The Israeli Supreme Court and the de-Contextualization of the Principle of Proportionality
Guy Harpaz*


* Senior lecturer and Jean Monnet Lecturer, Law Faculty and Department of International Relations, Hebrew University of Jerusalem; President of the Israeli Association for the Study of European Integration. This paper is heavily based on an earlier version written by Prof. Yuval Shany and myself, entitled "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (forthcoming in the Israel Law Review). Prof. Shany and myself wish to express our gratitude for the most helpful comments of Aeyal Gross, Amichai Cohen, Yael Ronen and David Kretzmer. The usual caveat applies.
The Israeli Supreme Court and the de-Contextualization of the Principle of Proportionality
Guy Harpaz*

Abstract
On 29 December, 2009, the Israeli Supreme Court, sitting as the High Court of Justice, delivered its judgment in Abu Safiya v Minister of Defense, annulling an order issued by an Israeli Military Commander, which completely barred Palestinians from travelling on Route 443, a major road in the West Bank. The ruling is based, inter alia, on the findings that the Military Commander has exercised his discretion under the laws of belligerent occupation in a disproportionate manner. This note criticizes the Abu Safiya Judgment as indicative, notwithstanding its specific outcome, of the Supreme Court’s ongoing willingness to expand the ratione materiae and ratione personae of occupation law and to allow the military authorities to protect the interests of Israelis in the West Bank, even at the expense of the stronger rights conferred upon the local Palestinian population by the lex specialis - the laws of belligerent occupation. This note further postulates that such inappropriate expansion is facilitated by the de-contextualization of the principle of proportionality, ignoring the legal and socio-political context in which it is embedded.

I. Introduction

Since the Six Days War (1967) and the resultant occupation by Israel of the West Bank and the Gaza Strip (the Occupied Territories), the Israeli Supreme Court has delivered a vast number of judgments dealing with most aspects of the Israeli occupation. As such, the Court has become the world’s most prolific non-military judicial organ operating in the field of belligerent occupation law, thereby attracting considerable scholarly and judicial attention.¹

* Senior lecturer and Jean Monnet Lecturer, Law Faculty and Department of International Relations, Hebrew University of Jerusalem; President of the Israeli Association for the Study of European Integration. This paper is heavily based on an earlier version written by Prof. Yuval Shany, Lauterpacht Chair in Public International Law, Law Faculty, Hebrew University of Jerusalem, and myself, entitled “The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law” (forthcoming in the Israel Law Review). Prof. Shany and myself wish to express our gratitude for the most helpful comments of Aeyal Gross, Amichai Cohen, Yael Ronen and David Kretzmer. The usual caveat applies.

¹ Israel unilaterally disengaged itself from the Gaza Strip in the summer of 2005, yet a legal controversy still persist regarding whether the laws of belligerent occupation still oblige it with regard to that territory. For analysis, see Yuval Shany, Binary Law Meets Complex Reality: The Occupation of Gaza Debate 41 (1-2) Israel Law Review (2008) 68.

² For analysis, see David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (State University of New York Press, Albany, 2002); Amichai Cohen, Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories 38 (3) Israel Law Review (2005) 24; Orna Ben-Naftali and Yuval Shany, Living in Denial: Application of Human Rights
The jurisprudence of the Supreme Court during all of these years may be seen as an exercise in judicial acrobatics, simultaneously regulating and legitimizing the occupation: The Court places some legal restraints on the Israeli army (thereby underlining Israel's duty to comply with international law), while striving to accommodate Israel's security and other interests in the Occupied Territories. 3

On 29 December, 2009, the Court, sitting as the High Court of Justice, delivered its judgment in Abu Safiya v Minister of Defense, regarding the legality of an order issued by an Israeli Military Commander, which completely barred the local Palestinian population from travelling on Route 443, a major road in the West Bank (the Order and Route 443, respectively). 4 The Supreme Court declared the Order to be unlawful under the laws of belligerent occupation on grounds of both lack of authority and disproportionate use of the Military Commander's powers. The Court recognized, however, the Military Commander's authority to issue temporary, partial travel bans that could restrict the movement of local Palestinians in the Occupied Territories, and held that such bans may be imposed, inter alia, in order to protect the security of Israelis commuters who are non-residents of the Occupied Territory.

An initial reading of the Judgment might suggest that it does not depart from the Court's voluminous jurisprudence on the laws of belligerent occupation, offering no more than another judicial balancing act, placing some legal restraints on the Israeli army, while not exceeding what are perceived by Israel's security establishment and the Israeli general public to be the legitimate boundaries of judicial review. 5 In that respect the Judgment may be seen as continuing a line of the decisions which seek to mitigate the harm caused by specific measures taken by Israel in the Occupied Territories, thereby rendering the broader occupation policies of Israel more palatable and legitimate, at least within Israel.

This note offers, however, an additional interpretation of the Abu Safiya Judgment. According to this reading, the Supreme Court’s willingness to incorporate protection of the interests of Israeli residents traveling on Route 443 within the scope of the powers and duties of the military authorities under the laws of belligerent occupation (and to weight those interests against those of the Palestinian population under the aegis of the principle of proportionality) 6 is to be seen as one link in a chain of decisions bringing about a gradual change in the Court’s approach towards the ratione

---

3 For a discussion, see Kretzmer, ibid., 2-3.
5 For analysis of the same theme in the U.S. context, see W. Mishler and R.S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 American Political Science Review (1993) 87.
6 For analysis of that principle, see Y. Shany, The Principle of Proportionality under International Law, Policy Paper 75, The Israel Democracy Institute, Jerusalem, 2009 (Hebrew);
materiae and ratione personae of the laws of belligerent occupation. Consequently, the Judgment contributes to the gradual expansion of the scope of discretion exercised by the military authorities in applying the laws of belligerent occupation and to a transformation of the nature of the judicial act of balancing rights and interests in the Occupied Territories, developments that run contrary to the letter and spirit of the laws of belligerent occupation. The Abu Safiya Judgment thus adds to the incremental loosening of some of the judicial limits that the laws on belligerent occupation have placed on advancing Israeli interests in the Occupied Territories, which exceed its strict security needs; inevitably, this legal development concomitantly erodes the preferential status of the local Palestinian population under the laws of belligerent occupation. In other words, the Abu Safiya Judgment should be seen as another stage in a process which commenced in the 1970s, throughout which the Court has moved to adjust and expand the judicial boundaries of the laws of belligerent occupation according to the realities of occupation on the ground (as determined by the Israeli executive, the Israeli public and – with increased frequency, by Israeli settlers). The Court's jurisprudence has thus been adjusted to accommodate the occupation more than the occupation having to adjust itself to accommodate legal restraints.

It is further contend that although the particular method of balancing employed by the Court addresses some of the problems resulting from its expansive reading of belligerent occupation law and appears to acknowledge the need for distinguishing between different right-holders in the Occupied Territories, it is not clear whether cases with different underlying fact patterns or involving less extreme restrictions would invite a similarly meaningful review of the balancing process. The growing list of protected interests and stakeholders recognized by the Court may eventually render rights or interest-balancing too complicated to be subject to substantive judicial review. Consequently, the Court may face a choice between (a) effectively limiting its scope of judicial supervision over military measures in the Occupied Territories and (b) developing a more robust structuring of the interest-balancing formulation it applies in a manner that would be reflective of the hierarchical ranking of interests provided by belligerent occupation law. Although this note recommends pursuing the latter course of action, it still realizes that embracing this choice may put the Court on a collision course with Israel’s other branches of government.

The article is structured along the following lines. Following this introductory Section, Section B of the note describes the underlying facts and the main findings of the Israeli Supreme Court in Abu Safiya v. Minister of Defence. Section C situates the Abu Safiya Judgment in a historical context – i.e., as part of a line of cases gradually expanding the scope of interests protected by Regulation 43 of the 1907 Hague Regulations, including within it Israel’s broader security interests and the protection of Jewish settlers and Israelis commuting in the West Bank. Section D analyzes the Abu Safiya Judgment and argues that it should be understood as a reaction to the decreasing suitability of the Court’s traditional jurisprudence on Regulation 43 to the increasingly inter-linked interests of Israel and Israelis on the one hand, and the West

Bank and its Palestinian inhabitants on the other hand. This Section further postulates that the Court’s approach raises serious normative objections concerning the long-term viability of judicial review over the exercise of military authority and its ability to offer a meaningful level of protection for Palestinian interests (commensurate with the protected persons status of Palestinians residing in the West Bank under the laws of belligerent occupation). The note concludes in Section E by advancing the argument that there are good legal and policy reasons to support the reinforcement of limitations on the scope of discretion afforded to the occupation's military authorities (and to national courts reviewing their decisions) in applying their powers and authorities under the laws of belligerent occupation.

B. The Al Safiya Judgment

Route 443 is a 28 km road that links Jerusalem and the major highways in the centre of Israel, including those leading into metropolitan Tel-Aviv. Just over half of the Route passes through the occupied West Bank. The construction of the Route took place in the early 1980s and required the expropriation of private Palestinian lands by Israel. These expropriations triggered the submission of a petition to the Israeli Supreme Court, sitting as a High Court of Justice. In December 1983, the Supreme Court held that the expropriation of land for the purpose of constructing a major road in the Occupied Territories does not violate the laws of belligerent occupation (the Jamayit Iscan case). In reaching this conclusion, the Court accepted the State’s assurances that the road was primarily designed to serve the transportation needs of the local Palestinian population and that, as a result, it fell within the scope of permissible justifications for adopting legal measures deviating from the status quo existing in the occupied territory pursuant to Regulation 43 of the 1907 Hague Regulations: the evolving needs of the local population or the narrow security needs of the occupation forces themselves. Significantly, and as discussed at greater length below, Justice Barak, who delivered the leading opinion in Jamayit Iscan, stated that any attempt to invoke the broad national interests of Israel in order to justify the expropriation and road construction would have failed – noting in particular the impermissibility of planning the new road as a “service road” for Israeli commuters.

Since 1983, Route 443 has become one of Israel's major traffic routes, serving tens of thousands of commuters each day. Users of the Route can be divided into three broad categories of persons: a) Palestinian inhabitants of the West Bank who used the Road, until the issuance of the contested Order, mainly for commuting within the West Bank (the Route connects, inter alia, Jerusalem and roads leading to Ramallah, the largest West Bank city); (b) Jewish West Bank settlers who rely on the Road for commuting between the West Bank settlements and between the West Bank and Israel "proper";

8 HCJ 393/82 Jamayit Iscan Almalmun Althaunia Almahduda Almesaulia v. Commander of IDF Forces in the Judea and Samaria Area, 37(4) PD 738.

9 ibid, para. 36: “[T]he military administration must function as a government and must look after the local population’s public life… [T]t is authorized to invest in infrastructure and undertake long term planning designed to benefit the local population… Against this background it is clear that no flaws appertained to the preparation of a national roads plan: the transportation needs of the local population have increased over time; the state of the roads cannot be frozen” (authors' own translation from Hebrew).

10 ibid, para. 13.
and (c) Israelis who reside within Israel’s 1967 borders and utilize Route 443 as an alternative route to “Route 1” – the main highway that connects Jerusalem to Tel Aviv (which does not run through the Occupied Territories). Partially as a result of the Order, the majority of the vehicles that have used Route 443 in recent years fall into the third category, i.e., Israelis who use the road for reasons of traffic convenience (avoiding traffic on Route 1, or shortening the length of the trip to North Jerusalem).

Following the outbreak of the Second Palestinian Intifada in 2000, Route 443 was the scene of numerous terrorist attacks perpetrated by armed Palestinians and directed against military vehicles and Israeli commuters. The attacks were at times launched from the Palestinian villages located in the vicinity of the Route; at other times, they involved drive-by shootings launched from Palestinian vehicles traveling on the road. All in all, seven Israelis were killed on Route 443 during the first years of the new millennium and many others were injured. As a result of the deteriorating security conditions on the Route, the Israeli Military Commander of the area moved to restrict Palestinian access to Route 443, in the hope that such restrictions would insulate Israeli users of the Route from Palestinian attacks: Access roads from nearby Palestinian villages to the Route were blocked with physical barriers; parts of the Route were enveloped with fences and barriers and, ultimately, a military order was issued imposing a total prohibition on the use of the Route by non-Israeli vehicles.  

Local Palestinians were directed to use alternative routes, some of which were constructed by Israel especially for that purpose.

Following the promulgation of the military Order banning of Palestinian traffic from Route 443, a number of residents of adjacent Palestinian villages have joined forces with the Association for Civil Rights in Israel (ACRI) to submit a petition to the Israeli Supreme Court, sitting as a High Court of Justice, challenging the legality of the travel ban. The petitioners claimed that the ban constituted a form of collective punishment and that the designation of Route 443 as a road exclusively reserved for Israeli traffic is based on unlawful racial and ethnic distinctions. In addition, it was argued that the ban inflicted serious and disproportionate hardships upon the local Palestinian population, infringing its right to movement, livelihood, dignified existence, education, family life and health. By preferring the interests of Israeli commuters in using the Route over those of the local Palestinian population, the Military Commander had allegedly overstepped his authority under international law. Hence, the petitioners requested the Court to order the respondents, including the Israeli Minister of Defense and the IDF Military Commander of the area, to allow again Palestinians traffic on Route 443.

The respondents contested the characterization of the travel ban as a discriminatory or collective punitive measure. They argued, instead, that the challenged Order was a mere temporary security measure aimed at saving lives. As such, the imposition of the

12 See HCJ 2150/07 (n. 4), para. 9 (per Justice Vogelman).
13 ibid, para. 8.
14 ibid, para. 9.
ban fell squarely within the authority of the Military Commander, who is not only authorized but also required to ensure the safety of all the Route's commuters. In adopting this temporary security measure, the respondents claimed, the Military Commander had exercised his authority in a proportionate and lawful manner.\textsuperscript{15}

The majority of the Supreme Court panel hearing the case accepted the petition in part. Justice Uzi Vogelman, writing for the majority, first established the legal framework governing the petition: The West Bank has been governed since 1967 under the laws of belligerent occupation; and the Military Commander constitutes the "long arm" of Israel – the Occupying Power - in relation to these territories.\textsuperscript{16} Being a state official, he is bound by general principles of Israeli administrative law that govern the exercise of governmental power, and as an organ of the State which is the Occupying Power, he is bound by the rules of international law governing belligerent occupation situations, including, in particular, the Regulations appended to the Fourth Hague Convention of 1907.\textsuperscript{17} Pursuant to the laws of belligerent occupation, the Military Commander must also normally respect the local laws applicable in the Occupied Territories (i.e., the Jordanian law that applied in the West Bank prior to 1967 and the various orders promulgated subsequently by the Military Commander). Where a lacuna exists under the laws of war and belligerent occupation, international human rights norms may also be invoked.\textsuperscript{18}

The key provision of the 1907 Regulations governing the situation at hand is Regulation 43, which reflects customary international law\textsuperscript{19} and which sometimes is referred to as the mini-constitution of occupied territories\textsuperscript{20} or the linchpin of the laws of belligerent occupation\textsuperscript{21} The Regulation stipulates that "[t]he Authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all 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

\textsuperscript{15} HCJ 2150/07 (n. 4), para. 9 (per Justice Vogelman).
\textsuperscript{16} ibid, para. 14.
\textsuperscript{17} ibid, para. 16.
\textsuperscript{18} ibid, ibid.
\textsuperscript{19} Trial of the Major War Criminals, International Military Tribunal in Nuremberg, published in 41 American Journal of International Law (1947) 172, in particular 248-249.
country" (hereinafter Regulation 43). In Justice Vogelman’s opinion, the duty of the Military Commander to ensure "public order and safety" by virtue of Regulation 43 extends to the regulation and protection of the utilization of traffic routes in the Occupied Territory. The Commander is thus obliged under international law to provide all users of the Route with adequate security.

Significantly, the Judgment states that the beneficiaries of the duty to ensure "public order and safety" include all individuals present in the area, irrespective of whether their presence is transitory or permanent, and regardless of the legality of the presence under belligerent occupation law. The beneficiaries of Regulation 43 thus include the local Palestinian villagers (who also qualify as "Protected Persons" under Article 4 of the 1949 Convention Relative to the Protection of Civilian Persons in Time of War – the Fourth Geneva Convention), Israeli settlers (who reside in the area and, should thus be considered according to the Court as part of the local population in the Occupied Territories, although not "Protected Persons" under the Fourth Geneva Convention), and all other Israelis who enter for limited periods of time the occupied area (and are neither part of the local population in the Occupied Territories, nor "Protected Persons" under the Fourth Geneva Convention). In light of this broad definition of the scope of duties of the Military Commander and of the beneficiaries from the fulfillment of these duties, Justice Vogelman held that all commuters on Route 443, within the Occupied Territory, are entitled to the enjoy legal protection as offered by Regulation 43. The Military Commander was entitled, in addition, to take into account the general security needs of the State of Israel insofar as they relate to the threat of terror attacks originating from the occupied territory in question.

Still, Justice Vogelman found that the Military Commander acted ultra vires in the circumstances of the case: Although he had legal authority under both international law and Israeli law to impose traffic restrictions in order to preserve public order and safety on traffic routes in the area, such authority did not extend to the imposition of a permanent and sweeping ban on the ability of Palestinian vehicles to travel on Route 443. Such a ban has rendered the Route, in effect, a road designated for exclusive use by Israeli commuters, who travel on it, by and large, in order to travel from one point to another within Israel. (Justice Vogelman referred to these travel patterns as “internal Israeli traffic”.) Such de facto designation of the Route for internal Israeli traffic runs contrary to the Route's original designated purpose for Palestinian transportation needs, a designation which provided the initial legal justification for the construction of the Route and for the expropriation of private Palestinian land for that purpose. Since most of the Israeli commuters on Route 443 are not residents of the Occupied Territories, the above designation would also run

---

22 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, 36 Stat. 2277 (hereinafter "Hague Regulations").
23 HCJ 2150/07 (n. 4) para. 22 (per Justice Vogelman).
24 ibid, para. 20.
25 Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287 (hereinafter "GC IV").
26 HCJ 2150/07 (n. 4) para. 24 (per Justice Vogelman).
27 ibid, para. 23.
28 ibid, para. 26.
afoul of Regulation 43’s focus on the needs of the local population. Consequently, the challenged Order has been issued in excess of authority and is illegal. 29 In that regard the Judgment is an exceptional, as most judicial interventions with respect to Israel’s actions in the West Bank are based on findings of an illegal use of authority (or disproportionate and hence improper exercise of discretion) rather than lack of authority.

Justice Vogelman added in obiter dicta that he would have reached the same legal conclusion even if the Order had been found to fall within the Commander's authority because the exercise of discretion by the Military Commander violated the principle of proportionality under both international law and Israeli administrative law. According to the principle of proportionality, measures may be justified only if they are necessary, if less harmful alternatives are unavailable and if a cost-benefit analysis produced a reasonable ratio between the interests served by the measure in question and the harm it inflicted. 30 In the present case, Justice Vogelman was of the view that alternative security measures that would inflict less harm on the Palestinians, such as checkpoint examination of Palestinian vehicles seeking to use the Route, were not seriously considered. 31 Moreover, the sweeping ban imposed by the Order created a disproportionate relationship between the security gains attained, in terms of the added level of security provided to Israeli commuters, and the adverse consequences inflicted on the local Palestinian population that was totally excluded from using the Route. 32 The Order was thus, according to Justice Vogelman, disproportionate in its effect and hence unlawful.

President Dorit Beinisch concurred with the opinion of Justice Vogelman and supported both of his findings on lack of legal authority and improper exercise of discretion. She emphasized in her short opinion that an alternative arrangement should have been sought 33 and that freedom of movement is a basic human right which ought to be realized even under conditions of belligerent occupation. 34 Part of her concurring Opinion was devoted to rejecting the comparison offered by the petitioners between the designation of Route 443 to “Israelis only” and South Africa’s Apartheid practices. In her opinion, the analogy to South Africa’s white supremacist regime should not have been offered. Not every distinction amounts to unlawful discrimination and not every form of unlawful discrimination is an Apartheid practice; the challenged travel ban was indeed unlawful, but was imposed for genuine security reasons. 35

Although the majority on the Supreme Court panel found the contested Order to be unlawful, it also took cognizance of the fact that its immediate annulment could seriously prejudice the security interests of the current users of the Route. Hence, it

29 ibid.
31 HCJ 2150/07 (n. 4) para. 31 (per Justice Vogelman).
32 ibid, para. 35.
33 ibid, para. 8 (per President Beinisch).
34 ibid, para. 3.
35 ibid, para. 6.
decided to opt for a delayed annulment remedy – i.e., to leave the Order in force for an additional period of up to five months, thereby allowing the Military Commander to adopt appropriate security measures that would protect Israelis commuters on the Route while permitting Palestinian traffic upon it. (Such measures were indeed adopted by the Military Commander within the stipulated period, and parts of the Route have been reopened on 28th May, 2010 to Palestinian traffic, subject to security checks upon entry to the Route).

Justice Edmund Levi, who wrote a minority opinion, was of the view that the Military Commander acted within the scope of his authority when imposing the sweeping travel ban. Still, given the relative calm that has characterized the security situation in the relevant area in recent years, Justice Levi too was of the view that a sweeping ban was disproportionate in nature. Still, in his opinion, there was no need to issue the annulment Order, as the Military Commander stated his willing to consider alternative security arrangements, which would facilitate some Palestinian traffic on Route 443.

C. The incremental expansion of the scope of the Laws on Belligerent Occupation

The judgment in Abu Safiya raises a number of interesting questions relating to some of the most basic principles of belligerent occupation law: Who are the beneficiaries of the laws of belligerent occupation? In favour of whom may the Military Commander of the Occupying Power exercise the authority bestowed upon him by these laws? Is he limited to exercising his duties for the sole benefit of individuals defined as "protected persons" under the Fourth Geneva Convention? Is the legality of the very presence of settlers and other Israeli in the Occupied Territory relevant to the discharge of the Military Commander’s duties?

The few and rather laconic provisions of Section III of the Hague Regulations do not address these questions in a direct, explicit and comprehensive manner. As stated above, the key clause laying out the basic contours of the powers of the occupant is Regulation 43, which relies on an ambiguous formulation according to which the occupant "shall take all measures in his power to restore and ensure, as far as possible, public order and safety (l’ordre et la vie publics, in the original, authoritative and more broadly formulated French version – G.H.), while respecting, unless absolutely

---

36 For an example of the use of postponed remedies by an international court, see Joined Case C-402/05 and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission, Judgment of the 3 September, 2008, para. 373-376. But cf Her Majesty’s Treasury v. Mohammed Jabar Ahmed, [2010] UKSC 2, para. 8 (per Lord Philips): “This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment. Accordingly, I would not suspend the operation of any part of the court’s order”.

37 HCJ 2150/07 (n. 4) para. 4 (per Justice Levi).

38 ibid, para. 6.

39 ibid, para. 7.

40 For analysis and comparison, see Sassòli (n. 20) 3.
prevented, the laws in force in the country". A reasonable reading of Regulation 43, supported by many commentators, is that the occupier is expected to protect three broad groups of interests: (i) the interest of the local population in a stable and orderly government; (ii) the interest of the temporarily displaced sovereign in the preservation of the preexisting legal status quo in the occupied area, (iii) the security interests of the occupying power itself.

The Fourth Geneva Convention is more explicit in identifying the individuals whose interests are to be protected pursuant to its provisions. According to Article 4 "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" (emphasis added – G.H.). According to the same Convention, these "protected persons" are entitled "in all circumstances, to respect for their persons, their honour, 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" (although the occupier “may take such measures of control and security in regard to protected persons as may be necessary as a result of the war”).

Thus, while the Hague Convention maintains a three-way balance between the rights of the local population, the rights and duties of the Occupying Power and the rights of the ousted sovereign of the occupied territory, the Fourth Geneva Convention tends to be bi-dimensional in nature, balancing the interests of the occupied population against the security needs of the occupier. Moreover, whereas the language of Article 43 of the Hague Regulations does not identity the particular “population” (or “inhabitants”) who should benefit from the restoration and maintenance of public order and public safety (or vie publics), article 4 of the Fourth Geneva Convention explicitly excludes from the Convention’s scope of protections in occupied territories

41 L’autorité du pouvoir légal ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.


43 GC IV, Art. 27.

44 ibid, ibid.

45 See Eyal Benvenisti, The International Law of Occupation (1993) 110 (“while the Hague Regulations primarily protect governmental interests, the Fourth Geneva Convention caters to the interests of individuals under foreign rule”). Benvenisti also noted in this regard the irony in Israel’s acceptance of the applicability of the Hague Regulations to the Occupied Territories, while rejecting the applicability of GC IV for reasons related to the invalidity of the Jordanian and Egyptian sovereign titles over these area, ibid, ibid.

46 Hague Regulations, Reg 50.

47 ibid, Reg 44, 45 and 52.
nationals of the occupying force and individuals protected by one of the other Geneva Conventions.\textsuperscript{48}

The remainder of this note is devoted to an analysis of the evolution of the jurisprudence of the Supreme Court on the scope of application of the law of occupation, the judicial policies underlying this evolution and their normative implications.

\textit{A. "First Generation" jurisprudence – the occupied population and "narrow" security interests}

Most of the early judgments of the Israeli Supreme Court after 1967 have adopted a rather restrictive approach regarding the identity of interest-holders protected under the laws of belligerent occupation.\textsuperscript{49} A classic example of this approach can be found in the 1983 \textit{Jamayit Iscan} judgment, where the legality of the land requisitions that facilitated the construction of Route 443 was reviewed. The petition was based, \textit{inter alia}, on the factual assertion submitted by the requisitioned land owners that the Route’s true purpose was to advance Israel's own transportation interests, i.e. improving traffic links between Jerusalem and Tel-Aviv. The petitioners also raised the normative claim that Military Commander’s discretion under Article 43 should be narrowly construed – i.e., that any attempt to alter the \textit{status quo} in the Occupied Territories should meet a high standard of necessity.\textsuperscript{50}

The Supreme Court, sitting as a High Court of Justice, rejected both of the petition’s main assertions. Justice Barak, writing for the Court, held that the Military Commander’s statement that the new road system was first and foremost designed to serve Palestinian traffic needs was not contradicted by any evidence on record.\textsuperscript{51} Moreover, Barak downplayed the suitability of the “pro-status quo” tilt of the laws of belligerent occupation to situations of long term occupation (as in the case of Israel’s occupation – then just over 15 years long), especially in the era of the welfare state. Instead, he was of the view that some flexibility in balancing between the competing interests that underlie the laws of belligerent occupation was warranted.\textsuperscript{52}

\footnotesize{\textsuperscript{48} Note that Geneva IV, Art. 4 also excludes from the definition of “protected persons” nationals of neutral states and co-belligerents who find themselves in the territory of a belligerent state.

\textsuperscript{49} Among the principal early Supreme Court judgments issued in the first 15 years after 1967, one may note in particular the following cases: HCJ337/71 Al Jamayia v. Minister of Defence, 26(1) PD 574; HCJ 256/72 East Jerusalem Electric Co. v. Minister of Defense, 27(1) PD 124; HCJ 302/72 Abu Hilu v. Gov’t of Israel, 27(2) PD 169; HCJ 606/78 Ayub v. Minister of Defense, 33(2) PD 113; HCJ 390/79 Dawikat v. State of Israel, 34(1) PD 1.

\textsuperscript{50} HCJ 393/82 (n. 8) para. 7-9. For analysis, see Sassòli (n. 20) 1.

\textsuperscript{51} HCJ 393/82 (n. 8) para. 14-16. But see Kretzmer (n. 2) 70, who argues that despite the Court's stated conviction that the Route was designed to benefit the local Palestinian population, there was in actuality no lack of evidence to show that it was constructed mainly to advance Israel's interests.

\textsuperscript{52} HCJ 393/82 (n. 8) para. 21 ("[T]he concrete meaning that is to be given to the provision of Regulation 43 of the Hague Regulations relating to the ensuring of public order and life would not conform to 19th century public order and life but to public order and life in a modern state at the end of the 20th century") (authors' own translation from Hebrew). For a discussion, see Roberts (n. 42) 92-93.}
At the same time, Justice Barak embraced a conservative approach on the question of the beneficiaries of the laws of occupation, – i.e., the identity of the individuals and groups whose rights and interests can be weighed by the Military Commander. Justice Barak held in this regard that the laws of belligerent occupation recognized only two legitimate sets of interests that could justify a change in the status quo: (i) the interests of the local occupied population and (ii) the "narrow" military interests of the Occupying Power insofar as they pertain to the occupied territory in question. Any exercise of the Commander's powers designed to advance other sets of interests must therefore be illegal. Thus, according to the Supreme Court, although the very use by Israelis of the Route in question is not prohibited, had the Route been constructed in order to advance the broader interests of the State of Israel or its nationals with regard to the area in question, the expropriation and consequent construction would have been deemed ultra vires and therefore illegal under international law:

Thus, the considerations of the Military Commander are to safeguard his military interests in the occupied territory, on the one hand, and the interests of the civil population in the occupied territory, on the other hand. Both those sets of interests relate to the occupied territory. The Military Commander is not entitled to consider the national, economic or social interests of his policy, to the extent that they have no implications for his security interest in the occupied territory or for the interests of the local population. Even military needs are his military needs and not national security needs in the broader sense. An area held under belligerent occupation is not an open field for economic or other exploitation… Consequently the Military Administration is not entitled to plan or to carry out networks of roads in an area held under belligerent occupation, if the purpose of that planning and that execution is only to provide a “service road” to his State. The planning and execution of a network of roads in an occupied area may be done out of military considerations… The planning and execution… may be done for the good of the local population. That planning and execution cannot be carried out solely to serve the occupying State. Therefore if the Applicant is right that the purpose of the planning is not to serve the needs of the (military or civil) occupied area but only the needs of the State of Israel, then they are also correct in their legal position that this purpose is beyond the considerations of the Military Commander.

The Court's "first generation" jurisprudence, which the 1983 judgment epitomizes, thus adopts a narrow interpretation to the security interests of the occupier and places a heavy emphasis on the interests of the local Palestinian population (and such interests override, according to Justice Barak, the ousted sovereign’s interest in maintaining the status quo in long-term occupation situations). The Jamayit Iscan approach, which is generally supported in the literature on belligerent occupation, was also adopted in other Supreme Court judgments justifying measures designed, for

53 HCJ 393/82 (n. 8) para. 13. For analysis of the authority to act in order to advance security interests, see Sassòli, (n. 20) 10; Schwenk (n. 20) 395-397.
54 HCJ 393/82 (n. 8) para. 13 (authors’ own translation from Hebrew).
55 See, for example, Sassòli (n. 20) 10 and Schwenk (n. 20) 395-397 who both place emphasis on the fact that Article 43 was aimed at empowering the occupying power to legislate in the interest of the local population.
instance, to quell riots \textsuperscript{56} and harmonize the tax laws applicable in Israel and the Occupied Territories.\textsuperscript{57}

\textbf{B. "Second Generation" jurisprudence – broader security interests and the protection of Jewish settlers}

Since the 1990s and building upon earlier verdicts, the Supreme Court has been expanding the two categories of beneficiaries under the laws of belligerent occupation whose interests can be legitimately protected through the invocation of Regulation 43, while nominally preserving its pre-existing method of applying the Regulation.\textsuperscript{58} The "narrow" security interests of the occupying forces have been transformed into the broader security interests of Israel, while the category of "local population", protected under the laws of occupation, has been expanded to include Israelis settlers residing in the Occupied Territories. This process, which this note refers to as the “second generation" jurisprudence on Regulation 43, has reached its culmination in the Separation Barrier cases, which involved both expansions of the scope of Regulation 43, applied cumulatively.

These cases dealt with Israel's construction of a 760 kilometer barrier separating large parts of the West Bank from Israel. The barrier, which was designed to head off terrorist attacks waged from Palestinian towns and villages in the West Bank, was mostly built East of Israel's pre-June 1967 borders, thereby bringing Jewish settlements and Palestinian villages into its "Israeli" side.

On 15\textsuperscript{th} September, 2005, an expanded panel of nine justices issued a judgment (\textit{Mara'abe} or \textit{Alfei Menashe}), examining the legality of one 25 kilometer segment of the barrier.\textsuperscript{59} The Court held that the \textit{raison d'être} of the construction of the barrier in general, and the reviewed segment in particular was security-based (preventing infiltration by Palestinian terrorists into Israel and into Israeli settlements in the Territories), and not, as claimed by the petitioners, politically-based (\textit{de facto} annexation of parts of the Occupied Territories). As a result, the construction of the barrier in the Alfei Menashe enclave fell within the authority of the Military Commander under the laws of belligerent occupation in general, and Regulation 43 in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} HCJ 9593/04 Morar v Commander of IDF Forces in the Judea and Samaria Area, Judgment of 26 June 2006 (the military commander is required to protect local Palestinians from settler violence)
\item \textsuperscript{57} HCJ 69/81 Abu Ita v. Commander of IDF Forces in the Judea and Samaria Area, 37(2) PD 197 (dealing with the introduction of VAT in the Occupied Territories).
\item \textsuperscript{58} See Kretzmer (n. 2) 117-118 who notes that first signs for the Supreme Court's willingness to utilize the laws of belligerent occupation in order to protect the settlers appeared already in the early 1970s. His analysis relies on \textit{Electricity Company for Jerusalem District v. Minister of Defence} (1972) 27 (1) PD 124, 138, in which the Court was willing to include the interests of the settlers as a factor that the Military Commander was obliged to consider within the interpretive framework of Article 43: ".the residents of Kiryat Arba must be regarded as having been added to the local population and they are also entitled to a regular supply of electricity". He also refers to \textit{Zalum v. Commander of Judea and Samaria} (1986) 41 (1) PD 528, 531 (in which the Court approved the imposition of security checks placed on Palestinians in Hebron were required in order to protect the security of settlers who settled in a house at the heart of Hebron) and to \textit{Natsh v. Minister of Defence} (1981) 35 (3) PD 361
\item \textsuperscript{59} HCJ 7959/04 Mara'abe v. Prime Minister of Israel, ILDC 157 (IL 2005).
\end{itemize}
\end{footnotesize}
particular.\textsuperscript{60} This last holding was based on a broad reading of Regulation 43, which represents, when compared to earlier cases, an expansion of its \textit{ratione materiae} and \textit{ratione personae} scope of application. Specifically, the Court held that the Military Commander may adopt security measures designed to protect the State of Israel "proper" from attacks launched against it from the Occupied Territories.\textsuperscript{61} Since locating parts of the trajectory of barrier inside the West Bank helped the military to secure the barrier and to intercept terrorists who cross it before they reach major population centres within Israel, its construction could be justified under Regulation 43. This stipulation appears to deviate from the \textit{Jamayit Iscan} Judgment, in which the Court implied that legitimate security considerations must be confined only to the needs of the army units \textit{inside} the occupied territory itself.

It appears that the \textit{Jamayit Iscan} judgment introduced an excessively narrow concept of military necessity, because it may be unreasonable to hold that military units situated in an occupied territory may respond to military threats directed against them, but refrain from taking measures to prevent military threats originating from the same territories and directed at towns within their country’s own territory. This is because such an outcome puts on its head the relationship between the military’s duty to protect civilians and its own forces. Nevertheless, the Court’s ‘second generation’ jurisprudence, which departs from the original, narrow interpretation on the issue, does not clarify what are the outer limits of the security considerations which the Military Commander could weigh. For example, it remains unclear whether the Military Commander could requisition West Bank land for the purpose of situating there a battery of ballistic missiles directed against Iran? Or whether he could pass legislation that would empower pro-Israeli factions within Palestinian society, which advocate reconciliation with Israel?

The \textit{Mara’abe} judgment also illustrates the expansion of the \textit{ratione personae} scope of coverage of Regulation 43. The Court determined that the definition of the “local population”, whose interests and needs ought to be protected by the Military Commander, also encompasses Israeli settlers, and that as a result Regulation 43 permits and at times obliges the Military Commander to adopt security measures designed to protect Israeli settlers residing in the Occupied Territories from terrorist attacks directed at them.\textsuperscript{62} According to the Court (and contrary to the ICJ’s

\textsuperscript{60} ibid, para. 98.
\textsuperscript{61} ibid, para. 18. See also HCJ 2056/04 (n.30) para. 32.
\textsuperscript{62} HCJ 7959/04 (n. 59) para. 19. Another case in point is a Supreme Court judgment (HCJ 6982/02 Wahidi v. Commander of IDF Forces in the Gaza Strip, judgment of 16 August 2002), which rejected a petition by Palestinian residents of the Gaza Strip challenging the legality of constructing a new road in the Gaza Strip in order to improve access of Israeli settlers (as well as the Israeli army) to the Israeli settlement of Netsarim, situated in what was then the Occupied Gaza Strip. The Court held that the Israeli settlers comprise part of the local population which the Military Commander is obliged to protect under the laws of belligerent occupation. According to the Court, the legality of the settlements “is not under discussion before the Court, and will be determined in the peace treaties which the relevant parties will reach”. See also HCJ 4219/02 Gussin v. Commander of IDF Forces in the Gaza Strip, judgment of 30 May 2002 [2002] IsrSC 56(4) 608; HCJ 4363/02 Zindah v. Commander of IDF Forces in the Gaza Strip, judgment of 28 May 2002; HCJ 10356/02 Hass v. IDF
conclusions in the advisory opinion it issued on the Legality of the Wall), the question of the legality of the settlements, which the Supreme Court chose not to adjudicate upon, is irrelevant as far as the entitlement to individual protection goes. The settlers are entitled to protection under international law (as well as under Israeli law) by virtue of Regulation 43 and their fundamental right to human dignity, to life and to security, rights enshrined in the Universal Declaration of Human Rights. The Military Commander must therefore ensure, in his application of the proportionality principle, the safety of the entire “local population” – i.e., all those residing in the Occupied Territory, regardless of their legal status, or of whether they are "Protected Persons" under the Fourth Geneva Convention.

The import of this aspect of the Court’s second generation jurisprudence is that the Court does not read Article 4 of the Fourth Geneva Convention as an elucidation of or limitation on the scope of coverage of Article 43 of the Hague Regulations, but rather as having a completely separate existence. The principle of proportionality is thus being de-contextualized from the legal environment in which it is embedded. Moreover, the Court in these cases has treated the composition of the local population as a factual question devoid of any normative meaning; that is, the lawfulness of the existence of Israelis in the Occupied Territories was not deemed relevant to the existence of a duty on the part of the Military Commander to protect them. Still, what is perhaps common to the treatment of the local population’s interests by the Supreme Court under both generations of jurisprudence may be that it has been invoked to justify an increase of the Military Commander’s powers and broadening of his discretion, despite the fact that the reference to the local population in Article 43 has been customarily understood by commentators as a limit on the Military Commander’s powers (and typically consistent with the status quo).

Of course, the invocation of settlers’ interests as a possible justification for security measures has put the interests of the local Palestinian population under greater tension than before. Not only can their interests be compromised due to military necessity (now potentially covering Israel’s broad security interests); since the two sets of local populations – the Palestinian and settlers, often compete over the same resources and occasionally act violently towards each other, the advancement of one set of interests may come at the expense of the interests of the other group. In other words, reading Article 43 as imposing a duty to protect the rights of the settlers and to advance their security may not only imply the expansion of the authorities of the Military Commander and the enhancement of his ability to alter the status quo in the occupied

---

West Bank Commander [2004] IsrSC 58(3), 443, para. 14 (“the obligation of the Military Commander [is] to ensure the safety of all local residents, regardless of whether they are Israeli or Palestinians”).

63 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ para. 121-122 (“[The Court] cannot remain indifferent to certain fears expressed to it that the route of the Wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access… [T]he route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements”).

64 HCJ 7959/04 (n. 59) para. 19.

65 For analysis, see Sassoli (n. 20) 5-10.
but also the need to restrict Palestinian rights and interests, an outcome that has sparked much academic criticism. Thus the principle of proportionality is being once again de-contextualized, this time by ignoring the inferior socio-political context in which the local Palestinian population lives in. Aeyal Gross, for example, is of the opinion that such interpretation upends the very meaning of Article 43 and distorts the very raison d’être of the laws of belligerent occupation, namely to protect those placed under occupation and to prevent the Military Commander from changing the nature of the territory under occupation.

Note that the Supreme Court did not limit the protection of settler interests to the realm of security; instead, the dicta used by the Court increasingly alluded to the Military Commander’s responsibility to protect the human rights of both settlers and Palestinian populations under his jurisdiction. For example, in Hess, a case dealing with requisition of Palestinian property in order to secure the movement of settler worshipers to and from the Cave of the Patriarchs in Hebron, the Court held that:

In the context of his responsibility for the welfare of the region’s inhabitants, the commander must diligently provide proper protection for constitutional rights of the local inhabitants, subject to the limitations posed by the conditions and factual circumstances in the area. Such protection applies to all types of populations residing in the place – Jews and Arabs alike. Among the protected constitutional rights, the right to free movement, freedom of religion and worship and the right to property are included. The area commander must exercise his authority to defend security and public order while protecting human rights. Sometime such a protection requires deciding between competing human rights... In issuing the requisitioning order, the area commander sought to improve the security measures afforded to pedestrians following the “worshipers’ road” en route to the Cave of the Patriarchs. In doing so he sought to facilitate the exercise of their

---

66 See, for example, Kretzmer (n. 2) 64-72, who argues in 65 that “Given the dubious legal status of the civilian settlements...regarding settlers as part of the local population for the purpose of Article 43 is highly problematic. Article 43 attempts to resolve the potential conflict between the governmental duties of an occupant bound to ensure civil life in the occupied territory and the nonsovereign and temporary nature of occupation by limiting the power to change laws to those cases in which changes absolutely cannot be prevented. By broadening the meaning of civil life to include all the interests of the local population and allowing changes in local law to promote those interests, the Court had already weakened the restraining influence of Article 43. If the test is the interests of the local population and the Israeli settlers...become part of the population, the potential for changing the law becomes almost unlimited”.


68 Gross (n.71) 5, 16, 18 and 25.

69 See e.g., HCJ 7999/04 (n. 59) para. 21; HCJ 1661/05 Gaza Coast Regional Council v Knesset [2005] IsrSC 59(2) 481, para .80.
constitutional right to freedom of religion and worship under conditions of security of life, even relative ones.\textsuperscript{70}

As noted by Gross, one of the effects of the move from an international humanitarian law discourse to a human rights discourse in the context of the Occupied Territories, and particularly in respect to the settlements/settlers, is the opening up of a sphere of permissible rights and interests, which the laws of belligerent occupation do not permit weighing.\textsuperscript{71} According to Gross, the merging of international human rights law with international humanitarian law may serve to legitimize violations of rights of those living under occupation and to "dilute" their human rights protection and place all people living under occupation, on a supposedly equal plane. This erodes, in turn, the special status granted under the laws of belligerent occupation to those subject to occupation.\textsuperscript{72} This note revisits some of these assertions in Section D of this note, where it is argued in favor of the parallel application of human rights and law of belligerent occupation protections, but suggest, not unlike Gross, that the latter body of law, with its hierarchy of protections should be afforded right of way as \textit{lex specialis}.

\textbf{C. "Third Generation" jurisprudence – the protection of Israelis who commute to the West Bank}

As stated above, the Supreme Court's "second generation" jurisprudence proposed that all individuals residing in the Occupied Territories, both Israelis and Palestinians are entitled to the protection owed to the local population under the laws of belligerent occupation. It also extended, in effect, protection to nationals of Israel, situated in Israel, from attacks against them originating in the Occupied Territories. But what about Israeli citizens who do not reside in the Occupied Territories, but merely pass through them? Surely, they cannot be classified as "Protected Persons" under the Fourth Geneva Convention, nor can they be considered as part of the local population according to the "second generation" jurisprudence. Does this mean that they are not entitled to any of the protections afforded by Regulation 43? Two cases relating to the protection of non-residing Israelis have been decided by the Supreme Court in recent years: A case involving the right of Israelis to worship in Bethlehem and the Route 443 case dealing with the protection of occasional commuters in the West Bank – the subject of the present note.

The West Bank is the heart of Biblical Canaan and as such is rich in historic and sacred Jewish sites such as Rachel’s Tomb and the Cave of the Patriarchs (the supposed burial site of the Biblical figures Abraham, Isaac, Jacob, Sara, Rebecca and Leah). In the exercise of their worship rituals, many Israelis who reside in Israel "proper" make pilgrimage to those sites; but given the volatility of the West Bank cities in which these religious sites are located (Rachel’s Tomb, for instance, is located in the Bethlehem area and the Cave of the Patriarchs in Hebron), such visits

\begin{itemize}
\item \textsuperscript{70} HCJ 10356/02 Hass v IDF West Bank Commander (n. 62) para. 15.
\item \textsuperscript{72} Gross (n.71), 4-5 and 7.
\end{itemize}
often expose Israeli visitors to security risks, and, as a result, security measures are required in order to facilitate the visits.

In the Bethlehem Municipality case, the Supreme Court found that Israeli worshipers were entitled to protection from the Military Commander under the laws of belligerent occupation. The case involved a petition against a requisition order issued by the Military Commander for Palestinian land situated in the vicinity of Rachel’s Tomb which was aimed at protecting safe access to the site by Jewish worshipers. The Court found that under The Hague Convention and the Fourth Geneva Convention, the Military Commander is authorized to issue such orders: "Jewish worshipers have a basic right of freedom of worship at Rachel's Tomb", and the Military Commander "must examine whether he is able to take reasonable steps which will allow the exercise of freedom of worship while ensuring the safety of the worshippers".

In the same vein, the Judgment which forms the subject matter of this note found that the Military Commander must protect the safety of all commuters on Route 443, including Israeli commuters who reside within Israel's 1967 borders but choose to use the Route as a less congested or shorter alternative route to "Route 1". Put differently, the Court held in the Abu Safiya case that the Military Commander should facilitate the use of the Occupied Territories by nationals and residents of the Occupying Power who choose to pass through that Territory:

The duty to ensure "public order and safety" pursuant to Regulation 43 of the Hague Regulations is broad. It does not just devolve upon those who are ‘Protected Persons’, but upon the entire population situated within the boundaries of the Region at any given time, including members of the Israeli Settlement population and Israeli citizens who do not reside in the area subject to belligerent occupation (emphasis added – G.H).

Hence, the "third generation" jurisprudence, as reflected in the Bethlehem Municipality and Abu Safiya judgments, further expands the ratione personae of those benefitting from Regulation 43. The relevant interest-holders whose needs must be considered by the Military Commander now include five categories of beneficiaries: (i) the local Palestinian population; (ii) the security forces of the Occupying Power, together with (iii) the citizens of the Occupying Force who settled in the Occupied Territory; (iv) the population of Israel that is threatened with attacks from the Occupied Territories and (v) all Israelis who enter into the Occupied Territory for any purpose whatsoever.

The upshot of the Abu Safiya judgment appears to be that nationals of the Occupying Power, who are not residents of the Occupied Territory, may at any given moment and for any reason whatsoever, including their mere convenience, enter an occupied territory and that their entrance imposes a legal duty on the Military Commander to

74 ibid, para. 13.  
75 ibid, para 14.  
76 HCJ 2150/07 (n. 4) para. 20 (per Justice Vogelman).
safeguard their movement in the area.\textsuperscript{77} This broad duty ought to be discharged, according to this line of judgments, even at the price of restricting the rights and interests of the local occupied population, including the imposition of limits on their freedom of movement, right to a livelihood, etc.

It is significant to note that the \textit{Abu Safiya} judgment stands in tension with the aforementioned 1983 \textit{Jamayit Iscan} judgment. While in 1983 the Supreme Court held that a “region held under belligerent occupation is not an open field for economic or other exploitation”,\textsuperscript{78} the present bench did in effect confer upon Israeli commuters a right to use the Route, even at the expense of limiting the interests of the same Palestinian population for whom the road was constructed. Although the judgment in \textit{Abu Safiya} acknowledged the special “protected persons” status of the Palestinian inhabitants of the West Bank\textsuperscript{79} and prohibited their total exclusion from Route 443, it still permitted restricting their rights (in a more proportional manner), in order to facilitate the utilization of this resource by Israelis who are neither protected persons, nor part of the local population of the Occupied Territories.

One may also note that the \textit{Abu Safiya} Judgment is broader in scope in some respects than the \textit{Bethlehem Municipality} judgment. Whereas the latter required the Military Commander to protect Israelis who have a strong interest in entering the Occupied Territories - i.e., in the exercise of a universal human right, namely the right to religious worship,\textsuperscript{80} the recent \textit{Abu Safiya} does not attempt to link the Military Commander’s duty to protect the Israeli commuters to any justification for their presence in the area. In this respect, it is akin to the \textit{Mara’abe} judgment which adopted an agnostic position on the relevance of the legality of the settlements in the Occupied Territories for the identification of a duty to protect them under Regulation 43.

\textbf{D. Analysis}

What is the underlying explanation for the “inter-generational” change in the Supreme Court’s jurisprudence on the scope of protected interests under the laws of belligerent occupation and how is this change to be normatively assessed? In this part of the note, I take a step back from the particular facts of the \textit{Abu Safiya} Judgment and try to understand that specific case as part of a broader trend in the Court’s jurisprudence on the Occupied Territories and human rights protections. As explained below, this note

\textsuperscript{77} It is perhaps interesting to note that decisions by the Military Commander not allow Israelis into parts of the Occupied Territories have been unsuccessfully challenged before the Supreme Court. See, for example, HCJ 727/02 Physicians for Human Rights v. Commander of IDF Forces in the Gaza Strip, judgment of 2 May 2002. The question of whether the Military Commander should restrict the travel of Israeli commuters on Route 443 was never addressed by the Court in Abu Safiya.

\textsuperscript{78} HCJ 393/82 (n. 8) para. 13.

\textsuperscript{79} HCJ 2150/07 (n. 4) para. 35 (per Justice Vogelman) (“no proper weight was given to the preservation of the rights of [Palestinians] as ‘Protected Persons’”) (authors’ own translation from Hebrew); ibid, para. 8 (per President Beinisch) (“The Military Commander must refrain as much as possible from resorting to a measure as extreme as totally excluding protected persons from using a specific road”) (authors’ own translation from Hebrew).

\textsuperscript{80} As noted already, the Hess case similarly upholds the right to of Israeli settlers to safely travel to places of worship inside Palestinian towns. HCJ 10356/02 (n. 62).
is less concerned with the specific outcome reached in the Abu Safiya case, than with the longer-term sustainability of the Court’s method of analysis.

A. The decreasing tenability of a narrow reading of Regulation 43

The move from a narrow conception of those whose interests the Military Commander must serve to a broader scope of stakeholders and interest-holders (including, settlers, Israeli commuters and the security interests of Israel “proper”) appears to respond to two cumulative and related developments – the mere passage of time since 1967, and the increasingly embedded nature of Israeli interests in the Occupied Territories. It is argued that both of these developments have put the traditional understanding of laws of occupation under considerable pressure and pushed the Court to gradually expand the interpretative framework it originally developed for Regulation 43 of the Hague Regulations.

The laws of belligerent occupation, as encapsulated in Regulation 43 and other key provisions (such as article 49 and 64 of the Fourth Geneva Convention) display a strong preference for preservation of the status quo ex ante in the occupied territory.\textsuperscript{81} Such a preference is often viewed as compatible with the interest of at least two of the three main stakeholders in occupation situations: the ousted sovereign (who expects to regain control over the area in question) and the local population in the occupied territory (whose interests are presumably better protected by the ousted sovereign than by the foreign occupier). Such a preference is also predicated on the assumption that belligerent occupations would not only be temporary in nature,\textsuperscript{82} but also of a relatively short duration, and that this constrained time-frame limits the ability or will of the occupier to introduce significant changes in the area in question.\textsuperscript{83} Finally, the historical background to the 1907 Hague Regulations also supports a conservative policy of non-interventionism on the part of occupiers because, as noted by Justice Barak in the Jamayit Iscan case, the 1907 Hague Regulations were enacted in an era still dominated by laissez faire ideology, in which governments assumed a modest role in regulating social life.\textsuperscript{84}

With the passage of time, the pro-status quo principle underlying the laws of belligerent occupation has become less and less tenable, leading Adam Roberts to observe that prolonged occupations may very well form a distinct category under

\textsuperscript{81} HCJ 69/81 Abu Ita v. Commander of IDF Forces in the Judea and Samaria Area [1983] IsrSC 37(2) 197, para. 22 (“[A]ccording to the basic concepts that restrain any deviation from the law in force before the occupation, no change or reform can be permitted unless for compelling reasons. Therefore, the need to respect existing rules should not be taken lightly; only weighty constraints or changes of circumstances of a similar nature… would permit the abandonment of existing rules”)(authors’ own translation from Hebrew). See also HCJ 351/80 Jerusalem Electric Co. v. Minister of Energy and Infrastructure [1981] IsrSC 35(2) 673, 690.

\textsuperscript{82} HCJ 393/82 (n. 8) para. 23 (“It is temporary control in its very essence… [Hence], the conclusion that certain powers, which the ordinary sovereign possesses, are not entrusted to the military administration”)(authors’ own translation).


\textsuperscript{84} HCJ 393/82 (n. 8) para. 21.
occupation law. If the status quo is the rule under the Regulation 43 and change is the exception, the passage of time weakens the grip of the ousted sovereign over the territory and renders its pre-occupation laws less and less suitable to meet evolving needs and challenges in the occupied area. Furthermore, since the scope of the legal obligations of the occupier under Regulation 43 correlates to the longevity of the occupation, long-term occupations generate increased expectations as to the positive measures that the occupier should undertake in order to restore and ensure public order and safety/life. In other words, the caveat in the text of Regulation 43, limiting the scope of the occupier’s obligations “as far as possible”, loses much of its meaning in long-term occupation.

True, Article 6 of the Fourth Geneva Convention runs in an opposite direction: Working under the dubious assumption that conditions on the ground would permit the delegation of power to the local authorities after the occupation has been consolidated (following the “general close of military operations”), the drafters of this Article limited many of the powers of the occupier to the first year of occupation. This could mean that less intervention should be expected in longer term occupations than in short-term ones. This somewhat odd construction has nonetheless limited legal significance. First, Article 6 does not halt the application of Regulation 43; thus, insofar as conditions in the occupied territory require intervention by the occupier, it continues to be held accountable to this broader standard, and should accordingly apply its legal powers under the applicable provisions of the Hague Regulations and Geneva Conventions (i.e., those provisions of the Fourth Geneva Convention that continue to govern long-term occupations). Second, it has been suggested that Article 3 of the First Additional Protocol of 1977 amended Article 6 and removed any restrictions it has imposed.

Finally, and more importantly, the increased acceptance of the application of international human rights to situations of occupation has rendered moot the

85 Roberts (n. 42) 47. See also Dinstein (n. 21) 7-12; Sassoli, (n. 20) 15-17.
86 See HHC 337/71 (n. 49) 581-582; HCJ 256/72 (n. 49) 138; HCJ 202/81 Tabib et al. v. Minister of Defence et al. Isr 36(2) 622, 630-631; HCJ 69/81 (n. 57) para. 50; HCJ 393/82 (n. 8) para. 22; Schwenk (n. 20); Roberts (n. 42).
87 The relevant part of GC IV, Art 6 provides that: “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143”.
88 J.P. Pictet, Commentary on the Geneva Conventions of 12 August, 1949 (International Committee of the Red Cross, Geneva, 1952-1960), 63 (“one year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect.”).
89 Roberts (n. 42) 56.
90 Roberts (n. 42) 56-57.
discussion over the import of Article 6 of the Fourth Geneva Convention.\textsuperscript{91} In fact, human rights law may impose a host of new obligations upon Occupiers, which can serve as independent justifications for deviating from the \textit{status quo ex ante}.\textsuperscript{92} Indeed, in its second and third generation jurisprudence on Regulation 43, the Israeli Supreme Court has made increased reference to human rights norms (enshrined both under international and Israeli law) in order to justify the exercise of the Military Commander’s power.\textsuperscript{93}

The tension between the pro \textit{status quo} presumption underlying belligerent occupation law and changing social needs of the occupied population has become particularly acute in the territories occupied by Israel, not only because of the exceptionally long duration of the occupation, but also in light of the specific circumstances of this occupation – the unique position of the “ousted sovereign” and the level of integration of the Occupied Territories and Israel. In the case of the West Bank, the passage of time has not only weakened the ousted sovereign’s links to the territory, but has eventually brought about a change in the very identity of the ousted sovereign: Jordan, which claimed sovereignty over the West Bank from 1950 onwards, had implicitly renounced such claims by 1988 by removing its administrative responsibility in favour of the Palestinians.\textsuperscript{94}

Under these conditions, it is not surprising that the Israeli courts have been willing to accord only a limited degree of deference to the pre-1967 Jordanian legislation in force in the West Bank\textsuperscript{95} and have allowed the Military Commander of the area broad discretion in introducing new laws and policies. As a result, in \textit{Jamayit Iscan} and numerous other cases, the Supreme Court opted for a flexible reading of the three-way balancing test underlying Regulation 43 (as it had originally been understood).

The second significant development that placed under pressure Regulation 43 and many other norms of the laws of belligerent occupation is the growing interdependence between the Occupied Territories and Israel (which are, after all, two adjacent territories). This integrative relationship finds expression in, \textit{inter alia}, strong economic ties, application of Israeli legal standards to transactions occurring in the Occupied Territories, cross-border security impacts, and an increasing number of Israelis residing there or travelling through the area. This development has particularly affected the contents of the variables employed by the Court in its balancing under Regulation 43 – old categories of interests and interest-holders were reinterpreted and new categories were introduced.


\textsuperscript{93} See notes 18, 64, 69 and 71 and accompanying texts.

\textsuperscript{94} Jordan: Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination, 27 I.L.M. 1637 (1988). Egypt, which controlled the Gaza Strip prior to 1967, has never claimed sovereignty over it.

\textsuperscript{95} In the same vein, limited reference was accorded to Egyptian military legislation in the Gaza Strip.
Although economic relations between Israel and the Occupied Territories have fluctuated over time, the Palestinian economy remains heavily dependent on Israel. As a result, it was plausible for the Court to hold in the 1983 VAT case that the economic welfare of Israel and that of the Occupied Territories were intertwined and that a tax harmonizing measure imposed by Israel on the population of the occupied area was compatible with the occupants' interests. The Court had also gradually moved in recent years to harmonize labor laws in Israel and the Occupied Territories (at least, in cases involving Israeli employers).

In the field of security, the deteriorating security conditions in the Occupied Territories from the late 1980s onwards have increasingly spilled-over into Israel "proper". This process, made possible by the close proximity of major Israeli population centres to the Occupied Territories, has accelerated with the acquisition by Palestinian militants of long-range rockets used for targeting Israel’s civilian population (all such rocket attacks were launched until now from the Gaza Strip area). This development has rendered obsolete the distinction introduced by Justice Barak in Jamayit Iscan between the (narrow) security needs of the occupation forces themselves and Israel’s (broad) national security. Hence, the Court has moved in the Separation Barrier and other cases to broadly construe the security needs implicit in Regulation 43's two caveats (“as far as possible” and “unless absolutely prevented”), reversing the narrow understanding of protected security interests espoused by the earlier case law on the matter.

Perhaps the most dramatic change in the context of growing inter-dependence between the Occupied Territories and Israel which may have rendered the restrictive

96 Israeli Shekels are still the main currency in the Occupied Territories; Israel and the Occupied Territories remain a single customs area; Israel has for many years taxed the population in the Occupied Territories and Israel still continues to control the employment of many thousands of Palestinians in its territory. For analysis see A. Arnon and J. Weinblatt, Sovereignty and Economic Development: The Case of Israel and Palestine 111/472 The Economic Journal (2001) 291.

97 HCJ 69/81 (n. 57) para. 53 (“[W]e did not find grounds to reject the respondents’ claim that the introduction of value added tax in Israel inevitably required the introduction of parallel taxation in the administered territories - that is, that the fiscal solution applied necessarily derived from the economic data before the military administration, and that such a measure was essential under the current political reality to facilitate the continuation of a situation, which presents a combination of positive economic factors of utter importance to the territories and their local inhabitants under existing conditions, and that one cannot negate, in essence, the argument that the contrary approach advocated by the applicants may have resulted in serious economic harm to the territories and their inhabitants, that would have entailed security risks as well”) (per Justice Shamgar)(authors’ own translation from Hebrew; emphasis found in original text). See also HCJ 393/82 (n. 8) para. 28 (“Investment in infrastructure, designed to benefit the local population, may often require planning and cooperation with elements situated outside the area. Such elements may comprise of a neighboring state or the military administration own country. Is there anything in the nature of military administration, which prevents it to undertake planning under these conditions? Surely, the welfare of the local population would require such cooperation”) (authors’ own translation from Hebrew).

98 For a discussion, see M. Karayani,, Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs, 5 Journal of Private International Law (2009) 1
The reading of Regulation 43 untenable in the eyes of the Supreme Court Justices has been the settlement movement – i.e., the taking up of residence of hundreds of thousands of Israelis in the Occupied Territories. The International Court of Justice held that the construction of settlements constitutes a violation of article 49 of the Fourth Geneva Convention, for its part, contests the ICJ’s reading of the Article and its applicability to the Occupied Territories, the sovereignty of which it regards as disputed in nature. Notwithstanding the controversy over the legality of the Israeli settlements, the Supreme Court of Israel has never pronounced on their legality per se. So, while the de jure legal status of the settlements is undetermined (as a matter of Israeli law), the Supreme Court has not been able to ignore their de facto existence. Nor could it ignore the large number of Israelis moving in and out of the Occupied Territories on a daily basis for a variety of commercial, religious, recreational and other reasons.

The large numbers of Israelis present at any given moment in the Occupied Territories, and their increased reliance on military measures of protection in a deteriorating security environment, pushed the Court to revaluate the contents of Regulation 43. One interpretive solution developed by the Court has been to construe broadly the concept of security interests so as to include the protection of Israelis in the Occupied Territories. Most cases, however, have taken another interpretive avenue, construing the local population protected by Section III of the Hague Regulations as encompassing all individuals in the occupied area, regardless of the legality of their presence. As noted above, this approach renders the term “protected persons” introduced by article 4 of the Fourth Geneva Convention (which explicitly excludes national of the Occupying Power) increasingly irrelevant. Thus the principle of proportionality was legally de-contextualized once again, this time by ignoring the illegality of the settlements and the special status afforded by the laws of belligerent occupation to the local, protected population.

100 See the Advisory Opinion (n. 63) para. 120-122.
101 For analysis, see Kretzmer (n. 2) 75-99.
102 To be clear, the Supreme Court did rule on many legal issues relating to the settlements, including the prohibition of confiscating private Palestinian land for their construction. See, for example, HCJ 390/79 (n. 49). Still, the Court held that a direct challenge to the legality of the policy of constructing settlements in non-justiciable. HCJ 606/78 (n. 49), 128-129 (“[T]his Court must refrain from adjudicating the problem of civilian settlement in occupied territories from an international law viewpoint, as I am aware that this problem is disputed between the government of Israel and foreign governments, and may be discussed in crucial negotiations facing the government of Israel. Any expression of opinion by this Court in such a sensitive matter, than cannot be stated but in obiter dicta, will not add or detract, and it is best if things that in their very nature belong to the sphere of international politics would be addressed in that sphere only”)(authors' own translation from Hebrew); HCJ 4481/91 Bar-Gil v. Gov’t of Israel, 47(4) PD 210.
103 See, for example, HCJ 9593/04 Morar v. IDF Commander in Judea and Samaria [2006] 2 IsrLR 56.
104 HCJ 2150/07 (n. 4) para. 20.
The upshot of these developments, reflected in the Court’s second and third generation jurisprudence, is that the Court now applies a multi-faceted balancing test under Regulation 43 of the Hague Regulations. A military measure deviating from the status quo can be justified if it is necessary to protect security interests (broadly understood) or the interests of the local population (also, broadly construed). Under this praxis, conflicts of interests are likely to occur not only between security and humanitarian interests, but also between the needs and interests of different protected groups. Such conflicts are addressed in the Israeli Supreme Court’s jurisprudence under the proportionality test, which compares and weighs the relative benefits and harms associated with the challenged measure.

B. Normative critique of the Supreme Court’s evolving jurisprudence

As in many other areas of jurisprudence, the move from a formalistic reading of legal norms to open-ended balancing in the field of the laws of belligerent occupation has many advantages. Most importantly, it mediates between law and social change: The laws of occupation, large parts of which were drafted more a century ago, fail to adequately regulate complicated modern phenomena such as terrorism and economic inter-dependence; nor do they adequately cover long-term occupations and “borderline” cases, where the Occupying Power has plausible sovereignty claims vis-à-vis parts of the occupied area. In a complex reality, where multiple interest-holders occupy the same space, present legitimate concerns and press their own visions of justice, the mechanical application of strict rules, which may be reflective of an arbitrary ranking of interests, should arguably be avoided.

The Judgment in Abu Safiya illustrates the almost heroic efforts of the Supreme Court to reach a “Solomonic” balancing formulation that is based on a flexible proportionality standard: The route will open for Palestinian traffic, but not immediately, and probably not fully. In other words, the military commander is instructed to formulate a policy which adequately strikes a horizontal balance between the competing interests of the two relevant “local populations” – the Israeli and Palestinian commuters. As in the previous separation barrier cases, the horizontal nature of the solution implies that some degree of risk has to be assumed by Israelis in order to minimize (but not fully avoid) the harm caused to Palestinians by more sweeping security measures.

Despite the analytical attractiveness of the balancing framework developed by the Court’s jurisprudence in general, and applied in the Abu Safiya case in particular, its significant drawbacks need to be acknowledged. As in other areas touching upon the protection of individual rights, the move to balancing undercuts the understanding of “rights as trumps” or “side-constraints” – i.e., super-protected interests removed from day-to-day political decision making. While Regulation 43 in itself invites

105 For discussion, see Shany (n. 1).
106 See for example, HCJ 2056/04 (n. 30).
balancing between security and the interests of the local population (and the ousted sovereign), by expanding the understanding of the scope of protected interests and rejecting the laws of belligerent occupation’s original pro-status quo disposition, the Court’s jurisprudence has vastly expanded the scope of discretion afforded to the Israeli military commander in governing the area. This coupled with the centrality of Regulation 43 in the Court’s jurisprudence has implied that the expansion of the range of permissible measures there under may limit the scope of protection afforded by other provisions of occupation law, formulated in the language of more rigid rules.\footnote{See, for example, HCJ 69/81 (n. 57) para. 22 (the specific provisions of the Hague Regulations addressing the taxation powers of the authorities to not limit its general powers in the field of taxation deriving from Regulation 43); HCJ 393/82 (n. 8) para. 31 (the specific prohibition on land confiscation under the Hague Regulations does not prevent confiscations under local laws, pursuant to Regulation 43).}

Indeed, this resultant expansion of military discretion and the dominance of balancing in the legal analysis employed by the Supreme Court have created a zone of normative indeterminacy – an area of policy-making which is sparsely regulated by specific legal provisions. In such a zone, law serves more to legitimize (and criticize) policy than to meaningfully guide conduct into specific policy directions.\footnote{For a discussion, see Martti Koskenniemi, ‘Occupied Zone – “A Zone of Reasonableness”? 41 Israel Law Review (2008) 13.} Consequently, one can argue for or against the plausibility of the proposition that the sweeping movement restrictions in the West Bank during the second \textit{intifada} were a proportionate security measure,\footnote{HCJ 2150/07 (n. 4).} that the right of Israeli worshipers to safely access the Cave of the Patriarchs or Rachel’s Tomb justifies the requisitioning of Palestinian land\footnote{HCJ 1890/03 (n. 73).} and even, as Israel has once argued, that the construction of settlements promotes security in the Occupied Territories and justifies the limitation of competing Palestinian rights and interests.\footnote{See HCJ 606/78 (n. 49), citing affidavit by the IDF Commander stating that Israeli settlements would comprise an element in the defense of the region during times of emergency. This line of argument was not argued after this judgment, where the Supreme Court found that the settlement in question was initiated by settler activists and not the military.}

But the very existence of a zone of normative indeterminacy is not an extremely powerful critique on the Court’s jurisprudence, as it may simply reflect the growing inability of law to address complicated or politically controversial situations.\footnote{See, for example, Ronald Dworkin, No Right Answer?, in P.M.S. Hacker and J. Raz (eds.) \textit{Law, Morality, and Society} (Clarendon Press, Oxford, 1977) 59.} After all, the Court’s landmark judgments on Regulation 43,\footnote{For a discussion of the relationship between “landmark cases” and ordinary Israeli Supreme Court jurisprudence relating to the Occupied Territories, see Ronen Shamir, Landmark Cases and the Reproduction of Legitimacy 24 Law and Society Review (1990) 781.} including the recent \textit{Abu Safiya} decision, suggest that judicial supervision can curb excesses in balancing by the Military Commander, putting in question the “everything goes” criticism directed against the resort to flexible standards.
It appears that a key factor, which must be taken into consideration when assessing the desirability and degree of embracing flexible standards in the context of belligerent occupation situations, is the institutional capacity of courts to oversee the Military Commander’s balancing decisions. As many authors have noted, the substitution of rules with standards entails a delegation of discretion and authority from the legislature to the executive. While courts exercise supervisory powers over such exercise of discretion and authority, their ability to “second guess” the balance struck by the executive is limited by their own modest fact-finding capabilities, lack of expertise and democratic deficit. Thus, under a “standard-based”, as opposed to "norm-based" legal regime, courts often find themselves legitimizing the application of power, rather than meaningfully curbing it.

This does not mean that the Court cannot detect, at times, disproportionate and unreasonable exercises of discretion or excessive use of authority: The Abu Safiya case, involving review of a lopsided act of “balancing” between Palestinian and Israeli commuter interests struck by the Military Commander and the historical irony of Palestinians being barred from driving on a route that was formally constructed to accommodate their travel needs, may exemplify one of these blatant cases where Courts are willing and able to intervene. But the number and nature of judicial interventions in “flagrant” cases may be far outweighed by the many more numerous judicial decisions not to intervene in “mundane” miscalculations of competing interest performed by the military, which the Court cannot review effectively or in a manner that attracts public legitimacy.

Furthermore, even with regard to Route 443, and following the delivery of the Abu Safiya Judgment, the Supreme Court placed its stamp of approval on less sweeping Palestinian travel restrictions applied by the Military Commander (which entail security checks upon entry to the Route and access to limited parts thereof only) – rendering the local Palestinians, in effect, “second class” travelers on the Route. The judicial approval of the new less-than-extreme measures adopted by the military would not only facilitate an erosion of the rights and interests of the local population in the Occupied Territory; it would also serve to legitimize the continuing presence of Israeli settlers and commuters in the Occupied

---

119 HCJ 2494/09 Good Honesty Ltd. v. Military Commander in the West Bank (delivered in 11th July 2010), dealing with a military order that confiscated money from the petitioner; HCJ 9792/09 an unspecified person v. Military Commander in the West Bank (delivered in 14th December, 2009), dismissing an appeal against the prohibition imposed upon the petitioner’s parents to visit him in his prison cell.
120 See Hanan Greenberg, IDF to Screen Palestinians entering Route 443, 25.3.10, http://www.ynet.co.il/english/articles/0,7340,L-3868377,00.html.
121 HCJ 3607/10 Israel Law Center and others v. Minister of Defence and others (not yet reported), judgment delivered on 27th June, 2010.
Territories, notwithstanding its adverse consequences for the local Palestinian population.\footnote{122}

It is important to note in this context that some of the main justifications for the move to standards in the domestic law realm, and for the attendant empowerment of the domestic executive (and, to a smaller extent, the expansion of judiciary review and discretion) do not translate well to situations of belligerent occupation. Context does, after all, matters. The democratic and efficiency principles, which support the delegation of authority to better-situated elected officials (or their underlings), and the trust societies place in judges to adequately protect the public interest\footnote{123} mean little for an occupied population that does not benefit from democratic accountability, and finds itself in frequent opposition of interests and aspirations from the population and institutions of the Occupying Power. Thus, the occupied population is unlikely to benefit from substituting the rigid protections afforded to them by the laws of occupation with the exercise of discretionary powers of government by the Military Commander, even if monitored by courts of the Occupying Power.\footnote{124} As in many other areas of law and policy, here too, the question of “who decides” is of critical importance. Thus, from the perspective of the occupied population, the gradual expansion of the military commander’s decision making discretion, approved by the Supreme Court’s jurisprudence, and contained in the principle of proportionality, is very problematic, to say the least.

Ultimately, one may have to fall back on core beliefs reflective of a hierarchy of relevant norms and values, and to formulate accordingly the institutional configuration of the decision-making process implementing them pursuant to a plausible view on the interests of the relevant norms’ primary beneficiaries. Perceived from this angle, it is hard to support the claim that the laws of occupation in their entirety, or even the Hague Regulations viewed separately, are indifferent to the scope of discretion bestowed upon the occupier. In fact, concerns about the manner in which the law will be implemented by the occupying power may have led the drafters of the law of occupation to initially opt, by and large, for rigid “rules” and not open-ended “standards”.\footnote{125} Furthermore, as noted already, Regulation 43, while seemingly flexible in nature, still contains a strong pro-status quo bias, which limits the scope of discretion afforded the Military Commander. It is thus difficult to reconcile this framework of interest analysis with the Supreme Court’s second and third generation jurisprudence on the scope of Regulation 43, which considerably expand the

\footnote{122}{In Gross’ terms it would place the burden of the settlers' security on the very same people whom the laws of belligerent occupation were supposed to protect. Gross (n.71) 5, 16, 18 and 25.}

\footnote{123}{For a comparable argument, concerning the applicability of “margin of appreciation” doctrine to minority right issues, see Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards 31 New York University Journal of International Law and Politics (1999) 843.}

\footnote{124}{See, for example, Gross (n. 71) 17 (“it is questionable whether this logic can apply when the government is a military occupation promoting the collective security interests of its own citizens while violating the rights of the people it occupies”).}

\footnote{125}{For a discussion, see e.g., Shany (n. 1) 75-76.}
Commander’s discretionary power to balance the interests of a growing list of recognized stakeholders.

Still, there are good reasons why the law of occupation prioritizes the needs of the local population, who found itself, in the words of Article 4 of the Fourth Geneva Convention: “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. This state of affairs places the occupied population in a particularly vulnerable situation of loss of sovereignty and separation from its organic political community. Understanding the laws of belligerent occupation as primarily designed to protect the interest of the occupied population conforms more generally to the correlation between right-talk and power-deficits, especially, in cases where the long duration of the occupation operates to accentuate, not mitigate, the said power-deficit. The Israeli Supreme Court must thus conduct an exercise of re-contextualization of the principle of proportionality in order to re-establish the legal and socio-political environment in which it is embedded.

Admittedly, belligerent occupation law is not the only legal framework applicable in the Occupied Territories – international human rights law and Israeli administrative law are also applicable. As a result, this note strongly agrees with the principled approach of the Israeli Supreme Court concerning the need to protect the human rights of all individuals situated in the Occupied Territories, including commuters on Route 443. Still, the laws of belligerent occupation constitute the lex specialis – suggesting that it should obtain an interpretive dominance and shape the application of the other applicable bodies of law as well. This implies that although the Military Commander is certainly obligated to protect all individuals under his jurisdiction pursuant to international human rights law and Israeli law, the manner of protection should be compatible with the rules and principles of the laws of belligerent occupation. For example, protection of individuals whose presence in the Occupied Territories is unlawful may entail their removal from the area, moreover, in the event of a conflict between different sets of individual rights, the rights of those individuals enjoying protection under the lex specialis should be accorded preference. So, if this conclusion is well-founded and the laws of belligerent occupation do regard non-nationals of the Occupying Power residing in the occupied area as a category of individuals in need of special protection (as the Fourth Geneva Convention explicitly stipulates), then the Court should be wary of developing a legal framework of broad discretion which has the potential of eroding this special status under international law.

In practical terms, the analysis conducted above leads to one of two possible legal solutions:

126 Gross (n.71) 5, 16, 18 and 25.
128 Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, 240.
129 For a similar position, see Yuval Shany, Capacities and Inadequacies: A Look at the Two Separation Barrier Cases 38/1-2 Israel Law Review (2005) 230.
(a) A return to "first generation" jurisprudence: A more limited understanding of Regulation 43, along the lines established in Jamayit Iscan (with the additional acknowledgement of the power of the Military Commander to adopt measures strictly necessary to curb all security threats originating in the occupied territory – including threats directed against the Occupying Power’s own territory). While such an approach would lead in long-term occupation situations to a considerable erosion of the pro-status quo bias of the laws of occupation, it still limits the scope of interest-holders in a way that reflects the unique status of the local population (that qualifies under the Fourth Geneva Convention for “protected persons” status).

(b) A restructuring of the discretion exercised by the Military Commander in a manner that will reflect the legal status of the various groups subject to its jurisdiction. Under this approach, the commander will be required to distinguish between the interests of “protected persons” and those of other individuals found within its territory, but not similarly protected by international law. So, while the interests of less-protected individuals and groups may justify a change in the status quo, only interests of an overwhelming nature, which cannot be otherwise protected, would justify a change entailing an encroachment upon the rights and interests of “protected persons”.

The upshot of this analysis may be that this note is not opposed to the continued use of Route 443 by Israelis, as we see nothing in the laws of occupation nor in the Supreme Court's jurisprudence that bars the temporary movement of nationals of the Occupying Power in and out of the occupied territory. On the other hand, it cannot countenance such utilization (other than for strict security reasons), if it implies a significant restriction of the ability of Palestinians to travel on the road. In other words, the proper act of balancing, manifested in the application of the principle of proportionality, ought not to be portrayed as between Israelis’ right to life and Palestinians’ freedom of movements, as suggested by the Court, but rather between the two populations’ right to use a Route situated in the Occupied Territories. Under the laws of occupation law, the rights and interests of the “protected persons” in this case and in others should be given the “right of way”.

E. Summary and Conclusions

The Israeli Supreme Court’s Judgment in Abu Safiya represents yet another expansion of the ratione personae scope of discretion of the Military Commander in the Occupied Territories under Regulation 43 of the Hague Regulations and a concomitant erosion of the rights and interests of the local Palestinian population: By affirming the duty of the Military Commander to protect Israeli commuters traveling on Route 443, the Court has embraced in the course of applying the principle of proportionality, a method of horizontal balancing between the rights and interests of such commuters and those of the local Palestinians. Such an act of balancing which de-constructs the principle of proportionality from thje legal and socio-political environment in which it is embedded, may, most likely, result in some restrictions on Palestinian movement on Route 443 designed to accommodate the security of the Israeli commuters. Arguably, this outcome stands in tension with the preferential “protected persons” status of the Palestinian population under the laws of belligerent occupation.  

\[130\] See also Gross (n.71) 16.
Although the Court’s Judgment constitutes a considerable improvement on the pre-existing situation on the ground, as the original travel ban issued by the Military Commander which indefinitely barred all Palestinians from traveling on Route 443 involved an improper act of vertical balancing between the rights and interests relevant populations (prioritizing the interests of Israeli commuters over Palestinian residents), one must still be concerned about the long-term implications of the Court’s approach. The increasingly broad reading of Regulation 43 embraced by the Supreme Court has created a zone of normative indeterminacy in which an open-ended list of factors and constituency interests ought to be balanced against one another. Under institutional conditions in which the interests of the local population of the Occupied Territories are non-represented in instruments of government, such a complex legal construction invites tendentious application and ineffective monitoring. The Court should reconsider its tendency to gradually expand the scope of Regulation 43, or in the alternative, develop clearer criteria for conducting acts of balancing rights and interests under Regulation 43, which meaningfully distinguish between the levels of protection the laws of belligerent occupation confer upon different interest and stakeholders present in the occupied area with a view to restoring the preferential status granted by the laws of belligerent occupation to the "Protected Persons". The re-contextualization of the principle of proportionality is thus called for.