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**REVIEW OF THE APPLICABILITY OF
INTERNATIONAL HUMANITARIAN LAW TO
THE OCCUPIED PALESTINIAN TERRITORY**

POLICY BRIEF



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This brief examines the question of whether the Hague Regulations and the Fourth Geneva Convention are applicable to the Gaza Strip, the West Bank and East Jerusalem. It outlines the debate over the applicability of these instruments, sets forth the relevant provisions, and reviews the positions of the different parties involved on these issues. Following the practice of the United Nations (UN), this policy brief will refer to the Gaza Strip, the West Bank and East Jerusalem as the “Occupied Palestinian Territory” (OPT).¹

IHL comprises several conventional legal instruments, including the four Geneva Conventions of 1949 and their Additional Protocols of 1977. It also includes a number of customary norms based on the universal acceptance of conventional rules such as those contained in the Hague Regulations of 1907 pertaining to the conduct of hostilities (see [Applicable IHL Instruments](#)). The most comprehensive set of rules relating to occupation is found in the Fourth Geneva Convention of 1949. These rules impose specific obligations – in terms of the treatment of civilian persons, assets and territory – on the parties to an armed conflict.

The Convention enters into force as soon as the conditions for its applicability have been fulfilled (conditions which will be discussed in detail below). No particular decision or determination by an external authority is required for the Convention to enter into force. For various reasons, though, parties to armed conflicts often dispute whether the conditions for the applicability of IHL have in fact been met. The applicability of IHL to the OPT is a case in point.

It should be noted that Israel’s objection to the applicability of the Fourth Geneva Convention to territories it occupies is far from unique. The majority of occupying powers since 1949 have contested, at least in part, the applicability of the law of occupation in the territories they occupied, such as in the case of Iraq in Kuwait (1990), Russia in Afghanistan (1979-1989), Indonesia in East Timor (1975-1999) and the U.S. in Granada (1983) and Panama (1989). One reason for this opposition is that occupying powers often fear that acquiescing to the applicability of the law of occupation to territories under their control may have implications beyond the protection of the occupied population.

The applicability of the Geneva Conventions of 1949 to the territories occupied by Israel in the 1967 war has been at the center of a bitter debate for more than 30 years. Although no interested party claims that IHL as a whole is inapplicable to the OPT, Israel has consistently argued against the applicability of the [Fourth Geneva Convention](#)² to the territories it has occupied since 1967, including the Gaza Strip, the West Bank (referred to by the Israeli government as “Judea and Samaria”), and East Jerusalem (which – unlike the rest of the OPT – Israel progressively annexed after 1967). At different times, Israel has occupied other territory in the region, including the Sinai Peninsula and southern Lebanon, and it continues to occupy the Golan Heights. Though these occupations have triggered similar legal debates, this brief will be limited to the Occupied Palestinian Territory.

This brief will review first the legal position of the Israeli Government that the Fourth Geneva Convention is not applicable *de jure* (i.e. as a matter of law) to the OPT, including the specific perspective of the Israeli High Court of Justice. The brief will then review the arguments made by other State Parties to the Geneva Conventions and various UN bodies (including the General Assembly and the Security Council), as well as the [International Committee of the Red Cross](#) (ICRC), arguing for the applicability of the Fourth Geneva Convention to the OPT. This policy brief will also examine issues specific to East Jerusalem

Finally, this policy brief will review the present legal situation under the “[Oslo Peace Process](#),” particularly the conclusion of a series of agreements between Israel and the Palestine Liberation Organization (PLO) on the establishment of a Palestinian Interim Authority. Arguably, the signing of these agreements substantially modified Israel’s responsibility for the situation in the OPT, and therefore also possibly the question of the applicability of IHL in that context. Issues specific to the Oslo Peace Process, as well as the current *intifada*, will be dealt with at the end of this policy brief.

Israeli Arguments Against the *de jure* Applicability of the Fourth Geneva Convention

The Legal Position of the Israeli Government

Several interlinked arguments are invoked by Israel to claim that the Geneva Conventions, and in particular the [Fourth Geneva Convention](#), are inapplicable *de jure* in the OPT.

The central argument has to do with the status of the territories *before* they were occupied in 1967, when the Gaza Strip was occupied by Egypt and the West Bank by Jordan.³ The starting point of this argument is that the [Fourth Geneva Convention](#) does not apply to all occupations,⁴ and that a careful reading of common [Article 2](#) (which appears in all four of the Geneva Conventions) would leave the situation in the OPT outside the scope of its application. According to this argument, the first two paragraphs of common Article 2 (see insert) must be read separately (as opposed to cumulatively), with the result that the Geneva Conventions apply under paragraph 1 to armed conflicts in general, with the exception of situations of occupation. Under paragraph 2, the Conventions also apply to situations of occupation, but only when the territory occupied is that of another High Contracting Party.

Excerpt of Article 2 of the Fourth Geneva Convention:

Paragraph 1:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war

is not recognized by one of them.

Paragraph 2:

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The result of the Israeli interpretation is that the Geneva Conventions, in particular the Fourth Geneva Convention and its rules pertaining to occupations, do not apply to occupations where the occupied territory does not belong to a High Contracting Party.⁵ As far as the OPT is concerned, Israel states that the Gaza Strip and the West Bank (including East Jerusalem) did not belong to a High Contracting Party at the time Israel assumed control.⁶ According to the Israeli argument, Egypt and Jordan merely occupied these territories as a result of the 1948 war, before which the territories were under the British Mandate for the League of Nations. Consequently, Egypt and Jordan did not have actual sovereignty over these areas from 1948-1967, and so Israel did not oust a sovereign power when occupying the OPT.

Under the Israeli interpretation of Article 2, ouster of a sovereign power is a condition for the applicability of the Fourth Geneva Convention to civilians in occupied territories, insofar as “occupation” is a transitory state ending with the return of the occupied land to the legitimate sovereign. In other words, the full application of the Fourth Geneva Convention is premised on the legitimacy of the *status quo ante*. In the case of the OPT, Israel argues that there are no legitimate sovereigns to whom it could return the territory. Israel therefore does not see itself as an Occupying Power in terms of the Fourth Geneva Convention.⁷ The government’s position is that “Judea, Samaria and Gaza” have a status *sui generis* (i.e. beyond the law as neither part of Israeli territory, nor formally occupied territory). This position has been termed the “missing sovereign” or the “missing revisioner” argument.

Interestingly, the Israeli objection to the *de jure* application of the Fourth Geneva Convention to the OPT did not preclude the Israeli Administration in the OPT from *de facto* applying parts of the Fourth Geneva Convention – Israel has stated that it will apply what it considers the “humanitarian provisions” of the Convention.⁸ No list has ever been given of what provisions are so included. In this context, the Supreme Court has in several instances reviewed actions of the Military Administration in the OPT on the basis of substantive provisions of the Fourth Geneva Convention.⁹ *De facto* application means also *de facto* cooperation with the International Committee of the Red Cross (ICRC), outside of the legal rights and duties created by the Fourth Geneva Convention¹⁰ between the ICRC and the Occupying Power.¹¹ The ICRC has been allowed access to the civilian population in and from the OPT, particularly in places of detention, and has been able to deploy its protection and assistance activities in favor of this population for over 36 years.

The Position of the Supreme Court of Israel

The denial of the applicability of the Fourth Geneva Convention has inherently created a legal void. Interestingly, the position of the executive branch of the Israeli government has been put under increasing pressure by the Israeli judicial establishment. Israeli judges have become increasingly uneasy regarding what Israel considers the *sui generis* character of the legal status of the Israeli presence in the OPT, which creates the potential for arbitrariness and potential abuses of executive authority.¹²

To ensure minimum cohesion and limit the discretionary power of the Israeli Administration in the OPT, the Supreme Court of Israel (sitting in those cases as the “High Court of Justice”) views the Israeli government in the territories as bound by the customary “Laws of War”. According to the Court, the disputed issue of sovereignty does not preclude the authorities from being bound by the customary laws of war, which are applicable as long as Israel is effectively in control of the OPT.¹³ The Court determines the existence of customary law, which may find its origin in written norms. The Court views the [Hague Regulations](#) annexed to the Fourth Hague Convention of 1907,¹⁴ as well as certain provisions of the Geneva Conventions,¹⁵ as representing customary international law. Most recently, the Supreme Court of Israel, in a [judgment](#) dated 30 May 2004, found that: “The military operations of the [Israeli Defence Forces] in Rafah, to the extent that they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907...and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.”

In the Court’s perspective, the Geneva Conventions are not as a whole reflective of customary law (in the same way the Hague Regulations are). They can be enforced only partially on the basis of the customary nature of certain provisions.¹⁶ For instance, the Court has held that [Article 49](#) (on deportations, transfer, and evacuations)—at least to the degree it prohibited individual deportations of persons who constitute a security threat—was inapplicable to the OPT because it did not express customary international law.¹⁷ On the other hand, the Court has held that [Article 23](#) (on free passage of humanitarian consignments), [Article 64](#) (on penal legislation), and [Article 78](#) (on security measures and internment) were applicable to the OPT,¹⁸ as well as generally all provisions of the Fourth Geneva Convention relating to detention.¹⁹

To summarize – the Israeli denial of the applicability of the Fourth Geneva Convention is based on its interpretation of Article 2, common to the Four Geneva Conventions. Israel argues that the Geneva Conventions are not formally applicable to the OPT since sovereignty over the territories occupied in 1967 was disputed at the time Israel assumed control. This legal position did not prevent the Israeli Administration in the OPT from applying *de facto* selected provisions of the Fourth Geneva Convention. The High Court of Justice has granted a customary character to certain provisions of the Fourth Geneva Convention.

Arguments Supporting the Applicability of the Fourth Geneva Convention as a Whole to the OPT

There seems to exist a very broad international consensus rejecting the Israeli argument and supporting the applicability of the Fourth Geneva Convention to the OPT. The position of all other State Parties to the Geneva Conventions,²⁰ the various UN bodies (General Assembly,²¹ Security Council,²² Economic and Social Council,²³ Commission on Human Rights²⁴), the International Committee of the Red Cross (ICRC),²⁵ as well as international Non-Governmental Organizations,²⁶ is that the Geneva Conventions are applicable *de jure* to the OPT.

Further, a Conference of High Contracting Parties to the Fourth Geneva Convention, held in 2001, issued a Declaration stating: “The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem.”²⁷ This is also the position defended by the Palestine Liberation Organization.²⁸

The International Court of Justice in its [decision](#) of July 9, 2004, encapsulated this general view by noting the applicability of the Fourth Geneva Convention to the OPT.

Para 101:...[T]he Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

The following section reviews the various legal arguments regarding the applicability of the Fourth Geneva Convention to the OPT.

The Critique of the Israeli Legal Position

Israel’s interpretation of Article 2 of the Fourth Geneva Convention has been criticized on the grounds that there is no clear and authoritative basis for reading the first two paragraphs in isolation from one another.²⁹ In particular, there is no evidence that the drafters of the Geneva Conventions intended to limit the applicability of the Geneva Conventions to occupied territories formally belonging to a High Contracting Party. The counter-argument to the Israeli interpretation is that, without any indication to do otherwise, Article 2 must be read as a whole. Paragraph 1 of Article 2 ensures that the Conventions apply to all situations of international armed conflict, including occupations resulting from direct hostilities (regardless of the legitimacy of any claims over the occupied territories), whereas paragraph 2 should be read as simply covering occupations

not resulting from an armed conflict (*i.e.* according to paragraph 2, “even if the occupation meets with no armed resistance”).³⁰

Moreover, the Israeli interpretation implies that the four Geneva Conventions would only apply to occupied territories for which sovereignty could not be disputed. Under this interpretation, the population of any disputed territory would be left unprotected in front of invading and occupying forces. Knowing that invading armies throughout history have frequently challenged the sovereignty of the territories they conquer, it is unlikely that the drafters of the Conventions would have intended to create such a loophole, especially as the Conventions are meant to be respected “*in all circumstances*” ([Common Article 1](#)). Further, the Israeli interpretation would defeat the purpose of the Fourth Geneva Convention, which is aimed principally at the protection of the civilian population and not the rights of the displaced power.³¹ According to this argument, the Israeli interpretation of Article 2 is therefore incorrect – the application of the Fourth Geneva Convention does not depend on whether Jordan or Egypt possessed valid titles to sovereignty over the West Bank or Gaza, respectively.³²

Furthermore, all participants in the 1967 war were High Contracting Parties to the Fourth Geneva Convention.³³ Once Israel occupied *de facto* the OPT as a result of the war, the threshold conditions for the application of the Fourth Geneva Convention were met, and it became an “Occupying Power”.³⁴ Moreover, Israel did not formally apply the Fourth Geneva Convention either in the Golan Heights or the Sinai Peninsula, two territories whose legitimate sovereign could not be challenged in the same way as Israel does in the case of the OPT.³⁵

Finally, the Israeli High Court of Justice’s acceptance of the application of the Hague regulations to the OPT leads to a potential contradiction, as the application of the Hague Regulations of 1907 seems clearly dependent, according to [Article 43](#), on “*the authority of the legitimate power having in fact passed into the hands of the occupant.*” (see insert).³⁶

Article 43 of the Annex to the Fourth Hague Conventions

Article 43: The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Insofar as Israel argues that Egypt and Jordan did not have sovereignty over the Gaza Strip and the West Bank, respectively, between 1948 and 1967 (the same argument used to deny the applicability of the Geneva Convention), it would seem illogical for the Israeli High Court not to reject the applicability of the Hague Regulations in the OPT as well. This contradiction has been widely explored by Israeli legal scholars and to some extent acknowledged by the Israeli Court.³⁷

Applicability of the Fourth Geneva Convention Based on the Right of Self-Determination of the Palestinian People as Recognized by the United Nations

It has also been noted by some scholars that the preceding arguments exclude from the debate the weight that international law may give to the relationship that the *Palestinian people* have to the land under occupation. An argument can be made that one should not ignore the internationally recognized status of the Palestinian people, as it might have a bearing on the question of whether IHL applies to the OPT. This argument is based upon the international community's recognition of the Palestinians' right to self-determination.

The principle of self-determination is enshrined in the [United Nations Charter](#), and is recognized as part of customary international law.³⁸ The right of peoples to self-determination has been recognized by the UN General Assembly in a number of general declarative resolutions,³⁹ and recognized more concretely in the particular case of the Palestinian people.⁴⁰ Initially framed as a right applicable to peoples under "alien subjugation, domination and exploitation,"⁴¹ whose struggle the General Assembly progressively asserted as legitimate,⁴² the terminology changed both to speak of "peoples under colonial rule, foreign domination and alien subjugation",⁴³ and to assert not only the legitimacy of the struggle but its character as an international armed conflict subject to the rules of the Geneva Conventions.⁴⁴ The notion that wars of national liberation are international armed conflicts to which the Geneva Conventions are potentially applicable was crystallized in [Article 1\(4\)](#) of Additional Protocol I of 1977.⁴⁵ It can therefore be argued that the Palestinians are waging a legitimate war of national liberation, and consequently that the current conflict in the OPT is an international armed conflict to which the Geneva Conventions are applicable.

It should be noted, however, that Israel questions the notion that the struggle of the Palestinian people is the type of situation targeted by the expressions "foreign rule" and "alien subjugation," and whether the change in the legal status of colonial wars of independence covers the *sui generis* struggle of the Palestinian people in the occupied territories.⁴⁶ Furthermore, Article 1(4) of Additional Protocol I is not applicable to Israel, since it has not ratified the Protocol. Though there is some room to assert that the application of the Geneva Conventions to wars of national liberation has become a customary norm, there would also be room in that case to assert that Israel is a "persistent objector" and therefore not bound by this customary norm, since it has consistently voted against the recognition of wars of national liberation as international armed conflicts in the General Assembly.⁴⁷

Application of IHL to East Jerusalem

In 1967, the Knesset passed the Law and Administration Ordinance (Amendment No. 11), which extended Israeli jurisdiction over East Jerusalem. At the time, Abba Eban, the Minister of Foreign Affairs, informed the UN Secretary General that this did not constitute annexation, but only administrative and municipal integration.⁴⁸ Subsequent Israeli Supreme Court decisions mentioned that East Jerusalem was in fact a part of the

State of Israel,⁴⁹ and in 1980 the Knesset passed the [Basic Law: Jerusalem Capital of Israel](#), stating that “Jerusalem, complete and united, is the capital of Israel.”

The international community has viewed the extension of Israeli jurisdiction over East Jerusalem as illegal under international law. For instance, the UN Security Council has condemned legislative and administrative actions taken by Israel which tend to change the legal status of Jerusalem.⁵⁰ United Nations Resolutions generally speak of the “Occupied Palestinian Territory, including East Jerusalem.”⁵¹

It is important to note that under [Article 47](#) of the Fourth Geneva Convention, unilateral annexation – whereby the Occupying Power acquires all or part of a territory and incorporates it in its own territory without an authorizing peace agreement (or another valid form of acquisition of title over territory) – cannot deprive protected persons from the protections offered by IHL.⁵² Israel has not, to date, made similar claims of sovereignty with regard to other parts of the West Bank and Gaza Strip.

The IHL Implications of the Oslo Agreements and the Recent *Intifada*

IHL Implications of the Oslo Agreements

Although it is unclear to what extent the Agreements are still in force, due to the evolution of the conflict since the Fall of 2000, the Oslo process has had a undeniable impact on the debate surrounding the applicability of IHL to the OPT.⁵³ The [Oslo Agreements](#) potentially affected the legal situation as far as IHL is concerned for three main reasons:

- They established the Palestinian Authority (PA) as a legitimate administrative authority in the OPT,⁵⁴ with security and police powers;⁵⁵
- They segmented the OPT into three relevant “areas” – areas A, B, and C – with varying degrees of PA control (A being zones of full control, C zones of no control at all, and B zones of shared control with the Israeli Administration);⁵⁶
- They crystallized the mutual recognition of the PLO as the representative of the Palestinian people, and Israel as a legitimate State.⁵⁷

There is a spectrum of opinion on the issue of how the Oslo Agreements affected the applicability of the law of occupation to the OPT. Some have stated that the Fourth Geneva Convention and the Hague Regulations applied in area C, but not in areas A and B, due to the fact that the PA maintained substantial control over them even though Israel kept ultimate security control.⁵⁸ Others have argued that the law of occupation still applied to the whole of the OPT, including areas A, B, and C, as well as Jerusalem.⁵⁹

The argument for a waning application of the law of occupation is based on [Article 6](#) of the Fourth Geneva Convention and [Article 42](#) of the Hague Regulations.⁶⁰ Article 6 of the Fourth Geneva Convention emphasizes the binding nature of the Convention on the

Occupying Power “for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory.” Article 42 of the Hague Regulations emphasizes that a “territory is considered occupied when it is actually placed under the authority of the hostile army” and that “the occupation extends only to the territory where such authority has been established and can be exercised.” According to this argument, “actual control” is what triggers the application of the Convention, and so theoretically areas A and B could not properly be called “occupied territories” due to the lack of actual Israeli control, at least as anticipated under the Oslo process.

On the other hand, the position that the law of occupation is fully applicable in conjunction with the Oslo Agreement stresses the fact that the actual end of the occupation will happen when all powers will have been surrendered by Israel over the whole of the OPT, including area A (where Israel still maintains ultimate security jurisdiction⁶¹), and when Israel will not hold even any theoretical control over the OPT.⁶²

Finally, some argue that the Fourth Geneva Convention has precedence over the Oslo Agreements on the basis of [Article 47](#) of the Convention. According to Article 47, an agreement between representatives of the occupied territory and the Occupying Power cannot affect the protections provided by the Convention to protected persons,⁶³ and thus the Convention would have preeminence over the Oslo Agreements.⁶⁴

In short, the transfer of authority from Israel to the PA under the Oslo Process, and the correlative restrictions upon Israeli intervention in PA-controlled areas, may have reduced, *but did not extinguish*, the scope of Israel’s obligations under the laws of occupation.

The IHL Implications of the Recent Intifada

The various failures of the Oslo process and the ensuing re-emergence of hostile activities in the OPT, including increasing military incursions and control by Israeli Defence Forces (IDF), underscore a possible progressive regression to the legal status prior to the Oslo process.

These incursions, especially into Areas A and B, represent renewed Israeli control over these areas. Although the IDF’s operations are now usually termed “incursions,” they consist of temporary security and administrative control similar to the powers exercised by an occupying military authority (such as the imposition of curfews).⁶⁵ Therefore, these incursions arguably trigger the application of IHL, regardless of whether IHL was applicable to areas A and B during the Oslo process.⁶⁵

Final Observations and Conclusions

The purpose of this brief was to review the key aspects of the debate related to the applicability of the Fourth Geneva Convention to the OPT. Several points need to be underlined:

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1. Although Israel has consistently rejected the formal applicability of the Fourth Geneva Convention, it has referred extensively to some of its provisions to validate the conduct of its administration in the OPT, particularly in terms of security and detention. It is also important to note that Israel has accepted the formal applicability of the Hague Regulations.
 2. The Israeli Supreme Court has played an increasing role over recent years in reviewing the conduct of the Israeli government in the OPT, referring as well to provisions of the Fourth Geneva Convention.
 3. Israeli arguments rejecting the applicability of the Fourth Geneva Convention are opposed by the other High Contracting Parties, the ICRC and the United Nations.
 4. The Oslo Agreements have had an important impact on the debate regarding the applicability of IHL to the OPT. However, the impact is subject to the implementation of the Agreements, which is in doubt since the re-emergence of hostilities.

Notes

¹ See, e.g., G.A. Res. ES-10/6, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/ES-10/6 (1999). See also IMSEIS, Ardi, "On the Fourth Geneva Convention and the Occupied Palestinian Territory", 44 *Harvard International Law Journal*, p. 67, FN 20.

² [Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949](#), *United Nations Treaty Series*, Vol. 75, p. 287. The four Geneva Conventions will be referred to hereinafter as [the First, the Second, the Third and the Fourth Geneva Conventions](#).

³ The argument has been summarized and repeated in many places: See COHEN, Esther Rosalind, *Human Rights in the Israeli-Occupied Territories, 1967-1982*, Manchester: Manchester University Press (1985), pp. 43-51; MALLISON, W. Thomas & Sally V. MALLISON, *The Palestine Problem in International Law and World Order*, Essex: Longman (1986), pp. 252-262; FALK, Richard & Burns H. WESTON, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Oxford: Clarendon Press (1992), pp. 130-136; BISHARAT, Carol, "Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza", *Hastings International and Comparative Law Review*, Vol. 12 (1988-1989), pp. 337-340; CAVANAUGH, Kathleen, "Selective Justice: The Case of Israel and the Occupied Territories", *Fordham International Law Journal*, Vol. 26 (2002-2003), pp. 944-945; IMSEIS, Ardi, "On the Fourth Geneva Convention and the Occupied Palestinian Territory", *Harvard International Law Journal*, Vol. 44 (2003), pp. 93-95.

⁴ SHAMGAR, Meir, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage", in SHAMGAR, Meir, *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects*, Jerusalem: Hebrew University, Harry Sacher Institute for Legislature Research and Comparative Law (1982), p. 32.

⁵ SHAMGAR, *supra* note 4, pp. 38-40.

⁶ BENVENISTI, Eyal, *The International Law of Occupation*, Princeton University Press, Princeton, NJ, 1993, p.108. The Gaza Strip was under Egyptian military administration from 1948 until 1967, but Egypt never claimed title to the area, nor did it attempt to annex it. Jordan did purport to annex the West Bank in 1950, but this

annexation was “widely regarded as illegal and void, by the Arab League and others, and was recognized only by Britain, Iraq, and Pakistan.”

⁷ In the words of Professor Yehuda Blum, “I would, therefore, conclude by saying that Israel cannot be considered as an occupying power within the meaning given to this term in international law in any part of the former Palestine mandate, including Judea and Samaria”. See UNITED STATES SENATE, *The Colonization of the West Bank Territories by Israel*, Hearings before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, Ninety-Fifth Congress, First Session on “The Question of the West Bank Settlements and the Treatment of Arabs in the Israeli-Occupied Territories, October 17 & 18, 1977, Testimony by Professor Yehuda Blum, Washington DC: U.S. Government Printing Office (1978), p. 35. See also the same argument and conclusions in SHAMGAR, Meir, “The Observance of International Law in the Administered Territories”, in *Israel Yearbook of Human Rights* vol I, pp. 263-4. It is important to note that the Israeli position has not always been constant. In June 1967, the Israeli military administration in the West Bank issued Military Proclamation #3, stating that “the military court and its officers must apply the provisions of the Geneva Convention of 13 August 1949 Relative to the Protection of Civilians in times of War. If there is any contradiction between the convention and the provisions of the Military Order the provisions of the Convention should prevail.” The portion of this Proclamation relating to the Geneva Convention was deleted in October 1967, after which the Israeli government no longer recognized the *de jure* applicability of the Fourth Geneva Convention.

⁸ SHAMGAR, *supra* note 7, p. 266: “The territorial position is thus sui generis, and the Israeli government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Geneva Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act *de facto*, in accordance with the humanitarian provisions of the Convention.”

⁹ QUPTY, Mazen, “The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel” in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Oxford: Clarendon Press (1992), p. 104.

¹⁰ In particular Art. 143 of the Fourth Geneva Convention. See also *Ajuri v. IDF Commander in West Bank*, H.C.J. 7015/02, 3 September 2002 [available on the website of the Supreme Court of Israel, at <<http://62.90.71.124/eng/verdict/framesetSrch.html>>].

¹¹ See e.g. ICRC, *Annual Report 2002*, Geneva: ICRC (2003), pp. 301-308. (available on the ICRC website at <[http://www.icrc.org/Web/Eng/siteeng0.nsf/0/4538B1E3F1B86D95C1256D430032B1FB/\\$File/icrc_ar_02_israel.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/0/4538B1E3F1B86D95C1256D430032B1FB/$File/icrc_ar_02_israel.pdf?OpenElement)>].

¹² See generally *Abd al Nasser al Aziz v. Commander of IDF Forces*, H.C.J. 785/87, 10 April 1987 [available on the website of the Supreme Court of Israel, at <<http://62.90.71.124/eng/verdict/framesetSrch.html>>].

¹³ See in particular *Leah Tsemel, Attorney, et al. vs. the Minister of Defence and others*, H.C.J. 593/82, 13 July 1983, reprinted in *Palestine Yearbook of International Law*, Vol. I (1984), pp. 164-174, esp. p. 168. See also *Bassil Abu Aita v. The Regional Commander of Judea and Samaria*, H.C.J. 69/81, 4 April 1983, §10 [available on the website of the Supreme Court of Israel, at <<http://62.90.71.124/eng/verdict/framesetSrch.html>>].

¹⁴ The Court first adopted the position that the military authorities in “Judea and Samaria” were bound by the Hague Regulations in 1972. See QUPTY, *supra* note 9, p. 88.

¹⁵ The proposition is most clearly stated in the “Beit-El case”, see *Suleyman Tawfiq Oyyeb and others v. The Minister of Defence and others*, H.C.J. 606, 610/78, 15 March 1979, reprinted in *Palestine Yearbook of International Law*, Vol. II (1985), pp. 134-150, esp. pp. 141-142; See *Bassil Abu Aita v. The Regional Commander of Judea and Samaria*, *supra* note 13, at §10 & 11 [available on the website of the Supreme Court of Israel, at <<http://62.90.71.124/eng/verdict/framesetSrch.html>>].

¹⁶ See generally KRETZMER, David, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Albany: SUNY Press (2002).

¹⁷ See *Abd al Nasser al Aziz v. Commander of IDF Forces*, *supra* note 12 at §§4 & 5.

¹⁸ See e.g. *Almandi v. Minister of Defence*, H.C.J. 3451/02, 2 May 2002; *Ajuri v. IDF Commander in West Bank*, *supra* note 10; *The Association for Civil Rights in Israel v. The Central District Commander*, H.C.J. 358/88, 30 July 1989 [available on the website of the Supreme Court of Israel, at <<http://62.90.71.124/eng/verdict/framesetSrch.html>>].

¹⁹ See generally *Center for the Defence of the Individual v. IDF Commander*, H.C.J. 3278/02, 18 December 2002; See also *Yassin v. Commander of Kziot Military Camp*, H.C.J. 5591/02, 18 December 2002, where the Court interprets Art. 85 of the Convention, contesting the ICRC’s official understanding of the Article as given in Pictet’s

Commentaries [available on the website of the Supreme Court of Israel, at

<<http://62.90.71.124/eng/verdict/framesetSrch.html>>]. See generally KRETZMER, David, *supra* note 16.

²⁰ See e.g. *Report of the Secretary-General Submitted in Accordance with General Assembly Resolution ES-10/2*, UN Doc. A/ES-10/6, S/1997/494, 26 June 1997, at §21, p. 7.

²¹ See e.g. General Assembly Resolutions 36/15 of 3 November 1981, 36/226 of 17 December 1981, 36/120 of 10 December 1981, 36/173 of 17 December 1981, 36/150 of 16 December 1981, 36/147 of 16 December 1981, 37/123 of 16 December 1982, 37/88 of 10 December 1982, 37/120 of 16 December 1982, 37/122 of 16 December 1982, 37/135 of 17 December 1982, 39/101 of 14 December 1984, 39/99 of 14 December 1984, 39/146 of 14 December 1984, 40/161 of 16 December 1985, 41/162 of 5 December 1986, 41/69 of 3 December 1986, 41/63 of 3 December 1986, 43/21 of 3 November 1988, 43/54 of 6 December 1988, 43/58 of 6 December 1988, 43/57 of 6 December 1988, 44/2 of 6 October 1989, 44/40 of 4 December 1989, 44/47 of 8 December 1989, 44/48 of 8 December 1989, 45/83 of 13 December 1990, 46/46 of 9 December 1991, 46/199 of 20 December 1991, 46/76 of 11 December 1991, 46/82 of 16 December 1991, 47/69 of 14 December 1992, 47/70 of 14 December 1992, 47/172 of 22 December 1992, 47/170 of 22 December 1992, 47/64 of 11 December 1992, 47/63 of 11 December 1992, 48/59 of 14 December 1993, 48/40 of 10 December 1993, 48/41 of 10 December 1993, 48/212 of 21 December 1993, 49/36 of 9 December 1994, 49/35 of 9 December 1994, 50/22 of 4 December 1995, 50/29 of 6 December 1995, 50/129 of 20 December 1995, 50/22 C of 4 December 1995, 51/128 of 13 December 1996, 51/131 of 13 December 1996, 51/132 of 13 December 1996, 51/133 of 13 December 1996, 51/190 of 16 December 1996, 51/223 of 13 March 1997, ES-10/2 of 25 April 1997, ES-10/3 of 15 July 1997, 52/65 of 20 February 1998, 52/66 of 20 February 1998, 53/54 of 10 February 1999, 54/77 of 22 February 2000, 54/78 of 22 February 2000, 54/79 of 22 February 2000, 54/80 of 22 February 2000, 55/131 of 28 February 2001, 56/56 of 14 February 2002, 56/62 of 14 February 2002, 56/59 of 14 February 2002, 56/60 of 14 February 2002, 56/61 of 14 February 2002, 56/204 of 21 February 2002, ES-10/10 of 14 May 2002, ES-10/11 of 10 September 2002, 57/188 of 6 February 2003, 57/121 of 24 February 2003, 57/124 of 24 February 2003, 57/125 of 24 February 2003, 57/126 of 24 February 2003, 57/127 of 24 February 2003, and 57/269 of 5 March 2003.

²² See e.g. Security Council Resolutions 452 of 20 July 1979, 465 of 1 March 1980, 468 of 8 May 1980, 469 of 20 May 1980, 471 of 5 June 1980, 476 of 30 June 1980, 478 of 20 August 1980, 484 of 19 December 1980, 497 of 17 December 1981, 592 of 8 December 1986, 605 of 22 December 1987, 607 of 5 January 1988, 636 of 6 July 1989, 641 of 30 August 1989, 672 of 12 October 1990, 681 of 20 December 1990, 694 of 24 May 1991, 726 of 6 January 1992, 799 of 18 December 1992, and 904 of 18 March 1994.

²³ See e.g. Economic and Social Council Resolutions 1988/25 of 26 May 1988, 1989/34 of 24 June 1989, 1991/19 of 30 May 1991, 1992/57 of 31 July 1992, 1992/16 of 30 July 1992, 1993/15 of 27 July 1993, 1997/67 of 28 July 1997, 1998/10 of 27 July 1998, 2001/2 of 23 August 2001, 2002/25 of 13 August 2002.

²⁴ See Resolutions by the Commission on Human Rights: 1993/2 of 19 February 1993, 1996/3 of 11 April 1996, 1997/1 of 26 March 1997, 1997/3 of 26 March 1997, 1998/1 of 27 March 1998, 1998/3 of 27 March 1998, 1999/5 of 23 April 1999, 1999/7 of 23 April 1999, 2000/8 of 17 April 2000, 2000/7 of 17 April 2000, S-5/1 of 19 October 2000, 2001/7 of 18 April 2001, 2001/8 of 18 April 2001, 2001/6 of 18 April 2001, 2002/7 of 12 April 2002, 2002/8 of 15 April 2002, 2002/90 of 26 April 2002, 2003/6 of 15 April 2003, 2003/7 of 15 April 2003. See also Resolutions by the Sub-commission on Human Rights 1996/6 of 20 August 1996, 1995/9 of 18 August 1995, and 1993/15 of 20 August 1993.

²⁵ See e.g. the official Statement of the ICRC on 5 December 2001, on the occasion of the Conference of High Contracting Parties to the Fourth Geneva Convention. [available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/64EF7FE0FC58B5EBC1256B660060BCF0>>]

²⁶ See e.g. AMNESTY INTERNATIONAL, *Israel and the Occupied Territories: The Issue of Settlements Must Be Addressed According to International Law*, Press Release, AI Doc. MDE 15/085/2003, 8 September 2003 available at <<http://web.amnesty.org/library/Index/ENGMDE150852003?open&of=ENG-ISR>>; HUMAN RIGHTS WATCH, *Center of the Storm: A Case Study of Human Rights Abuses in the Hebron District*, 11 April 2003, pp. 14-15 available at: <<http://www.hrw.org/reports/2001/israel/hebron-v2.pdf>>

²⁷ Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001, paragraph 1, available at <http://domino.un.org/unispal.nsf/0/8fc4f064b9be5bad85256c1400722951?OpenDocument>. Israel did not attend this Conference.

²⁸ See e.g. the position paper prepared by the Palestinian side for the Conference of the High Contracting Parties to the Fourth Geneva Convention, of 15 July 1999, available at <<http://www.palestine-un.org/tenth/frindex.html>>.

²⁹ ROBERTS, Adam, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", *American Journal of International Law*, Vol. 84 (1990), p. 64.

³⁰ CAVANAUGH, *supra* note 3, p. 945.

³¹ MALLISON & MALLISON (Palestine problem), *supra* note 3, p. 257; UNITED STATES SENATE (testimony of Thomas Mallison), *supra* note 7, p. 51.

³² GREENWOOD, Christopher, "The Administration of Occupied Territory in International Law", in *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, *supra* note 3, p. 243; BISHARAT, *supra* note 3, p. 338; MALLISON, W. Thomas & Sally V. MALLISON, *supra* note 3 pp. 254-255.

³³ BISHARAT, *supra* note 3, pp. 338-339. Egypt signed the Conventions on 08 December 1949, and ratified them on 10 November 1952, Jordan acceded to the Conventions on 29 May 1951, and the Syrian Arab Republic signed them on 12 August 1949, and ratified them on 02 November 1953. See the ICRC online database on IHL treaties at <

<http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=43.1#43.1>>.

³⁴ This much seems to be implied by the Israeli Supreme Court in *Leah Tsemel, Attorney, et al. vs. the Minister of Defence and others*, *supra* note 13.

³⁵ BOYD, Stephen M., "The Application of International Law to Occupied Territories", *Israel Yearbook on Human Rights*, Vol. 1 (1971), pp. 260; UNITED STATES SENATE (testimony of Thomas Mallison), *supra* note 7, 49.

³⁶ Regulations Respecting the Laws and Customs of War on Land, 18 October 1907, Art. 42 & 43, in INTERNATIONAL COMMITTEE OF THE RED CROSS (ed.), *International Law Concerning the Conduct of Hostilities: Collection of Hague Conventions and Some Other Treaties*, Geneva: ICRC (1989), p. 28.

³⁷ Benvenisti, *supra* note 6, p.110-112

³⁸ See generally *Western Sahara*, Advisory opinion of 16 October 1975, ICJ Reports 1975, pp. 12 ff.

³⁹ See especially UN, General Assembly Resolutions 1514 (XV), of 14 December 1960, and Resolution 2625 (XXV), 24 of October 1970.

⁴⁰ UN, General Assembly Resolution 3089 (XXVIII), of 7 December 1973.

⁴¹ UN, General Assembly Resolution 1514 (XV), of 14 December 1960, Art. 1.

⁴² UN, General Assembly Resolution 2105 (XX), of 20 December 1965.

⁴³ UN, General Assembly Resolution 3246 (XXIX) of 29 November 1974.

⁴⁴ UN, General Assembly Resolution 3103 (XXVIII) of 12 December 1973. The resolution in its relevant parts states: "The armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist régimes."

⁴⁵ Art. 1 of Additional Protocol I reads:

Article 1

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

⁴⁶ DAVID, Eric, *Principes de droit des conflits armés*, Bruxelles: Bruylant (2e ed., 1999), p. 153.

⁴⁷ DAVID, *supra* note 46, pp. 157-159.

⁴⁸ See LAPIDOTH, Ruth, "Jerusalem – Some Jurisprudential Aspects", *45 Catholic University Law Review* 661, p. 668.

⁴⁹ MAOZ, Asher, "The Application of Israeli Law to the Golan Heights is Annexation", *20 Brooklyn Journal International Law* 355, 2: "The question arose whether East Jerusalem is 'abroad' with respect to the West Bank, and as such, whether the export of an antique thereto would require a certification of the appropriate authorities. [FN30] Justice Haim Cohn refused to rule on the issue, stating that it was 'not a legal question, but

rather a political one.' Justice Cohn did, however, note that 'the thesis that the application of Israeli law to a particular area, is equivalent to the annexation of the area to the state of Israel, still requires proof.' In the Justice's opinion 'there is . . . nothing to prevent the application of the law of Israel to the occupied territories even in the absence of any intention to annex them to the area of the state. ' [FN31] On the other hand, Justice Yitzak Kahan ruled unequivocally that 'East Jerusalem . . . was annexed to the state of Israel and constitutes part of its area.' [FN32] According to Justice Kahan, this ruling is the consequence of the application *362 of Israeli law to East Jerusalem. He therefore had no doubt that 'the legislative intention was to authorize the government to annex the territories of Palestine to the state of Israel.' [FN33] Justice Kahan's statement echoed opinions voiced by other justices of the Supreme Court in previous cases. [FN34] This decision, however, differs from previous decisions because in this case the characterization of the application of Israeli law as annexation was made by the majority of the justices presiding over the case, while in previous cases the characterization was made by individual justices."

⁵⁰ Security Council Resolution 252, U.N. SCOR, 23d Sess., Resolutions & Decisions at 9, U.N. Doc. S/INF/23/Rev.1 (1968).

⁵¹ See G.A. Res. ES-10/6, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/ES-10/6 (1999); General Assembly Resolution 57/269 of 5 March 2003.

⁵² SASSOLI, Marco & Antoine BOUVIER, *How does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, Geneva (1999), p. 155.

⁵³ See WATSON, Geoffrey R., *The Oslo Accords: International Law and the Israeli-Palestinian Agreements*, Oxford: Oxford University Press (2000), pp. 115-121 (examining whether the suspension of Israeli redeployments envisaged in Oslo II can be analyzed as suspension of an agreement following a breach by the other party, under the international law of treaties, this being a possible legal translation of disagreements over the specifics of redeployment in November of 1999).

⁵⁴ *Declaration of Principles on Interim Self-Government Arrangements*, Art. I, reprinted in SHEHADEH, Raja, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, London: Kluwer Law International (1997), p. 191; *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1993, Art. I reprinted in *ibid*, p. 209.

⁵⁵ *Interim Agreement*, Art. XIV, *supra* note 54, p. 219.

⁵⁶ *Interim Agreement*, Art. XI.3 & XIII, *supra* note 54, pp. 216-217. A general explanation of the jurisdictional division among zones is given in WATSON, *supra* note 53, pp. 105-110.

⁵⁷ *Declaration of Principles*, Preamble, *supra* note 54, p. 191.

⁵⁸ WATSON, *supra* note 53, pp. 175-176.

⁵⁹ AL-HAQ, *A Human Rights Assessment of the Declaration of Principles on Interim Self-Government Arrangements for Palestinians*, Ramallah: Al-Haq (1993), p. 9.

⁶⁰ WATSON, *supra* note 53, p. 176.

⁶¹ *Ibid*, p. 175.

⁶² BENVENISTI, *supra* note 6, p. 548.

⁶³ Art. 47 reads as follows:

“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”

⁶⁴ QUIGLEY, John, “The Israel-PLO Agreements Versus the Geneva Civilians Convention”, *Palestine Yearbook of International Law*, Vol. 7 (1992-1994), p. 61; also UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000, Un Doc. E/CN.4/2001/121, 16 March 2001, at p. 13, §41.

⁶⁵ It should be noted that the idea that the rules of occupation follow the forces of the belligerent Power in its dealings with civilians even outside of the strict limits of the occupied territory, “even when the belligerent is only engaged in an incursion or an invasion not bound up with a prolonged occupation” was adopted by Judge Shamgar (the same who argued against the formal applicability of the Fourth Geneva Convention), in *Leah Tsemel et al. v. Minister of Defence*, *supra* note 13 pp. 164-174, esp. p. 168.

⁶⁵ QUIGLEY, John, “The Israel-PLO Agreements Versus the Geneva Civilians Convention”, *Palestine Yearbook of International Law*, Vol. 7 (1992-1994), pp. 55-61.