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PROLONGED MILITARY OCCUPATION: THE ISRAELI-OCCUPIED TERRITORIES SINCE 1967

By Adam Roberts*

To what extent are international legal rules formally applicable, and practically relevant, to a prolonged military occupation? The question has assumed prominence because of the exceptional duration of the occupation by Israel of various territories that came under its control in the war of June 5–10, 1967. The situation there has had two classic features of a military occupation: first, a formal system of external control by a force whose presence is not sanctioned by international agreement; and second, a conflict of nationality and interest between the inhabitants, on the one hand, and those exercising power over them, on the other. In highlighting these features, the Palestinian uprising, or *intifada*, which began in Gaza and the West Bank in December 1987, has added urgency to the question of the law applicable to prolonged occupations.

There is a simple answer, and a perfectly serious one, to the central question addressed here. Israel has given express commitments over the years to implement the terms of a large number of treaties, and is also, like all states, bound by international customary law. These are solemn obligations. There is no need to engage in the laborious business of seeking to prove that any or every commitment passes an artificial test of “applicability” in a given situation. Rather, the burden of proof lies on an obligated state to show, if it can, that in the actual situation a given commitment does not apply. Hence, it can be asserted, simply but also persuasively, that the Israeli occupation of various territories has been, and continues to be, covered by a wide range of agreements, with which Israel must conform.

This simple answer, though important as a starting point, is not the last word on the subject because of two main considerations, which form the *raison d'être* of this article. First, in a number of statements Israeli spokesmen and courts have suggested that certain international rules were never formally applicable to the occupied territories, or else that their application may be qualified in some ways owing to special circumstances, one being the long duration of the occupation. The validity of these Israeli statements needs to be examined. Second, even if it is accepted that the rules governing occupations should be applied (whether out of formal legal obligation or as a matter of policy), the question remains whether these rules are relevant to the practical problems that arise in a prolonged occupation—and, indeed,

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whether implementation of the rules is likely to serve their underlying purposes. In particular, are the rules a straitjacket that inhibits political, legislative and economic change?

Although the present writer is a specialist in international relations rather than international law, the focus here is on legal issues. There are good reasons for this so far as the Israeli-occupied territories are concerned. First, the very concept of occupation, with its implicit assertion that external military control is temporary, is a triumph of legal thinking. Second, the appeal to general norms and standards has had great practical significance as regards the Israeli occupation: much of the international comment on it, especially within the framework of the United Nations, has emanated from legal as well as other considerations, or at least has been expressed in legal language.

Nevertheless, there are some hazards in discussing burning political issues in legal terms. Other methodologies—those of history and political science, even strategy and arms control—are necessary complements to law, and may be just as likely to assist understanding and to promote solutions. Moreover, while most international lawyers are, quite properly, cautious in their application of rules and principles to particular cases, sometimes law may get misused. The language of law can easily become a language of right and wrong, of moralistic reproach, of the clothing of interest in the garments of rectitude, of the concealment of factual changes with legal fictions, of refined scholasticism in the face of urgent practical problems, and of the facile application of general rules without a deep understanding of situations that are unique. Such approaches are hardly the highest expressions of law; nor are they necessarily the best way of addressing complex and multi-layered international problems such as those encountered in the occupied territories.

Addressing as it does the single question of the rules applicable in a prolonged occupation, this article makes no attempt to assess the conduct of the Israeli occupation overall, or to cover the huge range of legal and practical issues to which it has given rise. For example, nothing is said here on such important and frequently raised matters as ill-treatment of detainees, since the basic pertinent rules are clear and are not affected by the duration of the occupation.

The article is divided into nine parts. The first three, which examine the law on occupations, are the most general; the rest deal centrally with the Israeli-occupied territories.

I. PURPOSES OF THE LAW ON OCCUPATIONS

There is no single authoritative exegesis of the various purposes served by that part of the laws of war relating to military occupations—what is called here the “law on occupations.” However, those purposes can be inferred from the principal conventions, from the events that gave rise to them, from their negotiating history, from military manuals, from court judgments and from writings.

The law on occupations is both permissive (accepting that an occupant exercises certain powers) and prohibitory (putting limits on the actions of various parties, including occupying powers). Briefly summarized, it can have the following purposes:

- Ensuring that those who are in the hands of an adversary are treated with humanity. (In this respect the rules on occupations serve a similar purpose to those on prisoners of war and internees.)
- Harmonizing these humanitarian interests with the military needs of the occupant.
- Preventing the imposition of disruptive changes in the occupied territory, and preserving the rights of the sovereign there. (Where the eventual disposition of territories awaits the outcome of peace negotiations, or the hold of the occupant might be reversed by the fortunes of war, there is a need for rules to inhibit any unilateral, drastic and permanent changes in the political, economic, social and legal orders.)
- Preserving military discipline among the occupying forces. (Occupations typically present problems—such as uncontrolled exercise of power, numerous points of friction between occupants and inhabitants—that can easily lead to looting, general disorder and a breakdown of military discipline. A modicum of rules is one safeguard against these dangers.)
- Reducing the risk that relations between occupant and occupied will get out of hand and lead to renewed conflict.
- Improving the chances that, if an occupant finds part of its own territory occupied, its population will in turn be treated with due regard to international norms. (Sometimes military occupations in war are concurrent, with each side holding some of the other's territory; or they may be consecutive, with a country that had been an occupant having part of its territory occupied. Either circumstance can give an additional incentive for observing rules.)
- Helping to maintain friendly relations between the occupying power and foreign states—whether allies, adversaries or neutrals.
- Facilitating the prospects for an eventual peace agreement.¹ (The prohibition of annexation of occupied territory, and the rules against transfers of populations into and from occupied territories, partly reflect this purpose.)

Whether the law has always succeeded in serving these purposes may be debated. Moreover, in any given situation determining the particular policies that will best reflect these purposes may well be a matter of delicate political judgment. However, the purposes themselves are enduring. They are not purely and simply humanitarian, but also practical—arising as they do from the interests and experiences of states over a long period.

As far as prolonged occupations are concerned, some or all of these purposes may remain important. Yet some may come to be seen as of less

¹ This can be inferred from, e.g., D. A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY* 37-40 (1949).

importance: to the extent that this is so, the detailed rules intended to reflect these purposes may be called into question.

II. PROLONGED OCCUPATIONS AS A DISTINCT CATEGORY

An important, but implicit, assumption of much of the law on occupations is that military occupation is a provisional state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war. However, many episodes during this century have called into question the assumption that occupations are of short duration. As Doris Appel Graber already noted in 1949:

Considering the complexity of modern occupations, such as those during World War I and II in which large areas were occupied for long periods of time, raising a multitude of legal questions about the rights and duties of occupants in particular situations and the legal effects of the occupant's actions after the war, the rules laid down in the landmark codes of the 1863–1914 period and expounded in the literature and in military manuals seem fragmentary indeed and inadequate to guide occupation policies. But . . . they were developed in a relatively peaceful period in which no major wars occurred and in which belligerent occupations were generally of short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign. Consequently, while general principles were evolved, few specific rules developed because of a lack of factual situations requiring application of specific rules often enough to permit their growth into law.²

In the period since the Second World War, there has been no shortage of cases of prolonged occupation, many of which have raised complex questions about the applicability and utility of international rules—rules that have of course developed significantly since Graber wrote. These occupations seem yet another proof of the paradox “Rien ne dure comme le provisoire.”

The precise definition of “prolonged occupation” is likely to be a pointless quest. For the purpose of this article, it is taken to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced—i.e., a period at least approximating peacetime.

A few examples from the post-1945 period are mentioned below. While by no means the only cases that might be viewed as prolonged occupations, they are sufficient to indicate how varied in character and purpose such occupations can be. Many of them have raised difficult questions: what body of international law applies in circumstances where the entire purpose of an occupation is (or ought to be) to bring about political change, rather than simply to preserve the status quo? And what rules apply when an occupation takes place (or continues) in peacetime?

² *Id.* at 290–91.

The Allied Occupations of Germany and Japan

The Allied occupations of Germany and Japan after the Second World War lasted for 10 and 6 years, respectively.³ They defied the neat legal categories on which the law on occupations often seems to be based. These were not cases of subjugation and annexation; hence, they were military occupations of a kind. However, the victors wished to exercise their powers freely, and to make drastic political changes. They were not willing to be formally bound by the Hague Regulations.⁴ One of the most cogent presentations of the argument for the Allied position suggested that the law of belligerent occupation had been designed to serve two purposes: (1) to protect the sovereign rights of the legitimate government of the occupied territory, and (2) to protect the inhabitants from being exploited for the prosecution of the occupant's war. Since neither of these purposes had much bearing on the situation the Allies faced, to have applied the law would have been "a manifest anachronism."⁵ While this view of the applicability of the Hague Regulations was by no means uncontested, it did largely prevail. For those who found the Hague Regulations inapplicable, what rules of international law did apply to the Allied occupation of Germany after its unconditional surrender? Theodor Schweisfurth has said convincingly that this phase was subject to "such rules of international law as limit the right of any Government to commit acts which constitute crimes against peace and crimes against humanity."⁶ Clearly, in these exceptional cases of prolonged occupation, any rules that could be interpreted as limiting the Allies' right to bring about significant political changes in the former Axis countries were deemed to be irrelevant.

Current and future military occupations, even postsurrender ones, cannot be governed by so few formal international rules as were these post-1945 cases. This is due to two legal developments. First, the fourth Geneva Convention would appear to be applicable to a future postsurrender occupation by virtue of its common Article 2.⁷ Second, the development of

³ The U.S. military occupation of Japan ended on Apr. 28, 1952, with the entry into force of the Peace Treaty between the two countries. The occupation by the three Western powers of West Germany ended on May 5, 1955. The Soviet occupation of East Germany can be said to have formally ended with the opening of diplomatic relations between the two countries on Sept. 20, 1955, following a Soviet government statement of Mar. 25, 1954. The city of Berlin remains in some technical sense occupied, and hence qualifies as a case of prolonged occupation, but the powers of the Allies are minimal.

⁴ Convention respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

On the UK discussion about the legal status of defeated Germany, see especially F. S. V. DONNISON, *CIVIL AFFAIRS AND MILITARY GOVERNMENT: CENTRAL ORGANIZATION AND PLANNING* 125-36 (1966).

⁵ Jennings, *Government in Commission*, 23 BRIT. Y.B. INT'L L. 112, 135-36 (1946).

⁶ *Germany, Occupation After World War II*, [Instalment] 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 191, 196-97 (R. Bernhardt ed. 1982).

⁷ Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 22 (J. Pictet ed. 1958) [hereinafter Pictet]; G. VON GLAHN,

international human rights law since 1945 has greatly enlarged the scope of rules of international law that place limits on the right of any government to commit whatever actions it pleases against those under its control. (This point will be discussed in part VI below.)

The U.S. occupation of the Ryukyu Islands, including Okinawa, lasted for 27 years, ending on May 14, 1972, in accord with the terms of the U.S.-Japanese Okinawa treaty of June 17, 1971.⁸

South Africa's Occupation of Namibia

The presence of South Africa in Namibia after its international mandate there was terminated by the United Nations in 1966 was increasingly viewed as an occupation—especially after the advisory opinion of the International Court of Justice in 1971.⁹ In this case, as in that of the Israeli-occupied territories, the international community made clear that it would like to see certain positive changes introduced, leading to the emergence of a new sovereign state. Agreements signed in New York on December 22, 1988, specified that the South African presence in Namibia would come to an end after elections in November 1989.¹⁰

THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 281, 283 (1957); UK WAR OFFICE, THE LAW OF WAR ON LAND: BEING PART III OF THE MANUAL OF MILITARY LAW 140 (1958); and M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 216–17, 224–27 (1959).

There might thus seem to be at least a theoretical possibility that a future postsurrender occupation would be subject to the Geneva Convention but not to the Hague Regulations, inasmuch as the latter stress mainly the preservation of the status quo against the background of war, while the former puts somewhat more emphasis on the protection of the individual inhabitants. (Israeli courts have to some extent reversed this formula, having relied more on the Hague than the Geneva rules.) However, most, if not all, future postsurrender occupations would be brought within the ambit of the Hague Regulations because of several factors, including (1) they are customary in character; and (2) in relations between powers bound by the 1899 or 1907 Hague Conventions, the fourth Geneva Convention (Art. 154) states that it is “supplementary” to the Hague Regulations.

⁸ Agreement concerning the Ryukyu Islands and the Daito Islands with related arrangements, June 17, 1971, United States-Japan, 23 UST 446, TIAS No. 7314. See also KEESING'S CONTEMPORARY ARCHIVES 24,715 (1971).

⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

Key UN resolutions on Namibia include the following. Before 1971: GA Res. 2145 (XXI) (Oct. 27, 1966) (terminating South Africa's mandate); GA Res. 2372 (XXII) (June 12, 1968) (referring several times to South Africa's “occupation” of South West Africa and proclaiming that it “shall henceforth be known as Namibia”); and SC Res. 284 (July 29, 1970). After the Court's advisory opinion, a consistent stream of UN resolutions referred specifically to South Africa's “illegal occupation” of Namibia. See, e.g., SC Res. 301 (Oct. 20, 1971); SC Res. 366 (Dec. 17, 1974); SC Res. 385 (Jan. 30, 1976); GA Res. 2871 (XXVI) (Dec. 20, 1971); GA Res. 41/39 (Nov. 20, 1986); SC Res. 601 (Oct. 30, 1987); and GA Res. 43/26 (Nov. 17, 1988).

¹⁰ See Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, Dec. 22, 1988, UN Doc. S/20346 (1988), reprinted in 28 ILM 957 (1989) (providing for implementation of SC Res. 435 (Sept. 29, 1978) on steps to establish

This occupation raised the question of what bodies of international law should be applied. In its 1971 advisory opinion, the International Court of Justice said that some multilateral conventions "such as those of a humanitarian character" may be viewed as binding as regards the occupation of Namibia.¹¹ For the purposes of the question it was addressing, it was not essential for the Court to specify which humanitarian conventions it had in mind: the important point is the endorsement of the applicability of international rules even though this occupation was seen as being marked by several exceptional features. In 1971 the UN General Assembly specifically urged South Africa to comply with the third and fourth 1949 Geneva Conventions in Namibia.¹²

The occupation of Namibia also raised the question of the legitimacy of resistance movements. This old and difficult question in the laws of war received in this case a simple answer. The General Assembly consistently supported the legitimacy of the armed struggle of the South West Africa People's Organization.¹³ So, notably, did Vice-President Ammoun in his separate opinion to the 1971 ICJ judgment on Namibia.¹⁴

Some Other Recent Cases of Prolonged Occupation

The presence of Turkish forces in northern Cyprus since the invasion of July 20, 1974, has been viewed in some resolutions of the UN General Assembly as an occupation.¹⁵

The presence of Moroccan forces in Western Sahara since they intervened in December 1975 and January 1976 has similarly been viewed in some resolutions of the General Assembly as an occupation.¹⁶

The presence of Vietnamese forces in Kampuchea following the invasion of December 27, 1978, was also seen in some General Assembly resolutions as an occupation.¹⁷ On April 5, 1989, the Governments of the three countries of Indochina (Vietnam, Laos and Kampuchea) announced that all Vietnamese "volunteer troops" would be withdrawn from Kampuchea by

Namibian independence); Agreement between the Government of the Republic of Cuba and the Government of the People's Republic of Angola for the Conclusions of the Internationalist Mission of the Cuban Military Contingent, Dec. 22, 1988, UN Doc. S/20345 (1988), *reprinted in* 28 ILM 959 (1989) (providing for staged withdrawal of Cuban troops from Angola). Elections to a constituent assembly were held in Namibia on Nov. 7-11, 1989. The last South African troops stationed in Namibia withdrew to their own country on Nov. 23-24, 1989.

¹¹ 1971 ICJ REP. at 55.

¹² See, e.g., GA Res. 2871, *supra* note 9.

¹³ See, e.g., *id.*; GA Res. 2403 (XXIII) (Dec. 16, 1968); and GA Res. S-14/1 (Sept. 20, 1986).

¹⁴ 1971 ICJ REP. at 70.

¹⁵ See GA Res. 33/15 (Nov. 9, 1978); GA Res. 34/30 (Nov. 20, 1979); and GA Res. 37/253 (May 13, 1983). In subsequent years, the question of Cyprus has been deferred by the General Assembly.

¹⁶ GA Res. 34/37 (Nov. 21, 1979); and GA Res. 35/19 (Nov. 11, 1980). Subsequent resolutions do not use the term "occupation" but do reaffirm the need for self-determination. See, e.g., GA Res. 43/33 (Nov. 22, 1988).

¹⁷ GA Res. 37/6 (Oct. 28, 1982); GA Res. 40/7 (Nov. 5, 1985); and GA Res. 43/19 (Nov. 3, 1988).

September 30, 1989, regardless of whether or not a political solution to the Kampuchean conflict had been found.¹⁸

Many other situations quite widely viewed as occupations could be cited. For example, the intervention of Soviet forces in Afghanistan between December 1979 and the conclusion of their phased departure on February 15, 1989, was called an occupation by many governments.¹⁹

* * * *

The idea that "prolonged occupation" is a special category of occupation should be set in the proper context, namely, that there are many different types of occupation: the present writer has tentatively suggested seventeen types—a listing that is far from exhaustive. Neither the law as laid down in international conventions nor state practice justifies the restrictive approach of viewing the law on occupations as applying only to the classic case of belligerent occupation, in which one belligerent occupies the territory of another belligerent during an armed conflict. The law on occupations has in fact been applied to a wider range of cases than this: it is properly viewed as being formally applicable to, and capable of being applied in, many types of occupation—and, indeed, many situations to which the opprobrious term "occupation" is not actually attached. It contains some notable elements of flexibility.²⁰

While the frequent occurrence of long occupations is beyond dispute, there are some grounds for doubt about the value of regarding them as constituting a special category. The danger in making such a suggestion is that it may seem to imply the further suggestion that those parts of the laws of war that deal with military occupations may not be fully applicable, and that departures from the law may be permissible. These conclusions would pose problems, especially if the applicability of major conventions were put in doubt, if the criteria for permitting departures from the law were vague and subjective, or if it were unclear what bodies have authority to suggest or make departures. However, it may be that departing from occupation law is not the only legal issue to be faced. There may also be some scope for variations *within* the framework established by existing international law. The laws of war treaties that govern occupations contain some scope for variations.

¹⁸ KEESING'S RECORD OF WORLD EVENTS 36,588 (1989). Vietnam was subsequently reported to have completed this withdrawal in the week ending Sept. 30, 1989, but without supervision by international observer forces.

¹⁹ See, e.g., British statement of July 13, 1982, *quoted in* 53 BRIT. Y.B. INT'L L. 352 (1982).

²⁰ Occupations that have differed in some respects from the classic case of a belligerent occupation include that of the Rhineland after 1918, the Franco-Belgian occupation of the Ruhr in 1923–1925, the German occupation of Bohemia and Moravia from March 1939, and Namibia since 1971. In these cases, certain courts and tribunals have accepted the use of the term "occupation" and the applicability of international rules, including, e.g., the Hague Regulations. Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 275, 278, 291–92 (1984).

Further, in a prolonged occupation the applicability of other bodies of law—including the international law of human rights—assumes special importance.

While there may be some dangers in regarding “prolonged occupation” as a special category, there are also very good reasons for doing so. At present, there is a distinct risk that the law on occupations, if not adapted to special problems arising in a prolonged occupation, could be used or abused in such a way as to contribute to leaving a society politically and economically undeveloped. During a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante: decisions may have to be taken about such matters as road construction, higher education, water use, electricity generation and integration into changing international markets. Such decisions, although they involve radical and lasting change, cannot be postponed indefinitely. Nor can the setting up of political institutions be postponed indefinitely without creating the theoretical possibility (and in the West Bank and Gaza it is more than theoretical) that the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo: neither entitled to citizenship of the occupying state, nor able to exercise any other political rights except of the most rudimentary character. If there is any risk at all that the law on occupations might provide, paradoxically, the basis for a kind of discrimination that might bear comparison with apartheid, the causes of that risk need to be identified, and possible solutions explored.

The category of prolonged occupation overlaps in certain respects with another category—peacetime occupation. Some writers have taken the view that in peacetime occupations the rights accruing to an occupant may be more limited than in the classic case of belligerent occupation. Thus, F. Llewellyn Jones wrote in 1924:

In the case of pacific occupation it is clear that the rights of the occupant are very much curtailed as compared with those of a belligerent occupant. In the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation. . . . Belligerent military occupation is now largely regulated by the provisions of the Hague Convention, 1907, and obviously a pacific military occupant can have no powers more extensive than those laid down in the Articles of this Convention.²¹

Following this general approach, it could be argued that in a prolonged occupation, as in a pacific one, the rights of the occupants are vastly curtailed. This conclusion is very persuasive; and it conforms with the approach adopted in the fourth Geneva Convention, discussed in the next part. However, this conclusion can hardly follow automatically in all cases, or on all issues. For example, if there is extensive and violent opposition to the occu-

²¹ Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 GROTIIUS SOC'Y, TRANSACTIONS 149, 159–60 (1924). See also Roberts, *supra* note 20, at 273–79.

pation, or a general terrorist threat to the nationals of the occupying power, there may be a situation somewhat akin to war, in which the prolongation of certain emergency measures can be justified.

In a prolonged occupation there may be strong reasons for recognizing the powers of an occupant in certain specific respects—for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupant's powers in other respects. An examination of past occupations suggests that any variations in the rules may have a more complex and multifaceted character than simply the curtailment of the rights of one party or another.

III. PROLONGED OCCUPATIONS IN THE PRINCIPAL CONVENTIONS

The following are the main conventions that set out rules relating to the conduct of military occupations. All of them entered into force within 1–3 years of the date of signature.

The fourth 1907 Hague Convention has 37 states parties.²² Whether or not a state is a party to this Convention is of limited significance, because the annexed Hague Regulations have since at least 1946 been widely and authoritatively viewed as embodying customary international law.²³

The fourth 1949 Geneva Convention (like the other three 1949 Geneva Conventions) has 166 states parties.²⁴ This remarkably high number is one of several factors that have strengthened arguments that the Conventions are, in whole or in substantial part, declaratory of customary international law.²⁵

²² Also, 18 out of the 48 states parties formally bound by the very similar terms of the second 1899 Hague Convention did not become parties to the 1907 agreement. Convention with respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, TS No. 403. Most of the provisions of the regulations annexed to these two Conventions are identical.

Information about states parties to the second 1899 Convention and the fourth 1907 Convention supplied by the depositary (the Netherlands Ministry of Foreign Affairs), and valid as of July 1, 1988. See DOCUMENTS ON THE LAWS OF WAR 44 and 58–59 (A. Roberts & R. Guelff 2d ed. 1989) [hereinafter Roberts & Guelff].

In addition, some states became bound by these two Hague Conventions through general declarations of succession to treaties (e.g., at the time of independence), even if they have not so notified the depositary. This explains why some sources give higher figures for states parties. According to the U.S. Department of State, the number of parties to the second 1899 Convention and the fourth 1907 Convention are 56 and 43, respectively. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1989, at 363 and 363–64.

²³ For the leading judgment to this effect, see 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 497 (1948). Note also Meron's statement that "the customary law status of the Regulations annexed to the Convention is universally recognized." T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 226 (1989).

²⁴ International Committee of the Red Cross [ICRC], List of Signatures, Ratifications, etc. (Jan. 31, 1989); and Addendum (Feb. 7, 1989).

²⁵ For an excellent discussion, see Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348 (1987). See also T. MERON, *supra* note 23, at 41–62.

The 1954 Hague Cultural Property Convention has 75 states parties; 63 of these are also bound by the 1954 Hague Protocol.²⁶ Various important powers—including China, Japan, the United Kingdom and the United States—are not yet formally bound by this Convention.

The 1977 Geneva Protocol I has 92 states parties.²⁷ Several important powers—including France, India, Indonesia, Japan, the United Kingdom and the United States—are not formally bound by this Protocol. However, some of its provisions are viewed as embodying customary law; and other provisions may be viewed, even by nonparties, as meriting inclusion in the rules governing their military operations.²⁸

In none of the above agreements is any formal limit set on the duration of an occupation. Inasmuch as the subject of duration is addressed at all, it is more in writings and judgments than in conventions.²⁹ Meir Shamgar is correct in saying:

According to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely. Military government does not derogate from the potential rights of either party but represents a minimum standard imposed by the Law of Nations and is co-extensive in time and space to the effective rule of the military.³⁰

This is certainly a good starting point for considering the whole question of prolonged occupation. The proposition that the basic rules codified in the law on occupations must continue to be observed for as long as the occupation lasts is a useful compass bearing to guide one through this difficult subject.

²⁶ Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 240. Information about states parties supplied by the depositary (UNESCO), and valid as of July 1, 1988. See Roberts & Guelff, *supra* note 22, at 367–70.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 UNTS 3. For information about states parties, see ICRC, List of Signatures, Ratifications, etc. (Nov. 3, 1989). The figure 92 includes the USSR, which ratified this Protocol (and Protocol II, on noninternational armed conflicts) on Sept. 29, 1989.

²⁸ See, e.g., President Reagan's Letter of Transmittal of Protocol II to the U.S. Senate, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987); and T. MERON, *supra* note 23, at 62–70.

²⁹ Although a great deal of published writing has some bearing on the subject, very few papers or articles have been specifically devoted to prolonged occupation either in general or in the Arab-Israeli context. There have not been any such articles in some of the journals where they might have been expected, e.g., the *Israel Yearbook on Human Rights*, the *Revue Egyptienne de Droit International* and the *Palestine Yearbook of International Law*. Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40 (1989), is very much the exception.

³⁰ Shamgar, *Legal Concepts and Problems of the Israeli Military Government—the Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL: THE LEGAL ASPECTS 13, 43 (M. Shamgar ed. 1982) [hereinafter MILITARY GOVERNMENT]. For statements on the same issue in Supreme Court judgments, see *infra* text at notes 177 and 178.

The "One Year After" Provision of 1949

While the condition of military occupation (or, more euphemistically, "military administration") may continue indefinitely, there is, or used to be, one formal provision for variation of the rules on the grounds of duration. This was Article 6, paragraph 3 of the fourth 1949 Geneva Convention:

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, 143.³¹

These provisions represent one attempt to address the issue of prolonged occupation. However, they are of little importance, for four main reasons.

First, Article 6, paragraph 3 has featured very little in legal analyses of prolonged occupations in the past 40 years; and the Israeli authorities have never invoked it as a means of reducing their obligations.³²

Second, in particular cases, including the Israeli-occupied territories, there might be scope for debate about whether, or when, there was, in the words of Article 6, a "general close of military operations."³³ The renewed outbreak of international war in 1973 has been only one of several events that might have given rise to the argument that, even if military operations had earlier been viewed as closed, they had now reopened and, in consequence, the fourth 1949 Geneva Convention was again applicable *in toto*.

Third, even if Article 6, paragraph 3 were invoked, many important provisions of the Convention would remain in force. The burden of the article is that from 1 year after the general close of military operations an occupying power is only obliged to observe 43 of the 159 articles of the Convention. However, these 43 do include no less than 23 of the 32 articles of that part of the Convention—section III—which deals most specifically with occupied territories. The 43 articles are important, covering as they do such matters as the humane treatment of protected persons.

In section III (Articles 47–78), the nine articles by which the occupying power would cease to be bound in a long occupation are 48 (dealing with

³¹ Fourth Geneva Convention, *supra* note 7, Art. 6, para. 3.

³² E. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982, at 51 (1985). Cohen also reports the opinion of Shabtai Rosenne, a legal adviser to the Israeli foreign ministry, given in a 1977 interview, that

the period of one year after the general cessation of hostilities set by the framers of Article 6 was arbitrary. While not admitting to the applicability of the Convention to the Israeli occupied territories, he felt that all the humanitarian provisions of the Convention, and not just those provided in Article 6, should be applied *de facto* . . .

Id. at 62 n.103.

³³ For an analysis written in 1969 or 1970 claiming that there had been no "general close of military operations" and that the Geneva Convention therefore remained fully applicable, see Hammad, *The Culprit, the Targets and the Victims*, in 2 THE ARAB-ISRAELI CONFLICT 366 (J. N. Moore ed. 1974).

foreign nationals in occupied territory), 50 (care and education of children), 54 (status of public officials and judges), 55 (food and medical supplies of the population), 56 (medical and hospital services), 57 (requisitioning of civilian hospitals), 58 (ministers of religion and articles for religious needs), 60 (relief consignments) and 78 (assigned residence and internment). The contents of these articles suggest that the framers of the 1949 Geneva Conventions may have optimistically assumed that, in the course of time, the rigors of occupation would gradually ease, and more and more responsibilities would be handed over to the institutions of the occupied territory.

The records of the 1949 Diplomatic Conference confirm this assumption. They show that the "one year after" provision in Article 6 was the subject of much debate.³⁴ In his *Commentary*, Jean Pictet states that in drawing up this provision, "the delegates naturally had in mind the cases of Germany and Japan." He goes on to defend the provision on the grounds that "if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified."³⁵

The final reason for doubting the importance of the provisions of Article 6, paragraph 3 of the fourth Geneva Convention is that Article 3(b) of Additional Protocol I effectively abrogates the "one year after" provision—at least so far as the parties to the Protocol are concerned. It states that "the application of the Conventions and of this Protocol shall cease, . . . in the case of occupied territories, on the termination of the occupation." Bothe, Partsch and Solf say of this abrogation:

Article 6(3) of the Fourth Convention . . . was a special *ad hoc* provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.³⁶

The abrogation of the "one year after" rule may reflect in part the proper desire of the international community to maintain the applicability of the law to occupations in general, and to areas occupied by Israel since 1967 in particular. However, the abandonment of Article 6, paragraph 3 has had little practical relevance to the Israeli-occupied territories. This was more because of the factor already mentioned (these provisions of Article 6 were

³⁴ See, e.g., 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 623–25.

³⁵ Pictet, *supra* note 7, at 62–63. In addition, Pictet suggests that where there has been no military resistance, no state of war and no armed conflict, the Convention will remain fully applicable as long as the occupation lasts. However, it is far from clear (1) whether this was the intention of the negotiators; and (2) what the logic is in treating such occupations differently.

³⁶ M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 59, also 57 (1982). See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 68 (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1987).

not invoked by Israel anyway) than because of the more legalistic point that Israel has neither signed nor ratified Protocol I.

In general, the “one year after” provision of 1949 must be viewed as a legal oddity. It may have correctly identified a problem—that the rules designed for belligerent occupation during a war may require some modification in a prolonged occupation—but the solution it proposed was not equally appropriate to all occupations, and it has not commended itself greatly to military administrators, inhabitants of occupied territories or international lawyers.

Other Possibilities of Variations

The main conventions relating to military occupations do not provide for any other variation in the rules specifically because of the length of an occupation. This omission does not mean that the conventions are inflexible or cumbersome on this matter. Rather, they contain a modest number of rules, intended primarily to prevent repetition of the worst excesses of previous occupation regimes. They do not govern all aspects of life, and their provisions leave substantial room for different policies, practices and administrative systems. There are in fact many general possibilities for variations, and these could be germane in a prolonged occupation, as well as in other cases.

The scope for variation within the existing conventions is illustrated by the matter of the occupant’s structure of authority, which can assume many different forms. The 1907 Hague Regulations refer variously to “the hostile army,” “the occupant,” “a commander-in-chief,” “the commander in the locality occupied,” “an army of occupation” and “the occupying State” as the bodies or individuals that exercise authority in occupied territory.³⁷ The fourth Geneva Convention, which refers throughout to the “Occupying Power” as the body with authority in occupied territory, says nothing about the precise administrative form of the occupation regime. Protocol I is identical in this regard. There is widespread agreement that the occupying power has substantial discretion as to whether it operates through a military or a civil administration, and whether through an imposed administrative system or indigenous authorities.³⁸

³⁷ 1907 Hague Regulations, *supra* note 4, Arts. 42, 43, 48, 49, 51, 52, 53 and 55.

³⁸ In *K.N.A.C. v. State of the Netherlands*, 16 Ann. Dig. 468 (Dist. Ct. The Hague 1949), the court said:

Though the régime envisaged by the Hague Regulations for occupied territory comprised a military administration with civil departments subordinate to it, the setting up by the Occupant of a separate civil administration to control the existing civil administration left functioning, was not forbidden and must, on the contrary, be held to be a permissible complement of the maintenance of the latter administration in office.

Id.

In the Ansar Prison case (No. H.C. 593/82) (July 13, 1983), telex transcript 13, the Israeli Supreme Court said, apropos of Israel’s occupation of parts of Lebanon: “the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth [Geneva] Convention are not conditioned upon the establishment of a special organizational framework in the

Some possibilities of variations are also evident in the rules on taxation. The Hague Regulations state in Article 48:

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.³⁹

Commenting on this article, Ernst Feilchenfeld says:

The provision would not seem to exclude, as has been asserted, taxation increases, particularly such changes as have been made desirable through war conditions or, in the case of an extended occupation, general changes in economic conditions.

. . . [I]f the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with "public order and safety" as understood in Article 43.⁴⁰

Special agreements between the high contracting parties are allowed for in the fourth Geneva Convention. Such agreements can be about practically any matter, as long as the principle spelled out in Article 7, paragraph 1 is observed: "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." In section III (on occupied territories), Article 47 further specifies that protected persons shall not be deprived of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power."⁴¹

IV. THE ISRAELI-OCCUPIED TERRITORIES

In the wake of the June 1967 war, Israel was in control of the following territories.

The West Bank. This is the area, previously under Jordanian rule, that lies between the River Jordan and Israel proper (i.e., Israel in its pre-1967 borders). On December 17, 1967, the Israeli military government issued an order stating that "the term 'the Judea and Samaria Region' shall be identi-

form of a Military Government" For extracts and a short summary of this leading judgment, see 13 ISR. Y.B. HUM. RTS. 360 (1983).

On various possible forms of administrative structure under occupation, see U.S. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE* 10, 139 and 141 (Field Manual No. 27-10, 1956); and UK WAR OFFICE, *supra* note 7, at 145. For an indication that there are limits to the constitutional changes an occupying power may bring about, see Pictet, *supra* note 7, at 273.

³⁹ 1907 Hague Regulations, *supra* note 4, Art. 48.

⁴⁰ E. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 49 (1942).

⁴¹ Fourth Geneva Convention, *supra* note 7, Arts. 7(1) and 47.

cal in meaning for all purposes . . . to the term 'the West Bank Region'." This change in terminology, which has been followed in Israeli official statements since that time, reflected a historic attachment to these areas and rejection of a name that was seen as implying Jordanian sovereignty over them.⁴² The 1978 Camp David accords, signed by Egypt and Israel, contained extensive provisions for a "self-governing authority" in the West Bank and Gaza; these provisions—heavily criticized by Arab governments, by the leadership of the Palestine Liberation Organization (PLO) and by the residents of the territories—were never implemented.⁴³

The Gaza Strip. This area was administered from 1948 to 1967 by Egypt, which did not claim sovereignty over it. Israeli official statements generally refer to it as "the Gaza Region." Gaza was mentioned both in the 1978 Camp David accords and in the 1979 Israel-Egypt Treaty of Peace (see below).

East Jerusalem. This area, previously part of the West Bank, came under Israeli law, with extended boundaries, on June 28, 1967, and was formally annexed on July 30, 1980.⁴⁴

The Golan Heights. This area, part of Syria, has been under Israeli control since 1967. In the 1973 Middle East war, Israel gained additional Syrian territory in the area. Following the 1974 Israeli-Syrian disengagement agreement, Israel withdrew from all this additional territory, and also from some areas occupied in the 1967 war, including the devastated town of Quneitra.⁴⁵ Israeli law was extended to the Golan Heights on December 14, 1981.⁴⁶

The Sinai Peninsula. This area, part of Egypt, came under Israeli control in 1967. For administrative purposes, the Israeli authorities divided it into two military government units: Northern Sinai (which was comparatively more inhabited), and Central and Southern Sinai (containing only a sparse Bedouin population). Israel withdrew progressively from Sinai—initially under two partial disengagement agreements, concluded in 1974 and 1975;⁴⁷ and

⁴² Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV U. STUD. IN L. 61 (1988). On Jordan's 1988 disengagement from the West Bank, see *infra* text at note 120.

⁴³ Camp David Agreements, Sept. 17, 1978, Egypt-Israel-United States, 17 ILM 1466 (1978).

⁴⁴ The enabling legislation for the extension of Israeli law and of municipal boundaries was the Municipalities Ordinance (Amendment No. 6) Law, June 27, 1967, 21 LAWS OF THE STATE OF ISRAEL 75 (1967). The act of annexation was the Basic Law: Jerusalem, Capital of Israel, July 30, 1980, 34 *id.* at 209 (1980). For a succinct Israeli exposition, see Y. BLUM, THE JURIDICAL STATUS OF JERUSALEM (Jerusalem Papers on Peace Problems No. 2, Hebrew University, 1974).

⁴⁵ Agreement on Disengagement between Israeli and Syrian Forces, May 31 and June 5, 1974, 13 ILM 880 (1974). The Israeli military withdrawal to the new lines was completed by June 26, 1974.

⁴⁶ Golan Heights Law, Dec. 14, 1981, 36 LAWS OF THE STATE OF ISRAEL 7 (1982).

⁴⁷ Agreement on Disengagement of Forces in Pursuance of the Geneva Peace Conference, Jan. 18, 1974, Egypt-Israel, 13 ILM 23 (1974), which provided for the withdrawal of all Israeli forces from the areas they had held west of the Suez Canal since the cease-fire at the end of the

then under the 1979 Peace Treaty, which laid down a timetable for phased total Israeli withdrawal, completed on April 25, 1982.⁴⁸ In 1989 Israel withdrew, additionally, from a small remaining disputed area at Taba.⁴⁹

Although East Jerusalem and the Golan Heights have been brought directly under Israeli law, by acts that amount to annexation, both of these areas continue to be viewed by the international community as occupied, and their status as regards the applicability of international rules is in most respects identical to that of the West Bank and Gaza.⁵⁰

In addition to the above territories, Israel briefly occupied parts of southern Lebanon during the Litani operation of March–June 1978. It occupied larger areas of Lebanon following the invasion of June 1982, and has maintained a security zone in the south since its withdrawal from the rest of the country in 1985. Although Israel did not establish a formal military-administrative system in Lebanon along the same lines as in other areas, its position was properly viewed as that of an occupant.⁵¹

For the most part, the Israeli occupation of territories since 1967 does belie the assumption that occupation is temporary. However, this brief listing shows that prolonged occupation does not necessarily mean permanent control: at least some areas, Sinai and part of the Golan, were returned (to Egypt and Syria, respectively) after long spells under Israeli control.

A full political analysis of the reasons for the exceptional length of this occupation is beyond the scope of this article. The problems of ethnicity and nationhood in the Middle East, which are thrown into such sharp relief in

1973 war, and for an Israeli pullback east of the canal to the area covered by the Mitla and Giddi Passes; and Agreement on the Sinai and Suez Canal, Egypt-Israel, Sept. 4, 1975, and various associated agreements, 14 ILM 1450 (1975), which provided for an Israeli withdrawal from a further 2,500 square miles of occupied Egyptian territory in Sinai, including the oil fields at Ras Sudar and Abu Rudeis, in return for certain Egyptian political undertakings, and on the basis of major pledges and commitments by the United States. Full implementation of the latter agreement was completed on Feb. 22, 1976.

On the background, content and implementation of these agreements, and the role of the United States and United Nations, see KEESING'S CONTEMPORARY ARCHIVES 26,317, 27,429 and 28,381 (1974, 1975 and 1977).

⁴⁸ Treaty of Peace, Mar. 26, 1979, Egypt-Israel, 18 ILM 362 (1979). Article II stated: "The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . without prejudice to the issue of the status of the Gaza Strip."

⁴⁹ Agreement Regarding the Permanent Boundary Between Egypt and Israel, Feb. 26, 1989, 28 ILM 611 (1989). This Agreement followed the Egypt-Israel arbitral tribunal award of Sept. 29, 1988, 27 ILM 1421 (1988). The disputed area at Taba was returned to Egypt on Mar. 15, 1989.

⁵⁰ See, e.g., UN General Assembly and Security Council resolutions, *infra* notes 79, 86–88 and 153. The Israeli laws on the status of East Jerusalem and the Golan Heights do not use the word "annexation" and do not extend Israeli citizenship to the local population.

⁵¹ It was so viewed by the Israeli Supreme Court in the Ansar Prison case, *supra* note 38, 13 ISR. Y.B. HUM. RTS. at 362–63. A question in the Knesset on Mar. 23, 1983, yielded the answer that the provisions of the fourth Geneva Convention were applied in Lebanon "on humanitarian grounds," implying that the Convention was not viewed as formally applicable. Rubinstein, *supra* note 42, at 63.

the occupied territories, have deep historical roots. The outside powers involved in the area in the past, including Britain, did not resolve these problems and may have made them worse. Throughout this century, most attempts to achieve a negotiated settlement of Jewish-Arab tensions in the Middle East have failed. Since 1967, Israel has maintained its occupation for a mixture of reasons that have included understandable security concerns, religious-fundamentalist expansionism and inertia. The situation was made more difficult to the extent (which is a matter of debate) that the PLO, Arab states and/or Israel failed to come forward with credible proposals for the future of the occupied territories. Such proposals necessarily involve grasping many extremely painful nettles: acceptance of the existence of Israel; the creation of a Palestinian state that might be radical, or unstable, or both; and possible conflict within Arab states, or between them, if the Palestinian cause or the PLO leadership is alleged to have been "betrayed" in a diplomatic compromise. Numerous other real or presumed obstacles to political settlement could be cited: various aspects of PLO, and Israeli, activities and pronouncements; and Israel's refusal to engage in direct talks with the PLO. At the superpower level, there has been a long history of disagreement between the United States and the USSR on the nature of the Middle East conflict and possible means of its amelioration. In this, as in some other cases of prolonged occupation, there can be no assumption that apportionment of blame for the length of the occupation will be a productive exercise, or will yield simple answers.

The Israeli occupation since 1967 has contained many special features quite apart from its unusual duration. These features, which inevitably inform the discussion in this article, include (1) the undecided previous legal status of the West Bank and Gaza; (2) the dispute over whether the Palestinians constitute an appropriate unit of self-determination; (3) the persistence of a threat to Israel itself, and of various types of violent incidents, all of which have tended to erode neat distinctions between "war" and "peace"; and (4) the existence among Israelis of expansionist and annexationist ideas of various kinds, which call into doubt the very idea of Israel as having only a provisional role in the occupied territories.

V. APPLICABILITY OF THE LAW ON OCCUPATIONS TO THE ISRAELI OCCUPATION

To consider how the law may be interpreted or varied to take account of the prolonged character of a particular occupation, it is first necessary to survey, at least briefly, some of the main viewpoints on what laws of war rules have been viewed as applicable to that occupation anyway.

The facts about states parties to treaties are straightforward: the states most directly involved (Israel, Egypt, Jordan and Syria) are formally bound by the principal international agreements governing occupations as follows:⁵²

⁵² See *supra* notes 22–27 for the sources of depositary information about the states parties to these agreements, their customary law status, and details of declarations, reservations, etc.

The fourth 1907 Hague Convention. None of the states involved has ever been a formal party. However, in view of the customary law status of the Regulations annexed to the Convention, all are bound.

The four 1949 Geneva Conventions. Israel and Jordan ratified these agreements in 1951, Egypt in 1952, and Syria in 1953.

The 1954 Hague Cultural Property Convention, and Protocol. Egypt ratified both in 1955, Jordan both in 1957, and Syria both in 1958; Israel ratified the Convention in 1957, and registered its accession to the Protocol in 1958.

The 1977 Geneva Protocol I. Israel has not made any indication of adherence; Egypt has signed but not ratified; Jordan ratified in 1979; and Syria acceded in 1983.⁵³

The Official Israeli View

Israeli positions on the applicability of international legal norms in the occupied territories are complex and occasionally misunderstood. There have been some variations over time, and in different forums. They have to be seen against the background of changing political views about the significance or otherwise of the "green line" separating Israel proper from the land held since 1967; and official use of such terms as "administered territories," rather than the blunter "occupied territories." The seminal legal statement remains that by Shamgar in 1971, which first advanced the argument that the terms of an agreement whose *de jure* applicability might be in doubt could nevertheless be applied on a *de facto* basis.⁵⁴

This principle applies particularly to the fourth 1949 Geneva Convention. Since the end of the June 1967 war, Israel has never stated that the Convention is formally applicable in the occupied territories on a *de jure* basis. However, it has indicated, along the lines advanced by Shamgar in 1971, that it is willing to observe the "humanitarian provisions" of this Convention.⁵⁵ For some years, Israel's voting on UN General Assembly

⁵³ Syria, at accession in November 1983, made a declaration that its accession to Protocol I in no way amounts to recognition of Israel or the establishment of any relations with it regarding the application of the Protocol.

In a note to the depositary, Israel objected to this declaration: "the Geneva Conventions and the Protocols are not the proper place for making such hostile political pronouncements, which are, moreover, in flagrant contradiction to the principles, objects and purposes of the Conventions and the Protocols." The Syrian declaration "cannot in any way affect whatever obligations are binding . . . under general international law or under particular conventions." As for the substance of the matter, Israel would adopt towards Syria "an attitude of complete reciprocity." Roberts & Guelff, *supra* note 22, at 466-67.

⁵⁴ Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262-77 (1971). This very influential article was first presented at a symposium at Tel Aviv University in 1971, when the author was Attorney General.

⁵⁵ *Id.* at 266; and Rubinstein, *supra* note 42, at 63. The latter refers to Order No. 3 as evidence that immediately after the 1967 war it seemed clear that the Convention would apply to the territories. However, that proclamation was in fact issued during the war; and, as he notes, the section mentioning the Convention was repealed soon after the war.

resolutions reflected the view that the applicability of the Convention was an open question; but since 1977, it has voted against *de jure* applicability.⁵⁶

As to the 1907 Hague Regulations, whose provisions are briefer and more general, the present position is simpler. Their applicability, whether on a *de facto* or a *de jure* basis, is widely accepted.⁵⁷ Esther Cohen has gone so far as to say that “no problem arises in regard to the Hague Regulations The official Israeli position is that these Regulations are applicable to the Israeli-occupied territories” She has indicated that the only real question about the applicability of the Regulations concerns areas (East Jerusalem and the Golan Heights) that Israel has in effect sought to annex.⁵⁸ However, in the late 1970s, some authoritative statements cast doubt on the formal applicability of the Hague Regulations.⁵⁹ Some Supreme Court judgments before 1979 avoided expressing a view on whether the Hague Convention applied to the administered areas.⁶⁰ Since the 1979 decision of the Supreme Court in the *Beth-El* case, a more positive view about the applicability and justiciability of the Hague Regulations has prevailed, based largely on acceptance that they are part of customary law.⁶¹

Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of international legal standards. Its position contrasts with those of the many occupying powers in the past 40 years that have avoided expressing any view on the applicability of international legal agreements: such powers have included the Soviet Union in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979); and South Africa in Namibia. Israel also deserves credit for cooperating with the International Committee of the Red Cross, which has played an important role in the occupied territories by performing a wide range of tasks, including, in particular, monitoring conditions of detention.⁶²

Nevertheless, Israel's position regarding the fourth Geneva Convention is unsatisfactory in several respects, and merits closer scrutiny. The scope of

⁵⁶ Resolutions on the applicability of the fourth Geneva Convention on which Israel abstained: GA Res. 3092A (XXVIII) (Dec. 7, 1973); GA Res. 3240B (XXIX) (Nov. 29, 1974); and GA Res. 31/106B (Dec. 16, 1976). Since 1977, Israel has always voted against the applicability of the Convention: *see infra* note 87.

⁵⁷ *See* Shamgar, *supra* note 54; *see also* Shamgar, *supra* note 30, at 48; Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in *MILITARY GOVERNMENT*, *supra* note 30, at 109, 129, 131–32 and 163–66. Nathan says re the Preamble to the Hague Convention: “This language would appear to express the intention of the parties . . . that insofar as the Regulations embody norms of international law, these are binding as minimum standards of international law, even in situations not directly covered by the Regulations.” *Id.* at 132.

⁵⁸ E. COHEN, *supra* note 32, at 43, 51 and 58 nn.49, 50.

⁵⁹ For elements of such doubt about the fourth Hague Convention, see the Israeli Ministry of Foreign Affairs, Memorandum of Law (Aug. 1, 1977), 17 ILM 432, 432–33 and 442 (1978) (on offshore oil exploration in the Gulf of Suez). *See also infra* note 162 and accompanying text.

⁶⁰ *See infra* note 175 and accompanying text.

⁶¹ *See infra* text at notes 166–79.

⁶² *See* the ICRC statement on the 20th anniversary of the occupation, ICRC BULL., No. 137, June 1987, at 1, noting that the ICRC has had free access to all the occupied territories, but listing a number of “persistent violations” of the fourth Geneva Convention.

application of the Convention is stated in common Article 2, whose first two paragraphs read as follows:

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.

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.⁶³

The publicly stated grounds for Israel's skepticism about the applicability of the Convention relate to the pre-1967 status of the West Bank and Gaza. Before 1967, Israel did not accept that these territories were part of Jordan and Egypt, respectively. The territories therefore could not be viewed as "the territory of a High Contracting Party" within the meaning of the second paragraph of common Article 2; rather, they had been under Jordanian and Egyptian occupation. Israel expressed concern that by accepting the automatic application of the Convention, it might appear to accord Jordan and Egypt the status of an ousted sovereign with reversionary rights.⁶⁴

This Israeli interpretation is open to several serious objections. Four principal ones are: (1) It has sometimes been based on what appears to be a technical error. To refer to the terms of the *second* paragraph of common Article 2 is of limited relevance, because it is in fact the *first* paragraph that applies when a belligerent occupation begins during a war. As shown above, this paragraph says nothing about "the territory of a High Contracting Party," referring simply to "all cases of declared war or of any other armed conflict" arising between two or more of the high contracting parties.⁶⁵ (2) The Israeli interpretation was never relevant to those occupied territories (Sinai and the Golan) whose pre-1967 status was not disputed by Israel,

⁶³ Fourth Geneva Convention, *supra* note 7, Art. 2, paras. 1–2.

⁶⁴ The clearest expositions of this Israeli view are in Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968); Shamgar, *supra* note 30, at 13–60; and Farhi, *On the Legal Status of the Gaza Strip*, in *MILITARY GOVERNMENT*, *supra* note 30, at 61–83.

Crown Prince Hassan Bin Tallal of Jordan has denied that Jordan's position in the West Bank up to 1967 was that of occupant. He does not specify the precise status Jordan did have there. He argues that even if Jordan was a belligerent occupant up to 1967, it would not follow that Israel was free of legal limitations after 1967—especially in light of the provisions of the Geneva Convention. H. BIN TALLAL, *PALESTINIAN SELF-DETERMINATION: A STUDY OF THE WEST BANK AND GAZA STRIP* 67–68 (1981).

⁶⁵ For an authoritative Israeli statement relying on the second paragraph of common Article 2, see Shamgar, *supra* note 54, at 262–77. See also his revised presentation (responding to the argument that the relevant paragraph is the first, not the second) in Shamgar, *supra* note 30, at 37–40.

For a commentary on Article 2, see Pictet, *supra* note 7, at 21, which leaves little room for doubt that it is the first paragraph that is relevant to the territories occupied by Israel in the 1967 war.

which were therefore clearly “the territory of a High Contracting Party.” (3) It has not been advanced consistently: similar objections could be, but seldom have been, made about the applicability of the Hague Regulations, which contain a similar assumption; namely, that occupied territory is “territory of the hostile state.” (4) The Israeli position ignores or understates the precedents for viewing the laws of war, including the law on occupations, as being formally applicable even in cases that differ in some respect from the conditions of application spelled out in the Hague Regulations and the Geneva Conventions.⁶⁶

In fact, Israel has got into a little-noted logical muddle on the applicability of the Hague and Geneva Conventions. Distinguished Israeli lawyers have asserted that the status of belligerent occupation is dependent on the continued existence of a state of war between two countries. As Yoram Dinstein put it in 1978: “Belligerent occupation continues as long as the occupant remains in the area and war goes on. That is to say, it is terminated if the occupant withdraws from the area or the war comes to a close (either with the occupant’s victory or his defeat).”⁶⁷ Likewise, the Supreme Court indicated in a judgment on March 15, 1979, that the application of the law was linked to a state of belligerency.⁶⁸ However, since the Israeli-Egyptian Peace Treaty of March 26, 1979, there has been no state of belligerency between Israel and Egypt. Thus, the Gaza Strip has even more certainly than before not been “territory of the hostile state.” Yet Israel has continued to justify its powers and actions there with reference to the law of belligerent occupation, including the Hague Regulations.⁶⁹ This is reasonable; but it shows that Israel itself, when it chooses, is prepared to depart from its own strict legal logic about the circumstances in which the relevant rules and conventions are applicable.

Several Israeli writers have argued that whether the fourth Geneva Convention is formally applicable or not is academic because of Israel’s stated willingness to observe the “humanitarian provisions.”⁷⁰ However, formal applicability versus *de facto* application is not always a distinction without a

⁶⁶ See *supra* note 20.

⁶⁷ Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 105 (1978).

⁶⁸ Justice Witkon, judgment in the Beth-El case (H.C. 606/78 and 610/78), translated in MILITARY GOVERNMENT, *supra* note 30, at 371, 374:

Each of us obviously knows of recent political developments that have occurred in our region, of the peace negotiations We deal with the rights of the parties according to the existing situation prevailing between Israel and the Arab countries. This situation is one of belligerency, and the status of the respondents in respect of the occupied territory is that of an occupying power.

On the *Beth-El* case, see also *infra* text at notes 166–71.

⁶⁹ See Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 ISR. Y.B. HUM. RTS. 173, 173–74 (1988).

⁷⁰ See, e.g., Haim H. Cohn, *Foreword to THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL*, at vii–viii (Israel National Section of the International Commission of Jurists, 1981); M. BENVENISTI, *THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL’S POLICIES* 37 (American Enterprise Institute, 1984); and Shamgar, *supra* note 30, at 32–33 and 42–43.

difference, for three main reasons. First, although the term "humanitarian provisions" is often interpreted to mean all of the provisions, Israel has never definitively clarified this point by specifying which provisions it regards as humanitarian. Second, the rejection of formal applicability has frequently been referred to in Israeli court proceedings, and has in the past been one of several factors making the courts reluctant to base their decisions fairly and squarely on the fourth Geneva Convention.⁷¹ Third, the hint of *ex gratia* about Israel's application of the Convention could be construed as carrying an implication that it might unilaterally interpret, or eventually abrogate, its terms.

Israel's refusal to accept the full *de jure* applicability of the fourth Geneva Convention has not proved persuasive. It has been criticized by many legal writers, including some in Israel itself;⁷² and, as mentioned below, it has been decisively rejected by virtually all the members of the international community—at least if their votes in the United Nations are a guide.⁷³

PLO Views

There has never been a full and authoritative exposition of PLO views on the international legal status of the territories occupied by Israel since 1967. The PLO has been in something of a quandary, principally because of the organization's commitment in the 1968 Palestinian National Covenant: "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit."⁷⁴ Consequently, for a long time the PLO was reluctant to draw clear legal distinctions between the lands controlled by Israel before and after June 1967. The fact that until 1984 the PLO had no specialized agencies concerned with legal aspects of the Palestine question contributed to the confusion.⁷⁵

The PLO has sometimes advanced the view that Israel is an aggressor or illegal occupant, and as such has no rights over the inhabitants under international law. The concept of "illegal occupation," and the related proposition that an illegal occupant has no rights, have precedents, not least in the writings of some Soviet and Polish lawyers about the Nazi occupations in the Second World War.⁷⁶ In 1970 a PLO Research Center Publication took this

⁷¹ On the Supreme Court's position in this regard, see *infra* text at notes 165–73.

⁷² For a reasoned account and criticism by a leading Israeli international lawyer, see Dinstein, *supra* note 67, especially at 106–08. See also E. COHEN, *supra* note 32, at 51–56; and Rubinstein, *supra* note 42, at 63–67. For a critical view by a British academic, see J. R. GAINSBOROUGH, *THE ARAB-ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS* 159 (1986).

⁷³ See *infra* notes 86–88 and accompanying text.

⁷⁴ Art. 2, Palestinian National Covenant, adopted by the PLO at its National Congress in Cairo in July 1968. The boundaries of Palestine during the British Mandate (which ended in 1947) encompassed all of the territory of Israel in its 1949–1967 frontiers, plus the Gaza Strip and the West Bank; they had also encompassed Jordan until 1922. For the text and exposition of Article 2, including discussion of whether it involves a claim to Jordan, see Y. HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* 33–39 and 113 (1979).

⁷⁵ 2 PALESTINE Y.B. INT'L L. 191 (1985).

⁷⁶ See especially Trainin, *Questions of Guerrilla Warfare in the Law of War*, trans. from Russian and reprinted in 40 AJIL 534, 535 (1946).

line.⁷⁷ Likewise, in 1981 a PLO document submitted to UNESCO about Military Order 854 of July 6, 1980 (which sought to bring higher education in the occupied territories under Israeli control), challenged the right of the Israeli authorities to justify it "on the basis of statements 'under international law' made by foreign authors in completely different contexts . . . because the existing occupation . . . has been illegalized by the Community of Nations which unanimously requested putting an end to it on various occasions and in many resolutions."⁷⁸

What these Palestinian writers appear to be suggesting is not that the law on occupations is not applicable at all, but rather that Israel cannot claim any rights under that law. This argument is questionable on several grounds. First, it is debatable whether Israel was an "aggressor" in 1967, or acted out of a basically defensive intent. There is also reason to doubt whether the occupation itself (as distinct from some of the actions by the occupying power) has been definitively considered illegal by the international community.⁷⁹ But these points pale into insignificance beside the cardinal principle that the laws of war, including the law on occupations, are widely viewed as applying equally to all states, whether aggressors or victims of aggression. Moreover, it seems strange to insist that Israel or any other country could be expected to carry out all its obligations under the conventions, without at the same time having certain rights, or at least being "suffered" by international law to take certain actions.

This Palestinian view has not commanded any significant international support, and by no means all Palestinian writers on these matters have

⁷⁷ F. YAHIA, *THE PALESTINE QUESTION AND INTERNATIONAL LAW* 184 (PLO Research Center, Beirut, 1970).

⁷⁸ UNESCO Doc. 22 C/18 (Aug. 30, 1983).

⁷⁹ The term "illegal occupation" has been used sparingly in UN resolutions. As regards the Israeli-occupied territories, GA Res. 32/20 (Nov. 25, 1977) expressed concern "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation." The term was also used in GA Res. 33/29 (Dec. 7, 1978). These resolutions were the exception rather than the rule. The voting figures for each resolution, showing countries for and against and abstentions (102-4-29 and 100-4-33, respectively), contain substantially fewer votes in favor than most General Assembly resolutions criticizing the Israeli occupation attracted in those years.

Some resolutions have implied the illegality of the occupation per se, without actually using the term "illegal occupation." For example, GA Res. 43/54A (Dec. 6, 1988) "[c]ondemns Israel's continued occupation of the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories, in violation of the Charter of the United Nations, the principles of international law and the relevant resolutions of the United Nations." Voting was 103-18-30.

The great majority of the numerous resolutions of the UN General Assembly and the Security Council on the Israeli occupation have not stated that it is illegal per se. They have deplored Israel's conduct of the occupation, have condemned as illegal the purported annexation of parts of the occupied territories (including Jerusalem), and have called upon Israel to put an end to its occupation of Arab territories—but have not stated that the fact of the occupation is in itself illegal. See, e.g., GA Res. 41/63 (Dec. 3, 1986) and GA Res. 43/58A-G (Dec. 6, 1988). The omission of the term "illegal occupation" from most UN resolutions on the Arab-Israeli conflict is in sharp contrast to its repeated use in those on Namibia. See *supra* note 9.

subscribed to it.⁸⁰ In statements in the last few years, the PLO has not reiterated the view, and indeed may have retreated from it in changing its policy in the direction of gradual acceptance of the existence of Israel.⁸¹ However, there does not appear to have been a clear PLO statement formally renouncing this view.

The Idea of "Trustee Occupation"

International laws and institutions, including the United Nations, have long recognized the reality that certain territories and peoples are not self-governing, and that outside powers can exercise certain trustee-like functions in such territories.⁸² Could Israel's occupation be viewed as at least an analogous case?

The idea that Israel's occupation of the West Bank might be of a special kind termed "trustee occupation" was advanced by Allan Gerson in 1973 and 1978.⁸³ His reasoning in support of this proposition was, briefly, as follows: Since Israel's rights to sovereignty over the West Bank are not superior to those of either Jordan or the indigenous population, Israel's status is that of occupant, not lawful sovereign. Yet the law of belligerent occupation imposes heavy constraints on the alteration of the political status quo ante—constraints that may be contrary to the interests of the inhabitants of the West Bank, as any momentum towards self-determination may be stifled. This reasoning reflects real concerns and points to a central problem in applying the law on occupations in these territories.

Nevertheless, there is doubt about the extent to which "trustee occupation" can usefully be viewed as a distinct legal category. Gerson himself leaves some doubt about what body of law would apply in such a case. In fact, as noted above, under its common Article 2, the fourth Geneva Convention is applicable to a wide range of occupations and not just to "belligerent occupation" narrowly defined. Moreover, some idea of "trusteeship" is implicit in all occupation law anyway. Finally, the central question, which has become even more difficult since Gerson wrote, is whether Israel could be viewed, either by Palestinians or by the international community, as an appropriate trustee for Palestinian interests. However, he does frankly accept that Israel has not in fact assumed the role of "trustee occupant."⁸⁴

⁸⁰ Palestinian works that appear to accept that the occupied territories are subject to the normal rules relating to occupations include R. SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* (Institute for Palestine Studies, Washington, D.C., 1985); and Kassim, *Legal Systems and Developments in Palestine*, 1 *PALESTINE Y.B. INT'L L.* 19, 29–32 (1984). However, neither of these studies contains a sustained and concentrated discussion of what parts of international law are applicable in the occupied territories.

⁸¹ See *infra* text at note 121.

⁸² See, e.g., the provisions regarding non-self-governing territories, and also regarding the trusteeship system, in UN CHARTER Arts. 73–85.

⁸³ Gerson, *Trustee Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 *HARV. INT'L L.J.* 1 (1973); A. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 78–82 (1978).

⁸⁴ A. GERSON, *supra* note 83, at 82.

The View of the International Community

The view that the fourth Geneva Convention is applicable, and should be applied, in all the territories occupied by Israel since 1967 has been very widely held internationally. Indeed, a remarkable degree of unanimity prevails on this matter. Countless international organizations, both intergovernmental and nongovernmental, have taken this view.⁸⁵ Within the UN General Assembly, it has been upheld from the beginning of the occupation.⁸⁶ Since 1973, Israel has completely lacked positive support in the voting on General Assembly resolutions on this specific issue.⁸⁷ Since the beginning of the occupation, the Security Council has also consistently urged the applicability of the Convention.⁸⁸

* * * *

⁸⁵ The ICRC has done so consistently. See ICRC, *Annual Reports* for 1968 and subsequent years; and its statement, *supra* note 62.

⁸⁶ The first such resolution, urging in general terms respect for the principles contained in the third and fourth 1949 Geneva Conventions, was GA Res. 2252 (ES-V) (July 4, 1967) (116-0-2) (the figures in parentheses are votes for, votes against and abstentions).

In 1968 came the first of a stream of resolutions making specific comments about the occupied territories, and calling on Israel to comply with the fourth Geneva Convention, as well as with various other agreements, including the 1948 Universal Declaration of Human Rights. See GA Res. 2443 (XXIII) (Dec. 19, 1968) (60-22-37). Similar resolutions in the first 5 years of the occupation included GA Res. 2727 (XXV) (Dec. 15, 1970) (52-20-43); and GA Res. 3005 (XXVII) (Dec. 15, 1972) (63-10-49). The resolutions in this period attracted less support than the 1967 resolution cited above, and less than those from 1973 onwards mentioned in note 87. There are many possible reasons for this: one that should not be overlooked is that in these years the resolutions tended to combine statements about what law was applicable with other, more contentious statements.

⁸⁷ See, e.g., the following resolutions (in all cases of a negative vote, i.e., from 1977 onwards, it is Israel's):

GA Res. 3092A (XXVIII)	(Dec. 7, 1973)	(120-0-5)
GA Res. 3240B (XXIX)	(Nov. 29, 1974)	(121-0-7)
GA Res. 32/5	(Oct. 28, 1977)	(131-1-7)
GA Res. 35/122A	(Dec. 11, 1980)	(141-1-1)
GA Res. 38/79B	(Dec. 15, 1983)	(146-1-1)
GA Res. 41/63B	(Dec. 3, 1986)	(145-1-6)
GA Res. 43/58B	(Dec. 6, 1988)	(148-1-4)

The United States voted for these resolutions in some years (1973, 1974 and 1980), and abstained in the others. However, the United States continued to state that it viewed the Convention as applicable. "The United States recognizes Israel as an occupying power in all of these territories and therefore considers Israeli administration to be subject to the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention concerning the protection of civilian populations under military occupation." U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987, 100th Cong., 2d Sess. 1189 (1988).

⁸⁸ For example, SC Res. 237 (June 14, 1967), adopted unanimously (4 days after the ceasefire came into effect), recommended to the governments concerned "the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949."

SC Res. 446 (Mar. 22, 1979), adopted by 12 votes to none, with 3 abstentions (Norway, the United Kingdom and the United States), reaffirmed the applicability of the fourth Geneva Convention, as well as opposing the establishment of Israeli settlements in the occupied territories.

None of the various attempts to argue that Israel's occupation of foreign territory is such a special case that some of the normal provisions of the law on occupations do not apply to it has proved persuasive: indeed, all these attempts have been based, in varying degrees, on dubious interpretations of the body of conventional and customary law relating to occupations. The better view is that both the fourth 1949 Geneva Convention and the 1907 Hague Regulations are applicable. However, serious problems remain: not only of getting their applicability accepted, and seeing that their basic provisions are applied, but also of relating the law to particular problems of prolonged occupation.

VI. APPLICABILITY OF HUMAN RIGHTS LAW

This is not the place to examine all the arguments concerning the applicability of the international law of human rights to military occupations generally.⁸⁹ Suffice it to say that (1) this question is but a part of the larger one of the applicability of multilateral conventions in occupied territories;⁹⁰ (2) the main impetus for UN action after 1945 to develop human rights law was the near-universal reaction against Nazi oppression in Germany and in German-occupied territories in the Second World War;⁹¹ (3) the scope-of-application provisions of human rights accords do not exclude their applicability in principle, even if they do, as noted below, permit certain derogations in time of emergency; (4) the idea of "respect for human rights in armed conflicts" has been stressed in numerous UN and other resolutions since at least the late 1960s;⁹² and (5) in some decisions, international courts and tribunals have affirmed the applicability of human rights law in occupied territories either implicitly (Namibia⁹³) or explicitly (northern Cyprus⁹⁴).

SC Res. 605 (Dec. 22, 1987) was strongly critical of Israeli conduct and reaffirmed that the Convention "is applicable to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem." This resolution was adopted by 14 votes to none, with one abstention (the United States). Two weeks later, SC Res. 607 (Jan. 5, 1988), adopted unanimously, reaffirmed the applicability of the Convention.

⁸⁹ See Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 REV. INT'L STUD. 39 (1987).

⁹⁰ See Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542 (1978), reprinted (with slight alterations) in MILITARY GOVERNMENT, *supra* note 30, at 217.

⁹¹ W. BISHOP, JR., INTERNATIONAL LAW: CASES AND MATERIALS 470 (3d ed. 1971).

⁹² See, e.g., GA Res. 2444 (XXIII) (Dec. 19, 1968) (adopted unanimously), which is on respect for human rights in armed conflicts generally; and the numerous General Assembly resolutions urging respect for human rights in specific armed conflicts and occupations, including those on the Israeli-occupied territories cited in note 99 *infra*.

⁹³ In its advisory opinion on Namibia, the International Court of Justice may have had human rights law in mind (as well as the laws of war, often called international humanitarian law) when it pointed to the applicability of "certain general conventions such as those of a humanitarian character." 1971 ICJ REP. at 46, 55 and 57.

⁹⁴ The European Commission of Human Rights ruled applications by the Government of Cyprus in respect of the Turkish occupation admissible in *Cyprus v. Turkey*. See 1975 Y.B. EUR. CONV. ON HUM. RTS. 82 (Nos. 6780/74 and 6950/75, Decision of May 26, 1975); and 1978 *id.* at 100 (No. 8007/77, Decision of July 10, 1978). The European Convention for the

The more specific question of the applicability of human rights law in the Israeli-occupied territories has been extensively discussed.⁹⁵ Cohen has suggested that in a prolonged occupation certain human rights accords may provide a useful guide for an occupying power, and should therefore be followed as a matter of policy:

[T]he concept of human rights was taken into account in drafting the Geneva Conventions, including the Fourth Geneva Convention.

Nevertheless, the Fourth Convention was designed to protect the civilian population under an essentially temporary occupation. While the Convention remains applicable to a large extent during the prolonged belligerent occupation phase, it is insufficient to ensure adequate protection for the needs of the civilian population during that phase. Further protection is called for. It is submitted that the Universal Declaration and the International Covenants on Human Rights may be used to guide the belligerent occupant in the administration of the territory occupied, just as civilian governments may be guided by these laws in the administration of their own territories.

Thus, in certain areas not covered by the Convention, such as economic rights, which involve a certain dynamism and initiative in order to avoid the stagnation which would result in their violation, the concept of human rights can serve to breathe new life into an otherwise stalemated situation.⁹⁶

The Israeli Government has frequently indicated a skeptical attitude towards the applicability of human rights instruments. One official publication has implied that human rights are totally dependent on the existence of peace; it has cited Article 4 of the 1966 International Covenant on Civil and Political Rights selectively, conveniently omitting all reference to those clauses of the article which spell out that certain general obligations, and certain specific provisions of the Covenant, continue to apply even in time of public emergency.⁹⁷

Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, Art. 1, states that the high contracting parties shall secure certain rights and freedoms to everyone "within their jurisdiction." The Commission found:

[T]his term is not equivalent to or limited to "within the national territory" of the High Contracting Party concerned. . . . [T]he High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad.

1978 Y.B. EUR. CONV. ON HUM. RTS. at 230.

⁹⁵ See particularly Meron, *The International Convention on the Elimination of All Forms of Racial Discrimination and the Golan Heights*, 8 ISR. Y.B. HUM. RTS. 222 (1978); and Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 *id.* at 106 (1979); see also Meron, *supra* note 90.

⁹⁶ E. COHEN, *supra* note 32, at 29.

⁹⁷ MINISTRY OF DEFENCE, CO-ORDINATOR OF GOVERNMENT OPERATIONS IN JUDEA-SAMARIA AND THE GAZA DISTRICT, *JUDEA-SAMARIA AND THE GAZA DISTRICT: A SIXTEEN-YEAR SURVEY (1967-1983)* 60 (1983). For the International Covenant on Civil and Political Rights, Dec. 16, 1966, see 999 UNTS 171.

A particularly clear exposition of the Israeli view on the applicability of human rights accords is contained in a memorandum prepared by the Office of the Legal Adviser in the Israeli Foreign Ministry in 1984. Written in response to an inquiry about the applicability of seven human rights accords, the memorandum asserts that Israeli policy in the West Bank and Gaza was in accord with the provisions of the 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials; the 1960 Convention against Discrimination in Education; and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. However, in respect of some other agreements (the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants), the memorandum says:

The unique political circumstances, as well as the emotional realities present in the areas concerned, which came under Israeli administration during the armed conflict in 1967, render the situation *sui generis*, and as such, clearly not a classical situation in which the normal components of "human rights law" may be applied, as are applied in any standard, democratic system in the relationship between the "citizen" and his government. Hence the criteria applied in the areas administered by Israel, in view of the *sui generis* situation, are those of "humanitarian law", which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety and security.⁹⁸

This passage contains a serious argument, namely, that much human rights law is about the relations between the citizen and his own government and is therefore not necessarily appropriate to the rather different circumstance of occupation. Nevertheless, it is doubtful whether human rights law only applies in "a classical situation," and the memorandum itself does not view all human rights law in this rather limited way. Its insistence that the relevant criteria are those of "humanitarian law" (i.e., the Hague Regulations and the Geneva Conventions) seems evasive in view of the elements of ambiguity in Israel's attitude towards the applicability of the fourth Geneva Convention.

A very strong case can be made for asserting the general applicability of human rights standards to military occupations, but this does not solve many problems. The relevance of the international law of human rights to the prolonged Israeli occupation needs to be assessed in individual cases, taking the following points into account.

1. There are different views on the exact legal status of some international agreements relating to human rights, including the 1948 Universal Declaration, whose applicability in the occupied areas has been urged in numerous UN General Assembly resolutions.⁹⁹

⁹⁸ Office of the Legal Adviser, memorandum (Sept. 12, 1984), *written for, and contained in*, A. ROBERTS, B. JOERGENSEN & F. NEWMAN, *ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION* 80, 81 (World University Service, London/International Commission of Jurists, Geneva, 1984).

⁹⁹ *See, e.g.*, GA Res. 2443 (XXIII) (Dec. 19, 1968); GA Res. 2546 (XXIV) (Dec. 11, 1969); GA Res. 2727 (Dec. 15, 1970); and the subsequent annual resolutions entitled "Report of the

2. Fewer states are parties to the international conventions on human rights than to the Geneva Conventions. For example, on December 31, 1988, the four Geneva Conventions had 165 states parties, including all the states in the area; whereas the two International Human Rights Covenants had 92 and 87 parties, respectively. Egypt, Jordan and Syria are parties to both Covenants. Israel has signed both but has not ratified them.¹⁰⁰

3. Many human rights conventions permit derogations from some of their provisions, for example, in time of public emergency. Israel is obviously inclined to view its military occupation, especially in the context of continuing armed conflict or internal revolt, as constituting such an emergency.

4. Over a wide range of issues, the laws of war rules regarding military occupations, as laid down in the Hague Regulations and the Geneva Conventions, may offer more extensive, detailed and relevant guidance than can the general human rights conventions;¹⁰¹ and their supervisory machinery may be more appropriate to the circumstances.

5. On a few specific issues, there may be an element of conflict between the law on occupations and human rights law. For example, Article 13(1) of the Universal Declaration says: "Everyone has the right to freedom of movement and residence within the borders of each state." Article 78, paragraph 1 of the fourth Geneva Convention says: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."¹⁰²

6. There are some issues (such as discrimination in employment, discrimination in education and the import of educational materials) that are addressed in considerable detail in certain human rights agreements, and are not so addressed in the law on occupations. In respect of such issues, the application of international human rights standards is highly desirable.

Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population in the Occupied Territories." For the Universal Declaration of Human Rights, see GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

¹⁰⁰ See note 24 *supra* and accompanying text. For the Covenant on Civil and Political Rights, *supra* note 97, and the Covenant on Economic, Social and Cultural Rights, GA Res. 2200 (Dec. 16, 1966), see MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1988, at 120, 130, UN Doc. ST/LEG/SER.E/7 (1989).

Syria, at accession to the Covenants in April 1969, made a declaration to the same effect as that of its declaration on Protocol I, *supra* note 53. In a note to the depositary in July 1969, Israel objected to this declaration.

¹⁰¹ Possible overlap between human rights law and the laws of armed conflict was raised in *Cyprus v. Turkey* where, because of the applicability of the third Geneva Convention on prisoners of war, the European Commission of Human Rights did not find "it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war." See T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 212 n.229 (1986) (quoting Eur. Comm'n of Hum. Rts., Report on Applications Nos. 6780/74 and 6950/75 (*Cyprus v. Turk.*) 109 (1976, declassified in 1979)). See also *supra* note 94.

¹⁰² Fourth Geneva Convention, *supra* note 7, Art. 78, para. 1.

7. Some human rights accords contain procedures for dealing with an issue, for example, enabling individuals to raise a matter directly with some outside institution, of a kind lacking in laws of war rules.

8. In the event that there is a significant change in status of the territories, with Israel and other states viewing the occupation phase as ending, the role of the law on occupations would probably be attenuated, and human rights law might be the principal body of international law to remain applicable.

VII. VIEWS OF THE INTERNATIONAL COMMUNITY

The Israeli occupation since 1967 has attracted a vast amount of international attention: from writers, including many in Israel and the occupied territories;¹⁰³ from nongovernmental organizations, especially those concerned with law and human rights; and from governments. Governmental interest has been evident at several levels: neighboring states, inter-Arab organizations, the nonaligned movement, the members of the European Communities, the two superpowers and the United Nations system.

This high degree of international interest has many causes. Politically, the occupation has been an appropriate target for the prevailing values and rhetoric of anticolonialism. The importance of the Middle East in power politics, and the key role of its oil resources, especially after 1973, has meant that the occupation could not be ignored. In any case, it is proper that there should be international concern about the effects of a prolonged occupation, particularly where there is a plain conflict of interest between occupier and occupied. Further, in common Article 1 of the four 1949 Geneva Conventions the states parties "undertake to respect and to ensure respect for the present Convention in all circumstances." An additional basis for international interest in the territories is the large number of refugees there who are entitled to, and do, receive international assistance.

The preoccupation of the United Nations with the occupied territories has been especially noteworthy, and controversial. Many aspects of UN involvement have attracted considerable, and often justified, critical comment—especially the work of the Special Committee to Investigate Israeli Practices.¹⁰⁴ Dinstein has written that "Israel is averse to proposals that the

¹⁰³ Critical work in English from the occupied territories includes many publications of the Palestinian affiliate of the International Commission of Jurists, al-Haq/Law in the Service of Man, Ramallah; and R. SHEHADEH, *supra* note 80, which summarizes a range of complaints against Israeli practices.

¹⁰⁴ The work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population in the Occupied Territories has illustrated the political hazards that can attend efforts to evaluate Israeli actions by reference to international legal standards. Since it was set up in 1968, the committee has submitted annual reports, published by the United Nations. *See, e.g.*, its 15th report, UN Doc. A/38/13 (1983). In the eyes of many Israelis, the committee was biased from the beginning and its reports one-sided. For a critical Israeli review, see Shefi, *The Reports of the UN Special Committees on Israeli Practices in the Territories*, in *MILITARY GOVERNMENT*, *supra* note 30, at 285. The committee's work may have reinforced two already existing tendencies in Israel: distrust of international organizations and reliance on unilateral, rather than multilateral, approaches.

legality of the measures taken by its military government in the occupied territories will be subjected to scrutiny by international organizations (especially the United Nations, which it regards as totally dominated by hostile countries)."¹⁰⁵ Persistent attempts in the 1980s to deprive Israel of the right to participate in various UN bodies, although unsuccessful, have not enhanced Israeli respect for the Organization.¹⁰⁶ The General Assembly's attitude to Israel has often been strident and denunciatory—most notably in the 1975 resolution equating Zionism with "racism and racial discrimination."¹⁰⁷ Phraseology in some General Assembly resolutions suggests that in occupations, as in war, the laws of war can easily get used for political propaganda. Such resolutions have probably had little effect other than to strengthen Israel's sense of isolation and defiance of international opinion. However, many UN resolutions have spelled out important positions on fundamental legal questions. These include the resolutions, already noted, on the applicability of international law to this occupation¹⁰⁸ and other resolutions, mentioned below, on additional key aspects of the legal framework of a prolonged occupation.

The Status of Territory and Self-Determination

When a prolonged occupation occurs because of ancient rivalries and deep-seated territorial-cum-political disputes, there well may not be a status quo ante to which states can easily revert as part of a diplomatic settlement. Moreover, during a prolonged occupation the aspirations of the inhabitants, and of the international community, may change. Thus, questions are raised about the extent to which the ousted sovereign, who had control before the occupation, continues to have rights with respect to the territory; and whether the inhabitants of the occupied territory have a right of self-deter-

For another critical view of the committee's work, see Alderson, Curtis, Sutcliffe & Travers, *Protection of Human Rights in Israeli-Occupied Territories*, 15 HARV. INT'L L.J. 470 (1974). They suggest that the General Assembly, through the committee and through its resolutions concerning rights in the occupied territories, has had little discernible effect other than to antagonize Israel and add another element of contention to the disputes between Israel and its neighbors. *Id.* at 481. They conclude that parties to the fourth Geneva Convention need to

perfect and reaffirm the enforcement procedures prescribed in that agreement. They cannot rely exclusively upon United Nations action to ensure conformity with its provisions. A consistent theme in United Nations pronouncements on the enforcement of the Convention has been that it is only the parties themselves which are, in the last analysis, in a position to implement the procedures and exert the pressures which will make the Convention work.

Id. at 482.

¹⁰⁵ Dinstein, *supra* note 69, at 174. Note also Schachter's observation, in *Self-Defense and the Rule of Law*, 83 AJIL 259, 263 (1989): "That states generally do not welcome international scrutiny of their defensive measures is hardly surprising. This attitude is especially marked when armed force is actually used, even though seen by the user as legitimate self-defense." The same attitude characterizes military occupants.

¹⁰⁶ See Tabory, *Universality at the UN: The Attempt to Reject Israel's Credentials*, 18 ISR. Y.B. HUM. RTS. 189 (1988).

¹⁰⁷ GA Res. 3379 (XXX) (Nov. 10, 1975).

¹⁰⁸ See *supra* notes 86–88 and accompanying text.

mination and, if so, how any such right may be recognized and exercised. While there cannot be absolute answers to these questions, the case of the West Bank and Gaza suggests some partial answers and points to the emergence of procedures for addressing them.

The international community has favored self-determination in respect of several recent and contemporary occupations—for example, in Kampuchea, Namibia and Western Sahara.¹⁰⁹ However, the case for self-determination has not been pressed where the occupied territory is widely accepted as being part of an existing state, from which it has been forcefully separated and to which it may be expected eventually to revert. A case in point is northern Cyprus: any act of self-determination there might well be seen as a threat to the sovereignty and territorial integrity of Cyprus, and as a victory for the Turkish invasion and occupation.

The idea of Palestinian self-determination, which has been extensively advanced since 1967, is not new. There are strong grounds for doubt whether the West Bank and Gaza were, before 1967, simply integral parts of Jordan and Egypt, respectively.¹¹⁰ There was also, even before 1967, some evidence of a tendency to view the inhabitants of Palestine as a people, and as candidates for self-determination—despite uncertainty and disagreement as to the geographical area in which it was to be exercised.¹¹¹

In the period since June 1967, Palestinian nationalism has grown within the occupied territories.¹¹² Moreover, in many different ways the international community has come to accept the propositions that there is a Palestinian people; that it has a right of self-determination; and that this right is to be exercised in the West Bank and Gaza, rather than in the whole of former mandatory Palestine. None of these propositions is self-evident, and in the nature of things their acceptance by the international community has been slow and uneven; for example, Palestinian self-determination was not mentioned in UN Security Council Resolutions 242 and 338.¹¹³ Significant

¹⁰⁹ See, e.g., GA Res. 36/5 (Oct. 21, 1981); and GA Res. 43/19 (Nov. 3, 1988) (both on Kampuchea); GA Res. 2403 (XXIII) (Dec. 16, 1968); and GA Res. 43/26 (Nov. 17, 1988) (both on Namibia); and GA Res. 38/40 (Dec. 7, 1983); and GA Res. 43/33 (Nov. 22, 1988) (both on Western Sahara).

¹¹⁰ See *supra* text at note 64.

¹¹¹ On the evolution within the international community of the idea of Palestinian self-determination, see especially S. & T. Mallison, *The Juridical Bases for Palestinian Self-Determination*, 1 PALESTINE Y.B. INT'L L. 36 (1984). On the emergence of nationalism among the Palestinian Arabs, see the important study by an Israeli scholar, Y. PORATH, THE EMERGENCE OF THE PALESTINIAN-ARAB NATIONAL MOVEMENT 1918–1929 (1974).

¹¹² On political developments in the West Bank, see particularly two fine studies by an Israeli and a Palestinian academic, respectively: M. MA'OZ, PALESTINIAN LEADERSHIP ON THE WEST BANK: THE CHANGING ROLE OF THE MAYORS UNDER JORDAN AND ISRAEL (1984); and E. SAHLIYEH, IN SEARCH OF LEADERSHIP: WEST BANK POLITICS SINCE 1967 (1988). In 1979–1980 Ma'oz was an adviser on Arab affairs to the Israeli Defense Minister, and to the Coordinator for Activities in the Territories.

¹¹³ SC Res. 242 (Nov. 22, 1967) provided for Israeli withdrawal from territories occupied in the 1967 war, coupled with a termination of all claims or states of belligerency. SC Res. 338 (Oct. 22, 1973) reaffirmed Res. 242 and called for negotiations "aimed at establishing a just and durable peace in the Middle East." These resolutions, accepting as they did Israel's right to

landmarks in the international acceptance of Palestinian aspirations have included General Assembly resolutions from 1969 onwards reaffirming “the inalienable rights of the people of Palestine”;¹¹⁴ the September 1978 Camp David Agreements between President Sadat, Prime Minister Begin and President Carter, with their proposals for a self-governing authority for the West Bank and Gaza for a transitional period of 5 years;¹¹⁵ the June 1980 Venice declaration of the heads of government of the nine member states of the European Communities, calling for recognition of two principles—the right to existence of all the states in the region and the legitimate rights of the Palestinian people;¹¹⁶ the peace plan, adopted by the Arab summit at Fez in September 1982 and accepted by the PLO, calling for a settlement based on Israeli withdrawal from the territories occupied in 1967;¹¹⁷ the September 1983 Geneva declaration on Palestine;¹¹⁸ and the short-lived Jordan-PLO accord of February 1985.¹¹⁹

In 1988 and 1989, many important diplomatic developments took place. King Hussein of Jordan changed the framework of discussion significantly on July 31, 1988, by accepting “the wish of the PLO, the sole legitimate representative of the Palestinian people, to secede from us in an independent Palestinian state,” and indicating that he would dismantle “the legal and administrative links” between Jordan and the West Bank.¹²⁰ On November 15, the Palestine National Council, in making a declaration of independence, proposed an international conference on the Middle East on the basis of Security Council Resolutions 242 (1967) and 338 (1973), and thus implic-

exist, and making no specific mention of Palestinian self-determination, were for many years viewed with deep suspicion by the PLO.

¹¹⁴ The first such resolution was GA Res. 2535B (XXIV) (Dec. 10, 1969). Another key resolution was GA Res. 2672C (XXV) (Dec. 8, 1970), which recognized that “the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations.” These early resolutions attracted only modest support: votes for and against and abstentions were, respectively, 48-22-47, and 47-22-50.

¹¹⁵ Camp David Agreements, *supra* note 43. For a succinct account of the negotiation of these accords, referring to memoirs of participants, see S. SOFER, *BEGIN: AN ANATOMY OF LEADERSHIP* 189–200 (1988). According to Sofer, as late as March 1978, “Sadat was inclined to agree that a Palestinian state should not be established.” *Id.* at 187.

¹¹⁶ KEESING'S CONTEMPORARY ARCHIVES 30,635 (1980). *

¹¹⁷ The Arab Peace Plan, adopted by the Twelfth Arab Summit Conference, held at Fez, Sept. 6–9, 1982, went some way towards accepting the existence of Israel. For details, including extracts from the Fez summit declaration, see KEESING'S CONTEMPORARY ARCHIVES 32,037 (1983). It was subsequently supported in numerous General Assembly resolutions, e.g., GA Res. 43/54A (Dec. 6, 1988), and at the extraordinary summit meeting of the Arab League at Algiers on June 7–9, 1988.

¹¹⁸ This declaration was issued at the conclusion of the UN International Conference on the Question of Palestine, held at Geneva, Aug. 29–Sept. 7, 1983, *reprinted in* 1 *PALESTINE Y.B. INT'L L.* 66 (1984).

¹¹⁹ The text of the Jordanian-Palestinian Accord, Feb. 11, 1985, together with indications of the PLO Executive Committee's desired alternative wording, is *reprinted in* 2 *PALESTINE Y.B. INT'L L.* 224 (1985). On the demise of the accord, see Roberts, *Decline of Illusions: The Status of the Israeli-occupied Territories over 21 Years*, 64 *INT'L AFF.* 345, 353–54 (1988).

¹²⁰ *N.Y. Times*, Aug. 1, 1988, at A1, col. 6.

itly accepted the existence of Israel and a two-state solution to the problem of Palestine.¹²¹ The proclamation of the State of Palestine was widely, though not of course universally, acknowledged in the international community.¹²² Subsequent clarifications by PLO Chairman Yasir Arafat in Geneva on December 13 and 14, including reiterations in a new form of earlier statements renouncing terrorism, led to the first official direct talks between U.S. and PLO officials, which began in Tunis on December 16.¹²³

All these developments were followed by a period of continued infiltration and incidents on the ground, and diplomatic stalemate. On May 14, 1989, the Israeli cabinet approved Prime Minister Shamir's plan for elections among Palestinians in the occupied territories, leading to a strictly limited autonomy. The PLO rejected it, while indicating that certain elements could be incorporated into a framework for an overall settlement. Shamir remained hostile to any Palestinian state, telling the Knesset on May 17 that he ruled out trading land for peace. The Egyptian Government announced a ten-point plan aimed at overcoming these differences in September 1989, following extensive consultations with key parties: it contained detailed proposals for internationally supervised elections in the West Bank (including East Jerusalem) and Gaza, and envisaged negotiations on a final settlement in 3 to 5 years' time.¹²⁴

These diplomatic moves came on top of some other demographic and political developments that have weakened, if not undermined, extreme positions on both sides: by the late 1980s, neither the complete abolition of Israel nor complete Israeli settlement and domination of the occupied territories could be presented with the same conviction as in earlier periods.¹²⁵

The effect of all these developments should not be exaggerated. They could not in themselves dissolve the encrusted bitterness of a long-standing and violent dispute, they could not alleviate deep fears on both sides about security and they could not prevent the growth of religious fundamentalism among Arabs and Israelis. They have had, at best, a limited effect in persuading Israelis and Palestinians to work towards pragmatic compromise. The Israeli Government remains obdurate; while on the Palestinian side, the belief that self-determination is an internationally recognized right still

¹²¹ For a succinct summary of the 19th session of the PNC, held in Algiers, Nov. 12-15, 1988, see KEESING'S RECORD OF WORLD EVENTS 36,438 (1989). On the evolution of Palestinian thinking that led to the events at the end of 1988, see Sayigh, *Struggle Within, Struggle Without: The Transformation of PLO Politics since 1982*, 65 INT'L AFF. 247 (1989).

¹²² Evidence of a degree of international acceptance of the PLO's move was GA Res. 43/177 (Dec. 15, 1988), which acknowledged the proclamation of the State of Palestine by the Palestine National Council and decided that the designation "Palestine" should be used in place of "Palestine Liberation Organization" in the UN system, without prejudice to the observer status and function of the PLO within the system. The vote was 104-2-36, the two votes against being those of Israel and the United States. UN Press Release GA/7814, at 112 (Jan. 16, 1989).

¹²³ Int'l Herald Trib. (Paris), Dec. 17-18, 1988, at 1.

¹²⁴ KEESING'S RECORD OF WORLD EVENTS 36,599 and 36,670 (1989); and report from Cairo, The Times (London), Sept. 13, 1989, at 12, col. 7.

¹²⁵ See, e.g., Y. HARKABI, ISRAEL'S FATEFUL DECISIONS (1988); and Roberts, *supra* note 119.

sometimes involves a corollary reluctance to think in terms of a transitional period before full independence, or to accept that there might be any obligation on Palestinians to demonstrate (to Arab states as much as to Israel) that a future Palestinian state would be a stable and responsible member of international society, accepting frontiers, regimes and rules of coexistence.

Despite the many problems associated with them, the diplomatic and political moves since the occupation began together have reinforced the view of the West Bank and Gaza as territories that jointly are a candidate for self-determination, and have weakened alternative views. The idea that either of these territories might revert eventually to the state that previously controlled it is effectively dead. Thus, the acts of the international community indicate that the implicit assumption of the law on occupations—that occupied territory is “territory of a High Contracting Party”—need not be a straitjacket when it comes to consideration of the future status of a land and its people.

Professor Richard Falk, in proposing a formal international convention on prolonged occupation, has suggested that if an occupation is not terminated after, say, 10 years, some political procedure needs to be established whereby the inhabitants can secure and exercise a right of self-determination.¹²⁶ Although the Falk proposal would accord with the expressed views of the international community on the West Bank and Gaza, it may be doubted whether an international convention would actually add clarity or force to what is already a strong demand. Moreover, it is not self-evident that in all cases of occupations, a formal requirement for some mechanism of self-determination after a specified period would be superior to the normal processes of bargaining for a political settlement. In some cases, the international community is unlikely to favor self-determination by the people in the territory deemed to be occupied, e.g., northern Cyprus.

The emphasis placed by the international community on Palestinian self-determination has not meant a complete abandonment of Jordanian and Egyptian responsibility for the West Bank and Gaza, respectively. With Israeli consent, the ousted administering powers have maintained a modest degree of involvement in various spheres, including some educational matters. Until the Palestinians actually exercise self-determination, and decide on the form of a future Palestinian entity, the Governments of Jordan and Egypt are likely to continue to have an important role in the territories—or at least in negotiations on their future.

The Legitimacy and Treatment of Resistance

In most cases of prolonged occupation, resistance emerges in some form, whether violent or nonviolent. However, the main international conven-

¹²⁶ Prof. Falk's article, *supra* note 29, was originally a paper presented on July 8, 1988, at an international symposium at Oxford. In this paper he also suggested that the proposed convention should specify that international human rights law, as well as the law of war, applies in a prolonged occupation.

tions on occupations say little about its legitimacy or otherwise, and only slightly more about the treatment of those involved in it. The most detailed rules governing the treatment of resisters are in Articles 5, 49 and 68 of the fourth Geneva Convention. There is also a much larger, but widely dispersed, body of case law, especially from the time of the Second World War.

The legitimacy of resistance in occupied areas, and of support from abroad for such resistance, has always been a difficult question for diplomatic conferences, courts, writers on the laws of war and governments. It has been raised in sharp form by events in the 1980s in Afghanistan, Nicaragua, Namibia and elsewhere. What is the status of combatants other than the members of the regular armed forces of a country? Is popular resistance (whether violent or nonviolent) a breach of a notional contract between occupier and occupied?¹²⁷ Is active outside support of resistance in occupied areas justified? Is the recovery of lost territories, including those under prolonged occupation, a justification for war?¹²⁸ These questions, which are by no means new, do not admit of absolute answers: it is placing too heavy a burden on international law to expect answers from it, but it can offer some criteria and guidelines.

In the post-1945 period, following Allied support for resistance in Axis-occupied countries, and the ending of the European colonial empires, the international community has tended not only to support self-determination in principle, but also—and increasingly—to view resistance against outside domination as justifiable. The 1974 UN Definition of Aggression contained the statement:

Nothing in this Definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . . , particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter¹²⁹

As a corollary of this approach, a degree of recognition has been granted to certain liberation movements. Thus, on November 13, 1974, PLO Chairman Arafat addressed the UN General Assembly. On November 22 of that year, the Palestine Liberation Organization was one of several national liberation movements accorded observer status in the General Assembly and UN-sponsored conferences.¹³⁰

¹²⁷ A famous exploration of resistance is Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950).

¹²⁸ For a brief, skeptical discussion of this issue in relation to the 1973 war, which Egypt and Syria justified partly as a war for the recovery of territory under prolonged Israeli occupation, see W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 286 (1981).

¹²⁹ Definition of Aggression, Art. 7, Annex to GA Res. 3314 (XXIX) (Dec. 14, 1974). See also the similar formula in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625 (XXV) (Oct. 24, 1970).

¹³⁰ GA Res. 3237 (XXIX) (Nov. 22, 1974). On recognition, see also *supra* note 122.

In countless statements, UN bodies have criticized the actions taken by Israel in response to resistance of one kind or another. For example, a telegram dispatched by the UN Commission on Human Rights on March 8, 1968, called on Israel "to desist forthwith from acts of destroying homes of the Arab civilian population in areas occupied by Israel."¹³¹ Eighteen years later, in 1986, a General Assembly resolution called on Israel "to release all Arabs arbitrarily detained or imprisoned as a result of their struggle for self-determination and for the liberation of their territories."¹³² In 1988, almost a year after the outbreak of the *intifada*, a General Assembly resolution stated that it

[c]ondemns Israel's persistent policies and practices violating the human rights of the Palestinian people in the occupied Palestinian territories, including Jerusalem, and, in particular, such acts as the opening of fire by the Israeli army and settlers that result in the killing and wounding of defenceless Palestinian civilians, the beating and breaking of bones, the deportation of Palestinian civilians.¹³³

Much Israeli policy and practice in dealing with resistance has deserved criticism. The above-quoted resolution was properly critical of the policy of "force, power and beatings" enunciated by Minister of Defense Rabin on January 20, 1988. This approach—though subsequently clarified by the Attorney General in a ruling that beatings could only be administered to subdue rioters while resisting arrest—led to the issuing of certain orders that were criticized by an Israeli military court in 1989 as "manifestly illegal."¹³⁴

Yet the General Assembly's tendency to criticize almost all Israeli actions against resistance has resulted in failure to take note of those that have recognized legal standards in the treatment of resisters; and an equal failure

¹³¹ Mentioned in GA Res. 2443 (XXIII) (Dec. 19, 1968). House demolitions have been widely criticized as an extrajudicial measure of collective punishment.

¹³² GA Res. 41/63A (Dec. 3, 1986). In logic, one could question the claim that the Arabs have been detained "arbitrarily," when the reason for their detention occupies the rest of the same sentence in the resolution. In reality, however, it does appear that many cases of detention and imprisonment have been arbitrary.

¹³³ GA Res. 43/21 (Nov. 3, 1988). In April 1989, the ICRC stated

that it had been extremely concerned for some time by the increasingly frequent use of firearms against civilians in the occupied territories, and by acts of physical violence against defenceless people. Over the past 16 months, more than 400 Palestinians and around 17 Israelis have been killed, while thousands of people have been injured. In addition, the institution stated that the evacuation of the wounded, the work of medical staff and the smooth running of hospitals in the occupied territories were hampered by Israeli forces.

ICRC BULL., No. 160, May 1989, at 1.

¹³⁴ Judgment of an Israeli military court, May 25, 1989, hearing the case of four soldiers accused of manslaughter of a Palestinian beaten to death after trying to protect his son from arrest. The four were convicted on the lesser charge of brutality. The court said that, under Israeli law, obeying orders is no defense if, as in this case, they were manifestly illegal. Charles Richards, reporting from Jerusalem, concluded: "Prosecutions and disciplinary actions have been rare; the army protects its own. . . . Since the Uprising began in December 1987, two soldiers have been convicted of manslaughter. Nearly 500 Palestinians have been shot dead or beaten to death in this period." *The Independent* (London), May 26, 1989, at 12, col. 1.

to note that the dilemmas Israel faces are difficult and its rights under the law on occupations real. Consequently, General Assembly resolutions bearing on the treatment of Palestinian resistance have had diminished impact, having been easy for Israelis to dismiss.

In general, United Nations involvement in the subject of resistance has been highly controversial, and has contributed to criticism of the Organization. It has sought simultaneously to maintain the Charter prohibitions on the use of force and to offer an "innovatory adumbration of the principles of the Just War."¹³⁵ UN support for struggles of national liberation has often been expressed rhetorically, without addressing important issues. One finds little awareness of the Burkean distinction between the possible existence of a right (e.g., of resistance, or of recovery of territory through war) and the wisdom of actually exercising that right in a given situation. Further, one finds little serious discussion of choice of means of pursuing a given right; for example, UN resolutions have given no clue as to whether liberation struggles ought to be fought within limits derived from, or akin to, the laws of war. This omission has been especially serious since terrorist attacks against wholly innocent civilian targets were already alarmingly widespread in the early 1970s. The record of the United Nations in this respect has not been wholly negative: it has, of course, been involved in drawing up conventions and resolutions dealing with various aspects of terrorism, and it has been increasingly critical of this phenomenon.¹³⁶ The real criticism is that UN resolutions have lacked intellectual coherence, and (for a time at least) they lost sight of laws of war principles as a possible restraint not just on occupying powers, but also on liberation movements.

The issue of making legal restraints clearly applicable to liberation struggles is addressed in Geneva Protocol I, which includes within its scope of application "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."¹³⁷ This formula, which is echoed in countless UN documents, clearly includes the peoples of southern Africa and Palestine.¹³⁸ If implemented, Protocol I would require any liberation movement to observe extensive restrictions as regards methods of operation, weaponry and targets. The provisions in respect of such movements, and, indeed, whether the Protocol encompasses such movements at all, have inspired considerable debate, especially in the United States.¹³⁹ Nevertheless, the Protocol does establish that there are rules that would apply to

¹³⁵ Howard, *The UN and International Security*, in UNITED NATIONS, DIVIDED WORLD 31, 37 (A. Roberts & B. Kingsbury eds. 1988).

¹³⁶ For results of the UN consideration of terrorism, including the texts of conventions on the subject, see especially GA Res. 3166 (XXVIII) (Dec. 14, 1973); GA Res. 34/146 (Dec. 17, 1979); and GA Res. 40/61 (Dec. 9, 1985).

¹³⁷ Protocol I, *supra* note 27, Art. 1(4).

¹³⁸ M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 36, at 51-52. Since neither South Africa nor Israel has become party to the Protocol, its formal applicability to these territories is of course doubtful.

¹³⁹ The main positions are outlined in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AJIL 910 (1987); and its continuation, 82 AJIL 784 (1988); see also Gasser's further letter, 83 AJIL 345 (1989).

participants in liberation struggles as well as to other types of combatant—which is more than can be said of some UN resolutions.

Palestinian Deportations, Israeli Settlements

Over 20 years, no aspect of life can remain static. The changes in the demography of the occupied territories have been particularly significant. In September 1967, the Palestinian population of the West Bank and Gaza was just under one million. By the end of 1987, it reached an estimated 1,424,100 (860,000 in the West Bank and 564,100 in the Gaza Strip).¹⁴⁰ This growth is remarkable, considering that it has taken place against a background of substantial labor emigration, especially in the oil boom of the 1970s. Among Israelis, these figures have caused much concern because they suggest that within decades there might be an Arab majority in the overall area comprising Israel and the occupied territories.¹⁴¹ For Palestinians, too, there are major causes of concern on demographic matters: deportations of Palestinians and Israeli settlements.

In accord with the view that occupation is a provisional state of affairs, the imposition of demographic changes within occupied territory has long been seen as undesirable. The fourth Geneva Convention appears to be precise on the question, stating as it does in the first and sixth paragraphs of Article 49:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.¹⁴²

The individuals deported from the occupied territories fall into two broad categories: political leaders and those alleged to be involved directly in hostile activities. The deportations began in 1967 in the first months of the occupation, have particularly affected the leadership and have involved well over a thousand persons.¹⁴³ Some of the deportations have been de-

¹⁴⁰ CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL 1988, at 705.

¹⁴¹ Unofficial Israeli projections for mandatory Palestine as a whole (i.e., Israel, the West Bank and Gaza) suggest that by the year 2010 there will be parity between the Jewish and Arab populations. See M. BENVENISTI, THE WEST BANK DATA BASE PROJECT 1987 REPORT 5 (1987). An accelerated influx of Soviet Jews in the 1990s could upset these forecasts.

¹⁴² Fourth Geneva Convention, *supra* note 7, Art. 49, paras. 1 and 6.

¹⁴³ E. COHEN, *supra* note 32, at 106–07, reports figures indicating that over 1,100 people were deported from the West Bank and Gaza between 1967 and 1977. She quotes a senior military official as saying that only 68 of these were genuine deportations—i.e., cases in which the individuals concerned were (1) recognized officially to be residents of the occupied territories, and (2) not transferred as part of an exchange with an Arab state. The deportations aroused opposition both internally and internationally; in 1980 they were discontinued, recommencing following a cabinet decision of Aug. 4, 1985.

A figure of 2,000 deportations for the whole period 1967–1986, apparently from the West Bank alone, is given in M. BENVENISTI, THE WEST BANK HANDBOOK: A POLITICAL LEXICON 87 (1986).

fended, e.g., in Supreme Court decisions, on a variety of grounds, such as that these deportations were quite different in character and intent from those which took place in the Second World War; that the individuals concerned were not "protected persons"; and/or that they were being deported, not to "any other country," but to a country (e.g., Jordan) whose nationals they were.¹⁴⁴ Such arguments could not allay the deep fears among the Palestinian population that the deportations actually carried out by Israel were the thin end of the wedge, to be followed by larger expulsions. One disturbing aspect of the Israeli swing to the right as a result of the Palestinian uprising has been an apparent increase in the numbers of Israelis favoring deportations. According to a survey conducted by Tel Aviv University, four Israelis in every ten support the idea of "transferring" the Arab populations out of the West Bank and the Gaza Strip.¹⁴⁵

The growth of Israeli settlements in the occupied territories, which has been most marked since 1977, has similarly fueled fears of mass expulsions. At the end of 1976, after almost a decade of occupation, there were an estimated 3,176 Jewish settlers in the West Bank. By April 1987, there were approximately 65,000 Jews living in the West Bank, and 2,700 in the Gaza Strip.¹⁴⁶ As with deportations, so with settlements: there have been some claims that Israeli practices are compatible with international norms, including those of the fourth Geneva Convention. A distinction has been drawn between the transfer of people—which is forbidden under Article 49—and the voluntary settlement of nationals on an individual basis; and it has been asserted that there is nothing wrong with settlements in the sense of army bases where soldiers are engaged in agriculture for part of the time.¹⁴⁷ Civilian settlements have also been called necessary for the occupying power's security, and therefore essential if the occupying power is to preserve public order and safety.¹⁴⁸

¹⁴⁴ For discussions of the legality of the deportations, see Dinstein, *Refugees and the Law of Armed Conflict*, 12 ISR. Y.B. HUM. RTS. 94 (1982); Shefi, *supra* note 104, at 304–06; E. COHEN, *supra* note 32, at 104–11. For a well-argued critique of the legality of deportations (mainly those of 1985–1986), see J. HILTERMANN, *ISRAEL'S DEPORTATION POLICY IN THE OCCUPIED WEST BANK AND GAZA (Al-Haq/Law in the Service of Man, 1986)*. For a 1988 Supreme Court case involving deportations, see *infra* text at note 181. For a recent affirmation of the illegality of deportations, under both the Geneva Convention and customary law, see T. MERON, *supra* note 23, at 48 n.131.

¹⁴⁵ OBSERVER (London), June 12, 1988, at 22, col. 5. In the November 1988 election, one party, Moledet, ran on this issue; it secured under 2% of the total vote and won only two seats in the Knesset.

¹⁴⁶ M. BENVENISTI, *supra* note 141, at 51–55; and M. BENVENISTI, *supra* note 143, at 66. The figures for settlers in the West Bank do not include the large number (80,000 in 1985, and still growing) in the extended municipal boundaries of Jerusalem.

¹⁴⁷ For an analysis suggesting that some Israeli settlements are compatible with the fourth Geneva Convention, see Dinstein, *supra* note 67, at 124. See also text at notes 169, 173 and 174 *infra*, for statements in the Supreme Court on the status and meaning of Article 49, paragraph 6.

¹⁴⁸ See, e.g., the material on various Supreme Court cases involving settlements in MILITARY GOVERNMENT, *supra* note 30, at 152–53, 158, 313–19, 371–97, 404–41. See also *infra* text at notes 166–74 (referring to the *Beth-El* and *Elon Moreh* cases).

Such arguments are far from convincing. In particular, even if voluntary settlement of nationals on an individual basis were permissible under Article 49, the ambitious settlements program of the 1980s, which was planned, encouraged and financed at the governmental level, does not meet that description.¹⁴⁹ Moreover, it is doubtful whether the settlements program was primarily intended to contribute to the occupying power's security and whether, in the event, it has contributed to that end; by causing friction with the Palestinian inhabitants of the territories, the program may even have added to the work of the Israel Defense Forces (IDF).¹⁵⁰ The settlements program is quite simply contrary to international law. However, it is now so far advanced, and so plainly in violation of the Geneva Convention, that it actually creates a powerful reason for Israel's continuing refusal to accept that the Convention is applicable in the occupied territories on a *de jure* basis.

The international community has taken a critical view of both deportations and settlements as being contrary to international law. General Assembly resolutions have condemned the deportations since 1969, and have done so by overwhelming majorities in recent years.¹⁵¹ Likewise, they have consistently deplored the establishment of settlements, and have done so by overwhelming majorities throughout the period (since the end of 1976) of the rapid expansion in their numbers.¹⁵² The Security Council has also been

¹⁴⁹ See, e.g., M. BENVENISTI, *supra* note 141, at 51-65.

¹⁵⁰ On unauthorized violence by settlers, see the Ministry of Justice report J. KARP ET AL., REPORT OF THE INQUIRY TEAM RE INVESTIGATION OF SUSPICIONS AGAINST ISRAELIS IN JUDEA AND SAMARIA (1984).

¹⁵¹ The first was GA Res. 2546 (XXIV) (Dec. 11, 1969). The following resolutions condemning deportations received overwhelming majorities: GA Res. 41/63E (Dec. 3, 1986) (131-1-21); and GA Res. 43/58E (Dec. 6, 1988) (152-1-1). The United States abstained on these resolutions. However, the "United States has stated that deportation is inconsistent with the Fourth Geneva Convention." DEPARTMENT OF STATE, *supra* note 87, at 1193.

¹⁵² See, e.g., the following examples, at 4-year intervals:

GA Res. 31/106A	(Dec. 16, 1976)	(129-3-4)
GA Res. 35/122B	(Dec. 11, 1980)	(140-1-3)
GA Res. 39/95C	(Dec. 14, 1984)	(143-1-1)
GA Res. 43/58C	(Dec. 6, 1988)	(149-1-2)

The United States voted against the 1976 resolution above, and abstained on the others. When it abstained on GA Res. 32/5 (Oct. 28, 1977) (131-1-7), the U.S. representative said that the United States opposed the Israeli settlements, but that it had accepted a special responsibility as cochairman of the Geneva Peace Conference on the Middle East, requiring it to remain impartial when the complex issues to be considered there were involved. 1977 UN Y.B. 317-18.

For a clear statement of the U.S. view that Israel's establishment of civilian settlements in the occupied territories is inconsistent with international law, see the letter of Herbert J. Hansell, Legal Adviser, Department of State, to House Comm. on International Relations (Apr. 21, 1978), 17 ILM 777 (1978). On U.S. policy towards settlements in 1989, see text at note 184 *infra*.

The General Assembly has shown some consistency in criticizing other cases of demographic changes imposed by foreign occupation forces. See, e.g., its expressions of concern "about reported demographic changes being imposed in Kampuchea by foreign occupation forces" in GA Res. 40/7 (Nov. 5, 1985), and GA Res. 43/19 (Nov. 3, 1988).

critical of deportations and settlements;¹⁵³ and other bodies have viewed them as an obstacle to peace, and illegal under international law.¹⁵⁴

Long-Term Economic Change

The idea that occupation is temporary, and that an occupying power has a role in some respects akin to that of a trustee, finds reflection in a number of rules on economic matters, particularly the 1907 Hague Regulations (Articles 48–56). Some of the foundations of the Hague rules now seem dated, especially the insistence (objectionable to Communist countries) that private property merits a higher degree of protection than state property. However, few in number and antique as they are, these rules do establish some important principles, such as on taxation.¹⁵⁵

In the West Bank and Gaza since 1967, extensive economic changes have been brought about in such key areas as agriculture, land ownership, use of water resources, the road system, building construction and taxation. Labor has become more mobile: large numbers work daily in Israel, and many have left on a longer-term basis to work abroad.¹⁵⁶ Not all these changes have been for the worse. For example, living standards rose, at least up to the mid-1970s. Nevertheless, some actual and planned economic measures have caused concern, on several grounds: discrimination against Palestinian economic activity, creation of an economy dependent on that of Israel and use of certain resources in the territories for the benefit of Israelis rather than Palestinians.

The international community has made many pronouncements on economic aspects of the Israeli occupation. The numerous references in the annual reports of the UN Special Committee on Israeli Practices have been reflected in the annual General Assembly resolutions on the reports.¹⁵⁷

¹⁵³ See, e.g., SC Res. 469 (May 20, 1980) (on deportations; quoting the fourth Geneva Convention, Art. 49, and calling on Israel to rescind the expulsion of the mayors of Hebron and Halhoul, and the Sharia Judge of Hebron); and SC Res. 465 (Mar. 1, 1980) (calling settlements a “flagrant violation of the Geneva Convention”). The latter resolution, which also criticized Israel’s purported annexation of Jerusalem, was adopted unanimously, but the U.S. Government subsequently stated that it was retracting its vote. For an account of “the highly publicized snafu” over this vote, see Z. BRZEZINSKI, *POWER AND PRINCIPLE: MEMOIRS OF THE NATIONAL SECURITY ADVISER, 1977–1981*, at 441 (rev. ed. 1985). Brzezinski presents much interesting material on the Carter administration’s thinking on the settlements; see, e.g., *id.* at 110, 258, 263 and 440–42. See also SC Res. 607 (Jan. 5, 1988), adopted unanimously, calling on Israel to refrain from deporting any Palestinian civilians from occupied territory.

¹⁵⁴ See, e.g., the June 1980 Venice declaration of the nine EEC countries, *supra* note 116 and accompanying text, which was blunt on the settlements issue.

¹⁵⁵ See, e.g., text at note 177 *infra*.

¹⁵⁶ On economic developments in the West Bank and Gaza, see Graham-Brown, *The Economic Consequences of the Occupation*, in *OCCUPATION: ISRAEL OVER PALESTINE* 167 (N. Aruri ed. 1984); and M. BENVENISTI, publications cited in notes 70, 141 and 143 *supra*.

¹⁵⁷ See, e.g., GA Res. 41/63D (Dec. 3, 1986), which includes in its litany of complaints of Israeli policies and practices the following economic items:

- (c) Illegal imposition and levy of heavy and disproportionate taxes and dues;

Other General Assembly resolutions have also addressed the legality of certain Israeli economic activities and plans. From 1973 to 1983, a series of resolutions on "Permanent Sovereignty over National Resources in the Occupied Arab Territories" asserted that Israel, as an occupying power, has very limited economic rights, and condemned Israel for alleged exploitation of resources.¹⁵⁸ Resolutions in the period 1981–1984 demanded "that Israel cease forthwith the implementation of its project of a canal linking the Mediterranean Sea to the Dead Sea."¹⁵⁹ All these resolutions reflect the underlying principle that an occupying power, even in a prolonged occupation, has particularly to avoid making drastic changes in the economy of the occupied territory—especially those which are of an exploitative character, or which would result in binding the occupied territory permanently to the occupying power. However, the international community has not been inflexible in its interpretation of this principle.¹⁶⁰

Oil was a subject of some contention in Israel's relations with Egypt, and with the United States. The oil fields in the Sinai Peninsula, which were operated during the Israeli occupation and returned to Egypt in November 1975, were not the main problem. Difficulties principally arose over prospecting for additional oil in Sinai and the Gulf of Suez, raising questions about an occupant's right to make so significant a change in the economy of

(f) Confiscation and expropriation of private and public Arab property in the occupied territories and all other transactions for the acquisition of land involving the Israeli authorities, institutions or nationals on the one hand and the inhabitants or institutions of the occupied territories on the other;

(m) Interference with the system of education and with the social and economic and health development of the population in the Palestinian and other occupied Arab territories;

(o) Illegal exploitation of the natural wealth, resources and population of the occupied territories.

¹⁵⁸ The first was GA Res. 3175 (XXVIII) (Dec. 17, 1973). It referred to the fourth Geneva Convention. It was not until the fifth resolution on this subject, GA Res. 32/161 (Dec. 19, 1977), that specific reference was made to the Hague Convention, which is more germane to the exploitation of natural resources. These resolutions received substantial, but not overwhelming, support. The voting on the last in this series, GA Res. 38/144 (Dec. 19, 1983), was fairly typical: 120 for, 2 against and 18 abstentions.

¹⁵⁹ If constructed, part of the canal would allegedly have gone through the Gaza Strip. The first General Assembly resolution criticizing it was GA Res. 36/150 (Dec. 16, 1981). The 1984 version, GA Res. 39/101 (Dec. 14, 1984), stated that the canal, "if constructed, is a violation of the rules and principles of international law, especially those relating to the fundamental rights and duties of States and to belligerent occupation of land." This received 143 votes for, 2 against and 1 abstention.

¹⁶⁰ One piece of evidence of discrimination by the international community is that there has been little, if any, international comment or censure regarding one apparent infringement by Israel of the law on occupations—the building of the main road from Jerusalem to Tel Aviv on a natural line that passes through what before 1967 was a demilitarized zone between the West Bank and Israel. Although this road in effect annexes a small portion of territory, Jordan and other states acquiesced in it.

an area, and about its position regarding maritime matters. A Memorandum of Law by the U.S. Department of State of October 1, 1976, concluded firmly: "International law does not support the assertion of a right in the occupant to grant an oil development concession."¹⁶¹ An Israeli response dated August 1, 1977, included this statement bearing on prolonged occupation: "if over a long period, such as in the case of the present occupation of Sinai, oil exploitation had been prevented, the development of the territory would have been delayed by that number of years."¹⁶² Although in the eyes of the international community there was considerable doubt about the legitimacy of Israel's oil exploitation policy, it does not appear in the end to have been an obstacle to peace with Egypt.¹⁶³

VIII. ISRAELI SUPREME COURT JUDGMENTS ON PROLONGED OCCUPATION

In a large number of cases, especially before the Supreme Court of Israel, questions of an inherently long-term character, or involving specific consideration of the prolonged nature of the occupation, have arisen. What follows is not in any sense a comprehensive survey of these cases, or even an account of the main issues raised in them, but rather a distillation intended to convey some of the main lines of the Supreme Court's thinking on a few such questions.

An innovation was made in the territories occupied by Israel after the June 1967 war, namely, the establishment of a right to petition the Israeli Supreme Court against arbitrary or illegal acts by the occupant. The Court asserted its competence to review the legislation and acts of the military commander and other authorities in the West Bank and Gaza. The effectiveness of the Court in bringing rules of law, including those of international law, to bear on Israeli occupation policy has been much discussed.¹⁶⁴

¹⁶¹ U.S. Dep't of State, Memorandum of Law (Oct. 1, 1976), 16 ILM 733, 752 (1977). This memo stated that concessions granted to Amoco by Egypt were valid, "whether granted prior to or post June 1967." *Id.*

¹⁶² Memorandum of Law, *supra* note 59, 17 ILM at 434 (submitted to the U.S. Department of State on Oct. 27, 1977). On Mar. 26, 1978, two wells in the Alma field in the Gulf of Suez began operation under a concession granted by Israel to the Neptune Oil Co. *Id.* at 432. All Sinai was returned to Egypt by Apr. 25, 1982.

¹⁶³ See further Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AJIL 725 (1977); and Claggett & Johnson, *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 AJIL 558 (1978).

¹⁶⁴ Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in *MILITARY GOVERNMENT*, *supra* note 30, at 109, 133. For other Israeli assessments, see Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 11 ISR. Y.B. HUM. RTS. 344 (1981); Negbi, *The Israeli Supreme Court and the Occupied Territories*, JERUSALEM Q., No. 27, Spring 1983, at 33; and E. COHEN, *supra* note 32, at 80-92.

Many inhabitants of the occupied territories with whom I discussed the matter in November-December 1983 and January 1988, welcomed this right of petition, and noted that it had fostered a few out-of-court settlements of certain issues, but argued that, overall, very few practical results had been achieved. These sources were critical of the tendency of the Court (1) to accept "security" as a justification for the acts of the occupant, and (2) to accept certain limits on the formal applicability or justiciability of the fourth Geneva Convention. For a critical Palestinian view, see R. SHEHADEH, *supra* note 80, at 95-100.

In reviewing acts by the occupant, the Supreme Court has had regard, *inter alia*, to the relevant rules of international law. However, it was not self-evident which rules of international law were to be applied by the Court or exactly how it was to apply them. The Court has had to take into account not only the Israeli Government's position on the *de jure* applicability of the 1907 Hague and 1949 Geneva Conventions, but also complex questions of justiciability: do these agreements impose obligations and create rights directly enforceable under Israeli municipal law before an Israeli court? In addressing this issue, the Court has suggested that customary international law, including the Hague Convention, is justiciable; whereas conventional international law (in which category it has tended to include the Geneva Convention) is more problematical in this regard.¹⁶⁵

Cases about Israeli Settlements

The matter of Israeli settlements, so central to any consideration of the long-term impact of the occupation, highlights the significance of relying more on the Hague Convention than on the Geneva Convention.

In the *Beth-El* case, the Court reached its key decision on settlements. The petitioners were inhabitants of the West Bank who owned land there that was being requisitioned by the Israeli authorities for Jewish settlement. In his judgment, given on March 15, 1979, Justice Witkon addressed the question

whether the petitioners as protected persons may themselves claim their rights under these Conventions in a municipal court of the occupying power or whether only states, parties to the Conventions, are competent to claim the rights of the protected persons, and this clearly on the international level alone. The answer to this question depends [on] whether a provision of an international convention which it is desired to enforce has become part of the municipal law of the state whose court is asked to deal with the issue or whether that provision remains the term of an agreement merely between states and has not been incorporated into municipal law. In the first case, we speak of customary international law, recognized by the municipal court so long as the term is not in conflict with some provision of the municipal law itself, and in the second case we speak of conventional international law, binding . . . only on states *inter se*.¹⁶⁶

Justice Witkon then referred to certain judgments of the Supreme Court indicating that "both Conventions are in the nature of conventional international law and were therefore not to be invoked in an Israeli municipal court." However, he went on to state that he had changed his mind following publication of an article by Dinstein: "I am now persuaded that the Hague Convention is accepted as customary law under which actions may be

¹⁶⁵ See, e.g., Nathan, *supra* note 164, at 125-49; and Hadar, *The Military Courts*, in MILITARY GOVERNMENT, *supra* note 30, at 171, 172-75. Also the judgments in the *Beth-El* and *Elon Moreh* cases, *infra* text at notes 166-74. For a critique of the view that the fourth Geneva Convention does not embody customary law, see T. MERON, *supra* note 23, at 45-50.

¹⁶⁶ *Beth-El* case, *supra* note 68, at 378. For a short report of this case, see 9 ISR. Y.B. HUM. RTS. 337 (1979).

brought in a municipal court . . . It is otherwise with the Geneva Convention."¹⁶⁷

On settlements, Justice Witkon said that "as regards the pure security aspect, it cannot be doubted that the presence in occupied territory of settlements—even 'civilian' settlements—of citizens of the occupying power contributes appreciably to security in that territory and makes it easier for the army to carry out its task."¹⁶⁸

In the same case, Justice Landau, concurring, raised some specific objections to the idea that Article 49, paragraph 6 of the fourth Geneva Convention had become customary law.¹⁶⁹ He also supported the Israeli settlements against the obvious objection that there was an inconsistency between the temporary character of an occupation and the construction of permanent settlements. Referring to the advocates for the petitioners and the respondents, he said:

Mr. Khoury asks how a permanent settlement can be established on land requisitioned only for temporary use. This is a good question. But Mr. Bach's answer, that the civilian settlement can only exist in that place as long as the IDF occupy the area by virtue of the Requisition Order, commends itself to me. This occupation can itself come to an end some day as a result of international negotiations . . .¹⁷⁰

All the opinions in the *Beth-El* case emphasized Israel's unique security problems as a basis for justifying the settlements.¹⁷¹ The petition objecting to the requisition of land was dismissed.

It was on the basis of Article 52 of the Hague Regulations (which deals with requisitions) that the Supreme Court, in its famous judgment of October 22, 1979, in the *Elon Moreh* case, declared an Israeli civilian settlement near Nablus in the West Bank to be illegal.¹⁷² Because the decision was based on this provision, it had little bearing on settlements that did not involve requisitions or were officially declared essential to Israeli security. In his judgment, Justice Landau said that he "excluded Article 49(6) of the Geneva Convention altogether from consideration because it belongs to conventional international law which does not legally bind an Israeli court."¹⁷³ In concurring, Justice Witkon said: "The question whether voluntary settlement falls under the prohibition of 'transferring sections of the

¹⁶⁷ *Beth-El* case, *supra* note 68, at 379. The article in question was Dinstein, *The Judgment in the Rafiah Approach Case*, 3 TEL AVIV U.L. REV. 934 (Hebrew 1974).

For critiques of the Supreme Court's view that the fourth Geneva Convention does not have the status of customary law, see T. MERON, *supra* note 23, at 5-6 n.5, and 48 n.131; and Rubinstein, *supra* note 42, at 65-67.

¹⁶⁸ *Beth-El* case, *supra* note 68, at 377.

¹⁶⁹ *Id.* at 387-90. See also Justice Witkon's statement that "the provisions of the Geneva Convention regarding the transfer of population from or to occupied territory do not come under already existing law. They are intended to enlarge, and not merely clarify or elaborate the duties of the occupying power." *Id.* at 380.

¹⁷⁰ *Id.* at 392.

¹⁷¹ *Id.* at 374-77, 392-93, 395-97.

¹⁷² *Elon Moreh* case, No. H.C. 390/79, reprinted in MILITARY GOVERNMENT, *supra* note 30, at 404, 419-26 and 437-38. For a short report, see 9 ISR. Y.B. HUM. RTS. 345 (1979).

¹⁷³ *Elon Moreh* case, *supra* note 172, at 419.

population' within the meaning of Article 49(6) of the Geneva Convention is not an easy one and, as far as we know, no answer has yet been found in international jurisprudence."¹⁷⁴ The only practical effect of the decision in this case was that Elon Moreh was built a short distance away from its original site.

Cases about Other Matters

Numerous other Supreme Court judgments have tackled issues, including economic ones, directly related to the prolonged character of the occupation.

In *Christian Society for the Holy Places v. Minister of Defence*, the Court considered whether an order by the Regional Commander of Judea and Samaria was *ultra vires* Article 43 of the Hague Regulations, which requires the occupant to respect, "unless absolutely prevented, the laws in force in the country." The case arose from an employment dispute, and the order in question was an amendment of a Jordanian law so as to make it possible to appoint members of an arbitration council. The petitioner's position was dismissed by a majority decision. Justice Sussman, in upholding the legality of the order, observed that the occupant has a duty in respect of the population's welfare:

A prolonged military occupation brings in its wake social, economic and commercial changes which oblige him to adapt the law to the changing needs of the population. The words "absolutely prevented" in Article 43 should, therefore, be interpreted with reference to the duty imposed upon him *vis-à-vis* the civilian population, including the duty to regulate economic and social affairs. In this context, it is of special importance whether the motive for the change was the furtherance of the occupant's interests or concern for the welfare of the civilian population. In Sussman's opinion, the appointment of persons to the arbitration council was done for the purpose of enabling an institution established by the Jordanian Law to function. The Order only completed the machinery set up under Jordanian Law, which would not otherwise have been able to operate. Therefore the Order did not constitute an excess of jurisdiction.¹⁷⁵

¹⁷⁴ *Id.* at 438.

¹⁷⁵ *Christian Soc'y for the Holy Places v. Minister of Defense*, No. H.C. 337/71, 26(1) Piskei Din 574 (1972), as summarized in 2 ISR. Y.B. HUM. RTS. 354, 355 (1972). Justice Cohn's dissenting opinion is at p. 355. On the application of particular treaties, the summary states that the Court

refrained from considering two issues: first, whether the Hague Convention applied to the administered areas, and second, whether the two aforementioned Conventions [i.e., the fourth Hague Convention and the fourth Geneva Convention] constitute law which could be invoked in an "internal" dispute between a State and its citizens. The Court explained that it avoided these questions because Counsel for the State chose not to raise them, as he based the defense of the respondents on the argument that they observed the Conventions properly.

Id. at 356. See also the interesting discussion of this case, and the implications of prolonged occupation, in Dinstein, *supra* note 67, at 112-14.

In *Jerusalem Electricity Co. Ltd. v. Minister of Energy*, the legality of the occupant's purchase of the undertaking that supplied electricity to the West Bank was considered. The Supreme Court declared that the notice on the purchase of the petitioner's undertaking was null and void. Justice Cahan said:

[G]enerally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far-reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.¹⁷⁶

The *Abu Aita* case centered on whether the imposition of a new tax (value added tax) was contrary to Articles 48 and 49 of the Hague Regulations. In his carefully argued judgment of over a hundred pages, given on April 5, 1983, Justice Shamgar referred to the significance, so far as a prolonged belligerent occupation is concerned, of the above-mentioned judgment in *Christian Society for the Holy Places*. He stated that international law prescribes no limits to the duration of a belligerent occupation. He went on to endorse the criterion, advanced by Dinstein, that in most instances legislative steps taken by the occupant should be regarded as legitimate if the occupant takes equal legislative steps towards its own population; but he noted that this criterion is not exhaustive, and that situations may occur in an occupied territory that demand legislative steps not required in the home country. He also accepted that the new tax was genuinely necessary.¹⁷⁷

In *Cooperative Society v. Commander of the IDF Forces in the Judea and Samaria Region*, the Court considered the occupant's authority to construct new roads in the region and to expropriate private lands for the purpose. The petitioners' application was dismissed. A central issue was whether the occupant had authority to initiate "a civil project of long-range permanent implications lasting beyond the duration of the belligerent occupation." Justice Barak said that, in defining the scope of the authority of a military administration, one must bear in mind the distinction between one of short duration and one that is prolonged. He cited Dinstein in noting that "the needs of the civilian population become more valid and tangible when the

¹⁷⁶ *Jerusalem Elec. Co. v. Minister of Energy*, No. H.C. 351/80, 35(2) Piskei Din 673 (1981), summarized in 11 ISR. Y.B. HUM. RTS. 354, 357 (1981).

¹⁷⁷ *Abu Aita* case, Nos. H.C. 69/81 and 493/81, 37(2) Piskei Din 197 (1983), translated in 7 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 6, 98-99 (1988). For a summary, see 13 ISR. Y.B. HUM. RTS. 348 (1983). The article by Dinstein to which Shamgar referred was *The Legislative Power in Occupied Territories*, 2 TEL AVIV U.L. REV. 505 (1972 Hebrew). See also Dinstein, *supra* note 67, at 112-13; and his analysis of this case, Dinstein, *Taxation under Belligerent Occupation*, in DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG 115 (J. Jekewitz et al. eds. 1989).

In a subsequent case, *'Atiah v. IDF Commander in Gaza Strip*, No. H.C. 118/84, 38(3) Piskei Din 107 (1984), summarized in 15 ISR. Y.B. HUM. RTS. 276 (1985), which concerned the treatment of mentally ill accused persons, the Supreme Court ruled that there was no obligation to make legislation in the occupied territories conform to Israeli legislation on similar matters; discretion for such conformity was vested in the commander of the region.

occupation is drawn out." Therefore, though the Hague Regulations had been codified against the background of a short occupation, "nothing prevents the development—within their framework—of rules defining the scope of a military government's authority in cases of prolonged occupation."¹⁷⁸ Barak concluded:

The authority of a military administration applies to taking all measures necessary to ensure growth, change and development. Consequently, a military administration is entitled to develop industry, commerce, agriculture, education, health, welfare, and like matters which usually concern a regular government, and which are required to ensure the changing needs of a population in a territory under belligerent occupation.¹⁷⁹

In *Mustafa Yusef v. Manager of the Judea and Samaria Central Prison*, the six petitioners, convicted of homicide by a court in Israel and sentenced to long prison terms, objected to their transfer from a prison in Israel to the newly opened Judea and Samaria Central Prison. Their petition was not successful. Justice Barak said in his judgment:

The right to a "civilized human life in prison" is granted to every "criminal" or "security" prisoner, both in Israel and in the Region. It is the duty of a military administration—in particular one of prolonged duration—to be concerned with the welfare of the inhabitants of the occupied territory, and this concern includes maintaining a minimal standard of prison conditions.¹⁸⁰

The legality of deportations has been examined in several Supreme Court decisions. In the *Afu* case, the Court asserted by a majority decision on April 10, 1988, that Article 49 of the fourth Geneva Convention prohibits "only such, especially collective, deportations as are carried out for purposes similar to those underlying the deportations by the Nazi authorities during the Second World War."¹⁸¹ Individual, security-motivated deportations are not prohibited. This holding is hard to reconcile with the clear language of Article 49, paragraph 1, and has been criticized.¹⁸²

Supreme Court Judgments: Some General Considerations

The judgments of the Israeli Supreme Court in cases arising from the occupation have been numerous, lengthy, erudite and carefully argued. Many have reflected key aspects of international law, and have related them to the multitude of problems thrown up in this prolonged occupation. Even

¹⁷⁸ *Cooperative Soc'y v. Commander of IDF Forces in Judea and Samaria Region*, No. H.C. 393/82, 37(4) Piskei Din 785 (1983), summarized in 14 ISR. Y.B. HUM. RTS. 301, 307-08 (1984) (referring to Y. DINSTEIN, *THE LAWS OF WAR* 216 (1983 Hebrew)).

¹⁷⁹ 14 ISR. Y.B. HUM. RTS. at 309.

¹⁸⁰ *Mustafa Yusef v. Manager of the Judea and Samaria Central Prison*, No. H.C. 540-6/84, 40(1) Piskei Din 567 (1986), summarized in 17 ISR. Y.B. HUM. RTS. 309, 312 (1987).

¹⁸¹ T. MERON, *supra* note 23, at 48 n.131 (referring to *Afu* case, Nos. H.C. 785/87, 845/87 and 27/88 (1988)).

¹⁸² *Id.* (referring also to Dinstein, *Deportation from Administered Territories*, 13 TEL AVIV U.L. REV. 403 (1988)). For the text of Article 49, paragraph 1, see *supra* text at note 142.

though the *de jure* applicability and justiciability of the fourth Geneva Convention have been questioned, the Court has increasingly taken for granted the *de facto* applicability of its provisions. Nevertheless, problems remain.

1. Applicability *de jure* of the fourth Geneva Convention to the occupied territories. Has the Court accepted too easily, without full scrutiny of all relevant issues, the position of the Israeli Government?

2. Justiciability of the fourth Geneva Convention. The Court has relied heavily on the assumption that the incorporation of provisions of international conventions into municipal law is a principal form of evidence that such provisions have the status of customary international law. Has it placed excessive reliance on this one form of evidence of customary law?

3. Interpretation of the fourth Geneva Convention. The Court has often interpreted the Convention's provisions in a relative way that is not easily squared with their language or with the interpretations placed on them by other states.

4. Views of governments and international organizations. The Court's judgments contain very little reference to the opinions of governments and the resolutions of international organizations (e.g., the United Nations, UNESCO, the ICRC) on matters relating to the occupation. There is an argument for taking some account of such statements—at least in cases where they reveal a high degree of agreement among states or address issues on which there is a need to interpret existing legal provisions, for example, in the light of new circumstances.

5. Israeli settlements. The Court has sometimes appeared not just reluctantly to accept, but positively to espouse, the debatable argument that settlements contribute to Israel's security. Further, its view that their apparently permanent character is not inconsistent with the provisional character of the occupation, though justified by the example of the now-abandoned settlements in Sinai, invites skepticism.

6. The principle of equal legislative treatment. The judgment in the *Abu Aita* case relied on an interesting, but potentially problematical, criterion for judging new legislation: whether the occupying power takes equal legislative steps towards its own population. As the judgment itself implied, legislation that is suitable for one society (with its own laws and customs, ethnic and religious composition, and state of development) may not be at all suitable for another, very different society. Such an approach could also have the effect of integrating the occupied territory into that of the occupant, and separating it from other states with which the inhabitants may want association.

7. The changing needs of the population. The argument made in several judgments—that in a prolonged occupation, new (and sometimes long-term) measures have to be taken in response to new problems—is powerful. However, it raises the question of exactly what individual or institution is able to assess and respond to the changing needs of the population, and by what means those needs or wishes should be determined.

Overall, the question arises whether the approach adopted by the Supreme Court—on the applicability, justiciability and interpretation of inter-

national conventions—has not had the effect of reducing the Court's possibilities of intervention. Is there an extent to which the Court has served as a buffer to soften the apparent conflict between international legal provisions, on the one hand, and Israeli policy and practices, on the other?

IX. ISSUES AND CONCLUSIONS

Prolonged Occupations Generally

1. Prolonged occupations, lasting more than 5 years, have not been uncommon in the post-1945 world. Although attaching the opprobrious label "occupation" to a given situation is always controversial, many situations have been so identified by the international community, and some have not ended quickly. Condemnation of occupations, especially prolonged ones, is natural; but there is a need also to understand why they occur, and how the interests of the occupants and the inhabitants can be balanced.

2. Some or all of the underlying purposes of the law on occupations remain relevant in prolonged occupations. However, there may sometimes be tension among the various purposes; and difficult matters of political judgment are often involved in determining what particular policies flow from them.

3. The one diplomatic attempt to establish which rules apply to an occupation on the basis of its duration—namely, Article 6, paragraph 3 of the fourth 1949 Geneva Convention—indicated that fewer rules would apply in a prolonged occupation. It was based on the assumption, confounded in the Israeli-occupied territories, that as time went by indigenous institutions would take over more and more responsibilities. The provision has never been formally implemented, was in effect rescinded by Protocol I and must be regarded as a failure.

4. Any effort to get formal international agreement on a body of rules to apply specifically to all prolonged occupations is likely to fail, partly because prolonged occupations differ in their character and purpose, as recent and contemporary cases (including Kampuchea, Namibia and northern Cyprus) demonstrate. Further, it has been hard enough to get states to agree on the existing rules on occupations; to try to revise these rules, subdivide them or create special permutations of them would create acrimony and invite legalistic chaos. If prolonged occupations deserve a special body of rules, then why not occupations in which the indigenous government remains in post? Or occupations of territory whose status is in dispute? The most that could reasonably be expected is some broad guidelines as to the principles that might inform any departure from or addition to the existing law—but even that would be difficult.

5. If a formal international agreement on the problems raised by prolonged occupations is unlikely, it may be more profitable to consider other means by which such problems might be tackled—especially the emergence of procedures, both national and international, for interpreting and implementing law in the light of changing conditions.

6. In an occupation, including a prolonged one, international organizations can have a number of important roles. They can remind all concerned of their obligations under international law; indicate which policies, or international legal provisions, remain not merely applicable but in urgent need of being applied; interpret legal provisions in the light of new circumstances; suggest appropriate action where there is a conflict between legal principles or provisions; engage in fact-finding or arbitration in respect of particular issues; and provide peacekeeping or observer forces to facilitate total or partial withdrawals by the occupant.

Whatever view is taken about the quantity, the quality and the precise status in international law of the many UN resolutions on particular occupations (those relating to Israel are considered further below), their existence does suggest that the international community already has machinery for addressing certain questions that arise in such cases. Granted the reluctance of sovereign states to accept international scrutiny of how they use their armed force, this machinery will always need to be used with care.

7. Specific causes for concern about the relevance of the existing law on occupations to prolonged occupations include, but are not limited to:

(a) The law on occupations, especially as interpreted in some writings and military manuals, seems to allow, or suffer, the occupant to have a very large measure of authority, especially regarding the occupant's own security, the maintenance of public order, the keeping in force of already existing public order legislation, control of the media and prohibitions on political activity. This degree of authority may be acceptable in a war, but can it be acceptable indefinitely? Statements by international bodies suggest that there is a widely held view that in a prolonged occupation, especially if it extends into something approximating peacetime, an occupant cannot exercise the draconian powers that may be permissible in a shorter occupation; the interests and wishes of the inhabitants must be accorded greater weight.

(b) The conventions sometimes seem to be based on assumptions about a territory—that its previous status as part of a sovereign state was clear, and its previous legal and political order was satisfactory—that are open to question in many recent and contemporary prolonged occupations.

(c) The conventions governing military occupations say little about certain issues that inevitably crop up in a prolonged occupation, including the safeguarding and promotion of the economic life of occupied territories.

(d) The conventions say little about the treatment of those involved in resistance activities of whatever kind (whether violent or nonviolent), apart from a few key references in the fourth Geneva Convention (Articles 5, 49 and 68).

8. Causes for concern such as those listed above may be perfectly genuine, but they do not suggest that the relevant international agreements (especially the Hague Regulations and the fourth Geneva Convention) should cease to be viewed as formally applicable. These agreements are not

a rigid straitjacket, but a flexible framework. They leave room for special agreements between the parties if they are willing to conclude them; for interpretation by policy makers in accord with their basic purposes and principles; for elucidation by various bodies; and for supplementation from other sources: from case law, writings and other international agreements.

9. There are grounds for viewing international human rights law as applicable to occupations, including prolonged ones. Certain provisions of this body of law—for example, prohibitions of discrimination in education and of racial discrimination generally—usefully supplement the Hague and Geneva rules on occupations. In addition, some human rights conventions offer procedures of a kind lacking in laws of war conventions. However, the application of some provisions is not free from difficulties, especially in time of armed conflict or internal uprising.

10. The questions whether there is a right of resistance in territories under occupation (especially when prolonged), whether foreign states are justified in assisting such resistance, and whether states are justified in going to war to recover occupied territories have cropped up in many recent conflicts. It is doubtful whether general answers in international law can be particularly helpful when the circumstances of each case, including the purpose and character of the occupation, vary so greatly. Some statements on these matters made in UN General Assembly resolutions have been vulnerable to other criticisms as well. They have drawn attention neither to the key importance of the choice of means involved in pursuing any such rights, nor to the related issue of the application of laws of war limitations to the armed actions of liberation movements.

Israeli-Occupied Territories

11. Israel deserves credit for accepting the relevance in these territories of international legal norms, including those outlined in the fourth Geneva Convention. However, its position that the latter is not necessarily applicable on a *de jure* basis is unconvincing.

12. During the long occupation, a continuous and, in the 1980s, increasingly strong litany of complaints has emerged about numerous aspects of Israel's rule: the annexation of East Jerusalem and the Golan Heights, the establishment of Israeli settlements, deportations of inhabitants, the treatment of institutions of higher education, the acquisition of land, the conduct of the judicial system, conditions of detention, and so on. Such complaints have often been expressed in legal form, as violations of particular international legal provisions or, indeed, of fundamental principles of humanitarian law. They are thus testimony to the continued salience, if not always to the efficacy, of international law in a prolonged occupation.

13. Both Israelis and Palestinians can point to ways that, in their view, the whole framework of the law on occupations has in some sense been abused by the adversary in this prolonged occupation:

- (a) Israelis could argue that the law on occupations has provided a safety net, enabling the Palestinians to escape the consequences of their

leaders' folly, or that of some Arab governments, in not negotiating seriously about the future of the territories—a safety net that it is not necessarily reasonable to maintain indefinitely. A related Israeli argument has been that the law is being used in a one-sided way if Palestinians claim legal rights at the same time as their leaders support “terrorism” (itself a violation of the laws of war) or deny Israel's right to exist—a violation of even more fundamental norms.

(b) A concern widely shared by Palestinians is that the law on occupations has afforded Israel a cloak of legitimacy: while apparently respecting international law, Israel has actually interpreted it to suit its purposes. The Israelis are seen as claiming all the rights of belligerent occupants but shirking some of their legal obligations, and as introducing a system of permanent control under the legal cover that it is temporary. A further concern is that the law on occupations provides a basis for putting the inhabitants in a separate legal category and denying them normal political activity, keeping them in effect permanently under Israeli control, but as second-class citizens or worse. From this perspective, the longer the occupation lasts, the more akin to colonialism it seems.

Both these positions are serious. They point to the hazards of using the law on occupations selectively: the Palestinian tendency to take little account of the corrosive effects of terrorism is one example; so is the Israeli tendency to see in the law on occupations a justification for preventing or strictly controlling political activity indefinitely.

14. Consideration of the practical relevance of the two main instruments on occupations (the Hague Regulations and the fourth Geneva Convention) to the situation in the territories is likely to yield the conclusions that both are of key importance in the various fields they address; that neither has lost its relevance because of passage of time; and that the Convention is germane to a wider range of currently critical problems, including treatment of detainees and the legality of deportations and settlements. The Convention has also been cited far more frequently in resolutions of international bodies.

15. The question whether, and if so to what extent, the fourth Geneva Convention embodies customary law has become important in respect of the Israeli occupation and needs to be further considered. Some relevant facts to be taken into account include the large number of states parties, the time that has elapsed since 1949, resolutions of international bodies, incorporation into domestic legislation, state practice and the opinions of writers. To the extent that its provisions are accepted as embodying customary law, the terms of the Convention might be taken into greater account by at least some Israeli decision makers and courts.

16. Any consideration of how to get the law on occupations properly implemented has to start with the fact that the Government of Israel has responsibility for these territories. (Indeed, there has always been some doubt whether other states would rush to pick up that responsibility if given the chance.) Israel does have a certain discretion in interpreting and applying the law on occupations—especially as that law, like much law, involves

balancing different considerations. In these circumstances, criticisms of Israeli policy that are seen as ill-considered, intemperate or unfair are obviously not likely to be heeded. Israel will pursue policies based on its view of its own interests, and up to a point it is right that it should do so. International law and the national interest of states—even occupying powers—should not be seen as necessarily incompatible.

17. Some Israeli legal practices in this occupation have been notably innovative. One example is the abolition of capital punishment for murder, which shows that the duty in Article 43 of the Hague Regulations to respect, “unless absolutely prevented, the laws in force in the country” need not be a bar to progressive legislation.

18. Another significant innovation is the right to petition the Israeli Supreme Court in respect of arbitrary or illegal acts by the occupant. Whatever the arguments about the effectiveness of this right in practice, and about the actual decisions reached by the Court, this innovation has potential as one additional means of bringing international law and occupation policy into some kind of relation with each other. (The other such means to have emerged in this occupation has been the United Nations, especially the General Assembly, discussed below. A difficulty is that the Supreme Court and the General Assembly have reached different conclusions on key matters and have largely ignored each other’s positions.)

International Interest in the Israeli Occupation

19. The interest of the outside world in events in the Israeli-occupied territories is legitimate not only because an interest in human rights anywhere is legitimate, but also because the territories and those inhabitants who are refugees have a special status. There is no reason for this interest to decline, or to be viewed as less legitimate, on account of the great length of the occupation; rather the reverse.

20. The interest of the outside world has been manifested through mechanisms somewhat different from the formal system enunciated in the fourth Geneva Convention. Some of the bodies that have exerted significant influence in the occupied territories are indeed mentioned in the Convention: the International Committee of the Red Cross, as well as individual governments, which have a responsibility under Article 1 to “ensure respect for the Convention in all circumstances.” On the other hand, the formal system of protecting powers, mentioned extensively in the Convention, has not operated. Numerous UN bodies, not mentioned in the Convention, have had an important role.

21. The outside power with the greatest capacity to influence Israel on adhering to the law on occupations is the United States. Indeed, the United States played a central role in negotiations leading to Israeli withdrawals from Sinai and part of the Golan Heights. It may have been partly because of positions adopted by the United States that Israel has not annexed the West Bank and Gaza: against the objections of so important an ally, Israel could not throw the restraints of international law out the window, even if it

wished to do so.¹⁸³ In the past, the United States has sometimes been diffident about restraining extreme Israeli policies, such as the extension of Israeli law to the Golan Heights in 1981, the invasion of Lebanon in 1982, and the building of settlements in the Golan Heights, the West Bank and Gaza. The reasons for past U.S. diffidence have included not just the much-vaunted Jewish lobby, but also a legitimate opposition to terrorism and to some of the PLO's aims; a genuine commitment to Israel's survival; a concern that extreme pressure could be counterproductive; a stated desire to maintain a degree of independence so as to sustain credibility in pursuit of a negotiated settlement; and perhaps a lack of confidence in the Government's own judgment (especially in view of Vietnam), combined with exaggerated respect for Israeli judgment. Further, in the early Reagan years, which were so fateful in the Middle East, the U.S. administration went through a phase of, at best, lukewarm support for multilateral legal agreements and procedures. In 1988 and 1989, U.S. policy on a range of issues connected with the occupation began to change, as indicated by Secretary of State James Baker's statement on May 23, 1989, that Israel should "for-swear annexation" of the West Bank and Gaza Strip, and "stop settlement activity there. For Israel now is the time to lay aside once and for all the unrealistic vision of a greater Israel."¹⁸⁴

22. The United Nations, and in particular the General Assembly, is sometimes seen as having done little but pass resolutions indiscriminately condemnatory of all aspects of Israeli policy. Although this is more a criticism of the member states than of the Organization as such, the United Nations is vulnerable to the charge of rebuking Israel endlessly, while maintaining a diplomatic silence in respect of certain brutalities committed by other governments, including some Arab governments. The Special Committee to Investigate Israeli Practices has been widely criticized. The potential of UN resolutions has been undermined by political partiality and intellectual inconsistency. The General Assembly's espousal in 1975 of the resolution equating Zionism with racism was the most spectacular, but not the only, example of a denunciatory and self-defeating approach. Too often, UN member states have seemed content to cast votes on the subject and leave it at that; painstaking fact-finding, authoritative argument and diplomatic dialogue have sometimes been lacking. All this has conveyed the unfortunate impression that the law on occupations is a stick with which to beat occupants and a mechanism of political warfare, rather than a serious means of seeking to reconcile the conflicting interests of the parties. Elements in the approaches taken at the United Nations have made careful and sober consideration of some issues more difficult and may have reduced the Organization's chances of exercising a useful role in mediation or negotiation. For the future, there is a case for reconsideration of the UN mechanisms both for the investigation of facts concerning prolonged occupations and for the articulation of opinion about them.

¹⁸³ A point argued impressively by Arthur Hertzberg, *Israel and the West Bank: The Implications of Permanent Control*, 61 FOREIGN AFF. 1064, 1072-75 (1983).

¹⁸⁴ *The Independent* (London), May 24, 1989, at 11, col. 1.

23. UN resolutions, though open to criticism, have had some consistency and utility. They have criticized other occupying powers and not just Israel. Many General Assembly and Security Council resolutions on the Israeli-occupied territories have usefully reaffirmed the value of key legal provisions and related these to changing factual situations. On basic matters, such as whether the West Bank and Gaza should eventually revert to the states that formerly controlled them or form a new state based on self-determination for the inhabitants, UN resolutions have been the principal means of expressing the changing views of the international community. On some issues, the United Nations has shown discrimination in its response to developments in the occupied territories: many extreme and one-sided resolutions have attracted fewer votes than more dispassionate ones.

24. During the Israeli occupation, international organizations not only have passed resolutions but have assumed other important roles. They have acted in mediatory, humanitarian and peacekeeping capacities. From the beginning, the International Committee of the Red Cross has engaged in a wide range of activities, including observing prison conditions, arranging prisoner transfers, making private representations to the Israeli Government and issuing public statements about the international legal provisions applicable in the territories. The UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has continuously assisted those inhabitants of the West Bank and Gaza classified as refugees, and it has served as an important point of contact between the territories and the UN system. In schools in the occupied territories, the extremely sensitive problem of eliminating objectionable material in textbooks from Jordan and Egypt was eventually resolved through the good offices of UNESCO.¹⁸⁵ The United Nations has provided peacekeeping and observer forces in Sinai and the Golan Heights to facilitate Israeli withdrawals from occupied territory. As to the future, there have been several suggestions that UN peacekeeping or observer forces could have a role in monitoring elections in the West Bank and Gaza.

25. The International Court of Justice has not been asked to consider issues arising from the Israeli-occupied territories. Its important advisory opinion on Namibia of 1971 stands as a reminder that it can play a role in clarifying certain legal questions in a prolonged occupation. It has sometimes been suggested that the General Assembly or the Security Council might refer certain legal matters to the Court, in accord with Article 96 of the UN Charter and Article 65 of the ICJ Statute. Theoretically, many questions might be put to the Court: for example, whether the fourth Geneva Convention is applicable in the occupied territories on a *de jure* basis and in its entirety; whether the Convention embodies customary law, and if so to what extent; whether, in a prolonged occupation, there might in principle be some room for variations within, or even departures from, the law on occupations, and if so on what grounds; whether international

¹⁸⁵ See A. GERSON, *supra* note 83, at 181–83; and the 1983 Report of the Commissioner General of UNRWA, 38 UN GAOR Supp. (No. 13) at 12, UN Doc. A/38/13 (1983).

human rights instruments are applicable in occupied territories; and whether settlements by nationals of the occupying power, or deportations of inhabitants, or major plans for new roads tying the territories to Israel proper accord with international law. Not all such questions are necessarily amenable to resolution by a legal body of this kind; and any such resolution would not of itself necessarily change political and military realities. The principal ground for considering the proposal at all is that, more than two decades after this occupation began, there is still basic disagreement about what parts of international law are formally applicable to the situation in the territories.

The Ending of Prolonged Occupations

26. Consideration of prolonged occupations, against the background of more than 20 years of Israeli occupation, should encourage some reflection about how occupations end. One idea, widely accepted by lawyers and politicians, is of international negotiation leading to a formal treaty that terminates the occupation at a single point in time. However, the end of many occupations (and also colonial regimes) has included the gradual emergence (or re-emergence) of autonomous political institutions within the territory, which assume increasing responsibilities culminating in sovereignty and independence. Past events there suggest that such a process would not be easy to initiate today in the West Bank and Gaza. However, some such process is envisaged in several current diplomatic proposals and should not be ruled out entirely on the all-too-familiar grounds of "all or nothing." Such a process could be especially important in view of the continuing need for Palestinians to show the rest of the world (including their Arab neighbors as well as Israel) that they can conduct their affairs in a responsible and effective way. Since many occupations have only ended when the occupying power has made its own decision, in its own interest, that the time for termination has come, the value of steps that might provide a basis for an occupant to reach that decision is clear. The PLO still has a long way to go to get over encrusted suspicions, and to demonstrate clearly its acceptance of Israel, its opposition to terrorism and its commitment to democracy.

27. Prolonged occupation may be a feature of the contemporary world, but it does not necessarily mean permanent occupation. Some long-standing and contentious cases of foreign military involvements—the Soviet Union in Afghanistan, Vietnam in Kampuchea, and South Africa in Namibia—have been drawing to a close. As for the Middle East, the Soviet Union now looks more willing to treat Israel in a less ideological manner than hitherto, and to assist more constructively in diplomatic negotiations. However, the problem of the Israeli occupation remains outstandingly difficult to resolve: Israel has greater grounds than some other recent occupying powers to be concerned about threats to its security; the presence of settlers in the occupied territories makes withdrawal more difficult; the political strength in

Israel of territorial claims is considerable; and drawing the borders of any future Palestinian state raises tangled problems, especially regarding Jerusalem.

28. The Israeli occupation, unlike some others, is therefore likely to be yet further prolonged. In these circumstances, the law on occupations cannot conceivably eliminate the fundamental conflict between the Israeli occupants and the Palestinian inhabitants. At most, it can mitigate some of the worst effects of that conflict. In particular, it can remind all concerned of the provisional status of the occupation and deter further drastic steps that would militate against an eventual settlement. If such modest functions are not to be wasted, the parties involved will need, not just to use law, but to demonstrate statesmanship.