³ . Principles 4, 5, 12, 13 and 14 of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* of 1990. In addition, see Article 3 of the *Code of Conduct for Law Enforcement Officials* of 1979, adopted by the UN General Assembly Resolution No. 34/169, and its Commentary, elaborated by the UN Office for Drugs and Crime.

– that is, whether it is a peaceful or violent demonstration – and that only peaceful and nonviolent demonstrations are protected under human rights laws. It is important to emphasize that international human rights laws do not condition the right to demonstrate upon the peaceful nature of the demonstration, but rather require military forces to respond to any case of violence in accordance with the rules of law enforcement and subject to the restrictions that those rules impose on the use of force. At the same time, there are bodies of law that prohibit demonstrations even if they are not violent at all, as is established by the positive law in the West Bank, which we will describe below. Hence, one must distinguish between the lawfulness of a demonstration and the peacefulness of a demonstration.⁵⁴

In summary, the rationales at the basis of the right to freedom of expression and protest, and particularly the rationale that deals with realizing the autonomy of the individual, also apply – and in some senses even all the more so – to a situation of protracted occupation, and they justify the application of the right to demonstrate in the West Bank. Therefore, it is our opinion that human rights laws dealing with the right to freedom of expression and protest also apply to the West Bank and impose upon the military commander, in the framework of his law enforcement activity, at least the **obligation to respect** the right of Palestinians to demonstrate in the West Bank and perhaps also the obligation to protect it.⁵⁵

⁵⁴ . “Promotion and Protection of Human Rights in the Context of Social Protest: Main International Standards Regulating the Use of Force by the Police,” in: International Network of Civil Liberties Organizations, *Take Back the Streets: Repression and Criminalization of Protests Around the World* (2013), p. 56.

⁵⁵ . The obligation to respect rights is a “negative obligation,” which requires the regime of a certain territory to at least refrain from directly contravening rights. The obligation to protect rights obliges the sovereign to prevent the violation of these rights by a third party. In addition, there is also the obligation to fulfill rights, which obliges the state to use the means necessary for the **maximal** realization of these rights through legislation, regulations, adequate budgets and so forth. In the professional literature regarding the application of social and economic rights during an occupation, there are some who argue that the obligation to respect rights, as opposed to the obligation to fulfill rights, is prescribed by the nature of the military commander's regime and also conforms with his obligations under international humanitarian law, as will be detailed below. In the context of freedom of protest, we believe that there might also be a basis for the claim that the

After presenting the legal basis for the application of the right to demonstrate in the occupied territories from the perspective of human rights law, we will now examine the application and scope of this right under the laws of occupation.

obligation to protect the right applies to the military commander as a derivative of his obligation to protect the local population of the occupied territory, but this discussion exceeds the scope of this paper, and therefore we will settle for the argument that the military commander is at least obligated to respect the right to demonstrate in its aforementioned sense. See: : Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht (1997).

The Right to Demonstrate According to the Laws of Occupation

One of the central goals of the laws of occupation is to deal with the intrinsic conflict created in a situation of a military occupation between two main groups of interests: the interests of the protected residents, the residents of the occupied territory, on one hand, and the security needs of the occupying power on the other.⁵⁶

Article 43 of the Hague Regulations, known as “the occupation constitution” (hereinafter: “Regulation 43”), establishes the normative framework of the occupation and delineates the general authority of the military commander towards the residents of the occupied territory. This regulation enshrines one of the central principles of the laws of occupation, which is the formula that balances the interests of these two main groups.⁵⁷

The first interest, the concern for the local civilian population, entails not only a negative obligation to refrain from harming it, but also a positive obligation to take the appropriate measures to protect it from dangers and deal with problems to which it is exposed.⁵⁸ Hence, according to Regulation 43, the occupying power must “restore, and ensure, as far as possible, public order and safety” in the occupied territory:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

⁵⁶ . H CJ 1661/05 **Gaza Shore Regional Council v. Knesset** (*supra* note 4), para. 9 of the judgement of former president A. Barak (2005).

⁵⁷ . *International Law Between War and Peace* (*supra* note 8), p. 179.

⁵⁸ . *Ibid.* The test of positive protection has also been adopted by the Supreme Court in the Rafah case: H CJ 4764/04 **Physicians for Human Rights v. Commander of IDF Forces in Gaza**, PD 58(5) 807, 827 (2004).

In the original version of the Hague Regulations, which was written in French, Regulation 43 refers to “l'ordre et la vie publics,” which was translated to “public order and safety” in English. Many academics and researchers interpreted this term broadly⁵⁹ and saw it as an expression of the notion of protecting civil life under an occupation.⁶⁰ This interpretation was even adopted by the Israeli High Court of Justice in the Jamait Askan case. As stated by the former president of the Court, Aharon Barak:

“The first clause of Regulation 43 of the Hague Regulations grants the military regime the authority and imposes upon it the obligation to restore and ensure public order and safety. This authority is twofold: first, restoring public order and safety where they had previously been interrupted; and second, ensuring the continued existence of public order and safety. The Regulation does not limit itself to a certain aspect of public order and safety. It spans all aspects of public order and safety. Therefore, this authority – alongside security and military matters – also applies to a variety of 'civilian' issues such as economic, social, educational, welfare, sanitation, health and transportation issues and other such matters that are related to human life in a modern society.”⁶¹

Of course, the more the military regime is prolonged and entrenched, the more the burden of the “civilian” needs of the protected population increases, as does the responsibility of the occupying power towards this population.⁶² As established by former Supreme Court president Dorit

⁵⁹ . “Legislation and Maintenance of Public Order” (*supra* note 19).

⁶⁰ . *International Law Between War and Peace* (*supra* note 8), p. 179.

⁶¹ . The Askan case (*supra* note 27), para. 18 to the judgement of former president A. Barak.

⁶² . HJC 1661/05 **Gaza Shore Regional Council v. Knesset** (*supra* note 4).

Beinisch, in her judgment in HCJ 2164/09 **Yesh Din v. Commander of IDF Forces in the West Bank**:

“As has been established many times by our rulings, the belligerent occupation of Israel in the region possesses some unique characteristics, primarily the duration of the occupation period that requires the adjustment of laws to the reality in the field, and imposes a duty upon Israel to administer a normal life for a period of time, which even if deemed temporary from a legal perspective, is certainly long-term. Therefore, the traditional laws of occupation require adjustment to the prolonged nature of the occupation, to the continuation of normal life in the region and to the existence of economic relations between the two authorities – the occupier and the occupied.”⁶³

An occupation is a state of military rule over an occupied population, a population which is frequently also hostile. As part of the regime's powers to ensure order in such a situation, it has the power to revoke certain rights. Undoubtedly, some of the political rights that are in place in a democracy, the primary justification for which is the orderly existence of a democratic regime, are automatically revoked at the outset of the occupation. It is a common assumption that the same logic holds true for all political rights, even those that are not founded solely on a democratic rationale. However, the laws of occupation do not include an explicit authority for a blanket denial of freedom of expression and protest. According to Article 70 of the Fourth Geneva Convention:

“Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the

⁶³ . Judgement granted on 9 December 2009, para. 10. See also: HCJ 69/81 **Bassil Abu Aita v. Regional Commander of the Judea and Samaria Area**, PD 37(2) 197, 313 (1983), the judgement of former HCJ president Meir Shamgar.

occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.”

This article indicates that although it is prohibited to punish the residents of the occupied territory for statements and opinions expressed before the occupation, there is no similar prohibition against punishing an expression, including a protest, during the occupation.⁶⁴ Hence, and considering the military nature of the occupation, the common perception is that the occupying power has the authority to restrict freedom of expression in order to maintain public order and security in the occupied territory. And indeed, occupiers have traditionally tended to impose severe restrictions on freedom of expression,⁶⁵ including the right to demonstrate, from the standpoint that protesting against the forced military rule will undermine public order and pose a threat to security – both of the occupied territory and of the occupying power.⁶⁶

Yet, Article 70, like other directives relating to the obligations and rights of the occupying power, is based on the assumption that a belligerent occupation is designated, by its very nature and essence, to be **temporary and short-term**, and so are the powers of the military commander, who is supposed to serve as a temporary trustee charged with administering the occupied territory and its residents.⁶⁷ In the official commentary on the Fourth Geneva Convention, Swiss jurist Jean Pictet, writes:

“The rule limiting the jurisdiction of the Occupying Power to the period during which it is in actual

⁶⁴ . 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. 63, 367-8 (hereinafter: “*Commentary: IV Geneva Convention*”).

⁶⁵ . “The Relation Between Human Rights Law and the Law of Belligerent Occupation” (*supra* note 31). The article brings examples for this matter.

⁶⁶ . *Ibid.*

⁶⁷ . Guy Harpaz and Yuval Shany, “The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law,” *Israel Law Review* 43, p. 514 (2010).

occupation of the territory is based on the fact that occupation is in principle of a temporary nature (3). The Occupying Power is therefore legally entitled to exercise penal jurisdiction in the occupied country in respect of acts which occur during occupation, and in respect of such acts only.”⁶⁸

In other words, the justification for restricting freedom of expression stems from the temporary nature of the occupation and from the concrete military need of the occupying power to control the occupied population that naturally exists in conflict with it.

In addition, the authority to restrict demonstrations and protest events in an occupied territory as inferred from Article 70, like all other authorities of the occupying power, is subject to the general principles of the laws of occupation, as enshrined in Regulation 43 of the Hague Regulations.⁶⁹ Furthermore, this authority must be balanced with the obligations of the occupying power towards the civilian population of the occupied territory, as enshrined in Article 27 of the Fourth Geneva Convention (hereinafter: “Article 27”).

Article 27 imposes concrete obligations upon the occupying power to respect and protect the basic and fundamental human rights of the protected residents of the occupied territory:

“Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

⁶⁸ . *Commentary: IV Geneva Convention (supra note 65)*, p. 349.

⁶⁹ . See p. 24-27 of this position paper.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”⁷⁰

The last clause of this article refers to the restrictions to its application. Similarly to Regulation 43 of the Hague Regulations, Article 27 also seeks to balance between the obligations of the occupying power towards the protected population and its military needs. This article stipulates that despite all of the detailed obligations, the occupying power may take “measures of control and security [...] as may be necessary as a result of the war.”⁷¹ Hence, according to Article 27, only security needs that are the result of an armed conflict justify shirking the obligations of the occupying power or restricting the rights of the protected residents.

The above implies that the occupying power indeed has the authority to limit freedom of expression, but that the infringement upon this right must be executed subject to the necessary balance between the interests of the occupying power on one hand and of the civilian population of the occupied territory on the other. In other words, the restriction of this right can only be carried out to the extent that is required for the purpose of maintaining security and public order. But this must be accomplished while taking heed of the obligation to enable an orderly public life for the residents of the occupied territory – an obligation that must be interpreted,

⁷⁰ . The Geneva Convention (*supra* note 2).

⁷¹ . *Commentary: IV Geneva Convention* (*supra* note 65), p. 367-8, 63.

as noted above, according to the context and while considering the length of the occupation and the intensity of the armed conflict entailed in it, as we shall demonstrate below.

The Status of the Right to Demonstrate in the West Bank after Forty-Seven Years of Occupation

From the General to the Specific: The Right to Demonstrate in the West Bank – between Occupation Laws and Human Rights Laws

As noted above, the scope of the application of the right to demonstrate under an occupation must be determined subject to the necessary balance between the interests of the occupying power and the interests and needs of the civilian population of the occupied territory. How should this balance be applied in the case of the West Bank?

The long-standing control of Israel over the West Bank enhances the need of the residents of the occupied territory to realize their right to free expression and protest. This is so, *inter alia*, in light of the fact that the residents have no other means of influence over the occupying power. In such a situation, the restrictions on the application of the right diminish and the weight of the interests of the residents of the occupied territory increases and with it – the obligations of the military regime towards these residents.⁷² That is to say, as time passes, the justification to protect the right of Palestinians to protest increases, both as an independent right and as a central – if not single – means of struggle for the purpose of realizing other rights. On the other hand, the justification for employing the authority of the military commander to restrict the application of the right to protest weakens with the passage of time, whereas his obligation to ensure an orderly civilian life for the protected residents increases.

In addition to the length of the occupation, one must take into account the intensity of the armed conflict. In recent years, the control over the West Bank has been characterized by a relatively low conflict intensity, which does not amount to an armed conflict. Even the military has acknowledged

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. See p. 24-29 of this position paper.

this fact.⁷³ Even when high-intensity confrontations do take place, they are localized and short-term and do not develop into an armed conflict as defined under international humanitarian law.⁷⁴

The demonstrations that take place every week across the West Bank are organized as part of the nonviolent struggle against the occupation of the territories, and this is how they are perceived by their organizers. Indeed, the reality on the ground is different and usually, during the demonstrations or immediately after them, a violent confrontation with military forces develops. But these confrontations mostly occur between civilians (who are neither combatants nor armed civilians) and the military in its role as a policing agent. This means that, as a rule, in demonstrations that take place in the West Bank, the soldiers are obligated to act in accordance with the rules of law enforcement, which require extra caution when using force against civilians, as opposed to the rules of armed conflict, which permit belligerent actions in accordance with military needs.⁷⁵

In this context, we should restate that in itself, the development of violence during a demonstration or protest event should not necessarily lead to the automatic revocation of the right to demonstrate. The level of violence during a demonstration can influence its definition as a legal or illegal demonstration, in accordance with the laws that apply in the place where this demonstration takes place. But this definition can only affect the ability to realize the right to demonstrate in that specific time and place, and it does not undermine the status of this right on the normative level.⁷⁶

The length of the occupation and the relatively low intensity of the armed conflict in the territories in recent years are two factors that influence, both together and separately, the desired normative status of the right to demonstrate. That is, in a situation of a protracted occupation, where the

⁷³ . Yael Stein, "Void of Responsibility: Israel Military Policy Not to Investigate Killings of Palestinians by Soldiers," *B'Tselem* (2010), p. 33-36. See also the position paper submitted to the Turkel Commission by the Military Advocate General (*supra* note 18), p. 33.

⁷⁴ . See p. 9-10 of this position paper.

⁷⁵ . See p. 9 of this position paper.

⁷⁶ . See p. 21-22 of this position paper.

conflict intensity is low and the concrete security need for restricting liberties is minor, the weight that should be granted to the right to protest as a means for ensuring an orderly life – is greater.

In a situation where the balance between the security needs of the occupying power and the interests of the residents of the occupied territory tilts towards the latter, as a result of the aforementioned circumstances, there is no real conflict between humanitarian law and human rights law as to the application of the right to demonstrate under an occupation. In fact, according to our position, and based on an analysis of the right to demonstrate and its limitations, in the present reality in the West Bank these two bodies of law are compatible and impose an obligation to respect freedom of expression and protest and to protect it.

Furthermore, in the absence of specific rules for this situation under humanitarian law, it is our opinion that precedence must be given to human rights laws that grant an explicit and wide protection to this right and limit the violation thereof to exceptional and clear cases.⁷⁷

In summary, even though the occupying power ostensibly has the authority to limit the freedom of expression and freedom of protest of protected residents under the laws of occupation, **in light of the length of Israeli control over the West Bank and considering the absence of a concrete military need for the sweeping restriction of protest events, our conclusion is that Israel is obligated to respect the right to demonstrate in the occupied territories and to refrain from directly violating it by imposing a sweeping ban on demonstrations and protest events.**

The Right to Demonstrate in the West Bank – Describing the Reality

Examining the reality in the occupied territories as reflected in the weekly demonstrations and in other protest events in the West Bank, and the military response to these events, reveals a wide gap between the required status of the right to protest and demonstrate, as analyzed

⁷⁷ . See p. 15-23 of this position paper.

above, and its realization in practice. Israel's approach, as inferred from the patterns of behavior of the military towards demonstrators and demonstrations in the West Bank, is not compatible with the enshrinement of freedom of expression in human rights laws nor with the balances required under the laws of belligerent occupation. Moreover, the conduct demonstrated by security forces does not fulfill their obligation to act in accordance with the rules of law enforcement when confronted with demonstrators and demonstrations and to refrain from using lethal weapons, except when a real threat to human life is presented.⁷⁸

Freedom of protest and the right to demonstrate in the West Bank are restricted on three levels: on the legislative level – through the military legislation that applies in the territories and regulates the existence of demonstrations, processions and protest events; on the practical level – through the manner in which military forces in the field deal with demonstrators and demonstrations; and on the judicial level – in the attitude of the military court system to demonstrators and to the right to protest. We will review these different levels below.

1. The Right to Demonstrate on the Level of Military Legislation

In August 1967, two months after the occupation of the West Bank, the military commander, who has *de facto* control over the area, signed Order 101, *Order Concerning the Prohibition of Acts of Incitement and Hostile Propaganda* (hereinafter: “Order 101”). This order regulates, *inter alia*, the holding of demonstrations, processions and protest events in the occupied territories. The order is still in effect and although it could be argued that at the basis of this order there is a general acknowledgment, on behalf of the military, of the right to demonstrate in the territories, in practice it is largely used as a tool for the sweeping suppression of the right to demonstrate in the West Bank.

Order 101 defines an **assembly** as “ten or more persons who have gathered in a place in which a speech is being made on a political subject,

⁷⁸ . Yuval Shany, “Riots – Not War,” *Israel Democracy Institute* (2011) (in Hebrew).

or that could be construed as political, or to discuss such a subject.”⁷⁹ A **procession** is defined in this order as “ten or more persons who are walking together or gathering to walk together from place to place, for a political purpose or for a matter that could be construed as political [...]”

According to Article 3(a) of this order, every such assembly or procession requires a permit from the military prior to their conduct. Should they take place without a permit they are dubbed illegal, and military forces have the automatic authority to disperse them. In this context, it should be noted that Order 101 does not define what could be construed as a “political subject,” what are the criteria for determining this and what are the boundaries of the term in this specific context.

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 such a permit.

Yet, beyond the procedural deficiencies, there is an inherent problem with the manner chosen by the Israeli military to regulate demonstrations and protest events in the West Bank: the very demand to require a permit is based on 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.

The complicated relationship between the military and the residents of the occupied territory, and the general and vague definitions included in Order 101 – have created a situation in which all demonstrations, processions and protest events held by Palestinians in the West Bank are defined as illegal, regardless of their goals or character.

⁷⁹ . Article 1 of the *Order Concerning the Prohibition of Acts of Incitement and Hostile Propaganda (Judea and Samaria)* (No. 101), 5727-1967.

2. The Right to Demonstrate on the Practical Level

The Implementation of Order 101

Military sources have noted more than once that Order 101 is not implemented in practice, and that as a matter of policy and *ex gratia* the military permits demonstrations in the West Bank 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.⁸⁰ This state of affairs, of problematic legislation and the absence of a clear and uniform rule concerning its implementation, leaves the military commander in the field with enormous discretion to determine which demonstrations pose a threat to public order and whether, when and to what extent to allow the realization of the right to demonstrate in the West Bank.

In practice, and as a result of the wide discretion granted to military commanders in the field, nearly every demonstration that takes place in the territories is dispersed by military forces, whether it is violent or not.⁸¹

Excessive Use of Force during the Dispersal of Demonstrations

Military forces often use great force, and in exceptional cases even lethal measures, in order to disperse demonstrations and protest events in the West Bank.⁸² As noted above, 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.⁸³

It is important to note that these are not sporadic events. Over the years, human rights organizations have documented many cases of excessive

⁸⁰ . For example, see: Hanan Greenberg, "IDF in Message to Palestinians: Calm Down the Demonstrations," *Ynet*, 14 April 2010 (in Hebrew).

⁸¹ . For more on this matter, see: "Background on demonstrations in the territories" on the B'Tselem website.

⁸² . Naama Baumgarten-Sharon, "Show of Force: Israeli Military Conduct in Weekly Demonstrations in a-Nabi Saleh," *B'Tselem* (2011).

⁸³ . See p. 21 of this position paper.

use of crowd control means.⁸⁴ This raises the concern that this excessive use represents a pattern of behavior reflecting the military's position that demonstrations in the West Bank, by their very nature, are a disruption of public order.

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").⁸⁵ The human rights organization B'Tselem has documented many cases of injuries to civilians as a result of illegal and unsupervised shooting of rubber bullets. Since 2000, these bullets have killed at least 19 Palestinians, including 12 minors, and many more have been injured.⁸⁶ In the past year alone, more than ten cases were documented in which civilians, who did not pose any threat to security forces, were injured by rubber bullets fired at them.

In this context, it is important to note that the reactions of security forces during a demonstration can significantly influence its course. The violent dispersal of a demonstration – under the claim that the use of force is intended to prevent violence or handle riots – may not only fail to control riots, but may even enhance them and aggravate the situation. This is particularly the case in a situation of protracted occupation, and is further

⁸⁴ . 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> (in 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> (in Hebrew); ACRI letter dated 23 January 2012 to the Commander of the Judea and Samaria Division, demanding that he put an end to the practice of spraying the liquid known as "Skunk" (which spreads an extremely strong bad odor) towards the homes of residents of the village of a-Nabi Saleh during the weekly demonstrations that take place in that village: <http://www.acri.org.il/he/25560> (in Hebrew).

⁸⁵ . Sarit Michaeli, "Crowd Control: Israel's Use of Crowd Control Weapons in the West Bank," *B'Tselem* (2012).

⁸⁶ . See 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 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/>.

aggravated by the hostile relations that exist between the occupying power and the residents of the occupied territory.

Closed Military Zone Orders – A Tool for Suppressing Protest

Another tool frequently used by Israeli military forces to restrict and control demonstrations in the West Bank is the “closed military zone” order, which prevents entry to certain areas or staying in them without a special permit. When such an order is issued before demonstrations and protest events or during them, it grants military forces the authority to disperse any demonstration or protest that takes place within the boundaries of the area delineated in that order and to arrest any person who participates in the demonstration and refuses to leave.

Under the rules of international law,⁸⁷ as well as according to the decisions of the High Court of Justice⁸⁸ and the guidelines of the legal advisor to the Judea and Samaria Area,⁸⁹ closing areas in the West Bank is only permitted when security needs or public order necessitate it. Yet, despite the clear rules in this context, orders closing an area of the West Bank are issued on a weekly – and sometimes even daily – basis. The order is usually issued as a preventative measure, before the demonstration begins, and without a concrete examination of the possible existence of a riot or an act that constitutes a real threat to the security of the area, even in areas where there are usually peaceful and nonviolent demonstrations. Human rights organizations that operate in the territories have warned more than once against the sweeping, arbitrary and illegal use of closed

⁸⁷ . Article 21 of the International Covenant on Civil and Political Rights (1966).

⁸⁸ . H CJ 9593/04 **Murar v. Commander of the Military Forces in Judea and Samaria** (judgement granted on 26 June 2006).

⁸⁹ . See, for example, paragraph 29 of the letter sent by ACRI to the Commander of the Judea and Samaria Division and the Commander of the Border Police in Judea and Samaria, dated 5 September 2011: <http://www.acri.org.il/en/2011/11/07/illegal-use-of-closed-military-zone-orders-to-restrict-legal-protest/>.

military zone orders as a means to suppress demonstrations⁹⁰ – but this practice still exists.

3. The Right to Demonstrate on the Judicial Level

Palestinian demonstrators in the West Bank are frequently brought to trial before Israeli military courts, either for violating Order 101 or as suspects in incidents of stone throwing, incitement to violence or incitement to participate in illegal demonstrations. As opposed to civil courts within Israel, which play a central and significant role in protecting the right to demonstrate, the military courts in the West Bank choose to avoid a principled legal debate about the application and scope of the right to demonstrate in the occupied territories and the normative framework that applies to and regulates this right, that is – the lawfulness of Order 101, the decision to disperse demonstrations and the army's conduct during them.

In addition to that, military judges – much like military commanders – do not use Order 101 in a uniform and consistent manner as the legal foundation for regulating demonstrations and protest events in the territories. In some cases military judges implement Order 101 verbatim, while in other cases they ignore the permit mechanism established by this order and accept the enforcement policy of the military commanders, according to which demonstrations are allowed *ex gratia*, so long as they are not violent – as prescribed by the relevant legal rule. While this can benefit some defendants in some cases, the lack of consistency and uniformity further enhances the ambiguity surrounding the applicable rules, creates uncertainty among the local residents and grants the soldiers on the ground an even wider discretion to make normative

⁹⁰ . See, for example, ACRI's letter to the Commander of the Judea and Samaria Division and the Commander of the Border Police in Judea and Samaria (Ibid.); and ACRI's letter to the Military Advocate General, dated 12 November 2012, concerning the closure of areas where weekly demonstrations take place, for a period of six months:

<http://www.acri.org.il/en/2012/11/13/closed-military-zone-orders-delivered-to-activists/>.

decisions concerning the application and scope of the right to demonstrate in each and every situation.

Thus, for example, Muhammad Alaa-Addin was accused of assaulting a soldier during a demonstration in the village of Umm Salamona, in which 20 demonstrators participated.⁹¹ According to the facts of the indictment against him, Alaa-Addin shoved a soldier while holding the Palestinian flag and refused the soldier's request to leave the place. In this case, the court cited Order 101 as the legal framework justifying the swift dispersal of the demonstration – under the claim that it was unauthorized and therefore illegal.

By contrast, in the case of Muhammad Amirah from the village of Ni'lin, who is one of the most prominent activists in the West Bank, the court interpreted Order 101 differently.⁹² Amirah joined a spontaneous and nonviolent protest near the Israeli settlement Nili, during which he sat down in front of a bulldozer in order to prevent the construction of a road on the lands of the residents of Ni'lin. He was arrested and accused of incitement, supporting a terrorist organization and interrupting a soldier in the performance of his duty. During the detention hearing, the judge chose to use the test of violence in order to determine the legality of the demonstration: He drew a clear line between a demonstration that is not violent and is therefore legal and a demonstration that is violent and therefore illegal, and completely ignored Order 101 and the permit mechanism established by it.

As noted above, under the current circumstances in the territories – in which there are blatant violations of the right to demonstrate both on the level of military legislation and on the level of practice, which do not receive adequate judicial review by judges in the military court system – the military commander in the field has enormous discretion to decide whether, when and how to disperse a demonstration. This wide discretion enables the decision to easily disperse demonstrations and increases the

⁹¹ . Case No. 5290/11 **Military Prosecution v. Muhammad Moussa Alaa-Addin** (judgement granted on 23 February 2012).

⁹² . See ACRI's report concerning Muhammad Amirah: <http://www.acri.org.il/en/2012/06/20/muhammad-amirah/>.

erosion of the right to demonstrate in the territories. It also significantly limits the ability to criticize and challenge illegal decisions made by the military commanders in the field and to resist them, in an effort to minimize the violation of the right.

Conclusion and Recommendations

It is our position that reviewing the normative framework that applies in the territories leads to the conclusion that Israel is obligated to at least respect the right of West Bank residents to conduct demonstrations. This obligation is enshrined both in occupation laws and in human rights laws, and therefore the *de facto* denial of freedom of protest in the occupied territories constitutes a violation of Israel's obligations under international law. In our opinion, the central discussion should focus on the scope of application of freedom of expression and the military's handling of demonstrations and demonstrators in practice, and not on the very existence of the right.

Even if we acknowledge the authority of an occupying power to restrict, to a certain extent, the right of the residents of the occupied territory to conduct demonstrations, then in light of the prolonged nature of the occupation and the lack of a concrete military need to restrict protest events, there is no doubt that Israel is obligated at least to respect the right to demonstrate in the occupied territories – that is, to recognize this right and refrain from directly violating it, including by imposing sweeping restrictions on the possibility of its realization.

First and foremost, as the occupying power in the West Bank, Israel must explicitly acknowledge the applicability of the right to demonstrate in the occupied territories. Subsequently, Israel should establish clear rules that will enable the realization of freedom of expression and the right to protest in the West Bank, whether through weekly demonstrations or other protest events. The infringement of the freedom of expression of Palestinians in the West Bank must be limited to the exceptions established by human rights laws.⁹³

To achieve this, the Israeli military must amend the law and alter its implementation. Among other things, the mechanism for authorizing demonstrations established by Order 101 – which disregards the

⁹³ . See p. 19-22 of this position paper.

complicated relationship between the occupying power and the residents of the occupied territory and is unimplementable – should be abolished.⁹⁴ Instead, clear guidelines should be provided to all security forces clarifying their obligation to respect and protect freedom of expression and protest; to grant the greatest possible space for organizing demonstrations and protest events and participating in them; and to treat demonstrators and human rights activists in a respectful and dignified manner. In addition to that, the rules and regulations concerning the use of closed military zone orders, as well as the rules concerning the use of crowd control means, should be clarified and integrated.

Finally, the military courts must act in order to initiate a discourse that acknowledges the right to demonstrate and legitimizes its realization in the territories. This can be achieved by framing hearings concerning demonstrators within the framework of the right to demonstrate, as well as through judicial review of military orders or military actions that unnecessarily or excessively violate the right to demonstrate in the West Bank.