

On the Fourth Geneva Convention and the Occupied Palestinian Territory

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I. INTRODUCTION

Since the Peace of Westphalia in 1648, the international system has witnessed countless armed conflicts, all of which have had devastating impacts on the societies enmeshed in them.¹ As the European state system evolved over the course of the seventeenth, eighteenth, and nineteenth centuries, recourse to war was widely considered a legitimate tool of statecraft. As Karl von Clausewitz put it, war was “merely the continuation of policy by other means.”² In the course of pursuing such policy, numerous territories were overrun and scores were left at the mercy of conquering armies that, more often than not, terrorized civilian populations under their control. It is with civilian populations subject to foreign military occupation that this Article is chiefly concerned.

The atrocities perpetrated against the populations of occupied Europe during World War II accounted for the high civilian casualty rate in that war. In the territories occupied by Nazi Germany “millions of human beings were torn from their homes, separated from their families and deported” to death and slave labor camps, while their unguarded property was either looted or destroyed.³ Similar gross violations of human rights, though narrower in scope and character, were carried out by Japanese and Russian occupation forces during the course of the war.⁴ In the wake of what emerged as one of the most horrific episodes in human history, “representatives of almost every established State met in Geneva in 1949 to sign revised conventions intended to cope with the effects of the new phenomenon of ‘total

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1. *See generally* PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1988).

2. KARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., Princeton University Press 1984) (1832).

3. JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 129–30 (1975).

4. GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 663–64 (7th ed. 1996).

war' on civilian populations as well as on military personnel."⁵ The result was the promulgation of the Geneva Conventions of 1949 (Geneva Conventions),⁶ one of which is focused on protecting civilians from the effects of war and armed conflict.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, generally known as the Fourth Geneva Convention, is widely regarded as a codification of customary international law.⁷ It supplements the earlier 1907 Hague Convention IV Respecting the Laws and Customs of War on Land (1907 Hague Convention), along with its annexed Regulations (1907 Hague Regulations).⁸ To a large extent, the Fourth Geneva Convention and the 1907 Hague Regulations govern the law of belligerent occupation—that branch of international humanitarian law that regulates “the occupation of enemy territory in time of war,”⁹ as well as “after a cease-fire or truce, when civilians could be subjected to military occupation in the absence of a final political settlement.”¹⁰ The Fourth Geneva Convention outlines the rights and duties of the occupying power (or belligerent occupant) and sets out the law of how civilian populations are to be treated while the occupying power maintains effective control in the occupied territory.¹¹ Although the Fourth Geneva Convention attempts to strike a balance between the rights of the occupier and the occupied, its “overriding aim . . . is to ensure that claims of military exigency do not result in the violation of basic political and human rights of the civilians under military occupation.”¹² To ensure this end, the convention not only provides a fairly thorough restate-

5. UNITED NATIONS, COMM. ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE (UNCEIRPP), THE QUESTION OF THE OBSERVANCE OF THE FOURTH GENEVA CONVENTION OF 1949 IN GAZA AND THE WEST BANK INCLUDING JERUSALEM OCCUPIED BY ISRAEL IN JUNE 1967, at 4 (1979). It should be noted that the 1949 Geneva Conventions, *infra* note 6, were not the exclusive product of post-war developments. As noted by Adam Roberts and Richard Guelff, they “were the outgrowth of efforts undertaken before the Second World War to draft new conventions; and they were also the product of the experience of the war itself.” *Prefatory Note: The Four 1949 Geneva Conventions*, DOCUMENTS ON THE LAWS OF WAR 195, 195 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

6. GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* Oct. 21, 1950); GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*entered into force* Oct. 21, 1950); GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950); GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* Oct. 21, 1950) [hereinafter FOURTH GENEVA CONVENTION].

7. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 196.

8. CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (*entered into force* Jan. 26, 1910) [hereinafter 1907 HAGUE CONVENTION].

9. VON GLAHN, *supra* note 4, at 662.

10. UNCEIRPP, *supra* note 5, at 1.

11. See Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 419, 420 (Emma Playfair ed., 1992) [hereinafter INTERNATIONAL LAW AND ADMINISTRATION].

12. UNCEIRPP, *supra* note 5, at 1.

ment of the substantive positive law on belligerent occupation, but it also furnishes a number of internal procedural “mechanisms . . . available to ensure the effective implementation” of its provisions.¹³ The latter are exemplified by the obligation expressed in article 1 of the convention by which the High Contracting Parties undertake not only to respect, but also to *ensure respect* for its provisions “in all circumstances.”¹⁴

“An important, but implicit, assumption of much of the law on occupations is that military occupation is a provisional state of affairs.”¹⁵ That is to say that states of occupation are regarded as temporary in nature.¹⁶ Nevertheless, the post–World War II era has witnessed a number of prolonged military occupations, including the Allied occupation of Germany and Japan,¹⁷ South Africa’s occupation of Namibia,¹⁸ and Indonesia’s occupation of East Timor.¹⁹ Of all prolonged military occupations, however, no other has been the subject of as much international attention as the State of Israel’s military occupation of the West Bank, including East Jerusalem, and the Gaza Strip, collectively known as the Occupied Palestinian Territory (OPT).²⁰

This year will mark the thirty-sixth year of Israel’s control of the OPT, making it the longest military occupation in modern history.²¹ During this

13. Statement of Miranda Joubert, Advocate, Legal Affairs Division, Department of Foreign Affairs, South Africa, to the United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, 43, 44, Cairo (June 14–15, 1999) (on file with the Harvard International Law Journal) [hereinafter United Nations International Meeting].

14. FOURTH GENEVA CONVENTION, *supra* note 6, art. 1 (emphasis added).

15. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988*, in INTERNATIONAL LAW AND ADMINISTRATION, *supra* note 11, at 25, 28.

16. Statement of David Delparaz, head of ICRC delegation in Cairo, to the United Nations International Meeting, *supra* note 13, at 47, 48.

17. Roberts, *supra* note 15, at 29.

18. *See id.* at 31.

19. *See* SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 281–92 (1996).

20. A word about terminology is in order. Since 1967 the West Bank, Gaza Strip, and East Jerusalem have been referred to by a number of different names, a matter usually dependent on who is framing the terms of reference. Official Israel, for instance, refers to those areas as either “Judea, Samaria, and Gaza” or the “administered territories” (neither of which include East Jerusalem, illegally annexed by Israel in 1967). On the other hand, the Palestine Liberation Organization (PLO) and the international community, through such bodies as the U.N. Security Council, the U.N. General Assembly, and the International Committee of the Red Cross, have referred to those areas as the “Occupied Territories,” the “West Bank, Gaza Strip, and East Jerusalem,” and the “Occupied Palestinian Territories,” reflecting what seems to be an intention to regard these areas as the territory where the Palestinian people are legitimately entitled to exercise their right to self-determination. Most recently, the United Nations has begun to refer to the areas collectively as the “Occupied Palestinian Territory,” a deliberate usage of the singular form of the term, apparently for the purpose of underscoring the contiguous nature of what is regarded as the self-determination unit of the Palestinian people. *See, e.g.*, G.A. Res. ES-10/6, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/ES-10/6 (1999). In keeping with this practice, the West Bank, including East Jerusalem, and the Gaza Strip, will be referred to collectively as the Occupied Palestinian Territory (OPT) throughout this Article.

21. *See* Edward W. Said, *Emerging Alternatives in Palestine*, AL-AHRAM WKLY. (Egypt), Jan. 10–16, 2002, <http://www.ahram.org.eg/weekly/2002/568/op2.htm>. *See also* Emadeddin J. Fraitkeh, *Palestinians*

period, the policy of successive Israeli governments toward the OPT has made Israel the focus of intense domestic and international criticism. As put by attorney Allegra Pacheco:

Since 1967, the Israeli military has consistently violated nearly every provision of the Fourth Geneva Convention. Human rights organizations worldwide, from Amnesty International to Israel's own B'Tselem, as well as the United States government, have issued hundreds of statements and reports criticizing Israel's violations. Among the lists are: torture of over 50,000 Palestinians; over 1,500 Palestinians deported; annexation of East Jerusalem; construction of over 150 Jewish settlements [i.e., colonies]; illegal transfer of over 400,000 Israeli civilians into the occupied territories; repeated collective punishment . . . demolition of over 8,000 homes and villages in East Jerusalem and the West Bank and Gaza; pillage of Palestinian natural resources, including water, quarries, and trees; and the illegal appropriation of over 70 percent of the occupied territories.²²

For its part, Israel officially denies that the Fourth Geneva Convention applies *de jure* to the OPT,²³ and strenuously resists the accusation that its military authorities have been the source of any systematic violations of international law in the territory.²⁴ The Palestinian point of view, on the other hand, holds that the Fourth Geneva Convention is *de jure* applicable to the OPT²⁵ (a position, as will be seen, that enjoys the unqualified support of the international community), and that Israel's failure to abide by its provisions, as well as the international community's failure to ensure that Israel respect those provisions, has allowed for the wholesale violation of the human rights of the civilians living under Israeli military rule.²⁶ In September 2000, a renewed uprising (dubbed the "al-Aqsa intifada") erupted in the OPT in response to the lack of progress in ending the military occupation through the Israel-Palestine Liberation Organization (PLO) peace process²⁷—a process, it is important to note, that has been accompanied by an increase in

Must Take the Moral Ground, HA'ARETZ (Tel Aviv), Dec. 11, 2002, at 5.

22. Allegra Pacheco, *Flouting Convention: the Oslo Agreements*, in *THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID* 181, 184–85 (Roane Carey ed., 2001).

23. Although Israel has never recognized the *de jure* applicability of the Fourth Geneva Convention to the OPT, it has always claimed to abide by its "humanitarian" provisions *de facto*. This position was first outlined in Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279, 293–94 (1968), and Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 *ISR. Y.B. HUM. RTS.* 262, 265–66 (1971). For further comment, see *infra* text accompanying notes 248–297.

24. See, e.g., Israel Defense Force Spokesperson's Unit, *Palestinian Lies as an Integral Part of the Struggle against Israel*, <http://www.idf.il/english/news/lies.stm>.

25. Statement of Nabil Shaath, Minister for Planning and International Cooperation, Palestinian Authority, to the United Nations International Meeting, *supra* note 13, at 9.

26. See generally Pacheco, *supra* note 22.

27. See *infra* text accompanying notes 173–190.

gross violations of international humanitarian law in the OPT.²⁸ Like the previous intifada of 1987 to 1993, the al-Aqsa intifada has highlighted the importance of both reaffirming and reexamining the role international humanitarian law must play in protecting civilian populations living under foreign military occupation.²⁹

This Article will examine the state of international humanitarian law in the OPT and provide fresh insight into the role it has in governing relations between Israel and the millions who continue to live subject to its military rule. Specifically, it will argue for the indispensability of the Fourth Geneva Convention and discuss various ways it may be used to protect the interests of all concerned. To that end, the body of the Article will be divided into three parts. Part II will outline the historical development of the conflict in Israel/Palestine in order to provide the reader with a contextual framework within which to approach the subject. Part III will examine the law of belligerent occupation in relation to the OPT, with particular attention devoted to the development and nature of that body of law, the theoretical debate regarding the applicability of the Fourth Geneva Convention to the OPT, and Israel's record of observance of the Fourth Geneva Convention. Finally, Part IV will explore the question of the enforcement of the Fourth Geneva Convention in the OPT, examining the wide array of municipal and international means available, including a brief assessment of the role the Israel-PLO peace accords have in this respect.

II. HISTORICAL BACKGROUND

Although Israel's occupation of the OPT is the result of the June 1967 Arab-Israeli war, a tracing of the historical development of the conflict in Israel/Palestine is imperative to fully appreciate the broader legal and political context which has allowed the occupation to endure.³⁰ In the pages that follow, an abridged account of that history will be offered, covering the rise of political Zionism in the late nineteenth century to the al-Aqsa intifada. But first, a note on historiography is in order.

Few political conflicts of the twentieth century have engendered more debate among contemporary historians than the conflict over Israel/Palestine. Though scholarship on the question is voluminous, it is as deeply divided as the protagonists themselves. To a certain degree, the traditional historical narratives of each of the parties to the conflict have been designed more to serve political interests than the purpose of authentic scholarly inquiry. While "political invention of history is common to both Israel and the Arab

28. Pacheco, *supra* note 22, at 185. See also B'TSELEM, OSLO: BEFORE AND AFTER: THE STATUS OF HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (1999) (prepared by Naemi Carmi).

29. For a comparison between the Intifada of 1987–1993 and the Intifada that broke out in September 2000, see Ghassan Andoni, *A Comparative Study of Intifada 1987 and Intifada 2000*, in THE NEW INTIFADA, *supra* note 22, at 209.

30. Cassese, *supra* note 11, at 3.

States,” this is so “for markedly different reasons.”³¹ To a large extent, “Arab official histories seek to advance state interests by mobilizing citizens disillusioned by the defeat of national armies and the loss of Arab Palestine, while Israeli official histories seek to reaffirm a sort of Zionist manifest destiny while diminishing responsibility for the negative consequences of the [1948] war.”³²

In the early 1980s, the Israeli side of the historical ledger changed with the opening up of repositories of official governmental papers by the Israel State Archives and Central Zionist Archives.³³ Among the materials were records of events that have long stood at the center of the dispute, namely the 1948 Arab-Israeli war and the creation of the Palestine refugee problem.³⁴ This primary archival material formed the basis of the scholarship of a cadre of Israeli-Jewish historians that “challenged the traditional [Zionist] historiography of the birth of the State of Israel,” which, according to one of them, had hitherto “remained largely unchallenged outside the Arab world.”³⁵ The New Historians—as the group has become known—include Simha Flapan,³⁶ Benny Morris,³⁷ Ilan Pappé,³⁸ Avi Shlaim,³⁹ and Tom Segev.⁴⁰ Their critical scholarship has “exposed as mere myths a large number of long accepted truisms” underlying the traditional Israeli historical narrative.⁴¹ Among these are the assertions that the Palestine refugees had voluntarily left their homes in 1948 on the orders of Arab leaders who promised a return “with the conquering Arab armies,”⁴² and “that a defenseless Israel faced destruction by” a numerically and militarily superior “Arab Goliath.”⁴³ Other such myths include claims that in 1967 the Arab states, led by Egyptian President Gamal ‘Abd al-Nasser, were bent on waging aggressive war against Israel,⁴⁴ and that post-war Israeli policy was guided by

31. THE WAR FOR PALESTINE: REWRITING THE HISTORY OF 1948, at 2 (Eugene L. Rogan & Avi Shlaim eds., 2001) [hereinafter THE WAR FOR PALESTINE].

32. *Id.*

33. LAURENCE J. SILBERSTEIN, THE POSTZIONISM DEBATES: KNOWLEDGE AND POWER IN ISRAELI CULTURE 96–102 (1999).

34. *Id.*

35. AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD, at xi (2000).

36. See SIMHA FLAPAN, THE BIRTH OF ISRAEL: MYTHS AND REALITIES (1987).

37. See BENNY MORRIS, 1948 AND AFTER: ISRAEL AND THE PALESTINIANS (1994); BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1949 (1987) [hereinafter MORRIS, THE BIRTH]; BENNY MORRIS, ISRAEL’S BORDER WARS, 1949–1956: ARAB INFILTRATION, ISRAELI RETALIATION AND THE COUNTDOWN TO THE SUEZ WAR (1993).

38. See ILAN PAPPÉ, BRITAIN AND THE ARAB-ISRAELI CONFLICT, 1948–1951 (1988); ILAN PAPPÉ, THE MAKING OF THE ARAB-ISRAELI CONFLICT, 1947–1951 (1992).

39. See THE WAR FOR PALESTINE, *supra* note 31; AVI SHLAIM, COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT, AND THE PARTITION OF PALESTINE (1988) [hereinafter SHLAIM, COLLUSION ACROSS THE JORDAN]; SHLAIM, *supra* note 35.

40. See TOM SEGEV, 1949: THE FIRST ISRAELIS (1986).

41. SILBERSTEIN, *supra* note 33, at 97.

42. *Id.*

43. THE WAR FOR PALESTINE, *supra* note 31, at 3.

44. SHLAIM, *supra* note 35, at 237.

an intention to return the West Bank to Arab hands upon the conclusion of a peace agreement with Jordan.⁴⁵

Although “there is certainly scope for new Arab histories of the Palestine war” as well as other post-1948 developments in the conflict, “Arab intellectuals lack the material for the task.”⁴⁶ This is largely due to the fact that Egypt, Jordan, Iraq, Syria, and Lebanon have not declassified their governmental archives as Israel has.⁴⁷ Although the extent to which any opening up of the official Arab archives will offer a refutation of the findings of Israel’s New Historians is uncertain, any such development would be unlikely to offer new insight into the strictly Zionist/Israeli policies documented by the New Historians concerning the issues most central to the conflict (such as Israel’s policies regarding the expulsion/flight of the Palestinians or its retention of the OPT).⁴⁸ That said, the government of Israel must be given full credit for its commitment to a relatively liberal archival policy.⁴⁹ Israel’s new historiography has confirmed much, though by no means all, of the Palestinian historical narrative, partially bridging the historical gap between Israeli and Palestinian scholars. Additionally, for one of today’s most profound Palestinian historians, Nur Masalha, access to Israel’s declassified records has proved invaluable in helping him provide fresh insight into many of the questions a number of his predecessors, most notably Constantine Zurayq⁵⁰ and Walid al-Khalidi,⁵¹ grappled with in the 1950s, 1960s, and 1970s.⁵² It is for these reasons that no reliable discussion of the history of the Israel/Palestine conflict can now be undertaken without reference to Israel’s new historiography, or to other scholarship based on Israel’s recently declassified archival materials. To the extent to which it is practical then, this seminal body of work will be used as the basis of the brief historical survey that follows.

45. *Id.* at 255.

46. THE WAR FOR PALESTINE, *supra* note 31, at 6.

47. While some scholars have had access to official Arab archival materials, “Arab governments only open their records for research, if they open them at all, in a haphazard and arbitrary manner.” *See id.* at 6.

48. *See infra* text accompanying notes 95–105, 141–151.

49. According to Morris, however, “there is still a severe problem of access to documents” in relation to “1967 and its aftermath.” Benny Morris, *Looking Back: A Personal Assessment of the Zionist Experience*, TIKKUN, Mar.-Apr. 1998, at 40, 49.

50. *See* CONSTANTINE ZURAYQ, THE MEANING OF THE DISASTER (R. Bayley Winder trans., 1956).

51. *See* WALID AL-KHALIDI, FROM HAVEN TO CONQUEST: READINGS IN ZIONISM AND THE PALESTINE PROBLEM UNTIL 1948 (1971). For more recent work by al-Khalidi, see ALL THAT REMAINS: THE PALESTINIAN VILLAGES OCCUPIED AND DEPOPULATED BY ISRAEL IN 1948 (Walid Khalid ed. 1992) [hereinafter ALL THAT REMAINS], and Walid al-Khalidi, *Plan Dalet: Master Plan for the Conquest of Palestine*, 18 J. PALESTINE STUD. 4 (1988).

52. *See* NUR MASALHA, EXPULSION OF THE PALESTINIANS: THE CONCEPT OF “TRANSFER” IN ZIONIST POLITICAL THOUGHT, 1882–1948 (1992) [hereinafter MASALHA, EXPULSION OF THE PALESTINIANS]; NUR MASALHA, IMPERIAL ISRAEL AND THE PALESTINIANS: THE POLITICS OF EXPANSION (2000) [hereinafter MASALHA, IMPERIAL ISRAEL]; NUR MASALHA, A LAND WITHOUT A PEOPLE: ISRAEL, TRANSFER AND THE PALESTINIANS 1949–1996 (1997).

A. 1882–1948

The conflict over Israel/Palestine finds its origins in the development of political Zionism in late nineteenth-century Europe.⁵³ In answer to centuries of persecution suffered by Jews “in Western and especially Eastern Europe,” political Zionism called for the establishment of “an independent Jewish existence in Palestine, the ancient land of Israel, which the Jews had last governed nineteen hundred years before.”⁵⁴ Zionism embodied a rejection of assimilation into European society as the solution to the so-called “Jewish Question,” and postulated in its place the creation of a modern nation-state in Palestine in which Jewish self-determination could develop and flourish.⁵⁵ In contrast to forms of revisionist Zionism that would later develop in Israel in the post-1967 era,⁵⁶ early political Zionism was largely secular in outlook,⁵⁷ and highly influenced by the dominant socio-political mores of imperial Europe. Accordingly, in the words of Zionism’s founding father, Theodor Herzl, the transformation of Palestine into a Jewish State was not only conceived as an emancipatory concept for European Jewry, but was in essence a “colonial idea,”⁵⁸ a sort of *mission civilisatrice* that would enable the Jewish people to “form a portion of the rampart of Europe against Asia, an outpost of civilization against barbarism.”⁵⁹

Of course, in the late nineteenth century Palestine was inhabited by well over 500,000 indigenous Palestinians,⁶⁰ who had themselves been settled in that land for well over two millennia.⁶¹ Of these, over eighty percent were Muslim, approximately ten percent were Christian, and about five to seven percent were Jews.⁶² Theirs was a traditional, largely agrarian society that, despite religious difference, “enjoyed much in common linguistically and culturally.”⁶³ Politically, Palestine was administered as a portion of the Ottoman Empire, with local authority “in the hands of notables or chiefs, heads of prominent families who became the tax collectors of their regions.”⁶⁴ Although the emergence of Arab nationalism would soon give rise to calls for

53. Benny Morris, *Revisiting the Palestinian Exodus of 1948*, in *THE WAR FOR PALESTINE*, *supra* note 31, at 37, 39. See also CHARLES D. SMITH, *PALESTINE AND THE ARAB-ISRAELI CONFLICT* 23–24 (4th ed. 2001).

54. SMITH, *supra* note 53, at 33.

55. See THEODOR HERZL, *THE JEWISH STATE* 85–97 (Sylvie d’Avigdor trans., Dover Publ’ns 1998) (1896).

56. See SHLAIM, *supra* note 35, at 549. See also MASALHA, *IMPERIAL ISRAEL*, *supra* note 52.

57. See SMITH, *supra* note 53, at 25.

58. ABDULLAH SCHLIEFER, *THE FALL OF JERUSALEM* 23 (1972).

59. HERZL, *supra* note 55, at 96.

60. See Janet Abu Lughod, *The Demographic Transformation of Palestine*, in *THE TRANSFORMATION OF PALESTINE: ESSAYS ON THE ORIGIN AND DEVELOPMENT OF THE ARAB-ISRAELI CONFLICT* 140 (Ibrahim Abu Lughod ed., 1987) [hereinafter *THE TRANSFORMATION OF PALESTINE*].

61. See SAMI HADAWI, *BITTER HARVEST: A MODERN HISTORY OF PALESTINE* 30–31 (1989).

62. *Id.*

63. *Id.*

64. SMITH, *supra* note 53, at 21.

Palestinian Arab independence,⁶⁵ the Palestinians in the late nineteenth century lacked the political maturity of their European-Jewish counterparts in the Zionist movement.

For the Zionists, it was the presence of an indigenous Arab people in Palestine that posed their most vexing dilemma—their “demographic problem,” as it was termed.⁶⁶ As noted by Benny Morris, this dilemma formed the very “root of the Zionist-Arab conflict” itself.⁶⁷ How would it be possible to colonize Palestine and transform it into a Jewish state when it was already inhabited by an indigenous Arab people? How would it be possible, in the words of Morris, for “a round peg to fit into a square hole?”⁶⁸

The initial solution put forth by the Zionists was to establish an organized program of mass Jewish immigration and colonization.⁶⁹ According to Morris, this was undertaken with the philosophy that “[g]radually the [Jewish] minority would demographically overwhelm the native majority, despite the Arabs’ higher birth rates; once the Jews were in a majority, a Jewish state would naturally ensue.”⁷⁰ In the three and one-half decades between the establishment of the first Zionist colony in Palestine in 1882 and the end of World War I,⁷¹ however, Zionist immigration and colonization continued at a pace insufficient to substantially alter the balance of demography in the country.⁷² By 1918 the percentage of Jewish inhabitants, both native and settler, stood at approximately eight percent.⁷³ The defeat of the Ottoman Empire in World War I, and the subsequent transfer of authority over Palestine to Britain by way of a League of Nations Mandate, held out the possibility that Jewish numbers would still be afforded ample opportunity to increase. In the Balfour Declaration of 1917, Britain committed itself to “the establishment in Palestine of a national home for the Jewish people.”⁷⁴ At that time, the Palestine Arabs numbered some ninety-two percent of the

65. See Richard P. Stevens, *Zionism as a Phase of Western Imperialism*, in *THE TRANSFORMATION OF PALESTINE*, *supra* note 60, at 57–58.

66. Morris, *supra* note 53, at 40.

67. *Id.* at 39.

68. *Id.*

69. *Id.*

70. *Id.*

71. The colony was named Rishon Letzion, Hebrew for “First in Zion.” See GERSHON SHAFIR, *LAND, LABOUR, AND THE ORIGINS OF THE ISRAELI-PALESTINIAN CONFLICT, 1882–1914*, at 51 (1989).

72. Morris, *supra* note 53, at 39–40.

73. See HADAWI, *supra* note 61, at 48–49.

74. The Balfour Declaration was issued on November 2, 1917, by Lord Arthur Balfour, British Foreign Secretary, to Lord Rothschild on behalf of the World Zionist Organization. The full text of the declaration reads as follows:

His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country.

The Balfour Declaration was incorporated into the terms of the Palestine mandate in 1922. W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 47 (1986).

population⁷⁵ and had developed an indigenous national movement calling for the establishment of a government deriving its authority from the will of the people.⁷⁶ For them, the Balfour Declaration represented a violation of the “sacred trust of civilization” contained in article 22(1) of the League of Nations Covenant,⁷⁷ under which Britain was legally obliged as the mandatory power to secure the “well-being and development” of the people of Palestine whose political independence had been “provisionally recognized” under article 22(4) of the Covenant.⁷⁸ The British paid no heed to this objection, and Jewish immigration and colonization was allowed to continue in varying degrees throughout the period of the mandate, which ran from 1922 to 1948.⁷⁹

As the Yishuv, or pre-state Zionist community in Palestine, grew during the mandate, clashes with the Arab population became increasingly common. “From the Zionist perspective,” Arab objection to their program was to be expected and was largely considered “a problem for the British.”⁸⁰ “From the Arab perspective, the expansion of the Yishuv posed a recognized threat that they should try to resist” if “the progressive loss” of their country was to be forestalled.⁸¹ Nationwide Palestinian riots in 1920, 1921, and 1929 had little relative effect on continued Zionist immigration,⁸² and a full-scale rebellion between 1936 and 1939 was brutally put down by the British.⁸³ Growing in size though the Yishuv was, “[b]y the 1930s many of the Zionist leaders understood that the pace of Jewish immigration was insufficient to lead within the foreseeable future to a Jewish majority.”⁸⁴ “By

75. SAMI HADAWI, *PALESTINIAN RIGHTS AND LOSSES IN 1948: A COMPREHENSIVE STUDY* 15–16 (1988).

76. See David Waines, *The Failure of the Nationalist Resistance*, in *THE TRANSFORMATION OF PALESTINE*, *supra* note 60, at 217–24. See also JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 18 (1990).

77. MALLISON & MALLISON, *supra* note 74, at 63.

78. *Id.* at 64. There is a fairly detailed literature dealing both with the legality and morality of the Balfour Declaration and British Mandate that falls outside of the scope of the present study. For those interested in examining the topic at further length see MALLISON & MALLISON, *supra* note 74, at 18–78; and LEONARD STEIN, *THE BALFOUR DECLARATION* (1961).

79. The extent of British indifference to Palestinian concerns was attested to by Lord Arthur Balfour himself in a memorandum to the British government dated August 11, 1919. In discussing the conflict between the “Jewish national home” policy of the Balfour Declaration and the “sacred trust of civilization” embedded in the League of Nations Covenant, the British Foreign Secretary stated:

The contradiction between the letter of the [League of Nations] Covenant and the policy of the Allies is even more flagrant in the case of the “independent nation” of Palestine than in that of the “independent nation” of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country The four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.

MALLISON & MALLISON, *supra* note 74, at 77–78.

80. SMITH, *supra* note 53, at 121.

81. *Id.* at 123.

82. *Id.* at 124–28.

83. *Id.* at 134–44.

84. MORRIS, *supra* note 53, at 40.

the end of 1936, Jews constituted” a mere “28 percent of the total population.”⁸⁵ Accordingly, a second solution to their ‘demographic’ problem had to be devised.

As documented by Nur Masalha and a number of Israel’s New Historians, the solution developed by the Zionists was the concept of “transfer”—“a euphemism denoting the organized removal of the indigenous population of Palestine to neighboring countries.”⁸⁶ Although traditional Zionist historiography denies the existence of any such phenomenon,⁸⁷ Israel’s declassified archives have proved that throughout the 1930s and 1940s, “consensus or near-consensus in support of transfer” had emerged at the highest levels of the Yishuv leadership.⁸⁸ According to Benny Morris:

The last and, let me say obvious and most logical, solution to the Zionists’ demographic problem lay the way of transfer: you could create a homogenous Jewish state or at least a state with an overwhelming Jewish majority by moving or transferring all or most of the Arabs out of its prospective territory. And this, in fact, is what happened in 1948.⁸⁹

By the late 1940s, tensions between the Jewish and Arab communities in Palestine had so escalated that Britain, still recovering from World War II, decided to end its mandate and hand the problem over to the United Nations. With the Nazi holocaust of European Jewry still fresh in the minds of the international community, the U.N. General Assembly voted to partition Palestine into a Jewish State and an Arab State by way of Resolution 181 on November 29, 1947.⁹⁰ The Palestinians viewed partition as an attempt to solve Europe’s Jewish Question at their expense, and was therefore rejected out of hand.⁹¹ The Zionists, on the other hand, widely accepted partition as

85. Abu Lughod, *supra* note 60, at 151.

86. MASALHA, *EXPULSION OF THE PALESTINIANS*, *supra* note 52, at 1.

87. Shabtai Teveth, *Charging Israel with Original Sin*, COMMENTARY, Sept. 1989, at 24, 24.

88. Morris, *supra* note 53, at 44. As pointed out by Morris, this consensus included eminent figures such as David Ben Gurion, who “had come out strongly in favor of transfer,” *id.* at 43; Menahem Ussishkin, who found “nothing immoral about transferring 60,000 Arab families,” *id.* at 44; and Moshe Shertok (Sharett), who considered transfer to “be the archstone, the final stage in the political development” of the Jewish state, *id.* at 46. Further, Nur Masalha observes:

It should not be imagined that the concept of transfer was held only by maximalists or extremists within the Zionist movement. On the contrary, it was embraced by almost all shades of opinion, from the Revisionist right to the Labour left. Virtually every member of the Zionist pantheon of founding fathers and important leaders supported it and advocated it in one form or another, from Chaim Weizmann and Vladimir Jabotinsky to David Ben-Gurion and Menahem Ussishkin. Supporters of transfer included such moderates as the “Arab appeaser” Moshe Shertok and the socialist Arthur Ruppin, founder of Brit Shalom, a movement advocating equal rights for Arabs and Jews. More importantly, transfer proposals were put forward by the Jewish Agency itself, in effect the government of the Yishuv.

MASALHA, *THE EXPULSION OF THE PALESTINIANS*, *supra* note 52, at 2.

89. Morris, *supra* note 53, at 40.

90. G.A. Res. 181, U.N. Doc. A/310 (1947). For a thorough discussion of the legality of the partition resolution, see MALLISON & MALLISON, *supra* note 74, at 166–73.

91. For the Palestinian position on partition, see HENRY CATTAN, *PALESTINE AND INTERNATIONAL*

the culmination of over five decades of significant colonizing effort.⁹² Yet, it brought their demographic problem into sharp relief. For the population of their prospective state under the U.N. partition was roughly fifty-five percent Jewish to forty-five percent Arab, thereby rendering the formation of an exclusively Jewish state impossible without the massive ethnic cleansing of the native Arabs.⁹³

The war that followed partition lasted from December 1947 to July 1949, and involved both local and inter-state conflict.⁹⁴ The first six months of fighting was completely local in nature, fought between the Yishuv and the indigenous Arabs and resulting in the forced expulsion and flight of over 300,000 Palestinians from within the borders of the proposed Jewish State.⁹⁵ The remainder of the war was fought on an inter-state basis following the Arab states' invasion of Israel on May 15, 1948, with the latter expanding its borders to control some seventy-eight percent of mandatory Palestine by war's end.⁹⁶ During this phase of the war, an additional 400,000 Palestinians fled or were forcibly expelled, thereby bringing the total number of Palestinian refugees in the 1948 war to approximately 700,000.⁹⁷ In response to this humanitarian catastrophe, the U.N. General Assembly passed Resolution 194 of December 11, 1948 calling on Israel to repatriate the refugees "at the earliest practicable date."⁹⁸ Repatriation was barred, however, by a special war-time decision of the Israeli Cabinet in June 1948,⁹⁹ and by the Zionists' deliberate destruction of between 369 and 418 of the villages whence the refugees were expelled or had fled.¹⁰⁰ Today, the Palestinian refugees, including their descendants, number between 3.9 and 5 million persons,¹⁰¹ and continue to remain in forced exile predominately, but not exclusively, in the OPT, Lebanon, Syria, Jordan, and Egypt. It is

LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT (1973).

92. There was a significant portion of the Yishuv that objected to the partition on the ground that the whole of Palestine should have been allotted to the Jewish State. See generally FLAPAN, *supra* note 36, at 15–53.

93. Morris, *supra* note 53, at 40.

94. See generally MORRIS, THE BIRTH, *supra* note 37.

95. SMITH, *supra* note 53, at 199.

96. HADAWI, *supra* note 75, at 81.

97. Morris, *supra* note 53, at 37. It is important to note that actual number of Palestinian refugees from the 1948 war is disputed to this day. Arab officials have traditionally estimated it to be as high as 900,000, while Israeli officials have usually cited 520,000. In 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) recorded numbers as high as 960,000. See LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 18–19 (1998).

98. G.A. Res. 194, ¶ 11, U.N. Doc. A/810 (1948).

99. Morris, *supra* note 53, at 38.

100. The figure of 369 is given in MORRIS, THE BIRTH, *supra* note 37, at xiv–xviii. The figure of 418 is offered by Khalidi in ALL THAT REMAINS, *supra* note 51, at 585.

101. UNRWA reports that, as of June 30, 2002, there are 3,973,360 registered Palestine refugees. UNRWA Public Information Office, UNRWA in Figures—30 June 2002, <http://www.un.org/unrwa/pr/pdf/uif-june02.pdf>. Salman Abu Sitta, a Palestinian academic, asserts that the number of Palestinian refugees (defined more broadly than UNRWA's categorization) is approximately 5 million. Salman Abu Sitta, *The Implementation of the Right of Return*, in THE NEW INTIFADA, *supra* note 22, at 299, 303.

their plight that forms the central question in the conflict over Israel/Palestine.

There are still considerable differences of opinion regarding the extent to which the expulsion and flight of the Palestinians in 1948 was preordained or merely a product of military exigency. Masalha, for instance, asserts that the expulsion and flight was long-planned by the Zionists, and for proof points to the seriousness with which the Yishuv leadership studied the policy of transfer in the decades prior to 1948 as well as the existence and implementation in 1948 of military plans “anchored in the . . . concept of transfer.”¹⁰² On the other hand, Morris asserts that despite the prevalence of transfer in pre-state Zionist political thought and the execution of military plans that necessitated forced expulsion, it was, to be sure, “born of war, not by design, Jewish or Arab.”¹⁰³ Thus, it is no longer disputed that the refugees were expelled and/or forced to flee during the 1948 war. The only matter now in dispute concerns the animus behind the expulsion/exodus. In the words of Morris, “above all . . . the refugee problem was caused by attacks by Jewish forces on Arab villages and towns and by the inhabitants’ fear of such attacks, compounded by expulsions, atrocities, and rumors of atrocities.”¹⁰⁴ Again, this stands in sharp contrast to the traditional Zionist assertion that the Palestinians left their homes on the orders of their own leaders, who promised a safe return once the Jewish state was destroyed.¹⁰⁵

B. 1949–1966

Following the 1948 war, the remaining twenty-two percent of Palestine territory that had not been conquered by Israel—the West Bank, including East Jerusalem, and the Gaza Strip—was effectively taken over by Jordan and Egypt, respectively. Jordan’s King Abdullah had long coveted the Haram al-Sharif compound in East Jerusalem enclosing the Dome of the Rock and the al-Aqsa Mosque, Islam’s third holiest shrine.¹⁰⁶ As noted by

102. MASALHA, *THE EXPULSION OF THE PALESTINIANS*, *supra* note 52, at 178. The principal military plan in question was officially known as *Tochnit Dalet*, or “Plan D.” According to Shlaim,

[t]he aim of Plan D was to secure all the areas allocated to the Jewish state under the U.N. partition resolution as well as Jewish settlements outside these areas and corridors leading to them, so as to provide a solid and continuous basis for Jewish sovereignty. The novelty and audacity of the plan lay in the orders to capture Arab villages and cities, something the Haganah [Israeli armed forces] had never attempted before. Although the wording of Plan D was vague, its objective was to clear the interior of hostile and potentially hostile Arab elements, and in this sense it provided a warrant for expelling civilians. By implementing Plan D in April and May [1948], the Haganah thus directly and decisively contributed to the birth of the Palestinian refugee problem.

SHLAIM, *supra* note 35, at 31.

103. MORRIS, *THE BIRTH*, *supra* note 37, at 286.

104. MORRIS, *supra* note 53, at 38.

105. SILBERSTEIN, *supra* note 33, at 100. It is important to note that, from a legal standpoint, the animus behind the expulsion of the Palestinians in 1948 bears no relevance to the fact that under international refugee, humanitarian, and human rights law, the refugees enjoy the right to return to their homes.

106. See generally SHLAIM, *COLLUSION ACROSS THE JORDAN*, *supra* note 39.

Avi Shlaim, “[h]aving gained military control over the West Bank, Abdullah set in motion a process of creeping annexation that culminated in the Act of Union in April 1950,” whereby the West Bank was officially annexed to Jordan.¹⁰⁷ Although the Act of Union contained a clause stating that it was without prejudice to “the final settlement of Palestine’s just cause,”¹⁰⁸ Jordan’s annexation was “unanimously denounced” by the Arab League as being contrary to its policy regarding Palestine, adopted on April 12, 1948, which stated that:

The Arab armies shall enter Palestine to rescue it. His Majesty [King Farouk, representing the League] would like to make it clearly understood that such measures should be looked upon as temporary and devoid of any character of the occupation or partition of Palestine, and that after completion of its liberation, that country would be handed over to its owners to rule in the way they like.¹⁰⁹

With the exception of Britain and Pakistan, the Jordanian annexation was not recognized by any member of the international community.¹¹⁰ With respect to the Gaza Strip, Egypt harbored neither political designs nor the inclination to annex; it administered the Gaza Strip in accordance with Arab League policy until 1967.¹¹¹

During this period, Israel faced a steady flow of Palestinian refugees attempting to return to their homes and, to a lesser extent, lightly armed irregular bands intent on doing so through force of arms.¹¹² In order to consolidate both its internal and external security, Israel maintained its wartime state of emergency, declared on May 19, 1948 under the Defence (Emergency) Regulations (1945)—an amended version of the regulations used by the British to quell the Palestinian rebellion of 1936–1939.¹¹³ In addition to allowing its armed forces wide latitude in dealing with cross-border Palestinian “infiltrators,”¹¹⁴ these regulations allowed for the imposition of a system of military rule aimed at “the fragmentation and division of the [Palestinian] Arab population” that had remained inside what became the state of Israel following the 1948 war.¹¹⁵ Under this regime, local Israeli military commanders were empowered to “exercise legislative, judicial and executive powers over extensive spheres of life” of the roughly 170,000 Palestinian

107. SHLAIM, *supra* note 35, at 43.

108. Territory and Sovereignty of States, 2 WHITEMAN DIGEST § 8, at 1166, *quoted in* Allan Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1, 38 (1973).

109. *Id.*

110. Gerson, *supra* note 108, at 38.

111. Emma Playfair, *Introduction to INTERNATIONAL LAW AND ADMINISTRATION*, *supra* note 11, at 4.

112. SHLAIM, *supra* note 35, at 82.

113. *See* URI DAVIS, ISRAEL: AN APARTHEID STATE 72 n.1 (1987).

114. According to Shlaim, “[a]ltogether between 2,700 and 5,000 infiltrators were killed in the period 1949–1956, the great majority of them unarmed.” SHLAIM, *supra* note 35, at 82.

115. MENACHEM HOFNUNG, DEMOCRACY, LAW AND NATIONAL SECURITY IN ISRAEL 95 (1996).

citizens of Israel, including the demolition of homes, imposition of curfews, collective punishment, deportation, and arbitrary arrest, search, and detention.¹¹⁶ This military regime, which did not apply to Jewish citizens of the state, remained in place until 1966. By this time, relations between Israel and its Arab neighbors had deteriorated even further, due in no small part to the increasing influence of Cold War politics,¹¹⁷ and a second regional war in 1956.¹¹⁸

During this period, the Palestine Liberation Organization (PLO) emerged as the political representative of the Palestinian people.¹¹⁹ Established on June 1, 1964, it was charged with leading the “struggle to liberate their land and return to it to practice their right to self-determination.”¹²⁰ In order to accomplish this, “an elaborate bureaucratic structure” was developed to administer the regional and international affairs of the Palestinian people and to provide them with “a variety of social services . . . in [the] diaspora.”¹²¹ Inspired by the “success of the Algerian revolt against the French,”¹²² as well as by the general momentum of the decolonization period of the 1960s, the PLO adopted a policy of armed struggle as a means of liberating Palestine.¹²³ As will be seen below, although the political contours of the Palestinian homeland have varied over time—from the whole of mandatory Palestine at the time of the PLO’s founding, to merely the OPT in the late 1980s—the “overriding goal” of the PLO has remained “securing for the Palestinian people the opportunity to return to their homeland under circumstances that will enable them to exercise self-determination.”¹²⁴

C. 1967–1992

The Six-Day War of 1967 witnessed the most wide-ranging political transformation in the Middle East since 1948. In this third Arab-Israeli war, Israel conquered the West Bank and East Jerusalem from Jordan, the Gaza Strip and Sinai peninsula from Egypt, and the Golan Heights from Syria, in blitzkrieg fashion between June 5 and 10, 1967.¹²⁵ There has traditionally been great controversy over who was to blame for the war; more specifically, whether Israel’s launching of the war “with a surprise air strike on enemy

116. *Id.* at 50. See also QUIGLEY, *supra* note 76, at 102–04.

117. See SMITH, *supra* note 53, at 278–81.

118. SHLAIM, *supra* note 35, at 178–85.

119. See *id.* at 187.

120. Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT’L L. & POL’Y 27, 50 (1997) (paraphrasing THE PALESTINIAN NATIONAL CHARTER, art. 26, in BASIC POLITICAL DOCUMENTS OF THE ARMED PALESTINIAN RESISTANCE MOVEMENT (Leila S. Kadi trans., 1969)).

121. Dajani, *supra* note 120.

122. SMITH, *supra* note 53, at 273.

123. YEZID SAYIGH, ARMED STRUGGLE AND THE SEARCH FOR STATE: THE PALESTINIAN NATIONAL MOVEMENT: 1949–1993, at 100–06 (1997).

124. Dajani, *supra* note 120, at 50.

125. See SHLAIM, *supra* note 35, at 241–50.

airfields” constituted aggression or a legitimate exercise of self-defense under article 51 of the Charter of the United Nations.¹²⁶ Article 51 allows a state to use a proportionate measure of force in self-defense if it is the object of an “armed attack.”¹²⁷ Where there is no armed attack, as was the case in the Six-Day War, “it is not clear” whether “a preemptive strike is lawful.”¹²⁸ While “most authorities agree” that “preemptive self-defense is not permitted under international law,”¹²⁹ some say it may be allowed in cases where “the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation.”¹³⁰ Adopting this reasoning, traditional Israeli historiography asserts that the aerial bombardment of Egypt on June 5, 1967, was a legitimate act of preemptive self-defense in response to an imminent Egyptian attack.¹³¹ Proponents of this theory point to, inter alia, Egypt’s closure of the straits of Tiran to Israeli shipping, its positioning of troops in the Sinai desert, and various verbal threats issued by President Gamal ‘Abd al-Nasser.¹³² Traditional Arab historiography, on the other hand, asserts that Israel’s preemptive strike was unlawful and constituted an act of armed aggression deliberately embarked upon “in order to fulfill its long-standing territorial ambitions.”¹³³ Proponents of this theory invoke, inter alia, Israel’s pre-attack troop build-up and talk of overthrowing the Syrian government,¹³⁴ as well as its ex post facto admission on the third day of hostilities that it authored the initial strike notwithstanding its report to the U.N. Security Council on the first two days of hostilities that the launching of its attack was in response to an Egyptian first strike.¹³⁵

As is the case with the Palestine refugee question, Israel’s new historiography has helped bridge the gap between these two divergent historical narratives. According to Avi Shlaim, “the June 1967 war was the only one that neither side wanted.”¹³⁶ The archival materials illustrate that “[t]he war resulted from a crisis slide that neither Israel nor her enemies were able to control.”¹³⁷ To be sure, Shlaim notes that Egypt’s “Nasser neither wanted nor planned to go to war with Israel,”¹³⁸ as evidenced by former Israeli Prime Minister and elder statesman David Ben Gurion’s admission that “I very much doubt whether Nasser wanted to go to war, and now we are in serious

126. *Id.* at 241. See U.N. CHARTER art. 51. See also QUIGLEY, *supra* note 76, at 163–64.

127. U.N. CHARTER art. 51.

128. QUIGLEY, *supra* note 76, at 165.

129. *Id.*

130. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984), quoted in LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 969 (4th ed. 2001).

131. See, e.g., JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 46 (1981).

132. QUIGLEY, *supra* note 76, at 164.

133. SHLAIM, *supra* note 35, at 241–42.

134. *Id.* at 236–39. See also QUIGLEY, *supra* note 69, at 158.

135. See QUIGLEY, *supra* note 76, at 163.

136. SHLAIM, *supra* note 35, at 236.

137. *Id.*

138. *Id.* at 237.

trouble.”¹³⁹ This was consistent with statements of other leading Israelis, including Yitzhak Rabin, then an Israeli General and Chief of Staff in charge of reporting on Egyptian military capabilities to the Israeli cabinet, who admitted that “I do not believe that Nasser wanted war. The two divisions he sent into the Sinai on May 14 would not have been enough to unleash an offensive against Israel. He knew it and we knew it.”¹⁴⁰ While Shlaim’s work does not fully reconcile the Israeli and Arab narratives, it elucidates the subjective intentions of the parties on the eve of the war. As will be seen in the coming section, these intentions have figured prominently in Israeli arguments regarding the applicability of the Fourth Geneva Convention to the OPT.

As a result of Israel’s capture of the West Bank, East Jerusalem, and the Gaza Strip, the Jewish state had established full control over the whole of what was once mandatory Palestine. Military success, however, was accompanied by a serious dilemma for Israel: the ‘demographic’ problem that was thought laid to rest in 1948 suddenly resurfaced.¹⁴¹ In addition to the approximately 440,000 Palestinian refugees that had been created by the war,¹⁴² roughly 1.3 million Palestinians remained in the OPT.¹⁴³ As noted by Shlaim, while the Israeli government was intent on holding on to the conquered territory, it “was reluctant to incorporate a substantial Palestinian population into the Jewish state The problem was how to keep the West Bank without turning Israel into a binational state.”¹⁴⁴ Ultimately, the answer lay in imposing military rule over the OPT and its Palestinian Arab inhabitants.

With the exception of a unilaterally expanded East Jerusalem illegally annexed, Israel extended its Defence (Emergency) Regulations (1945) to the West Bank and Gaza Strip, thereby imposing martial law on the Palestinian inhabitants of the OPT.¹⁴⁵ On November 22, 1967, the U.N. Security Council passed Resolution 242 reaffirming “the inadmissibility of the acquisition of territory by war,” and calling upon Israel to withdraw its “armed forces from territories occupied in the recent conflict.”¹⁴⁶ With respect to East Jerusalem, the Security Council asserted in Resolution 252 on May 21, 1968 that “all legislative and administrative measures and actions taken by Israel . . . which tend to change the legal status of Jerusalem are invalid and cannot change that status.”¹⁴⁷

139. *Id.* at 239.

140. QUIGLEY, *supra* note 76, at 164.

141. See MASALHA, *IMPERIAL ISRAEL*, *supra* note 52, at 22.

142. This number includes approximately 200,000 second-time refugees from the 1948 war. See TAKENBERG, *supra* note 97, at 17.

143. MASALHA, *IMPERIAL ISRAEL*, *supra* note 52, at 22.

144. SHLAIM, *supra* note 35, at 255.

145. Playfair, *supra* note 111, at 8.

146. S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., U.N. Doc. S/INF (1967).

147. S.C. Res. 252, U.N. SCOR, 23d Sess., 1421st mtg., U.N. Doc. S/8590 (1968).

For its part, Israel set out to fortify its control over the OPT through the promulgation of hundreds of military orders—“occupiers laws,” as one authority has put it¹⁴⁸—effectively vesting in the Israeli military governor absolute power to legislate in the OPT. “Until 1982, this significant body of law” was unpublished and therefore “remained unavailable both to the general public and to practicing lawyers.”¹⁴⁹ Among other things, these military orders have enabled the Israeli military authorities to expropriate Palestinian land, and construct exclusively Jewish colonies (settlements) on that land; demolish Palestinian homes; deport Palestinians; arrest, search, and detain Palestinians for indefinite periods without warrant, charge, or trial; mistreat—including torture—Palestinian political detainees; usurp Palestinian natural resources; and impose curfews and other forms of collective punishment on hundreds of thousands of Palestinians at a time.¹⁵⁰ Although more will be said about Israel’s record in the OPT in the coming section, suffice it to say that much of it has contravened the law of belligerent occupation in general, and the provisions of the Fourth Geneva Convention in particular.¹⁵¹

It was Israel’s sustained record of abuse and denial of Palestinian collective and human rights—most notably the right to self-determination—that led to the intifada of 1987–1993, a spontaneous grassroots uprising in which “tens of thousands of ordinary civilians, including women and children,” daily demonstrated against the military occupation and its excesses.¹⁵² Characterized by “popular street demonstrations and commercial strikes,” the weapons of choice in this popular revolt were stones and molotov cocktails, and the target was the then 20 year-old military occupation and its matrix of colonial domination in the OPT.¹⁵³ Not since the rebellion of 1936–1939 had the Palestinian people expressed such an overwhelming collective desire for freedom from foreign rule. As noted by Avi Shlaim, “[t]he standard of revolt against Israeli rule had been raised” with the intifada, and the rallying cry “was self-determination and the establishment of an independent Palestinian state” in the OPT.¹⁵⁴

148. See RAJA SHEHADEH, *OCCUPIER’S LAW: ISRAEL AND THE WEST BANK* (1988).

149. Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation*, in *INTERNATIONAL LAW AND ADMINISTRATION*, *supra* note 11, at 151.

150. See Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in *INTERNATIONAL LAW AND ADMINISTRATION*, *supra* note 11, at 125.

151. *Id.* at 127–29.

152. SHLAIM, *supra* note 35, at 451. For one of the most authoritative political and historical accounts of the intifada 1987–1993, see F. ROBERT HUNTER, *THE PALESTINIAN UPRISING: A WAR BY OTHER MEANS* (1991). See also GEOFFREY ARONSON, *ISRAEL, PALESTINIANS AND THE INTIFADA: CREATING FACTS ON THE WEST BANK* (1987); DON PERETZ, *INTIFADA: THE PALESTINIAN UPRISING* (1990); ZE’EV SCHIFF & EHUD YA’ARI, *INTIFADA* (Ina Friedman ed. & trans., 1990).

153. SHLAIM, *supra* note 35, at 451–54.

154. *Id.* at 451.

The brutality of Israel's response to the intifada—embodied in its “Iron Fist” policy of “might, force and beatings” to quell the unrest¹⁵⁵—made it the object of intense domestic and international criticism.¹⁵⁶ This criticism, in turn, contributed to a fundamental Israeli rethinking of its position vis-à-vis the OPT.¹⁵⁷ In July 1988, eight months into the uprising, King Hussein “announced that Jordan was cutting its legal and administrative ties with the West Bank,” thereby rescinding the 1950 Act of Union.¹⁵⁸ This disengagement strengthened the political position of the PLO in the OPT,¹⁵⁹ and forced Israel to confront the reality of the PLO as the sole legitimate representative of the Palestinian people—long the ultimate taboo for the Jewish state, given its policy “to never recognize the PLO, enter into any negotiations with the PLO, or agree to the establishment of a Palestinian state.”¹⁶⁰ For its part, the PLO used the intifada “to bolster the international legitimacy of the Palestinian national liberation movement,”¹⁶¹ and to moderate its political program to suit the goals of the uprising.¹⁶² When, in November 1988, the Palestine National Council¹⁶³ issued the largely symbolic Palestinian Declaration of Independence proclaiming “the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem,”¹⁶⁴ it did so with express reference to U.N. partition Resolution 181 and *only* with respect to the pre-1967 “territorial boundaries of the West Bank (including East Jerusalem) and the Gaza Strip.”¹⁶⁵ This ultimately created the possibility of a negotiated settlement based on the principle of a two-state solution as outlined in U.N. Security Council Resolution 242, the principle which eventually formed the basis of peace negotiations between Israel and the PLO.

D. 1993–2002

The Israel-PLO peace process—also known as the Oslo peace process¹⁶⁶—was inaugurated on September 13, 1993 with the signing of the Declaration of Principles on Interim Self-Government Arrangements (DOP).¹⁶⁷ The

155. *See id.*

156. Falk & Weston, *supra* note 150, at 126–27.

157. *See* SHLAIM, *supra* note 35, at 453–54.

158. *Id.* at 457.

159. *Id.* at 459.

160. *Id.* at 330.

161. Dajani, *supra* note 120, at 59.

162. *See* SHLAIM, *supra* note 35, at 465–66.

163. The Palestinian parliament-in-exile.

164. *Palestinian Declaration of Independence*, ¶ 10, U.N. GAOR, 43d Sess., Annex 3, Agenda Item 37, U.N. Doc. A/43/827 (1988), *quoted in* Dajani, *supra* note 120, at 57.

165. *Id.* at 58.

166. The process was so named in reference to the city in which the parties met secretly to frame the terms of the first of their accords. *See* GEOFFREY WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 41 (2000).

167. *DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS*, Isf.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter DOP].

foundation for the Oslo process was an exchange of letters in which the PLO recognized “the right of the State of Israel to exist in peace and security,” and Israel recognized “the PLO as the representative of the Palestinian people.”¹⁶⁸ Under the DOP, Israel and the PLO undertook to conclude a number of interim agreements leading to a final settlement of their conflict based on the “land-for-peace” formula outlined in U.N. Security Council Resolutions 242 and 338.¹⁶⁹ The interim phase was to last no longer than five years, and was intended to lead the parties into direct negotiations on the “permanent status” of the OPT, to commence “no later than the beginning of the third year of the interim period.”¹⁷⁰ Although the parties have concluded a number of interim agreements,¹⁷¹ “the peace process has repeatedly broken down” and permanent status negotiations—delayed for nearly four years—have failed to produce any major breakthroughs.¹⁷²

In the meantime, the interim period (1994–1999) was characterized by a continuation of gross human rights violations by Israel in the OPT,¹⁷³ including, but not limited to, extra-judicial killing,¹⁷⁴ administrative detention and torture,¹⁷⁵ expansion of Jewish colonial settlements,¹⁷⁶ and demolition of Palestinian homes.¹⁷⁷ All of this was exacerbated by the imposition in March 1993 of a prolonged Israeli military blockade (commonly referred to as “closure”) of Palestinian areas following a series of bomb attacks in Israel.¹⁷⁸ This blockade—prohibited under international humanitarian law as

168. WATSON, *supra* note 166, at 315–16.

169. In addition to emphasizing “the inadmissibility of the acquisition of territory by war” and calling upon Israel to withdraw its armed forces “from territories occupied” in the 1967 war, U.N. Security Council Resolution 242 affirmed that “the establishment of a just and lasting peace in the Middle East” required “[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.” S.C. Res. 242, U.N. SCOR, 22d Sess., 132d Mtg., U.N. Doc. S/INF.Rev.2 (1967). U.N. Security Council Resolution 338 was adopted during the October 1973 Arab-Israeli war and called upon all parties to implement “Security Council Resolution 242 (1967) in all its parts.” S.C. Res. 338, U.N. SCOR, 28th Sess., U.N. Doc. S/11036 (1973).

170. DOP, *supra* note 167, art. V, ¶ 2.

171. To date, the following interim agreements have been concluded: PROTOCOL ON ECONOMIC RELATIONS, FORMING ANNEX IV OF THE GAZA-JERICHO AGREEMENT, Isr.-P.L.O., Apr. 29, 1994, 33 I.L.M. 696; AGREEMENT ON THE GAZA STRIP AND THE JERICHO AREA, Isr.-P.L.O., May 4, 1994, 33 I.L.M. 622; AGREEMENT ON PREPARATORY POWERS AND RESPONSIBILITIES, Isr.-P.L.O., Aug. 29, 1994, 34 I.L.M. 455; INTERIM AGREEMENT ON THE WEST BANK AND GAZA STRIP, Isr.-P.L.O., Sept. 28, 1995, 36 I.L.M. 551; AGREEMENT ON THE TEMPORARY INTERNATIONAL PRESENCE IN THE CITY OF HEBRON, Isr.-P.L.O., Jan. 21, 1997, 36 I.L.M. 547; PROTOCOL CONCERNING THE REDEPLOYMENT IN HEBRON AND NOTE FOR THE RECORD, Isr.-P.L.O., Jan. 17, 1997, 36 I.L.M. 650; WYE RIVER MEMORANDUM, Isr.-P.L.O., Oct. 23, 1998, 37 I.L.M. 1251; SHARM EL-SHEIKH MEMORANDUM, Isr.-P.L.O., Sept. 4, 1999, 38 I.L.M. 1465.

172. WATSON, *supra* note 166, at 310.

173. See B’TSELEM, *supra* note 28, at 2.

174. *Id.* at 7–8.

175. *Id.* at 13–15.

176. *Id.* at 4–5. See also Pacheco, *supra* note 22, at 191.

177. See B’TSELEM, *supra* note 28, at 8–11.

178. See Sara Roy, *Decline and Disfigurement: The Palestinian Economy After Oslo*, in THE NEW INTIFADA, *supra* note 22, at 91, 98.

a form of collective punishment¹⁷⁹—had a devastating economic impact on the OPT.¹⁸⁰ Palestinian unemployment reached seventy percent in the Gaza Strip and fifty percent in the West Bank,¹⁸¹ gross domestic product in the OPT declined by 18.4% between 1992 and 1996,¹⁸² and the Palestinian economy suffered a total loss of \$2.8 billion between 1993 and 1996.¹⁸³ Combined with the lack of progress in ending the occupation through the repeatedly stalled peace negotiations, this “steady impoverishment” of the Palestinians led to the outbreak of the al-Aqsa intifada in September 2000 which continues as of the time of writing.¹⁸⁴

Although there are many similarities between the al-Aqsa intifada and the intifada of 1987–1993, two principal differences are manifestly apparent. First, from a conceptual standpoint, whereas the earlier intifada was directed solely at resisting and finally ending the Israeli military occupation, the al-Aqsa intifada seems additionally directed toward protesting the current Palestinian leadership—widely perceived as corrupt and incompetent for having engaged in a political process that has allowed Israel to consolidate its hold over the OPT, while continuing to infringe on inalienable Palestinian rights, most notably the right of the 1948 refugees to return to their homes and the right of the Palestinian people to self-determination.¹⁸⁵ Second, relative to its predecessor, the al-Aqsa intifada has been exponentially more violent in its cycles of resistance and repression, with the result that the rate of casualties on both sides has far surpassed anything experienced in the period between 1987 and 1993. According to Amnesty International, between September 2000 and December 2002 approximately 1800 Palestinians and 600 Israelis were killed,¹⁸⁶ the vast majority of them civilians.¹⁸⁷ This is largely due to the expansion of tactics to include “limited, localized armed struggle” against Israeli military targets in the OPT,¹⁸⁸ interspersed with sporadic suicide bomb attacks against Israeli civilians.¹⁸⁹ Israel, on the other hand, has intensified its occupation and unleashed “large-scale military operations” on Palestinian “civilian areas and refugee

179. See FOURTH GENEVA CONVENTION, *supra* note 6, art. 33.

180. See Roy, *supra* note 178, at 100–01, 103.

181. B'TSELEM, *supra* note 28, at 23.

182. *Id.* at 19.

183. *Id.*

184. Roy, *supra* note 178, at 101.

185. Pacheco, *supra* note 22, at 185–91. For a thorough discussion of the point of view that the Oslo accords amount to little more than an alternate means by which Israel can maintain its control over the OPT, see EDWARD W. SAID, PEACE AND ITS DISCONTENTS: ESSAYS ON PALESTINE IN THE MIDDLE EAST PEACE PROCESS (1995); EDWARD W. SAID, THE END OF THE PEACE PROCESS: OSLO AND AFTER (2000); RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES (1997).

186. Amnesty Int'l, *Israel and the Occupied Territories: An Ongoing Human Rights Crisis* (Dec. 2002), http://web.amnesty.org/web/web.nsf/pages/IOT_home.

187. See B'Tselem, *Total Casualties Since Dec. 1987* (Jan. 2002), http://www.btselem.org/English/Statistics/Total_Casualties.asp.

188. Andoni, *supra* note 29, at 209.

189. AMNESTY INT'L, *BROKEN LIVES: A YEAR OF INTIFADA* 41–44 (2001).

camps,” including the disproportionate and indiscriminate use of live fire by thousands of ground troops, and shelling from Merkava tanks, Apache helicopter gun-ships, and F-16 fighter jets.¹⁹⁰

Of course, at the heart of the problem lies Israel’s 35 year military occupation of the OPT and the policies it has pursued there since 1967. In light of the current crisis, a discussion of the role international humanitarian law has in protecting the civilian population in the OPT is especially imperative.

III. THE LAW OF BELLIGERENT OCCUPATION AND THE OCCUPIED PALESTINIAN TERRITORY

A. *The Development and Nature of the Law of Belligerent Occupation*

The modern law of belligerent occupation was an outgrowth of the traditional international law and practice concerning the right to acquire territory by force, or the right of conquest. The right of conquest is defined simply “as the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants.”¹⁹¹ Throughout most of recorded history the right of conquest was treated as a self-evident proposition of force and statecraft, a corollary of the right of the sovereign to exercise absolute dominion over everything coming under his control. As noted by Graber, according to this right the conquering sovereign “could do what he liked” with conquered lands “and their inhabitants”:

He could devastate the country, appropriate all public and private property, kill the people, or take them prisoners, or make them swear allegiance to himself and force them to fight in his army against their old sovereign. He could even before the war was decided dispose of the territory by annexing it or ceding it to a third state.¹⁹²

As early as the seventeenth century, Grotius counseled the need for conquering sovereigns to use “more humane practices” in their disposition of conquered territories and their civilian populations.¹⁹³ It was not until the middle of the eighteenth century, however, that the “modern concept of belligerent occupation” was articulated by Vattel.¹⁹⁴ He asserted “that possession acquired under occupation was not definite until the treaty of peace,” thereby introducing the notion that occupation is best understood “as a provisional condition, vastly different in its legal consequences from con-

190. The Secretary General, *Secretary General Tells Security Council Middle East Crisis ‘Worst in Ten Years’; Calls on Palestinians, Israelis to ‘Lead Your Peoples Away from Disaster,’* Mar. 12, 2002, at 1, U.N. Doc. SG/SM/8159 SC/7325 (2002). See also Edward W. Said, *What Price Oslo?*, AL-AHRAM WKLY. (Egypt), Mar. 14–20, 2002, at 13, <http://www.ahram.org.eg/weekly/2002/577/op2.htm>.

191. KORMAN, *supra* note 19, at 8.

192. DORIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY* 13 (1949).

193. *Id.*

194. *Id.* at 14.

quest.”¹⁹⁵ Whereas conquest implied the right to assume sovereignty, belligerent occupation only vested the conqueror with temporary rights of administration pending a political settlement. Through this formulation, an important theoretical distinction between the concepts of *belligerent occupation* and *subjugation* emerged—the former being “a defined legal position which falls far short of sovereignty [and] which comes into operation as soon as enemy territory is occupied,” and the latter being a signification “that the war has come to a close, . . . a state of affairs which alone qualifies the victor to substitute itself for the pre-existing sovereign in the conquered territory.”¹⁹⁶ Although these jurisprudential developments helped set the stage for the emergence of the modern law of belligerent occupation, its process of maturation was relatively slow. As a result, the modern conception of belligerent occupation did not become a prevailing international legal norm until the middle of the nineteenth century.¹⁹⁷

The first codification of the law of belligerent occupation was prepared by Dr. Francis Lieber of Columbia University in 1863.¹⁹⁸ His *Instructions for the Government of the Armies of the United States in the Field*, also known as the Lieber Code, was issued on April 24, 1863 as General Order No. 100 to Union forces in the American Civil War at President Abraham Lincoln’s request.¹⁹⁹ The Lieber Code expounded upon the laws of war in general, covering “very traditional and practical subjects like guerrilla warfare, captured enemy property, and the treatment of prisoners.”²⁰⁰ Significantly, however, approximately one-third of the code was devoted to the law of belligerent occupation,²⁰¹ and it articulated the modern principle that belligerent occupation is in essence a temporary condition in which the powers of the belligerent occupant are not without limit.²⁰² The fact that the Lieber Code was a national legal development did not detract from its law-making value on the international plane.²⁰³ Not long after it was issued, “[i]t became the model for many other national manuals (for example, those of the Netherlands in 1871, France in 1877, Serbia in 1879, Spain in 1882, Portugal in 1890, and

195. *Id.*

196. KORMAN, *supra* note 19, at 110.

197. *Id.* An expression of an earlier acceptance of the norm is found in the position adopted by the United States Supreme Court in *American Insurance Co. v. Bales of Cotton*, 26 U.S. 511 (1828), where Chief Justice Marshall stated that “the usage of the world is, if a nation be not entirely subdued, to consider the holding of a conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace.” *Id.* at 542.

198. GRABER, *supra* note 192, at 14.

199. *Id.*

200. PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 36 (2000).

201. GRABER, *supra* note 192, at 15.

202. *Id.* at 37–39.

203. In fact, as noted by Roberts and Guelff, “[n]ational manuals of military law and rules of engagement can serve as perhaps the closest links between the laws of war and belligerent armed forces in the field.” *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 5, at 12.

Italy in 1896), and it prepared the way for” further international developments in the area.²⁰⁴

The first international effort to codify the law of belligerent occupation took place as part of a general intergovernmental conference on the laws of war in 1874 at Brussels.²⁰⁵ Attended by delegates from 16 European states,²⁰⁶ the Brussels conference developed a code, the Brussels Declaration, that built upon many of the principles laid down by Lieber in 1863.²⁰⁷ As noted by Graber, however, the Brussels Declaration was “more humane and respect[ed] the rights of the peaceful population to a greater degree than the Lieber code.”²⁰⁸ Although the Brussels Declaration did not result in the conclusion of an international treaty, “its influence was far-reaching because subsequent codes on the laws and customs of war . . . were patterned according to it.”²⁰⁹ Shortly after it was promulgated, the Institute of International Law endorsed the Brussels Code and “decided to sponsor a draft code” of its own with the view to convincing each member of the international community to incorporate it into its national military manual.²¹⁰ The result was the adoption in 1880 of the Oxford Code, named for the venue at which the Institute met to complete the project. Because “the framers of the Oxford code had tried to specify and codify existing laws, rather than formulate new rules . . . there is very little substantial difference between the rules promulgated in the Brussels code and those set out in the Oxford code.”²¹¹ Furthermore, because the Oxford Manual was intended “a basis for national legislation,” no international treaty followed its dissemination.²¹²

That changed in 1899, when representatives of 26 states met at the Hague Peace Conference to conclude a number of treaties on the laws of war, among them the 1899 Hague Convention II Respecting the Laws and Customs of War on Land (1899 Hague Convention).²¹³ The 1899 Hague Convention “represented the first successful effort of the international community to codify a relatively comprehensive regime governing the laws of land warfare.”²¹⁴ However, because the “convention merely bound the contracting parties to issue instructions to their armies in accordance with” its provisions, many states either adopted it in a diluted form or not at all.²¹⁵ Accordingly, the international community reconvened at the Hague in 1907 to

204. *Id.* at 12–13.

205. GRABER, *supra* note 192, at 20.

206. *Id.* at 21–22.

207. *Id.* at 20.

208. *Id.* at 28.

209. *Id.* at 26.

210. *Id.* at 28.

211. *Id.* at 29.

212. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 68.

213. HAGUE CONVENTION II RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter 1899 HAGUE CONVENTION].

214. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 68.

215. GRABER, *supra* note 192, at 33–34.

make appropriate revisions to the 1899 convention, the result of which was the 1907 Hague Convention, along with its annexed regulations.²¹⁶ Of the fifty-six articles in the 1907 Hague Regulations, fourteen addressed the law of belligerent occupation. These articles did not constitute a complete overhaul of the 1899 effort, but one of their innovations was to provide that “[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation,” thereby giving rise to international civil liability for actions arising out of the conduct of war.²¹⁷ It would take nearly forty more years for the international community to assert, in convention form at least, that criminal liability could also flow in similar circumstances.²¹⁸

It was the ravages committed against civilian populations during the world wars that demonstrated the need for the international community to develop a more comprehensive body of law aimed specifically at the protection of civilians in time of war. Up to that point, the law of belligerent occupation was concerned predominantly with the rights of political elites in occupied territories, with the rights of ousted sovereigns vis-à-vis belligerent occupants.²¹⁹ As a result, the 1907 Hague Regulations—which were the governing “treaty[-]based rules in force” in this period—proved hopelessly inadequate in protecting against the internment, deportation, enslavement, and murder of millions of civilians in occupied Europe during the wars.²²⁰ From the interwar period to the end of World War II, the International Committee of the Red Cross (ICRC) was charged with the task of fashioning a revised codification of the law of belligerent occupation to address this major deficiency in the law.²²¹ The result was the promulgation of the Fourth Geneva Convention on August 12, 1949,²²² which, along with the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts,²²³ has emerged as the principal international convention on the law of belligerent occupation.

The Fourth Geneva Convention was not intended to supercede the 1899 and 1907 Hague conventions or regulations, but was rather designed to supplement them.²²⁴ Therefore, the Hague law continues to apply to all

216. 1907 HAGUE CONVENTION, *supra* note 8.

217. *Id.* art. 3. See also GRABER, *supra* note 192, at 33–34.

218. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS, annex, Aug. 8 1945, 59 Stat. 154, 82 U.N.T.S. 279.

219. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 105–06 (1993).

220. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 300.

221. *Id.* at 195–96, 299–300.

222. See *id.* at 300.

223. GENEVA PROTOCOL I ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, June 8, 1977, 1125 U.N.T.S. 3.

224. FOURTH GENEVA CONVENTION, *supra* note 6, art. 154. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 300.

cases of belligerent occupation. Moreover, the rules codified in both the Hague law and the Fourth Geneva Convention are understood by the international community to form part of the customary international law of war.²²⁵ The *erga omnes* character of the provisions contained in the Fourth Geneva Convention in particular is evidenced by the fact that there are at present 189 High Contracting Parties to the instrument, the same number of States Members of the United Nations.²²⁶ The Fourth Geneva Convention is not *completely* declarative of customary international law principles on the law of war, however. The framers of the convention, recognizing that much of international humanitarian law continued to exist in the form of unwritten customary principles, inserted an important provision stipulating that even where the High Contracting Parties denounced the convention,²²⁷ such denunciation:

shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.²²⁸

It is significant to note that this proviso was modeled after the so-called “Martens Clause” of the 1899 Hague Convention,²²⁹ included in that treaty because of the serious disagreement that arose among the treaty’s drafters over the issue of whether the inhabitants of occupied territory possessed the right to resist under international law.²³⁰ By virtue of its inclusion, all states continue to be bound by the customary international law of war even if they denounce the Fourth Geneva Convention.²³¹

225. On the customary nature of the Hague law, see BENVENISTI, *supra* note 219, at 98. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 68. On the customary nature of the Fourth Geneva Convention, see Statement of Jordan Paust to the United Nations International Meeting, *supra* note 13, at 20, 21. See also DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 196.

226. Int’l Comm. of the Red Cross, *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions*, http://www.icrc.org/eng/party_gc.

227. Under article 158 of the convention, the High Contracting Parties are at liberty to denounce the convention upon one year’s notice to the Swiss Federal Council so long as the denouncing power is not at the time of denunciation involved in a conflict to which the convention applies. See FOURTH GENEVA CONVENTION, *supra* note 6, art. 158.

228. *Id.*

229. The Martens Clause is found in the preamble to the 1899 Hague Convention and states that:

[u]ntil a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

1899 HAGUE CONVENTION, *supra* note 213, pmbl.

230. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 8–9.

231. With the exception of those States who unequivocally and consistently express their intention not to accept a custom that is in the process of formation.

As its proper style suggests, the Fourth Geneva Convention is chiefly concerned with protecting the rights of civilians in time of war. This concern for individuals lies at the heart of the Convention's main contributions to the law of belligerent occupation, which, according to Benvenisti, are twofold. First, the convention "delineates a bill of rights for the occupied population,"²³² who are afforded the legal status of "protected persons" under Article 4.²³³ Taking its cue from the principles established at Nuremberg, the convention affirms the right of civilian persons to be protected against, *inter alia*, willful killing,²³⁴ torture or inhuman treatment,²³⁵ deportation,²³⁶ collective punishment,²³⁷ and extensive destruction and appropriation of property,²³⁸ and classifies these acts as "grave breaches," which are considered war crimes under international law.²³⁹ Second, the convention shifts attention from the rights of the ousted sovereign to the rights of the civilian population under occupation—an important departure from the state-centric philosophy underpinning the traditional law and a signification of the "growing awareness in international law of the idea that peoples are not merely the resources of states, but rather that they are worthy of being the subjects of international norms."²⁴⁰

Of course, the two most important substantive principles of the traditional law of belligerent occupation continue to figure prominently in the Fourth Geneva Convention regime. The first of these is the principle that belligerent occupation represents a temporary condition during which the role of the belligerent occupant is limited merely to that of the *de facto* administrative authority. Accordingly, the belligerent occupant is prohibited from altering the status of the occupied territory, and is allowed to "amend the laws and regulations in force in the territory only to the extent needed to enable it to meet its obligations under the . . . Convention," which include ensuring both the well-being of the protected population and the security of its armed forces.²⁴¹ As the case of the OPT illustrates, the phenomenon of prolonged occupation "has produced particular problems" for this principle

232. BENVENISTI, *supra* note 219, at 105.

233. Article 4 of the Fourth Geneva Convention defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." FOURTH GENEVA CONVENTION, *supra* note 6, art. 4.

234. *Id.* arts. 3(1)(a), 32, 147.

235. *Id.*

236. *Id.* arts. 49(1), 49(6), 147.

237. *Id.* art. 33.

238. *Id.* arts. 33, 53, 147.

239. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8, July 17, 1998, U.N. Doc. 32/A/CONF. 183/9, 37 I.L.M. 999 (*entered into force* July 1, 2002) [hereinafter ROME STATUTE]. See also STATUTE FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 2, May 25, 1993, 32 I.L.M. 1159, 1192 (1993) [hereinafter ICTY STATUTE]; STATUTE FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, arts. 3, 4, Nov. 8, 1994, 33 I.L.M. 1598 (1994) [hereinafter ICTR STATUTE].

240. BENVENISTI, *supra* note 219, at 106.

241. Delparaz, *supra* note 16, at 48.

of law, given the fact that “the longer an occupation continues, the more difficult it is to ensure effective compliance with the Fourth Geneva Convention.”²⁴² In this respect, Benvenisti has noted that because “the Fourth Geneva Convention stop[s] short of requiring the occupant to develop (not just maintain) the economic, social, and educational infrastructures[,] . . . a protracted occupation . . . might lead to stagnation, and consequently to the impoverishment and backwardness of the occupied community.”²⁴³

The second of the important traditional principles was summarized best by Oppenheim when he noted that belligerent occupation does not yield so much as “an atom of sovereignty in the authority of the occupant.”²⁴⁴ This is an affirmation of the *jus cogens* rule of international law prohibiting the acquisition of territory through the threat or use of force, a pillar upon which the law of belligerent occupation rests.²⁴⁵ In instances where the ousted sovereign may not have possessed full legal title to the occupied territory, as is the case in the OPT, this gives rise to the question “in whom does sovereignty in the territory lie?” Benvenisti rightly observes that a contemporary reading of the law of belligerent occupation much acknowledge the principle of “self-determination of peoples and the complementary idea that sovereignty lies in the people and not its government.”²⁴⁶ Accordingly, “the modern occupant needs to heed the political interests of this people,” who are “the sovereign.”²⁴⁷ However, in an age where questioning the sovereignty of the ousted power has been used by belligerent occupants as a means to refuse to recognize the applicability of the Fourth Geneva Convention, thereby denying the occupied population the protections affirmed therein, it is important to guard against becoming too focused on questions of sovereignty, critical though they may be. Rather, of foremost importance is ensuring that so long as the belligerent occupant maintains effective control over the occupied territory, the civilian population must be accorded the benefit of the protections set forth in the convention.

B. *The Applicability of the Fourth Geneva Convention to the OPT*

In the period since the Fourth Geneva Convention was promulgated in 1949, occupying powers have routinely failed “to recognize the applicability of the law of [belligerent] occupation to their actions in foreign countries

242. *Id.*

243. BENVENISTI, *supra* note 219, at 105.

244. L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 363, 364 (1917), quoted in Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. ON H.R. 104, 106 (1978).

245. See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121 (1970). See also S.C. Res. 242, *supra* note 146.

246. BENVENISTI, *supra* note 219, at 29.

247. *Id.* at 183.

under their control.”²⁴⁸ Examples include the Indonesian occupation of East Timor,²⁴⁹ the Soviet occupation of Afghanistan,²⁵⁰ and the Iraqi occupation of Kuwait.²⁵¹ The Fourth Geneva Convention has been signed and ratified by all states directly involved in the Arab-Israeli conflict, including Israel.²⁵² Although Israel initially expressed an intention to apply the Fourth Geneva Convention to the OPT following the June 1967 war,²⁵³ since October 1967 it has consistently taken the position that the convention is not de jure applicable to the West Bank and the Gaza Strip.²⁵⁴ Instead, it has only declared an intention to act de facto in accordance with the “humanitarian provisions” of the Fourth Geneva Convention with respect to the OPT (excluding annexed East Jerusalem),²⁵⁵ an official enumeration of which has never been offered by Israel and in any event, a curious notion given the complete humanitarian object and purpose of the convention. The upshot of this official position is that Israel views its presence in the OPT not as an “occupation,” but rather as an “administration,” completely “unaccountable to the Fourth Geneva Convention and the law of belligerent occupation,” and mitigated only by a vague undertaking to apply in good faith those protections it deems suitable for the Palestinian civilian population.²⁵⁶ Later, the question of Israel’s observance of the Fourth Geneva Convention in the OPT will be examined in some detail. The following pages will be devoted

248. *Id.* at 149.

249. *Id.* at 153–59.

250. *Id.* at 160–63.

251. *Id.* at 150–51.

252. UNCEIRPP, *supra* note 5, at 3. With respect to the State of Palestine, a note appended to all four 1949 Geneva Conventions states the following:

Palestine. On 21 June 1989 the Depositary received a letter from the Permanent Mission of Palestine to the UN Office at Geneva stating “that the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided on 4 May 1989, to adhere to the four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto” On 13 September 1989 the Depositary circulated a note stating: “Due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine . . . the Swiss Government . . . is not in a position to decide whether this communication can be considered as an instrument of accession” The note also stated: “The unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982 by the Palestine Liberation Organization remains valid.”

DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 362.

253. This intention was codified by the Israeli military through the promulgation of Military Proclamation Number 3 on June 7, 1967. Pursuant to Article 35 of this military order, all Israeli military courts and officers were made legally bound to “apply the provisions of the Geneva Conventions of 13 August 1949 [sic] regarding the protection of civilians during war as to all which pertains to legal proceedings. If there should be any contradiction between the provisions of the order and the Geneva Conventions, the provisions of the Conventions should apply.” SHEHADEH, *supra* note 148, at xi. As noted by Raja Shehadeh, “Article 35 of Proclamation No. 3 was quietly deleted by Military Order 144” four months later in October 1967. *Id.*

254. UNCEIRPP, *supra* note 5, at 4.

255. Blum, *supra* note 23, at 293–94. See also Shamgar, *supra* note 23, at 266.

256. Falk & Weston, *supra* note 150, at 131.

to an analysis of the legal debate regarding the Convention's applicability to the OPT, and the international community's position on the matter.

In asserting its position, the Israeli government has relied upon the so-called "missing reversioner" theory first advanced in 1968 by Professor Yehuda Blum of the Hebrew University²⁵⁷ and subsequently elaborated upon by a handful of pro-Israeli legal scholars.²⁵⁸ The missing reversioner theory is based upon two separate but related arguments. The first of these turns on a unique interpretation of common article 2 of the Geneva Conventions, which states, in part, that "[t]he Convention shall . . . apply to all cases of partial or total occupation of the *territory of a High Contracting Party* . . ."²⁵⁹ Asserting that the object and purpose of the law of belligerent occupation is to protect the rights of the ousted sovereign holding valid legal title,²⁶⁰ it is argued that because Jordan and Egypt were not the legitimate sovereigns in the OPT prior to 1967 owing to their alleged unlawful aggression against Israel in 1948,²⁶¹ that territory cannot be said to constitute the "territory of a High Contracting Party" under common article 2, thereby rendering the Fourth Geneva Convention totally inapplicable. In Professor Blum's words:

[T]he concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognising and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application.²⁶²

The second argument of the missing reversioner theory holds that Israel possesses better title to the OPT than does Jordan or Egypt, based on a notion of "defensive conquest."²⁶³ The claim maintains that because Israel came into control of the OPT in 1967 through a defensive war against Jordan and Egypt, neither of whom held valid legal title to that territory, its control of the OPT is tantamount to perfect legal title. Again, according to Professor Blum, because

257. Blum, *supra* note 23. Professor Blum was later Israel's Permanent Representative to the United Nations.

258. See Shamgar, *supra* note 23, at 265–66. See also STONE, *supra* note 131, at 177–78, 209 n.2.

259. E.g., FOURTH GENEVA CONVENTION, *supra* note 6, art. 2 (emphasis added). The article is common to all four conventions.

260. Blum, *supra* note 23, at 293.

261. Falk & Weston, *supra* note 150, at 131.

262. Blum, *supra* note 23, at 293.

263. UNCEIRPP, *supra* note 5, at 4–6.

no state can make a legal claim to Judea and Samaria [*viz.* the OPT] that is equal to that of Israel, this relative superiority of Israel may be sufficient under international law to make Israel's possession of those territories virtually undistinguishable from an absolute title to be valid *erga omnes*; . . . I would, therefore, conclude by saying that Israel cannot be considered as an occupying power within the meaning given to this term in international law in any part of the former Palestine mandate, including Judea and Samaria.²⁶⁴

Israel's legal position on the applicability of the Fourth Geneva Convention to the OPT has enjoyed very limited support. As noted by Professor Richard Falk, the missing reversioner argument is "strained and artificial in character, and [has] commanded little to no respect among 'highly qualified publicists' or within the organized international community."²⁶⁵ Yoram Dinstein, an Israeli professor of law at Tel Aviv University, has dismissed the theory as being "based on dubious legal grounds."²⁶⁶ One of its most vociferous detractors was Professor W. Thomas Mallison of George Washington University. In the late 1970s and early 1980s, Professor Mallison set out a number of arguments effectively countering the Blum theory,²⁶⁷ a brief account of which follows.

With respect to the claim postulating the necessity that the "legitimate sovereign" be displaced by the belligerent occupant, Professor Mallison noted that there is no evidence to support the interpretation of the words "territory of a High Contracting Party" as used in common article 2 of the Geneva Conventions to refer only to full legal title as the "legitimate sovereign." It is well accepted that the word "territory" was intended by the framers of the Fourth Geneva Convention to connote, "in addition to *de jure* title, a mere *de facto* title to the territory."²⁶⁸ If the case were otherwise, any belligerent occupant would be able to evade the obligations imposed by the Fourth Geneva Convention by contesting the validity of the title of the ousted power to the territory—a notion, according to Professor Mallison, that "finds no support in either the text of the Convention or its negotiating history."²⁶⁹ Similarly, the unilateral assertion that the Fourth Geneva Convention cannot apply because of the fact that the ousted power's control over

264. *The Colonization of the West Bank Territories by Israel: Hearing Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 95th Cong. 35 (1978) [hereinafter *Senate Judiciary Hearings*] (statement of Yehuda Blum).

265. Falk & Weston, *supra* note 150, at 132. See also MALLISON & MALLISON, *supra* note 74, at 252–62; Roberts, *supra* note 15, at 25; SHEHADEH, *supra* note 148, at xi–xiii; Türkaya Ataöv, *The Status of Jerusalem as a Question of International Law*, in *THE LEGAL ASPECTS OF THE PALESTINE PROBLEM WITH SPECIAL REGARD TO THE QUESTION OF JERUSALEM* 139–40 (Hans Köchler ed., 1981); T. A. Van Baarda, *Is it Expedient to Let the World Court Clarify, in an Advisory Opinion, the Applicability of the Fourth Geneva Convention in the Occupied Territories?*, 10 *NETH. Q. HUM. RTS.* 4 (1992).

266. Dinstein, *supra* note 244, at 107.

267. *Senate Judiciary Hearings*, *supra* note 264, at 46–71 (statement of W. T. Mallison).

268. MALLISON & MALLISON, *supra* note 74, at 254.

269. *Id.* at 255.

the territory was the result of unlawful aggression in the first instance leads to an absurd result, namely that although “the inhabitants of the West Bank were the victims of Jordanian aggression in 1948,” it is because of this aggression that “these civilians must be victimized further by being denied the humanitarian protections of the [Geneva] Civilians Convention under Israeli occupation.”²⁷⁰ As stated by Professor Mallison, if “humanitarian law were to be interpreted so that its application were made contingent upon acceptance by the belligerent occupant of the justness and the non-aggressive character of the war aims of its opponent, it is clear that this law would never be applied.”²⁷¹ In essence, this branch of the Blum theory is regarded as unpersuasive because it places too much discretion in the hands of the would-be belligerent occupant, and “it frustrates the entire humanitarian purpose” of the Fourth Geneva Convention, which is to protect the interests of *civilian persons* in time of war, not governments.²⁷²

With respect to the claim of title to the occupied territory on the basis of “defensive conquest,” Israel’s position runs into a factual impediment: its actions in the 1967 war may not in fact have been defensive at all. As illustrated above, Israel’s new historiography has laid serious challenge to this idea through the use of primary Israeli archival materials that illustrate that its leadership possessed subjective knowledge that Israel did not face an imminent threat of an armed attack justifying its purported preemptive strike against Egypt.²⁷³ In any event, even if one were to concede *arguendo* that Israel’s actions in 1967 were defensive, as did Professor Mallison, the Blum thesis must fail on the ground that it offends the *jus cogens* principle of the inadmissibility of the acquisition of territory through the threat or use of force.²⁷⁴ This is consistent with the demise in international law and practice of the right of conquest, “defensive” or otherwise,²⁷⁵ and the contemporaneous emergence of the law of belligerent occupation, being provisional in nature and carrying “an implicit duty to withdraw once hostilities have been brought to an end.”²⁷⁶ Furthermore, the relevant international law on the use of force in self-defense does not permit the defending state to acquire territory through such use of force. As noted by Professor Mallison, “[a] state exercising national defense may go beyond its national boundaries to repel an attack, but it may not go beyond its national boundaries to acquire territory If international law provided for an exception to this basic rule under the heading of ‘defensive conquest,’ it would prove to be an irresisti-

270. *Id.* at 256–57.

271. *Id.* at 257.

272. *Id.*

273. *See supra* text accompanying notes 136–140.

274. *See* MALLISON & MALLISON, *supra* note 74, at 259.

275. Falk & Weston, *supra* note 150, at 133.

276. *Id.* at 134.

ble attraction for a militaristic and expansionist state.”²⁷⁷ In essence, the concept of defensive conquest is unknown in modern international law.

Another challenge to the missing reversioner thesis, not raised by Professor Mallison, is that it fails to take into account the effect of the international law on self-determination of peoples. As noted above, any contemporary reading of the law of belligerent occupation must necessarily take into account a core principle underlying the right to self-determination, that sovereignty lies in the people of a state and not in its governing elites.²⁷⁸ Some jurists have asserted that the principle of self-determination may be *jus cogens*.²⁷⁹ Thus, Professor Blum’s omission of any discussion of the political rights of the Palestinian people in the OPT—his failure to entertain the possibility that *they* might constitute the lawful reversioner in that territory—renders his thesis and Israel’s reliance on it problematic. This is especially so given that the right of the Palestinian people to exercise self-determination within the borders of mandatory Palestine has long been recognized by the international community,²⁸⁰ and since 1967 the territorial unit within which that right is expected to one day be fulfilled has widely been taken to be the OPT.²⁸¹

This conclusion is bolstered by the fact that the whole of the international community—except Israel—is of the opinion that the West Bank, including East Jerusalem, and the Gaza Strip are incontrovertibly subject to the provisions of the Fourth Geneva Convention.²⁸² Since 1967 the U.N. Security Council has issued scores of resolutions affirming the applicability of the Fourth Geneva Convention to the OPT, and calling upon Israel to abide by its terms as the occupying power.²⁸³ For example, following Israel’s decision

277. MALLISON & MALLISON, *supra* note 74, at 259.

278. See *supra* text accompanying notes 244–247.

279. See DAMROSCH ET AL., *supra* note 130, at 269.

280. This recognition goes back to article 22 of the League of Nations Covenant and the recognition by the U.N. General Assembly in the 1947 Partition of an Arab State in Palestine. See *supra* text accompanying notes 75–78, 90. See also Dajani, *supra* note 120, at 33–35, 40. Two notable exceptions to this historical near consensus are Israel and the United States, who have only relatively recently acknowledged the existence of the Palestinian people as such, with the accompanying right to self-determination.

281. For a discussion of international law and opinion on the question of Palestinian self-determination, see Dajani, *supra* note 120, at 33–48.

282. Falk & Weston, *supra* note 150, at 135.

283. See, e.g., S.C. Res. 1322, U.N. SCOR, 55th Sess., 4205th mtg., U.N. Doc. S/RES/56 (2000); S.C. Res. 904, U.N. SCOR, 49th Sess., 3351st mtg. at 108, U.N. Doc. S/RES/50 (1994); S.C. Res. 799, U.N. SCOR, 47th Sess., 3151st mtg. at 6, U.N. Doc. S/RES/48 (1992); S.C. Res. 726, U.N. SCOR, 47th Sess., 3026th mtg. at 5, U.N. Doc. S/RES/48 (1992); S.C. Res. 694, U.N. SCOR, 46th Sess., 2989th mtg. at 2, U.N. Doc. S/RES/47 (1991); S.C. Res. 681, U.N. SCOR, 45th Sess., 2970th mtg. at 8–9, U.N. Doc. S/RES/46 (1990); S.C. Res. 673, U.N. SCOR, 45th Sess., 2949th mtg. at 7, U.N. Doc. S/RES/46 (1990); S.C. Res. 672, U.N. SCOR, 45th Sess., 2948th mtg. at 7, U.N. Doc. S/RES/46 (1990); S.C. Res. 641, U.N. SCOR, 44th Sess., 2883d mtg. at 14, U.N. Doc. S/RES/45 (1989); S.C. Res. 636, U.N. SCOR, 44th Sess., 2870th mtg. at 14, U.N. Doc. S/RES/45 (1989); S.C. Res. 608, U.N. SCOR, 43d Sess., 2781st mtg. at 2, U.N. Doc. S/RES/44 (1988); S.C. Res. 607, U.N. SCOR, 43d Sess., 2780th mtg. at 1, U.N. Doc. S/RES/44 (1988); S.C. Res. 605, U.N. SCOR, 42d mtg. at 4, U.N. Doc. S/RES/43 (1987); S.C. Res. 592, U.N. SCOR, 42d Sess., 2727th mtg. at 7, U.N. Doc. S/RES/42 (1986); S.C. Res. 484, U.N. SCOR, 35th Sess., 2260th mtg. at 16, U.N. Doc. S/RES/36 (1980); S.C. Res. 478, U.N.

to deport “hundreds of Palestinian civilians” from the OPT in 1992, the Security Council passed Resolution 799 on December 18, 1992, reaffirming “the applicability of the Fourth Geneva Convention of 12 August 1949 to all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and affirm[ing] that deportation of civilians constitutes a contravention of its obligations under the Convention.”²⁸⁴ Similarly, since 1967 the General Assembly has issued hundreds of similar resolutions, though usually in much harsher language than that adopted by the Security Council.²⁸⁵ For instance, in Resolution 42/60 of December 8, 1987 the General Assembly reiterated that the Fourth Geneva Convention “is applicable to all Arab territories occupied since June 1967, including Jerusalem,”²⁸⁶ and condemned Israel’s “continued and persistent violation” of the convention, “in particular those violations which the Convention designates as ‘grave breaches’ thereof,” which “are war crimes and an affront to humanity.”²⁸⁷ Significantly, most of these General Assembly resolutions were (and continue to be) passed by an overwhelming majority, usually with only one or two states—Israel and, frequently, the United States—voting against them, and are therefore sound evidence of international opinion on the matter.²⁸⁸

To this international consensus on the applicability of the Fourth Geneva Convention to the OPT has been added the opinions of a number of other

SCOR, 35th Sess., 2245th mtg. at 14, U.N. Doc. S/RES/36 (1980); S.C. Res. 476, U.N. SCOR, 35th Sess., 2242d mtg. at 13, U.N. Doc. S/RES/36 (1980); S.C. Res. 471, U.N. SCOR, 35th Sess., 2226th mtg. at 10–11, U.N. Doc. S/RES/36 (1980); S.C. Res. 469, U.N. SCOR, 35th Sess., 2223d mtg. at 9–10, U.N. Doc. S/RES/36 (1980); S.C. Res. 468, U.N. SCOR, 35th Sess., 2221st mtg. at 9, U.N. Doc. S/RES/36 (1980); S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg. at 5, U.N. Doc. S/RES/36 (1980); S.C. Res. 452, U.N. SCOR, 34th Sess., 2159th mtg. at 8, U.N. Doc. S/RES/35 (1979); S.C. Res. 446, U.N. SCOR, 34th Sess., 2134th mtg. at 4, U.N. Doc. S/RES/35 (1979); S.C. Res. 271, U.N. SCOR, 24th Sess., 1512th mtg. at 5, U.N. Doc. S/RES/24/Rev.1 (1969).

284. S.C. Res. 799, *supra* note 283, at 6.

285. *See, e.g.*, G.A. Res. 56/204, U.N. GAOR, 56th Sess., Supp. No. 49, 90th plen. mtg., U.N. Doc. A/56/49 (2001); G.A. Res. ES-10/8, U.N. GAOR, 56th Sess., 15th plen. mtg., U.N. Doc. A/ES-10/8 (2001); G.A. Res. 56/60, U.N. GAOR, 56th Sess., Supp. No. 49, 82d plen. mtg., U.N. Doc. A/56/49 (2001); G.A. Res. 55/131, U.N. GAOR, 55th Sess., Supp. No. 49, at 211, U.N. Doc. A/55/49 (2000); G.A. Res. 54/77, U.N. GAOR, 54th Sess., Supp. No. 49, 71st plen. mtg. at 143, U.N. Doc. A/54/49 (1999); G.A. Res. 53/54, U.N. GAOR, 53d Sess., Supp. No. 49, 78th plen. mtg. at 133, U.N. Doc. A/53/49 (1998); G.A. Res. 52/65, U.N. GAOR, 52d Sess., Supp. No. 49, 69th plen. mtg. at 129, U.N. Doc. A/52/49 (1997); G.A. Res. 42/160 C, U.N. GAOR, 42d Sess., Supp. No. 49, 95th plen. mtg. at 114, U.N. Doc. A/42/49 (1987); G.A. Res. 32/91 A, U.N. GAOR, 32d Sess., Supp. No. 45, 101st plen. mtg. at 69, U.N. Doc. A/32/45 (1977); G.A. Res. 2252 (ES-V), U.N. GAOR, Supp. No. 1, 1548th plen. mtg. at 3, U.N. Doc. A/6798 (1967).

286. G.A. Res. 42/160 C, U.N. GAOR, 42nd Sess., Supp. No. 49, at 114, U.N. Doc. A/42/49 (1987).

287. G.A. Res. 42/160 D, U.N. GAOR, 42nd Sess., Supp. No. 49, at 114, U.N. Doc. A/42/49 (1987).

288. *See, e.g.*, G.A. Res. 47/70 B, U.N. GAOR, 47th Sess., Supp. No. 49, at 98, U.N. Doc. A/46/49 (1992) (vote: 141 for, 1 against, 4 abstaining); G.A. Res. 45/69, U.N. GAOR, 45th Sess., Supp. No. 49, at 32, U.N. Doc. A/45/49 (1990) (vote: 141 for, 2 against, 3 abstaining); G.A. Res. 44/2, U.N. GAOR, 44th Sess., Supp. No. 49, at 12, U.N. Doc. A/44/49 (1989) (vote: 140 for, 2 against, 6 abstaining); G.A. Res. 43/21, U.N. GAOR, 43rd Sess., Supp. No. 49, at 26, U.N. Doc. A/43/49 (1988) (vote: 130 for, 2 against, 16 abstaining); G.A. Res. 42/160 C, U.N. GAOR, 42nd Sess., Supp. No. 49, at 114, U.N. Doc. A/42/49 (1987) (vote: 143 for, 1 against, 8 abstaining).

intergovernmental and non-governmental organizations such as the United Nations Commission on Human Rights, the International Commission of Jurists, and the ICRC.²⁸⁹ The ICRC is of particular importance because it was the body that originally drafted the Fourth Geneva Convention in 1949, and it is vested with a special status under articles 30 and 143 of the convention as a third-party monitor in occupied territories.²⁹⁰ As noted by a U.N. study, “[t]his impartial body is usually extremely reticent in comment, normally dealing in confidence with the authorities concerned.”²⁹¹ It is in this capacity that the ICRC has consistently declared that the Fourth Geneva Convention “is applicable *in toto*” to the OPT, and that it is unacceptable “that a duly ratified international treaty may be suspended at the wish of one of the parties” (i.e., Israel).²⁹²

For its part, although the Supreme Court of Israel has held since 1988 that the relatively terse 1907 Hague Regulations apply to the OPT because they form a part of international customary law, to this day it has maintained that the far more expansive Fourth Geneva Convention is not justiciable in Israeli courts because it “constitutes treaty law as opposed to customary law,” which has not been formally incorporated into municipal law by an act of the Israeli legislature—i.e., the Fourth Geneva Convention is non-self-executing.²⁹³ There are two problems with this judicial approach to the question of the applicability of the Fourth Geneva Convention. First, as discussed above, it is not the case that the Fourth Geneva Convention does not constitute customary international law. On the contrary, “[a] report of the U.N. Secretary-General to the Security Council in May 1993 concerning the establishment of the” International Criminal Tribunal for the Former Yugoslavia (ICTY) “affirmed that the law embodied in the four 1949 Geneva Conventions had become part of customary international law.”²⁹⁴ Likewise, countless experts on the law of belligerent occupation have asserted that Israel is bound by the Fourth Geneva Convention because the convention “reflects customary humanitarian law.”²⁹⁵ Second, under article 27 of the

289. UNCEIRPP, *supra* note 5, at 11–12.

290. For instance, article 143 of the Fourth Geneva Convention provides, in part, that representatives of the ICRC:

[S]hall have permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter. Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted. Such representatives and delegates shall have full liberty to select the places they wish to visit. The Detaining or Occupying Power . . . may agree that compatriots of the internees shall be permitted to participate in the visits.

FOURTH GENEVA CONVENTION, *supra* note 6, art. 143.

291. UNCEIRPP, *supra* note 5, at 11.

292. INT’L COMM. OF THE RED CROSS, *Unsolved Problems Covered by the Fourth Convention*, 1975 ANNUAL REPORT 22.

293. BENVENISTI, *supra* note 219, at 112.

294. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 196.

295. Final Document of the United Nations International Meeting, *supra* note 13, at 87.

Vienna Convention on the Law of Treaties—which is itself widely regarded as declarative of customary international law and to which Israel is a signatory²⁹⁶—a party to a treaty “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁹⁷ Thus, as a matter of international law, Israel is bound as a High Contracting Party to the Fourth Geneva Convention to apply the convention’s provisions to the OPT notwithstanding the fact that its domestic law considers it to be a non-self-executing treaty. Having concluded that the Fourth Geneva Convention is indeed applicable to the OPT, the following section will be devoted to a discussion of Israel’s record of observance of the convention over the course of its 35-year military occupation.

C. *Israeli Violations of the Fourth Geneva Convention in the OPT*

As noted at the outset, since 1967 “the Israeli military has consistently violated nearly every provision of the Fourth Geneva Convention” in its capacity as the occupying power in the OPT.²⁹⁸ Under article 4 of the Fourth Geneva Convention, the approximately 3.1 million Palestinian civilian inhabitants of the OPT have the status of “protected persons.”²⁹⁹ This status entitles them to the human rights protections enshrined therein, which the occupying power itself has a legal duty to safeguard. For reasons of economy, it is impossible to completely catalogue all of Israel’s violations of the Fourth Geneva Convention here. For that purpose, a great many studies have been produced by such groups as Amnesty International,³⁰⁰ Human Rights Watch,³⁰¹ B’Tselem,³⁰² al-Haq,³⁰³ and the International Commission of Ju-

296. DAMROSCH ET AL., *supra* note 130, at 453–54.

297. VIENNA CONVENTION ON THE LAW OF TREATIES, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (1969) [hereinafter VIENNA CONVENTION].

298. Pacheco, *supra* note 22, at 184.

299. FOURTH GENEVA CONVENTION, *supra* note 6, art. 4.

300. See AMNESTY INT’L, REPORT AND RECOMMENDATION OF AN AMNESTY INTERNATIONAL MISSION TO THE GOVERNMENT OF THE STATE OF ISRAEL, 3–7 JUNE 1979 (1980) [hereinafter AMNESTY INT’L, REPORT OF MISSION TO ISRAEL]. See also AMNESTY INT’L, *supra* note 189.

301. See generally HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT: ISRAEL’S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES (1994).

302. See generally RON DUDAI, FREE REIN: VIGILANTE SETTLERS AND ISRAEL’S NON-ENFORCEMENT OF THE LAW (2001); RON DUDAI, NO WAY OUT: MEDICAL IMPLICATIONS OF ISRAEL’S SIEGE POLICY (2001); RON DUDAI, TACIT CONSENT: ISRAELI LAW ENFORCEMENT ON SETTLERS IN THE OCCUPIED TERRITORIES (2001) [hereinafter DUDAI, TACIT CONSENT]; YEHEZKEL LEIN, NOT EVEN A DROP: THE WATER CRISIS IN PALESTINIAN VILLAGES WITHOUT A WATER NETWORK (2001); Yael Stein, STANDARD ROUTINE: BEATINGS AND ABUSE OF PALESTINIANS BY ISRAELI SECURITY FORCES DURING THE AL-AQSA INTIFADA (2001).

303. See AL-HAQ, A NATION UNDER SIEGE: AL-HAQ ANNUAL REPORT ON HUMAN RIGHTS IN THE OCCUPIED PALESTINIAN TERRITORIES, 1989 (1990); AL-HAQ, ISRAEL’S WAR ON EDUCATION IN THE WEST BANK: A PENALTY FOR THE FUTURE (1988); AL-HAQ, PUNISHING A NATION: HUMAN RIGHTS VIOLATIONS DURING THE PALESTINIAN UPRISING, DECEMBER 1978–DECEMBER 1988 (1988); AL-HAQ, BRIEFING PAPERS ON TWENTY YEARS OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA (1987); AL-HAQ, IN THEIR OWN WORDS: HUMAN RIGHTS VIOLATIONS IN THE WEST BANK (1983); Jonathan Kuttab, *Avenues Open for the Defence of Human Rights in the Israeli-Occupied Territories*, in INTERNATIONAL LAW AND ADMINISTRATION, *supra* note 11, at 489.

rists.³⁰⁴ Suffice it to say, the al-Aqsa intifada in the OPT has been accompanied by a drastic increase in serious violations of international humanitarian law, many of which constitute grave breaches of the Fourth Geneva Convention and thus war crimes under international law. This Section will discuss a number of these violations, with a focus on Israel's more long-term grave breaches.

1. Annexation and Illegal Expropriation of Palestinian Land

Annexation of occupied territory is absolutely prohibited under the law of belligerent occupation.³⁰⁵ Article 47 of the Fourth Geneva Convention stipulates that the convention shall continue to apply to occupied territory notwithstanding any attempt by the occupying power to annex the territory in whole or in part.³⁰⁶ Similarly, article 147 of the Fourth Geneva Convention identifies as a "grave breach" the "extensive . . . appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."³⁰⁷ Under article 8, section 2(a)(iv) of the Rome Statute this act is considered a war crime.³⁰⁸

Since the turn of the twentieth century, the issue of land has remained at the heart of the Israel/Palestine conflict.³⁰⁹ In many respects, the objectives of modern Zionist policy respecting the OPT closely mirror those of the Zionist settlers in the pre-1948 period.³¹⁰ Since 1967, Israel has engaged in a systematic campaign of usurpation of Palestinian land in the OPT for the purpose of establishing exclusively Jewish colonies.³¹¹ By and large, this campaign has manifested itself through two distinct methods. The first is annexation and describes Israel's land policy in and around occupied East Jerusalem. The second is expropriation and embodies its policy respecting the remainder of the OPT. Each of these phenomena will be dealt with in turn.

Immediately following the close of hostilities in June 1967, the Israeli government passed a number of acts which extended its municipal law and jurisdiction to occupied East Jerusalem, effectively annexing the city in violation of international law. Among other things, Israel unilaterally expanded the city's "6.5 square kilometer land area to encompass 71 square kilometers of expropriated Palestinian land" in the surrounding areas of the West

304. Jordan J. Paust et al., *Report of the ICJ Mission of Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1 (1990) [hereinafter *ICJ Mission of Inquiry*].

305. BENVENISTI, *supra*, note 219, at 3.

306. FOURTH GENEVA CONVENTION, *supra* note 6, art. 47.

307. *Id.* art. 147.

308. ROME STATUTE, *supra* note 239, art. 8, § 2(a)(iv).

309. Ibrahim Matar, *Exploitation of Land and Water Resources for Jewish Colonies in the Occupied Territories*, in INTERNATIONAL LAW AND ADMINISTRATION, *supra* note 11, at 443, 444.

310. *Id.*

311. See *infra* text accompanying notes 329–356 for a discussion of Jewish colonies in the OPT.

Bank,³¹² and set out to develop and effectuate a mass expropriation policy aimed at divesting Palestinian owners of vast tracts of land.³¹³ Over the course of the 35-year occupation, Israel has expropriated—without compensation—over 60,000 dunums of Palestinian land in occupied East Jerusalem, all of which has been converted to exclusive Jewish use.³¹⁴ This amounts to roughly 86.5% of the total land area of occupied East Jerusalem as expanded by Israel.³¹⁵ Among the ostensibly legal methods used to justify this illegal annexation and expropriation have been: Military Order Number 70 (1967), allowing Israeli authorities to arbitrarily declare any locale a “closed military area,” transferring all use to the state;³¹⁶ Military Order Number 150 (1968), enabling the state to expropriate land belonging to “absentee” Palestinian owners, or individuals who were not accounted for in an Israeli census following the 1967 war;³¹⁷ and Military Order Number 321 (1968), authorizing the state to unilaterally expropriate Palestinian land for “public” purposes, which is “almost always synonymous with exclusive Jewish use.”³¹⁸ In July 1980, Israel attempted to further consolidate its annexation of occupied East Jerusalem through the passing of its “Basic Law: Jerusalem,” under which the city was declared the eternal capital of the state.³¹⁹ In response, the United Nations Security Council passed Resolution 478, affirming, *inter alia*, “that the enactment of the ‘basic law’ by Israel constitutes a violation of international law and does not affect the continued application of the” Fourth Geneva Convention to the OPT, “including Jerusalem,” and “that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of” the city “are null and void and must be rescinded forthwith.”³²⁰

Israeli law and policy respecting the remainder of the OPT is highly similar to that governing its control over occupied East Jerusalem, with the exception that it has not formally annexed the territory. Instead, it has utilized a host of near identical military orders to expropriate a massive expanse of Palestinian land, resulting in the *de facto* annexation of the vast majority of the OPT, without having to absorb its large Palestinian population through the extension of its citizenship.³²¹ Since 1967, the hundreds of military orders that have been used as a pretext for this policy include: Military Order

312. ALLISON B. HODGKINS, *THE JUDAIZATION OF JERUSALEM* 6 (1996). The laws in question are the Law and Administration Ordinance (Amendment No. 11) Law, 21 L.S.I. 75 (1967), and the Municipalities Ordinance (Amendment No. 6) Law, 21 L.S.I. 75 (1967).

313. HODGKINS, *supra* note 312, at 22–23.

314. UNITED NATIONS, *COMM. ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE, THE STATUS OF JERUSALEM* 22–23 (1997). Note: one dunum is approximately equal to 1,000 square meters or 0.247 acres.

315. *Id.*

316. HODGKINS, *supra* note 312, at 79.

317. *Id.*

318. *Id.* at 23.

319. Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980).

320. S.C. Res. 478, *supra* note 283, at 14.

321. See SHEHADEH, *supra* note 185, at 3.

Number 59 (1967), permitting the Israeli military government to declare all lands not registered with them as “state lands,” thereby restricting their use to Israeli authorities;³²² Military Order Number 58 (1967), enabling Israeli authorities to confiscate lands of those “absent” during the 1967 census;³²³ Military Order Number S/1/96, allowing Israeli authorities to unilaterally declare Palestinian land a “closed military area,” thereby preventing its use from all but the state;³²⁴ and Military Order Number T/27/96, permitting Israeli authorities to expropriate Palestinian land for “public” purposes.³²⁵

Importantly, notwithstanding its express agreement in article XXXI(7) of the 1995 Interim Agreement on the West Bank and Gaza Strip to refrain from initiating or taking “any step that will change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations,”³²⁶ Israel has continued to expropriate Palestinian land in the OPT.³²⁷ As stated above, the purpose of this expropriation has been to continue its colonization of the OPT. There is little doubt that under article 147 of the Fourth Geneva Convention, Israel’s extensive annexation—itsself invalid under article 47—and expropriation of Palestinian land in the OPT constitutes a “grave breach” of international humanitarian law.³²⁸

2. Jewish Colonial Settlement

Article 49 of the Fourth Geneva Convention provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”³²⁹ Under article 8, section 2(b)(viii) of the Rome Statute, this act is defined as a “serious violation of the laws and customs applicable in international armed conflict” and may give rise to individual criminal responsibility thereunder.³³⁰ According to the official ICRC commentary on the Fourth Geneva Convention, the intent of article 49 was to “prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories.”³³¹

322. SHEHADEH, *supra* note 148, at 27.

323. *Id.* at 35.

324. U.N. Econ. & Soc. Council, *Report on the Economic and Social Repercussions of the Israeli Settlements on the Palestinian People in the Palestinian Territory, Including Jerusalem, Occupied Since 1967, and on the Arab Population of the Syrian Golan Heights*, U.N. ESCOR, 52d Sess., ¶ 15, U.N. Doc. A/52/172/E/1997/71 (1997).

325. *Id.* ¶ 14.

326. INTERIM AGREEMENT ON THE WEST BANK AND GAZA STRIP, art. XXXI(7), Isr.-P.L.O., Sept. 28, 1995 [hereinafter INTERIM AGREEMENT].

327. See Geoffrey Aronson, *Settlement Monitor*, J. PALESTINE STUD., Autumn 1996, at 128.

328. For United Nations pronouncements on this issue, see S.C. Res. 465, *supra* note 283, at 5; G.A. Res. 47/70 C, *supra* note 288, at 98.

329. FOURTH GENEVA CONVENTION, *supra* note 6, art. 49.

330. ROME STATUTE, *supra* note 239, art. 8, § 2(b)(viii).

331. OSCAR M. UHLER ET AL., THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY

For its part, Israel has never concealed the colonial intent underlying its 35-year program of annexation and expropriation of Palestinian land in the OPT. In similar fashion to Yishuv policy in the pre-1948 period, since 1967, Israeli state planners have colonized the OPT with exclusively Jewish settlements intended to impose a *fait accompli*, rendering any future withdrawal by the occupying power—whose international legal status is merely that of a provisional administrator with limited powers and no sovereign rights—all but impossible. According to a 1980 plan prepared by Mattiyahu Drobles of the Settlement Department of the World Zionist Organization (the so-called “Drobles Plan”):³³²

The best and most effective way of removing every shadow of doubt about our intention to hold on to Judea and Samaria [i.e., the West Bank] forever is by speeding up the [Jewish colonial] settlement momentum in these territories. The purpose of settling the areas between and around the centers occupied by the minorities [that is, the Palestinian majority in the West Bank] is to reduce to the minimum the danger of an additional Arab state being established in these territories. Being cut off by Jewish settlements, the minority population will find it difficult to form a territorial and political continuity.³³³

Over the course of the occupation, Israel’s colonial settlement policy in the OPT has largely developed along the lines articulated in the Drobles Plan. Palestinian city centers have been surrounded by ever-expanding Jewish colonies and bypass roads.³³⁴ According to the United Nations Special Rapporteur to the Commission on Human Rights, this has had the effect of dividing the West Bank “into some 60 discontinuous zones” and “segmenting the Gaza Strip into four parts.”³³⁵ Palestinian freedom of movement to and from these areas is severely restricted by an intricate network of Israeli military checkpoints that may only be traversed by those possessing special travel permits from the Israeli military authorities. The construction of Jew-

283 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

332. The World Zionist Organization was constituted by Theodor Herzl at the First Zionist Congress in Basel, Switzerland in 1897. MALLISON & MALLISON, *supra* note 74, at 19. “Since the 1922 League of Nations Mandate for Palestine, the term ‘Zionist Organization’ has been equivalent to the term ‘Jewish Agency.’” *Id.* at 8. Today it operates as a quasi-governmental body of the government of the state of Israel, existing both within the state and extraterritorially, “to achieve the political objectives of Zionism.” *Id.*

333. MATTIYAHU DROBLES, MASTER PLAN FOR THE DEVELOPMENT OF SETTLEMENT IN JUDEA AND SAMARIA (1980), *as quoted in* Matar, *supra* note 309, at 446.

334. For a discussion of Israel’s network of bypass roads intended to service its system of colonies in the West Bank, see Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221 (1997).

335. U.N. Comm’n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine—Update to the Mission Report on Israel’s Violations of Human Rights in the Palestinian Territories Occupied Since 1967, Submitted by Giorgio Giacomelli, Special Rapporteur, to the Commission on Human Rights at its Fifth Special Session*, U.N. ESCOR, 57th Sess., ¶ 26, U.N. Doc. E/CN.4/2001/30 (2001) [hereinafter *Human Rights Commission Update*].

ish colonies in and around occupied East Jerusalem has had a particularly devastating impact, altering the demography of the city in the Jewish state's favor, and geographically severing it from its natural West Bank hinterland.

Over the course of Israel's occupation, the number of Jewish settlers in the OPT has steadily increased, with colonial settlement construction fluctuating "between 2,000 and 5,000 housing units each year."³³⁶ Whereas in 1972 there were 8,400 Jewish settlers in the OPT, by 1992 that number reached 250,784.³³⁷ Again, notwithstanding its commitment in the Interim Agreement to refrain from altering the status of the OPT pending the outcome of permanent status negotiations with the PLO, since the onset of the peace process in 1993, the number of Jewish settlers has increased at an unprecedented rate. As of February 2002, the population of Jewish settlers in the OPT stood at approximately 384,000, with no sign of the settlement process receding.³³⁸ Since his election in January 2001, Israeli Prime Minister Ariel Sharon has authorized construction of more than fifty new colonies on expropriated Palestinian land.³³⁹ In the West Bank, including East Jerusalem, there are 376,000 Jewish settlers living in 141 colonies among approximately 2 million Palestinians.³⁴⁰ Nevertheless, the lands upon which the colonies are built (in addition to "adjacent confiscated land, settlement [bypass] roads and other land controlled by the" Israeli military authorities) amount to fifty-nine percent of the total land area of the West Bank.³⁴¹ In the Gaza Strip—an area only 140 square miles in size—7000 Jewish settlers live on twenty percent of the land, with the remainder left for the approximately 1.1 million Palestinian inhabitants, the vast majority of them impoverished refugees, making it one of the most densely populated places on earth.³⁴²

In addition to severely limiting the amount of land resources available to the indigenous Palestinian population in the OPT, Israel's Jewish colonies have been the cause of an acute water shortage for Palestinians.³⁴³ With many of the colonies "strategically located to command access to the main aquifer underlying the West Bank,"³⁴⁴ Israel has maintained a "patently unfair" distribution of water since 1967.³⁴⁵ For instance, Jewish "settlers con-

336. Found. for Middle East Peace, *Israeli Settlements in the Occupied Territories: A Guide* (Mar. 2002), <http://www.fmep.org/reports/2002/sr0203.html>.

337. *Id.*

338. *Id.*

339. Geoffrey Aronson, *New "Outposts" Lead Settlement Expansion*, REPORT ON ISRAELI SETTLEMENT IN THE OCCUPIED TERRITORIES, Sept.-Oct. 2002, <http://www.fmep.org/reports/2002/v12n5.html>

340. Found. for Middle East Peace, *supra* note 336.

341. *Id.*

342. *Id.*

343. See LEIN, *supra* note 302.

344. Found. for Middle East Peace, *supra* note 336.

345. LEIN, *supra* note 302, at 3.

sume six times more water per capita than Palestinians,”³⁴⁶ while “218 Palestinian communities are not connected to a water network.”³⁴⁷

Even more problematic than the water problem, is the security problem. Since 1967, the Israeli military has furnished Jewish settlers with arms that have frequently been used to terrorize Palestinians in the OPT.³⁴⁸ In the period between December 1987 and March 2001, “119 Palestinians, among them 23 minors, [were] killed by Jewish settlers.”³⁴⁹ As documented by the Israeli human rights organization, B’Tselem, this settler violence occurs with the “tacit consent” of Israeli military authorities who rarely, if ever, punish the perpetrators with the same severity exacted against Palestinians³⁵⁰—not an insignificant matter given “Israel’s legal duty, as an occupying power, to protect the well-being and security of the Palestinian population under its control.”³⁵¹ This difference in treatment is no doubt the result of the fact that since 1967 Israel has imposed two different systems of law in the OPT, in what Allegra Pacheco has called “an apartheid-like legal and rights structure.”³⁵² Under this structure, separate Israeli civilian and military legal systems operate concurrently in the OPT, the applicability of which is determined solely by the nationality of the individual concerned, effectively dividing the population along racial lines. As such, Jewish colonial settlers are extra-territorially subject to Israeli civilian laws as Israeli-Jewish citizens, while the Palestinian inhabitants of the OPT are strictly subject to the much more repressive Israeli military laws.³⁵³ Thus, in addition to violating article

346. Found. for Middle East Peace, *supra* note 336.

347. LEIN, *supra* note 302, at 6.

348. See generally DUDAI, TACIT CONSENT, *supra* note 302.

349. *Id.* at 3.

350. *Id.* at 36. As noted by Dudai,

[settler] violence occurs against the background of leniency and prolonged impotence of the Israeli law-enforcement authorities. These factors received much media coverage following two recent decisions of Israeli courts. The first was the Supreme Court’s ruling to accept the Parole Board’s decision to release Yoram Skolnick, convicted of killing a Palestinian who was tied up, after serving only eight years in jail. . . . The second decision was the Jerusalem District Court’s sentence, following a plea bargain, of Nahum Korman to six months’ public service for his manslaughter conviction in the killing of an 11-year-old Palestinian boy.

Id. at 3.

351. *Id.* Israel’s colonial settlement policy in the OPT has been roundly condemned by the international community as being in clear violation of article 49 of the Fourth Geneva Convention. For instance, following three assassination attempts by Jewish settlers on the Palestinian mayors of Nablus, Ramallah, and al-Bireh in 1980, the U.N. Security Council passed Resolution 471 of June 5, 1980, expressing its deep concern “that the Jewish settlers in the occupied Arab territories are allowed to carry arms, thus enabling them to perpetrate crimes against the civilian Arab population,” and “that Israel, as the occupying Power, has failed to provide adequate protection to the civilian population in the occupied territories in conformity with the provisions of the [Fourth] Geneva Convention.” S.C. Res. 471, *supra* note 283, at 10–11. Likewise, following the massacre of twenty-nine Palestinian Muslim worshipers in the Ibrahimi Mosque in al-Khalil (Hebron) by a Jewish settler in 1994, the U.N. Security Council passed Resolution 904 of March 18, 1994, calling “upon Israel, the occupying Power, to continue to take and implement measures, including inter alia, confiscation of arms, with the aim of preventing illegal acts of violence by Israeli settlers.” S.C. Res. 904, *supra* note 283, at 108.

352. Pacheco, *supra* note 22, at 191.

353. As noted by Dudai,

49 of the Fourth Geneva Convention, Israel's Jewish colonial settlements in the OPT potentially represent very serious transgressions of other international human rights and criminal law conventions, including the International Convention on the Elimination of all forms of Racial Discrimination,³⁵⁴ the Rome Statute,³⁵⁵ and the International Convention on the Suppression and Punishment of the Crime of Apartheid.³⁵⁶

3. *Wilful and Extrajudicial Killing or Execution*

Just as all municipal legal systems prohibit the crime of murder, article 147 of the Fourth Geneva Convention outlaws the “wilful killing” of protected persons and categorizes such acts as “grave breaches” of the convention.³⁵⁷ Similarly, article 8, section 2(a)(i) of the Rome Statute defines the “wilful killing” of protected persons in occupied territory as a war crime.³⁵⁸

Since 1967, Israel has employed a policy authorizing the wilful killing of Palestinian civilians engaged in mass protests and popular marches against the occupation. This policy initially came to the fore during the intifada of 1987–1993, in which hundreds of civilian protesters were killed by Israeli military authorities, and tens of thousands were maimed and permanently injured through the use of live fire and rubber-coated metal bullets.³⁵⁹ As discussed previously, the Israeli response to the al-Aqsa intifada has been exponentially more violent than its predecessor, with the result that, between its outbreak in September 2000 and December 2002, approximately 1800 Palestinians have been killed,³⁶⁰ the “vast majority” of them by live gunfire.³⁶¹ According to B’Tselem, “[t]he principal reason for these deaths is

[t]he Israeli [civilian] legal system grants [Jewish] settlers a number of legal rights that are absent from the military-justice system applying to Palestinians. The period of detention of a suspect before being brought before a judge, the right to meet with an attorney, the defenses available to a defendant at trial, maximum sentences set by law, release of prisoners before serving a full sentence—all of these differ in the two systems of law, with the Israeli [civilian] system granting more extensive rights and defenses.

DUDAI, TACIT CONSENT, *supra* note 302, at 5.

354. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 (1966).

355. ROME STATUTE, *supra* note 239, art. 7, § 1(j).

356. INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973).

357. FOURTH GENEVA CONVENTION, *supra* note 6, art. 147.

358. ROME STATUTE, *supra* note 239, art. 8, § 2(a)(i).

359. See B’Tselem, *Palestinians Killed in the Occupied Territories (including East Jerusalem), since the Beginning of the Intifada (Dec. 9, 1987) until the end of January 2002*, http://www.btselem.org/English/Statistics/Total_Casualties.asp.

360. Amnesty Int’l, *supra* note 186.

361. B’Tselem, *The Open Fire Regulations*, http://www.btselem.org/english/Open_Fire_Regulations/index.asp. According to LAW: The Palestinian Society for the Protection of Human Rights and the Environment (LAW), a non-governmental organization operating in Jerusalem, between September 2000 and March 22, 2002, 1200 Palestinians were killed, and 18,485 were injured. According to their statistics, “[a]bout 81.07% of those killed and 97.02% of those injured are civilians not serving in the PA [Palestinian Authority] civilian police or security forces.” LAW, *Updated Overview of Israeli War Crimes and Crimes Against Humanity*, Apr. 2, 2002 (prepared by Dianne Luping), <http://www.lawsociety.org/Reports/>

the deliberate policy of allowing lethal gunfire in situations where [Israeli] soldiers are not in danger” or in “life-threatening situations.”³⁶² Under its internal “open fire regulations,” the Israeli military authorizes its troops to use live fire only in “life-threatening” situations, but includes in its definition of “life-threatening” the act of stone-throwing—the most widely used tactic among Palestinian civilian protesters in the OPT.³⁶³ Particularly disturbing is the evidence found by the U.N. Commission on Human Rights in its report on the first seven months of the al-Aqsa intifada “that many of the deaths and injuries inflicted were the result of head wounds and wounds to the upper body, which suggests an intention to cause serious bodily injury rather than to restrain demonstrations/confrontations.”³⁶⁴

Quite apart from its practice of using live fire on unarmed civilian protesters, since 1967 Israel has engaged in the practice of “extrajudicial executions or targeted political assassinations” of members or leaders of Palestinian resistance groups in the OPT.³⁶⁵ According to a recent Amnesty International report:

Israel has for years pursued a policy of assassinating its political opponents. Because extrajudicial executions are universally condemned, most governments who practice assassinations surround such actions in secrecy and deny carrying out the killings they may have ordered. Although the Israeli government prefers to talk about “targeted killings” and “preventative actions” (or “pinpointed preventative actions”) rather than “extrajudicial executions,” members of the Israeli government have confirmed that such killings are a deliberate government policy carried out under government orders.³⁶⁶

Over the course of the occupation, the methods employed by Israel in its commission of these acts have included sniper fire, undercover death squads, and—especially in the current uprising—heavy weapons, such as rocket fire from Apache helicopter gunships or F-16 jet fighters.³⁶⁷ Since September 2000, “at least 72 Palestinian activists have been assassinated” using these methods.³⁶⁸ In addition, “at least 20 bystanders (including 5 children)” have

reports/2002/over.html.

362. B’Tselem, *supra* note 361.

363. *Id.*

364. U.N. Comm’n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine—Report of the Human Rights Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000*, U.N. ESCOR, 57th Sess., ¶ 47, U.N. Doc. E/CN.4/2001/121 (2001) [hereinafter *Human Rights Commission Report*].

365. *Id.* ¶ 54.

366. AMNESTY INT’L, *supra* note 189, at 32–33.

367. See *Human Rights Commission Update*, *supra* note 335, ¶ 11. See also *Human Rights Commission Report*, *supra* note 364, ¶ 57. For statistical information on the number of extrajudicial killings committed by Israeli death squads, see B’Tselem, *Casualties by the Undercover Units in the Occupied Territories (including East Jerusalem) since the Beginning of the Intifada (Dec. 9, 1987), until the End of April 2001*, http://www.btselem.org/English/Open_Fire_Regulations/Undercover_Units_Statistics.asp.

368. LAW, *supra* note 361.

been killed as a result.³⁶⁹ Although the Israeli military authorities claim that those who are killed extrajudicially are legitimate military targets due to their alleged involvement in the killing of Israelis, no evidence or proof of guilt is ever offered, nor is the right to make full answer and defense afforded.³⁷⁰ As noted by the U.N. Commission on Human Rights, in the absence of any proof to the contrary, the civilian character of those targeted remains intact and they continue to enjoy the status and rights of protected persons under the Fourth Geneva Convention.³⁷¹ In any event, “there is no legal foundation” in the law of belligerent occupation “for killing protected persons on the basis of suspicion or even on the basis of evidence of their supposedly menacing activities or possible future undertakings.”³⁷² In essence, such extrajudicial executions amount to “wilful killings” under article 147 of the Fourth Geneva Convention and, by extension, are war crimes at international law.

Even more unsettling has been Israel’s practice of targeting ambulances, medical relief workers, and journalists in the OPT during the al-Aqsa intifada. According to a B’Tselem report, between February 28 and March 13, 2002, “intentional [Israeli] attacks on medical teams and the prevention of medical teams from treating the sick and wounded [were] almost unprecedented.”³⁷³ In that period alone, a total of five Palestinian medical personnel were killed while on duty,³⁷⁴ including the head of the Palestinian Red Crescent Society (PRCS) in Jenin,³⁷⁵ with many more seriously wounded. Inves-

369. *Id.* One such case was the extrajudicial killing of Jamal Mansur and Jamal Salim on July 31, 2001. The event was reported in AMNESTY INT’L, *supra* note 189, at 37–38, as follows:

On 31 July 2001 the Israeli Air Force killed eight people, among them two children and two journalists, and wounded 15 others, including a human rights defender, as they shot two missiles from an Apache helicopter at the Nablus-based Palestinian Centre for Information, run by a Hamas leader, Jamal Mansur. The two Hamas leaders killed, Jamal Mansur and Jamal Salim, had both been held in the past in administrative detention by Israel. Jamal Mansur had later spent more than three years in detention without charge or trial under the PA [Palestinian Authority] between 1997 and 2000. The two journalists killed, Muhammad Beshawi and ‘Uthman Qatanani, were apparently interviewing Jamal Mansur at the time of the attack. Two children, Ashraf Khader, aged six, and Bilal Khader, aged 11, were killed as they played outside, while their mother visited a clinic in the same building. Ahmad Abu Shallal, a human rights defender, who was critically injured, works for the International Solidarity organization, based in Washington, USA. He was reportedly visiting the office of the Palestinian Centre for Information to collect material for a report he was preparing on refugees.

370. AMNESTY INT’L, *supra* note 189, at 34. See also *Human Rights Commission Report*, *supra* note 364, ¶ 62.

371. *Human Rights Commission Report*, *supra* note 364, ¶ 62.

372. *Id.* ¶ 63. See, e.g., FOURTH GENEVA CONVENTION, *supra* note 6, art. 27 (providing that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, . . . especially against all acts of violence”). See also *id.* art. 32 (providing that “[t]he High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands”); *id.* art. 68 (limiting the application of the death penalty by an occupying power and, in any event, requiring a judicial trial prior to such punishment).

373. Press Release, B’Tselem, *Stop Shooting at Ambulances and Allow Medical Treatment*, Mar. 14, 2002, http://www.btselem.org/English/Press_Releases/2002/020314.asp.

374. *Id.*

375. Press Release, Human Rights Watch, *Israel: Cease Attacking Medical Personnel*, Mar. 9, 2002,

tigations by B'Tselem, Human Rights Watch, and the ICRC demonstrate that this targeting has become “an integral part of Israeli policy” in the OPT.³⁷⁶ According to Amnesty International, between March 29 and April 5, 2002 “more than 350 ambulances had been denied access” to the sick and wounded, “and 185 ambulances had been hit by [Israeli] gunfire.”³⁷⁷ As a result, on April 5, 2002 the ICRC announced its decision “to limit its movements in the West Bank to a strict minimum” owing to Israeli military “attacks on its vehicles and premises.”³⁷⁸

Members of the international media cannot be said to enjoy much better treatment. The International Federation of Journalists has repeatedly protested Israeli targeting of media personnel and outlets in the OPT, in what it considers “a vicious attempt to prevent journalists from reporting on a story that affects millions of people around the world.”³⁷⁹ Over the course of the al-Aqsa intifada, at least three journalists have been killed by Israeli fire, and many more have been wounded, prompting the Committee to Protect Journalists to declare “the West Bank as the world’s worst place to be a journalist.”³⁸⁰ Israel’s policy of attacking medical relief workers and journalists—all “protected persons” under article 4 of the Fourth Geneva Convention—gives cause for serious concern not only because the killings of those directly targeted amount to grave breaches under the convention,³⁸¹ but more generally because it impedes the provision of emergency medical relief and interna-

<http://hrw.org/press/2002/03/medics030902.htm>.

376. Press Release, B'Tselem, *supra* note 373. See also Press Release, Int'l Comm. of the Red Cross, *Israel and the Occupied and Autonomous Territories: ICRC Appeals for Protection of Medical Staff*, Mar. 8, 2002, Press Release 02/19, <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/F34CD17608954CAC1256B98004B0DCB>. Human Rights Watch reported the following incident:

Ibrahim Assad, a PRCs driver, and Kamal Salem, of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) were killed by Israeli fire on March 7 while en route to provide emergency assistance to wounded in the West Bank town of Tulkarem. Medical personnel have informed Human Rights Watch that Ibrahim Assad had received permission to move forward from the Israeli authorities. He drove some 750 meters, and was shot in the hand from the machine gun of an Israeli tank. He exited the ambulance, and was then shot in the head. The International Committee of the Red Cross and PRCs have publicly stated that all ambulances were clearly marked and were coordinating their movements closely with the Israeli authorities.

Human Rights Watch, *supra* note 375.

377. See AMNESTY INT'L, *ISRAEL AND THE OCCUPIED TERRITORIES: THE HEAVY PRICE OF ISRAELI INCURSIONS* 12 (2002). In the words of Peter Hansen, Commissioner-General of UNRWA, “I would strongly suggest that when 185 ambulances have been hit, including 75 percent of UNRWA’s ambulances . . . this is not the result of stray bullets by mistake hitting an ambulance, this can only be by targeting ambulances.”

378. Press Release, Int'l Comm. of the Red Cross, *Israel and the Occupied/Autonomous Territories: ICRC Restricts its Movements in the West Bank*, Apr. 5, 2002, <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/BC00D2113B04DA2EC1256B9800471FBC>.

379. Press Release, Int'l Fed'n of Journalists, *Journalists Say Israel Should be Punished for “Reckless War on Media,”* Apr. 9, 2002, <http://www.ifj.org/publications/press/pr/327.html>. See also Calin Neacsu, *Israeli Army Also Targets Reporters in Ramallah*, AGENCE FRANCE PRESSE, Apr. 5, 2002.

380. *Israel's News Blackout Criticized*, BBC NEWS, May 3, 2002, http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1966000/1966094.stm. See also Press Release, Int'l Fed'n of Journalists, *Journalists Accuse Israel of “Failure of Discipline” After Italian Journalist is Killed in Hail of Bullets*, Mar. 13, 2002, <http://www.ifj.org/publications/press/pr/311.html>.

381. FOURTH GENEVA CONVENTION, *supra* note 6, art. 147. See also *id.* arts. 16–23.

tional reporting crucial to protecting the interests of the civilian population in the OPT.

4. *Torture or Inhuman Treatment*

International law imposes an absolute prohibition on the use of torture or inhuman treatment.³⁸² This means that the right to be free from such abuse is non-derogable, no matter the circumstances. It is in this context that “torture or inhuman treatment” is defined as a “grave breach” under article 147 of the Fourth Geneva Convention.³⁸³ Likewise, article 8, section 2(a)(ii) of the Rome Statute defines the “torture or inhuman treatment” of protected persons in occupied territory as a war crime.³⁸⁴

Although it has historically denied it, since 1967 Israel has systematically engaged in the torture and inhuman treatment of thousands of Palestinian political detainees in the OPT. In 1987, an Israeli judicial commission of inquiry (the “Landau Commission”) was charged with the task of investigating the truth of various allegations that its General Security Service (GSS) was engaged in such practices. The Landau Commission “revealed that between 1971 and 1986 the GSS systematically employed the use of physical pressure on Palestinian suspects under interrogation to procure ‘confessions’” that would subsequently form the basis of convictions in military courts.³⁸⁵ Although it did not publicly specify what methods the GSS had used in this period,³⁸⁶ the Landau Commission noted that they regularly involved “cases of criminal assault.”³⁸⁷ Notwithstanding these findings, the Landau Commission took the position that the Israeli “government should acknowledge that some measure of coercion is permissible, and then codify and carefully monitor the allowable techniques.”³⁸⁸ Accordingly, the commission recommended that the Israeli authorities use a “moderate measure of physical pressure” in the interrogation of Palestinian political detainees.³⁸⁹ In November 1987, the Israeli government endorsed the Landau Commission recommendations.³⁹⁰

382. MELISSA PHILLIPS, *TORTURE FOR SECURITY: THE SYSTEMATIC TORTURE AND ILL-TREATMENT OF PALESTINIANS IN ISRAEL* 25 (1995).

383. *FOURTH GENEVA CONVENTION*, *supra* note 6, art. 147.

384. *ROME STATUTE*, *supra* note 239, art. 8, § 2(a)(ii).

385. *HUMAN RIGHTS WATCH*, *supra* note 301, at 49.

386. That information is still classified. *Id.* at 48.

387. *COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITIES*, *LANDAU COMMISSION REPORT*, ¶ 4.20, *quoted in HUMAN RIGHTS WATCH*, *supra* note 301, at 48 [hereinafter *LANDAU COMMISSION REPORT*]. Despite these findings, the commission asserted that because Israel regularly faced “hostile terrorist acts” the interrogation methods employed by the GSS were “largely to be defended, both morally and legally.” *LANDAU COMMISSION REPORT*, *supra*, ¶ 1.8.

388. *HUMAN RIGHTS WATCH*, *supra* note 301, at 50.

389. *See LANDAU COMMISSION REPORT*, *supra* note 387, ¶ 1.8.

390. *PHILLIPS*, *supra* note 382, at 53.

The effect of the Landau Commission recommendations exposed itself immediately following the outbreak of the Intifada of 1987–1993. Because the recommendations authorized the use of “physical pressure” on persons suspected of “political subversion,”³⁹¹ thousands of Palestinians in the OPT were arbitrarily arrested and tortured for engaging in what would otherwise fall within the “spectrum of indigenous and permissible activity.”³⁹² These acts “included, *inter alia*, participating in marches consisting of ten or more persons for political purposes, displaying flags or emblems of any political significance, possessing banned books or any publication deemed adverse by the military authorities, and expressing any support or sympathy for the activities or aims of any ‘hostile organization.’”³⁹³ According to a number of independent studies conducted by groups such as Amnesty International, Human Rights Watch, B’Tselem, and al-Haq, the methods of torture utilized by Israel in its interrogation of Palestinians included electric shock;³⁹⁴ violent beatings (often with implements such as truncheons and rifle butts) to all areas of the body including bottoms of feet, the torso, and genitals;³⁹⁵ sexual assault, including sodomy;³⁹⁶ application of burning cigarettes;³⁹⁷ violent shaking;³⁹⁸ partial suffocation;³⁹⁹ prolonged abusive body positioning;⁴⁰⁰ prolonged exposure to temperature extremes, including the use of refrigerator units;⁴⁰¹ prolonged sleep, space, and toilet deprivation;⁴⁰² and death threats and threats of rape of the detainee or female relatives in its interrogation of Palestinians.⁴⁰³ According to Human Rights Watch, an average of 4000 to 6000 Palestinians have been subjected to interrogation by Israel every year since 1987.⁴⁰⁴ Many of these individuals “have died during, or as a result of, the interrogation process.”⁴⁰⁵

In addition to the express support torture and inhuman treatment has received at the governmental level, in a series of 1996 cases, the Supreme Court of Israel effectively authorized “the use of physical force against [Pal-

391. *ICJ Mission of Inquiry*, *supra* note 304, at 13.

392. PHILLIPS, *supra* note 382, at 60.

393. *Id.* at 60–61.

394. *Id.* at 23. See also STANLEY COHEN & DAPHNA GOLAN, THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, “MODERATE PHYSICAL PRESSURE,” OR TORTURE? 32, 35 (1991).

395. See HUMAN RIGHTS WATCH, *supra* note 301, at 187–98. See also COHEN & GOLAN, *supra* note 394, at 34, 87, 90.

396. AMNESTY INT’L, REPORT OF MISSION TO ISRAEL, *supra* note 300, at 18.

397. COHEN & GOLAN, *supra* note 394, at 34.

398. HUMAN RIGHTS WATCH, *supra* note 301, at 187–98.

399. COHEN & GOLAN, *supra* note 394, at 35.

400. HUMAN RIGHTS WATCH, *supra* note 301, at 111–46.

401. *Id.* at 147–54.

402. *Id.* at 156–86.

403. *Id.* at 199–204.

404. *Id.* at x.

405. Ardi Imseis, “Moderate” Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods, 19 BERKELEY J. INT’L L. 328, 337 (2001).

estinian] detainees.”⁴⁰⁶ Following an intense international campaign criticizing this policy, a case was brought before the Court in 1999 in which it was asked to rule on the legality of the GSS’s use of “moderate physical and psychological pressure.”⁴⁰⁷ In its ruling, the Court purported to outlaw the use of torture by the GSS.⁴⁰⁸ Nevertheless, Israel’s treatment of Palestinian detainees during the al-Aqsa intifada has cast serious doubt on this ruling.

According to Amnesty International, “an increasing number of cases of alleged torture [have been] recorded” since September 2000.⁴⁰⁹ Between March 29 and April 11, 2002, “more than 4,000 Palestinians were arrested,” hundreds en masse, and the arrests were “almost invariably accompanied by cruel and degrading treatment.”⁴¹⁰ In November 2001, the United Nations Committee Against Torture reported “that there were numerous allegations of torture and ill-treatment by [Israeli] law-enforcement personnel”—including the use of methods purportedly outlawed by the Supreme Court in 1999—and “called for Israel to take steps to prevent [such] abuses.”⁴¹¹

406. AMNESTY INT’L, REPORT 1997, at 193 (1997).

407. See generally Imseis, *supra* note 405

408. In a consolidated application brought in late 1999 against the GSS and other governmental bodies and figures, the Court was requested to rule on the legality in Israeli law of the use by the GSS of certain methods of “psychological pressure” and “a moderate degree of physical pressure” on Palestinian detainees in the OPT pursuant to the Landau Commission recommendations. *Supreme Court of Israel: Judgement Concerning the Legality of the General Security Service’s Interrogation Methods*, 38 I.L.M. 1471, 1477 (1999). The only “interrogation methods” in issue were the use of violent shaking, a number of prolonged abusive body positioning techniques, excessive tightening of handcuffs, and prolonged sleep deprivation. *Id.* at 1474–76. The Court held that under Israeli law, as at the time of judgment, the GSS lacked the legal authority to make use of these methods in its interrogation of Palestinians. *Id.* at 1489. Although the judgment was generally lauded as bringing an end to Israel’s use of torture in the OPT, this conclusion is tenuous at best. In addition to being plagued by a number of serious legal lacunae—including a failure even to discuss whether the interrogation methods reviewed amounted to torture under international law—the Court instructed the legislature that if it wanted to authorize the GSS to use such measures of moderate physical and psychological pressure it would have to do so via an express governmental enactment. *Id.* at 1487.

409. AMNESTY INT’L, *supra* note 189, at 62.

410. According to Amnesty International, such arrests have followed

[t]he typical pattern [of] a summons by the IDF [i.e., Israeli military] by loudspeaker for all male Palestinians between certain ages (usually 15 to 45) to report at a designated assembly point. [In a number of cases] the loudspeaker had warned that anyone who failed to report might be killed Once there they were sorted, usually by being asked basic details such as name and age, some were immediately released. However, the majority were blindfolded and handcuffed with plastic handcuffs (which can tighten and be extremely painful). Some were numbered on their wrists. However, after protests in the Knesset (Israeli Parliament) and in many sectors of Israeli society, this practice, which was not general, was stopped. The vast majority of those arrested said they were not given any food for the first 24 hours and were not allowed even to go to the toilet; they had to relieve themselves on the ground where they sat. During a season when nights remain extremely cold, no blankets were given to detainees during the first night of their detention. Those arrested and detained included many children reportedly as young as 14 or 15.

AMNESTY INT’L, *supra* note 377, at 22.

411. In its final report concerning Israel, the U.N. Commission on Human Rights’s Committee Against Torture expressed concern, *inter alia*,

that the 1999 Supreme Court decision did not contain a definite prohibition of torture; that there were continuing allegations of use of interrogation methods by the Israel Security Agency [i.e., GSS] against Palestinian detainees that were prohibited by the ruling; that there were allegations of torture and ill-treatment of Palestinian minors; that there was continued use of incommunicado de-

For its part, Israel has issued a number of fresh military orders granting it extremely wide powers of arrest and detention,⁴¹² including an order issued on April 5, 2002 retroactively determining that any Palestinian “detained on or after March 29, 2001, can be held for 18 days before being brought before a judge,” and “that during the eighteen days of detention, the detainee does not have a right to see a lawyer.”⁴¹³ In response, B’Tselem filed a petition before the Supreme Court demanding that the “detainees be allowed to meet with lawyers and that the court forbid the use of physical force against the detainees during interrogation.”⁴¹⁴ Following a brief hearing on April 7, 2002, a three-judge panel of the Court rejected the petition and upheld the State’s argument that under the current circumstances in the OPT “it is impossible to allow” Palestinian detainees “to see lawyers.”⁴¹⁵ As for the question of the allegations of torture, the Court “refused to discuss the matter” altogether.⁴¹⁶

5. *Wilfully Causing Great Suffering or Serious Injury to Body or Health*

Article 147 of the Fourth Geneva Convention outlaws the act of “wilfully causing great suffering or serious injury to body or health” of protected persons, and classifies this as a “grave breach” of the Convention.⁴¹⁷ Similarly, article 8, section 2(a)(iii) of the Rome Statute defines the act of “wilfully causing great suffering or serious injury to body or health” of protected persons in occupied territory as a war crime.⁴¹⁸

It is evident that this particular crime can encompass virtually all of the grave breaches canvassed thus far. There is little doubt that the cumulative effect of Israel’s prolonged military occupation of the OPT has “caused great suffering” and “serious injury to body or health” of the millions of Palestinians subject to its rule. Among other things, the Palestinians’ rights to life, liberty, housing, property, food, adequate health care, and education, have all

ention, even of children; that there had been very few prosecutions undertaken against alleged perpetrators of torture and ill-treatment, and that there were reported instances of ‘extra-judicial killings.’

Press Release, United Nations, *Committee Against Torture Concludes Twenty-seventh Session*, Nov. 23, 2001, <http://www.unog.ch/news2/documents/newsen/cat0139e.html>.

⁴¹² One particular order is directed specifically toward Palestinian children. As noted by the United Nations Special Rapporteur to the Commission on Human Rights,

Israeli Military Order 132 allows for the arrest and detention of Palestinian children aged from 12 to 14 years. At the beginning of the current intifada [i.e., the al-Aqsa intifada], some 70 Palestinian minors were reportedly detained in Israeli prisons. Since then, this number has increased to more than 250. These children range in age from 14 to 17 years, of whom at least 105 are from Jerusalem.

Human Rights Commission Update, *supra* note 335, ¶ 17.

⁴¹³ B’Tselem, *Torture and Total Communication Ban in Ofer Detention Camp*, http://www.btselem.org/English/Special/Ofer_Detention_Camp.asp.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ FOURTH GENEVA CONVENTION, *supra* note 6, art. 147.

⁴¹⁸ ROME STATUTE, *supra* note 239, art. 8, § 2(a)(iii).

been violated without let since 1967.⁴¹⁹ Of particular concern have been the numerous policies wilfully pursued by Israel aimed at collectively punishing the Palestinians.⁴²⁰ Some of the most notorious examples of this have been Israel's use of city- or region-wide shoot-to-kill curfews for extended periods of time,⁴²¹ the imposition of strict limitations on freedom of movement within the OPT, requiring all Palestinians to possess special travel permits from the Israeli military authorities to traverse the 130 to 150 military checkpoints separating Palestinian villages and towns,⁴²² and the bulldozing of Palestinian homes—"usually . . . without notice and at night"—belonging to the families of youth suspected of "throwing rocks at Israeli soldiers" in popular demonstrations against the occupation.⁴²³

The al-Aqsa intifada has been met with a drastic increase in Israeli collective punishment policies that have caused "great suffering or serious injury to body or health" of the Palestinians in the OPT. These policies have included:

deliberate attacks on medical staff, ambulances, fieldclinics [sic] and hospitals, preventing or restricting access to medical aid and assistance, resulting in deaths, and denial of primary/secondary health care[;] . . . regular and targeted bombardments, shelling and shootings at civilians in civilian areas; regularly flying [over] civilian areas with helicopter gunships and F-16 warplanes; incursions with tanks, armoured personnel carriers and troops; taking over homes and schools as military posts to launch further attacks on civilians—with attacks on residents/destruction of their property/looting and pillage; [and] killings, injuries and various cruel [and] degrading treatment of civilians by Israeli forces at checkpoints.⁴²⁴

In addition, and as noted by the United Nations Special Rapporteur to the Commission on Human Rights, "Israeli officials have openly admitted a strategy of restricting the Palestinian economy with the intent and purpose of effecting social control" in the OPT.⁴²⁵ The effect of this policy—which is rooted in the imposition of a comprehensive military blockade of Palestinian towns and villages—has been to increase the already acute poverty rate in the OPT "from 21.1 per cent. in September 2000, to 31.8 per cent. at the end of 2001."⁴²⁶ As a result, between September 2000 and March 2001, "the number of Palestinians living on less than U.S.\$2 per day [increased] from

419. See *Human Rights Commission Update*, *supra* note 335. See also INTERNATIONAL LAW AND ADMINISTRATION, *supra* note 11.

420. Collective punishment is prohibited under article 33 of the FOURTH GENEVA CONVENTION, *supra* note 6.

421. See LAW, *supra* note 361.

422. *Id.*

423. UNCEIRPP, *supra* note 5, at 25.

424. Luping, *supra* note 421. See also *Human Rights Commission Update*, *supra* note 335.

425. *Human Rights Commission Update*, *supra* note 335, ¶ 20.

426. *Id.* ¶ 21.

650,000 to 1 million.”⁴²⁷ According to a September 2002 report issued by the U.N. Special Coordinator for the Middle East Peace Process, this figure has increased to at least sixty percent of the Palestinian population in the OPT, approximately two million persons.⁴²⁸ In an attempt to alleviate this humanitarian disaster, “the World Food Programme” has drawn “on its emergency food reserves” in order “to distribute wheat flour to 13,000 [newly impoverished] families,” not including the substantial Palestinian refugee population in the OPT.⁴²⁹ As for them, UNRWA has reported that it is “struggling to provide basic food supplies” to the refugee camps in the OPT.⁴³⁰ Israeli lawmakers have on more than one occasion declared this policy of economic siege as central to a purported “war of attrition” against the Palestinians, pursued with the aim to “starve them out.”⁴³¹

6. *Unlawful Deportation or Transfer*

Article 49 of the Fourth Geneva Convention provides that “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited, regardless of their motive.”⁴³² Likewise, article 147 of the Fourth Geneva Convention prohibits the “unlawful deportation or transfer” of protected persons from occupied territory, and classifies this as a “grave breach” of the convention.⁴³³ Similarly article 8, section 2(a)(vii) of the Rome Statute defines the “unlawful deportation or transfer” of protected persons from occupied territory as a war crime.⁴³⁴

More than any other provision of the Fourth Geneva Convention, the prohibition on the deportation or transfer of protected persons is perhaps the most directly linked to the horrors of World War II. As noted earlier, it was in Nazi-occupied Europe that “millions of human beings were torn from their homes, separated from their families and deported” to death and slave labor camps.⁴³⁵ Bearing this in mind, the framers of the convention set out in articles 49 and 147 to ensure that future occupying powers would be absolutely barred from deporting or transferring protected persons for any purpose. According to the official ICRC commentary on the Fourth Geneva Convention, “the prohibition [on forcible transfers] is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.”⁴³⁶ Paragraph 2 of

427. *Id.* ¶ 14.

428. Office of the U.N. Special Coordinator in the Occupied Territories, *The Impact of Closure and Other Mobility Restrictions on Palestinian Productive Activities, 1 January 2002–30 June 2002*, at 2 (Oct. 2002), <http://www.un.org/News/dh/mideast/econ-report-final.pdf>.

429. *Id.*

430. *Id.* See also UNRWA, *Emergency Appeal 2002—Progress Report* (Feb. 2002), <http://www.un.org/unrwa/emergency/pdf/report14.pdf>.

431. LAW, *supra* note 361.

432. FOURTH GENEVA CONVENTION, *supra* note 6, art. 49.

433. *Id.* art. 147.

434. ROME STATUTE, *supra* note 239, art. 8, § 2(a)(vii).

435. PICTET, *supra* note 3, at 129–30.

436. UHLER ET AL., *supra* note 331, at 279.

article 49 allows the occupying power *to evacuate* an area “if the security of the population or imperative military reasons so demand,” but it is clear from the language of the provision that such evacuation is not to be understood as deportation or transfer, and in any event is intended to be temporary.⁴³⁷ According to the ICRC commentary, “protected persons who have been evacuated are to be brought back to their homes as soon as hostilities in the area have ended.”⁴³⁸

Since 1967, deportation and transfer has been “one of the harshest punishments Israel has used against Palestinians from the” OPT.⁴³⁹ As a matter of policy, Israeli deportation orders have always been completely summary in nature, offering no opportunity of appeal, and deemed to be absolutely final by the issuing authorities.⁴⁴⁰ According to Roberts, Palestinians deported from the OPT have tended to “fall into two broad categories: political leaders and those alleged to be involved directly in hostile activities.”⁴⁴¹ Without any doubt, the former group has been most affected by Israel’s deportation policy.⁴⁴² Covering a wide spectrum of Palestinian intelligentsia, this group has included, *inter alia*, lawyers, professors, teachers, doctors, trade unionists, religious leaders, and human rights activists. Although there are currently no comprehensive studies detailing the exact number of Palestinians that have been deported by Israel up to the present date, one American source places the figure at just over 1100 for the period between 1967 and 1979,⁴⁴³ and an authoritative Israeli source states that at least 2000 Palestinians had been deported from the West Bank alone between 1967 and 1986.⁴⁴⁴ In its attempt “[t]o thwart resistance” to the occupation, the Israeli “government expelled hundreds of persons” during the course of the intifada of 1987–1993, “primarily those it considered potential leaders” of the popular revolt.⁴⁴⁵ The most egregious instance of this occurred on December 17, 1992, when over four hundred Palestinians (among them professors, lawyers, teachers, and clerics) were deported *en masse* to Lebanon.⁴⁴⁶

437. FOURTH GENEVA CONVENTION, *supra* note 6, art. 49. The relevant part of the article reads as follows:

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

Id.

438. UHLER ET AL., *supra* note 331, at 280–81.

439. B’TSELEM, *supra* note 28, at 22.

440. *Id.* See also UNCEIRPP, *supra* note 5, at 30.

441. Roberts, *supra* note 15, at 65–66.

442. *Id.* at 66.

443. Ann Lesch, *Israeli Deportation of Palestinians From the West Bank and Gaza Strip, 1967–1978*, J. PALESTINE STUD., Winter 1979, at 101, 102.

444. MERON BENVENISTI, THE WEST BANK HANDBOOK: A POLITICAL LEXICON 87 (1986).

445. QUIGLEY, *supra* note 76, at 201.

446. See S.C. Res. 799, *supra* note 283, at 6. See also B’TSELEM, *supra* note 28, at 22.

The international community—through such bodies as the United Nations Security Council and the United Nations General Assembly—has in no uncertain terms expressed its reprobation with Israel’s deportation policy, deeming it to be in clear violation of the law of belligerent occupation in general, and the Fourth Geneva Convention in particular.⁴⁴⁷ Both the Israeli government and the Israeli Supreme Court, on the other hand, have defended the policy on a number of grounds, including the argument that deportations from the OPT are “different in character and intent from those that took place in World War II,” and that Palestinian deportees are not “protected persons” under the Fourth Geneva Convention.⁴⁴⁸

B’Tselem reports that since the signing of the DOP in 1993, Israel has not used the “draconian measure” of deportation or transfer.⁴⁴⁹ Nevertheless, as documented by Masalha, the notion that the Palestinians should *altogether* be transferred from the OPT to other Arab countries has gained increased political currency in Israeli governmental circles in recent years, spearheaded by the official political platforms of the right-wing Moledet, Tehya, and Tzomet parties, as well as by various independent calls for such a mass transfer from members of the Israeli Knesset.⁴⁵⁰ The fact that these and other rationales for the unlawful deportation and transfer of Palestinians have been advanced by both the legislative and judicial branches in Israel has only served to contribute to “the deep fears among the Palestinian population [in the OPT] that the deportations carried out” since 1967 represent “the thin end of the wedge, to be followed by larger expulsions” of the sort that occurred during the 1948 and 1967 wars.⁴⁵¹

7. Wilful Deprivation of the Rights of Fair and Regular Trial

One of the most fundamental principles of criminal justice in any legal system is the timely right to make full answer and defense before a compe-

447. For Security Council resolutions, see, for example, S.C. Res. 799, *supra* note 283, at 6; S.C. Res. 726, *supra* note 283, at 5; S.C. Res. 694, *supra* note 283, at 4; S.C. Res. 681, *supra* note 283, at 8–9; S.C. Res. 641, *supra* note 283, at 14; S.C. Res. 636, *supra* note 283, at 14; S.C. Res. 608, *supra* note 283, at 2; S.C. Res. 607, *supra* note 283, at 1; S.C. Res. 484, *supra* note 283, at 16; S.C. Res. 469, *supra* note 283, at 9–10; and S.C. Res. 468, *supra* note 283, at 9. For General Assembly resolutions, see, for example, G.A. Res. 48/41 C, U.N. GAOR, 48th Sess., Supp. No. 49, 75th plen. mtg., U.N. Doc. A/48/49 (1993); G.A. Res. 47/70 E, U.N. GAOR, 47th Sess., Supp. No. 49, 85th plen. mtg., U.N. Doc. A/47/49 (1992); G.A. Res. 46/76, U.N. GAOR, 46th Sess., Supp. No. 49, 69th plen. mtg., U.N. Doc. A/46/49 (1991); G.A. Res. 45/69, *supra* note 288, at 32; G.A. Res. 44/2, *supra* note 288, at 12; G.A. Res. 42/160 D, *supra* note 287, at 114; G.A. Res. 41/63 D, U.N. GAOR, 41st Sess., Supp. No. 53, 95th plen. mtg., U.N. Doc. A/41/53 (1986); G.A. Res. 40/161 E, U.N. GAOR, 40th Sess., Supp. No. 53, 118th plen. mtg., U.N. Doc. A/40/53 (1985); G.A. Res. 39/95 D, U.N. GAOR, 39th Sess., Supp. No. 51, 100th plen. mtg., U.N. Doc. A/39/51 (1984); G.A. Res. 38/79 D, U.N. GAOR, 38th Sess., Supp. No. 47, 98th plen. mtg., U.N. Doc. A/38/47 (1983); and G.A. Res. 37/88 D, U.N. GAOR, 37th Sess., Supp. No. 51, 100th plen. mtg., U.N. Doc. A/37/51 (1982).

448. Roberts, *supra* note 15, at 66. See also UNCEIRPP, *supra* note 5, at 29; Kuttat, *supra* note 303.

449. B’TSELEM, *supra* note 28, at 22. *But see* H.C. 7015/02, Ajuri v. IDF Commander, [2002] I.L.R. 45 (Israel) (arising out of claims of illegal transfer).

450. See MASALHA, IMPERIAL ISRAEL, *supra* note 52, at 163–95.

451. Roberts, *supra* note 15, at 66.

tent and impartial judicial tribunal. Articles 71 to 74 of the Fourth Geneva Convention provide for these and other fundamental penal rights, including the right to “be promptly informed, in writing, [and] in a language” understood by accused persons, “of the particulars of the charges preferred against them”;⁴⁵² the right to “be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely”;⁴⁵³ and the right to an appeal from a conviction.⁴⁵⁴ Likewise, article 147 of the Fourth Geneva Convention prohibits the occupying power from “wilfully depriving a protected person of the rights of fair and regular trial,” and classifies such deprivation as a “grave breach” of the convention.⁴⁵⁵ Similarly article 8, section 2(a)(vi) of the Rome Statute states that “wilfully depriving a . . . protected person of the rights of fair and regular trial” constitutes a war crime.⁴⁵⁶

Since 1967, Israel has continually violated these penal provisions of the Fourth Geneva Convention in its treatment of Palestinian detainees in the OPT. By far, the most egregious form of this violation has been Israel’s practice of administrative detention, which is “detention without charge or trial, authorized by administrative order rather than judicial decree.”⁴⁵⁷ Under regulations 108 and 111 of Israel’s Defence (Emergency) Regulations (1945), local military commanders are authorized to unilaterally order the administrative detention of protected persons in the OPT.⁴⁵⁸ Successive Israeli governments have insisted that “[a]dministrative detention is resorted to only in cases where there is corroborating evidence that an individual is engaged in illegal acts which [involve a] danger to state security.”⁴⁵⁹ Yet, as noted by B’Tselem, Israeli “authorities do not inform detainees or their attorneys of the material on which the detention is based, so it is impossible to question the accuracy of the charges and the justification for the detention.”⁴⁶⁰ Moreover, “detention order[s] may be renewed indefinitely, for periods of up to six months each time,”⁴⁶¹ and done so by Israeli military commanders “without a judicial hearing.”⁴⁶² As noted by Amnesty International, since 1967, a great many of Israel’s administrative detainees have been prisoners of conscience, held for the “non-violent exercise of [their] right to freedom of expression and association.”⁴⁶³ During the intifada of 1987–1993, “the overall number of Palestinians who were administratively

452. FOURTH GENEVA CONVENTION, *supra* note 6, art. 71.

453. *Id.* art. 72.

454. *Id.* art. 73.

455. *Id.* art. 147.

456. ROME STATUTE, *supra* note 239, art. 8, § 2(a)(vi).

457. B’TSELEM, *supra* note 28, at 13.

458. Amnesty Int’l, *Administrative Detention: Despair, Uncertainty and Lack of Due Process*, 2 n.1, Apr. 30, 1997, Report MDE 15/03/1997, [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/MDE150031997ENGLISH/\\$File/MDE1500397.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/MDE150031997ENGLISH/$File/MDE1500397.pdf).

459. *Id.* at 2.

460. B’TSELEM, *supra* note 28, at 13.

461. *Id.*

462. Amnesty Int’l, *supra* note 458, at 1.

463. *Id.* at 2.

detained was well over 5,000. These included students, labourers, human rights workers, journalists, trade unionists, and teachers.”⁴⁶⁴ Since the signing of the DOP in 1993, Israel’s practice of administrative detention in the OPT has continued unabated.⁴⁶⁵ According to B’Tselem, between 1993 and 1999, Israel “detained some one thousand Palestinians for periods ranging from two months to five and a half years.”⁴⁶⁶ Not surprisingly, the al-Aqsa intifada has been accompanied by a considerable increase in the number of Palestinian administrative detainees imprisoned by Israel. On May 5, 2002, Israel authorities informed the High Court of Justice that close to 1000 such individuals were being held⁴⁶⁷—among them ‘Abd al-Rahman al-Ahmar, a local human rights activist and “former B’Tselem fieldworker” who was eventually released on May 23, 2002 after having been imprisoned by Israel without charge or trial for 325 days.⁴⁶⁸

For those Palestinians in the OPT who are afforded a trial by Israel, circumstances are scarcely better. Because their affairs are strictly governed by Israeli military law, trials of Palestinian detainees are conducted before Israeli military courts.⁴⁶⁹ According to Amnesty International, the justice meted out by these courts is “seriously flawed.”⁴⁷⁰ For example:

[j]udges and prosecutors are officers serving in the IDF [Israeli military] or the reserves. Judges are appointed by the IDF Regional Commander upon the recommendation of the Military Advocate General who is advised by a special committee. They are promoted almost exclusively from the ranks of prosecutors. Once appointed, judges have no right of tenure and can be removed by the Regional Commander. As a result of this lack of tenure and the close links between military judges and prosecutors, serious doubts have been expressed about their impartiality.⁴⁷¹

In addition, because of Israel’s intricate system of military checkpoints used to enforce its blockade of Palestinian areas in the OPT, Palestinian lawyers are frequently unable to meet with their clients or attend important hearings.⁴⁷² Because Israeli military courts are located “in military camps or attached to [Jewish] settlements, Palestinian lawyers need authorization to

464. *Id.*

465. B’TSELEM, *supra* note 28, at 13.

466. *Id.* at 13–14.

467. B’Tselem, *Administrative Detention—Statistics*, http://www.btselem.org/english/Administrative_Detention/Statistics.asp.

468. B’Tselem, *Human Rights Activists in Administrative Detention*, http://www.btselem.org/English/Administrative_Detention/Human_Rights_Activists.asp.

469. AMNESTY INT’L, *supra* note 189, at 64. Again, this is to be distinguished from Israeli-Jewish settlers in the OPT who enjoy the benefits of the Israeli civilian legal system. See *supra* text accompanying notes 352–353.

470. AMNESTY INT’L, *supra* note 189, at 64.

471. *Id.*

472. *Id.*

enter these areas, and often, even with this permission, they may be forbidden to pass through.”⁴⁷³

Putting aside the fact that a great number of Palestinian detainees are convicted and sentenced to imprisonment for acts that are permissible under the law of belligerent occupation and pose no direct threat to Israel’s national survival,⁴⁷⁴ other more substantive problems with Israel’s system of military justice in the OPT persist. One such problem is that military “[t]rials are usually based on confessions and plea bargains” procured through highly questionable means.⁴⁷⁵ The fact that Israeli authorities have for years been known to use torture to elicit confessions, that then form the basis of convictions against their Palestinian deponents, casts doubt on the fairness of the military trial process in the OPT.⁴⁷⁶ Furthermore, the fact that “[b]ail is almost invariably refused” and “the time spent waiting for a trial might be roughly equivalent to the time that a person convicted of [an] offence would spend in prison as their sentence”—which is particularly the case respecting the common offences of throwing stones or molotov cocktails—a “not guilty” plea usually guarantees a longer period of detention.⁴⁷⁷ Finally, one of the most glaring problems with Israel’s military trials of Palestinians in the OPT is the inordinately harsh sentences handed down by its judges. It is not uncommon for Palestinian youth who partake in stone throwing or tire burning in popular demonstrations against the occupation to be sentenced to more than one year’s imprisonment.⁴⁷⁸ Likewise, Palestinians convicted of serious crimes are dealt with in a much harsher manner than their Israeli-Jewish counterparts in the OPT. According to a recent B’Tselem study, “[w]hereas a Palestinian who kills an Israeli is punished to the full extent of the law, and sometimes his family as well, it is extremely likely that an Israeli who kills a Palestinian will not be punished or will receive only a light sentence.”⁴⁷⁹

473. *Id.*

474. See *supra* text accompanying notes 391–393. See also COHEN & GOLAN, *supra* note 394, at 28.

475. AMNESTY INT’L, *supra* note 189, at 64.

476. See *supra* text accompanying notes 385–416.

477. AMNESTY INT’L, *supra* note 189, at 65.

478. Defence for Children Int’l/Palestine Section, *Violations of Palestinian Children’s Rights Stemming from the Israeli Occupation—Fact Sheet* (Mar. 2002), <http://www.dci-pal.org/english/reports/factviol.html>.

479. DUDAI, TACIT CONSENT, *supra* note 302, at 37. One example of this disparity in sentencing can be seen in the manner in which the cases of Nahum Korman, a Jewish settler, see *supra* note 350, and Sana’ ‘Amer, a fourteen-year-old Palestinian girl, were dealt with by Israeli authorities. After being convicted of the manslaughter of an eleven-year-old Palestinian boy, Korman was sentenced following a plea bargain to six months of public service. See DUDAI, TACIT CONSENT, *supra* note 302, at 3. On the other hand, Sana’ ‘Amer was charged with planning to stab a Jewish settler after she watched her sister ‘Abir attempt to do so. Sana’, who had a knife in her pocket when she was arrested, refused an offered plea bargain to serve a three-year prison sentence. “Although she was a minor and had been found . . . without committing any offence, she was sentenced to one year’s imprisonment with an additional four-year sentence suspended for five years.” See AMNESTY INT’L, *supra* note 189, at 65–66.

IV. ENFORCEMENT OF THE FOURTH GENEVA CONVENTION IN THE OCCUPIED PALESTINIAN TERRITORY

Enforcement “is an important but ultimately secondary office in any system of law.”⁴⁸⁰ This is so “because the question of enforcement can only arise where there has already been a failure” to secure the “primary purpose of law in maintaining defined normative standards of behaviour.”⁴⁸¹ In the context of the law of belligerent occupation, the primary purpose “is the effective and impartial protection of victims of armed conflict rather than the punishment of war crimes and other violations after they have been committed.”⁴⁸² Nevertheless, in cases where there has been an abject failure to ensure compliance with normative standards through proactive implementation of legal obligations *before* breaches take place—as with Israel’s violations of the Fourth Geneva Convention—it becomes imperative as a practical matter to shift the focus of analysis to a consideration of the means available to enforce such obligations *ex post facto*.

The concept of enforcement is typically associated with notions of coercion and retribution. Depending on the context and contours in which enforcement in this sense plays itself out, the result can be either positive or negative.⁴⁸³ In recent years, a number of scholars have attempted to introduce new theories of compliance with legal obligations at the international level, postulating a move from an “enforcement model” which is necessarily based on coercion, to a “managerial model” that relies primarily on cooperation and problem-solving.⁴⁸⁴ Again, for reasons of economy a debate over the relative advantages and disadvantages of these competing theoretical approaches is not here possible. Suffice to say, however, that the extent to which these new theories tend to restrict themselves to situations where violations are not absolutely “premeditated and deliberate,”⁴⁸⁵ but are rather the result of an unintended “lack of capability or clarity or priority” to comply, they would seem ill-suited to deal with the case of the enforcement of the Fourth Geneva Convention in the OPT.⁴⁸⁶ For Israel has furnished the international community with little reason to believe that its consistent violation of this important body of law has been the result of anything other

480. Statement of Hilaire McCoubrey to the United Nations International Meeting [hereinafter McCoubrey Statement], *supra* note 13, at 66.

481. *Id.*

482. *Id.*

483. The Allies’ treatment of Germany after World War I and World War II exemplifies the difference in possible outcomes. Whereas the post-World War I settlement at Versailles was seen as unduly punitive in nature and possibly contributing to the growth of Nazi Fascism in the 1930s, the post-World War II settlement and the Marshall Plan were widely regarded as successful in transforming Germany into a thriving democracy.

484. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 3 (1995). *See also* DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* (2d ed. 2000).

485. CHAYES & CHAYES, *supra* note 484, at 9.

486. *Id.* at 22.

than a premeditated and deliberate policy course, limited only by considerations of realpolitik and protected externally by its special relationship with the United States.⁴⁸⁷

That said, this section will attempt to canvass a number of the available methods of bringing Israel as the occupying power in the OPT into a state of compliance with the terms of the Fourth Geneva Convention, particularly in relation to its “grave breaches” regime. These methods can be said to fall into two distinct categories: municipal enforcement measures and international enforcement measures. For reasons that will become apparent, emphasis will be placed on the latter category. It should be kept in mind, however, that all of the measures here examined find their common legal genus in the obligation in article 1 of the Fourth Geneva Convention of all High Contracting Parties “to respect and to ensure respect for the present Convention in all circumstances,”⁴⁸⁸ and in the principle of *pacta sunt servanda*—that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁴⁸⁹

A. *Municipal Enforcement Measures*

This category is meant to cover those enforcement measures that are local in nature and which contemplate the active involvement of the two parties most directly affected by the state of affairs in the OPT, namely Israel and the 3.1 million Palestinian inhabitants of the OPT. Generally, these methods of enforcement fall into two separate spheres: unilateral enforcement and bilateral enforcement.

As discussed earlier, “in all cases of hostile occupation of territory the primary duty of enforcement falls upon the occupying Power itself.”⁴⁹⁰ In this sense, it can be said that the Fourth Geneva Convention may be enforced by Israel unilaterally. This flows from article 146, which states in part that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accor-

487. See *supra* text accompanying note 288. See also NOAM CHOMSKY, *THE FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL AND THE PALESTINIANS* (1999); CAMILLE MANSOUR, *BEYOND ALLIANCE: ISRAEL IN U.S. FOREIGN POLICY* (1994).

488. *FOURTH GENEVA CONVENTION*, *supra* note 6, art. 1.

489. *VIENNA CONVENTION*, *supra* note 297, art. 26.

490. McCoubrey Statement, *supra* note 480, at 70.

dance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.⁴⁹¹

Although this provision has been understood by some to embody the principle *aut dedere aut judicare*—that is, the legal obligation of a High Contracting Party to prosecute or extradite any person suspected of committing war crimes or ordering such crimes to be committed—some, including a recent judge ad hoc of the International Court of Justice (ICJ), have suggested that it actually goes one step further in codifying the principle *promo prosequi, secundo dedere*—the idea that domestic prosecution of suspected war criminals is to be resorted to before extradition.⁴⁹² In any event, it is clear that this provision places Israel under a legal obligation to “enact legislation penalizing the commission of grave breaches . . . and also to track down and bring to trial persons suspected of having committed or ordering the commission of such offences.”⁴⁹³ Israel is also obliged to protect against the commission of violations of the Fourth Geneva Convention that do not amount to “grave breaches” under article 147.

Clearly, “the most immediate forum for the enforcement” of the Fourth Geneva Convention in the OPT is through the “Israeli judicial system itself.”⁴⁹⁴ As noted by Jonathan Kuttub, co-founder of al-Haq, “[m]uch has been made by the Israeli authorities of the fact that they have allowed the residents of the Occupied Territories access to their highest court,” which is often lauded as an effective “watch-dog [that] provides judicial oversight of activities of the military government.”⁴⁹⁵ Although “Palestinians have had mixed views about going to the High Court”—their concerns have ranged from the political implications of attorning to the jurisdiction of a foreign colonial power’s court, to the practical difficulties of obtaining competent, willing, and reasonably priced Israeli lawyers who are more likely to be familiar with the court’s procedure and case law than local Palestinian practitioners—a relatively small number have brought cases before it in an attempt to seek remedies for Israel’s excesses in the OPT.⁴⁹⁶ Unfortunately, as noted by Kuttub, “there have been an insignificant number of [cases] where Palestinians obtained . . . the recourse that they sought in matters pertain-

491. FOURTH GENEVA CONVENTION, *supra* note 6, art. 146.

492. Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. (Feb. 14) (dissenting opinion of Judge ad hoc Van den Wyngaert, at 32), <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

493. McCoubrey Statement, *supra* note 480, at 70.

494. *Id.*

495. Kuttub, *supra* note 303, at 493. See also Benvenisti, *supra* note 219, at 123.

496. *Id.*

ing to the military government or its agents.”⁴⁹⁷ This should come as no surprise, given the fact that over the years the Israeli Supreme Court, sitting as the High Court of Justice, has upheld such practices as unlawful deportations and transfers,⁴⁹⁸ and torture and inhumane treatment.⁴⁹⁹ In any event, in none of these cases has the Court applied the terms of the Fourth Geneva Convention, because of its declaration that the convention is non-self-executing (rejecting the convention’s status as a codification of customary international law) and therefore requiring of specific legislation incorporating it into Israeli domestic law before the Court can regard itself as competent to apply its provisions.⁵⁰⁰ Of course, the reason no such legislation has been passed is the Israeli government’s long-held position that the Fourth Geneva Convention is not *de jure* applicable to the OPT. As a result, Israel has never taken any of the “enforcement” steps required of it as a High Contracting Party in article 146 to enact legislation penalizing the commission of grave breaches, to search for and prosecute or extradite any individuals suspected of committing or ordering the commission of such breaches, or to penalize those suspected of committing other violations of the convention not amounting to grave breaches. From a practical standpoint, this is particularly troubling given that Israel, as the occupying power, is by far the most capable and best positioned of all of the High Contracting Parties to undertake the task of bringing those responsible for war crimes and other transgressions of the Fourth Geneva Convention in the OPT to justice.

Another manner in which the Fourth Geneva Convention may be enforced municipally is by agreement of the parties—that is to say, through bilateral enforcement. It is sometimes overlooked that if Israel and the PLO were to conclude a final peace treaty putting a complete end to the military occupation of the OPT, there would be no need for anyone to even discuss the Fourth Geneva Convention. In this way, it has been noted that “[t]he best means of securing the primary endeavour of the Fourth Geneva Convention is, paradoxically, to ensure that it is not applicable.”⁵⁰¹ The most obvious point of reference in this respect is the Oslo Accords. Unfortunately, though, the accords omit any reference to the Fourth Geneva Convention or the law of belligerent occupation,⁵⁰² so they are not a viable bilateral enforcement mechanism. As a result, they do not expressly recognize the West Bank, including East Jerusalem, and the Gaza Strip as occupied territory, nor do they recognize Israel’s status as a belligerent occupant. These major lacunae were no doubt the product of the imbalance of negotiating power between Israel and the PLO, among other things. Nevertheless, the Oslo

497. *Id.*

498. See *supra* text accompanying notes 439–448.

499. See *supra* text accompanying notes 385–416.

500. See *supra* text accompanying note 293.

501. McCoubrey Statement, *supra* note 480, at 72.

502. John Quigley, *The Israel-PLO Agreements Versus the Geneva Civilians Convention*, 7 PALESTINE Y.B. INT’L L. 45, 57 (1992/1994).

Accords raise an important issue related to the enforcement of the Fourth Geneva Convention in these types of political situations: namely, to what extent may the purported representatives of the occupied population derogate from the terms of the convention in its agreements, interim or otherwise, with the occupying power?

A number of the provisions of the Oslo Accords conflict with the terms of the Fourth Geneva Convention. For instance, under article 5 of the DOP, negotiations over the final status of Jerusalem were postponed during most of the interim period.⁵⁰³ As noted by Quigley, although Israel's annexation of East Jerusalem is clearly illegal under the law of belligerent occupation, this provision may "appear to be a condonation by the PLO of Israel's tenure there, at least on a temporary basis."⁵⁰⁴ Similarly, under article 5 of the DOP, negotiations over the final status of Jewish colonies in the OPT were also postponed for most of the interim period, and under article 8 Israeli jurisdiction was effectively extended over the colonies and settlers.⁵⁰⁵ Although such colonies are strictly prohibited under article 49 of the Fourth Geneva Convention, these provisions can also be construed as an acquiescence by the PLO to Israel's sovereign jurisdiction over these areas and persons. Nevertheless, there are two very important provisions of the Fourth Geneva Convention that effectively render these and other aspects of the Oslo Accords "a nullity."⁵⁰⁶

First, article 7 of the Fourth Geneva Convention provides, in part, that although agreements may be made between the purported political representatives of the occupied population and the occupying power, no such "agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."⁵⁰⁷ Second, article 47 of the Fourth Geneva Convention states that:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power*, nor by any annexation by the latter of the whole or part of the occupied territory.⁵⁰⁸

503. DOP, *supra* note 167, art. V(3).

504. Quigley, *supra* note 502, at 52.

505. DOP, *supra* note 167, arts. V(3), VIII. *See also* The Agreement on the Gaza Strip and the Jericho Area, *supra* note 171, art. 5.

506. Quigley, *supra* note 502, at 46.

507. FOURTH GENEVA CONVENTION, *supra* note 6, art. 7.

508. *Id.* art. 47 (emphasis added).

Consistent with the Fourth Geneva Convention's overriding aim of protecting the interests of civilian persons in time of war, the purpose behind these two provisions was to forestall the possibility of "pressure being exerted by belligerent occupants on local authorities."⁵⁰⁹ As noted by Pacheco, "[t]he harsh experience of the Vichy regime after the Nazi conquest of France provided all-too-familiar reasons for the Convention's drafters to prevent the recurrence of such a situation."⁵¹⁰ Thus, the ICRC commentary on the convention notes that:

Agreements concluded with the authorities of the occupied territory represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law; the possibility of concluding such agreements is therefore strictly limited by Article 7 . . . and the general rule expressed there is reaffirmed by [Article 47].⁵¹¹

Accordingly, to the extent that the Oslo Accords conflict with the requirements of the Fourth Geneva Convention, the latter shall prevail as a matter of international law.⁵¹²

B. International Enforcement Measures

International enforcement measures include both independent and collective state activity. These methods of enforcement can be said to fall into two separate spheres: those internal to the Fourth Geneva Convention and those external to it.

One of the principal internal mechanisms is the obligation contained in article 146 of all High Contracting Parties to enact legislation penalizing the commission of grave breaches, to search for and prosecute or extradite any individuals suspected of committing or ordering the commission of such breaches, and to penalize those suspected of committing other violations of the convention not amounting to grave breaches. It has been demonstrated how this provision forms the basis of considerable legal duties on Israel as both a High Contracting Party and the occupying power in the OPT. In addition, however, it also "implicitly authorizes the exercise of universal jurisdiction" by the national courts of every other High Contracting Party to the Fourth Geneva Convention.⁵¹³

Universal jurisdiction "refers to the authority of domestic courts and international tribunals to prosecute certain crimes, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the

509. Quigley, *supra* note 502, at 47.

510. Pacheco, *supra* note 22, at 199.

511. Uhler, *supra* note 331, at 274.

512. Quigley, *supra* note 502, at 46–47.

513. Statement of William A. Schabas to the United Nations International Meeting, *supra* note 13, at 73, 76.

victim.”⁵¹⁴ The concept rests upon the rationale that some crimes—such as war crimes—are so universally condemned, they warrant the exercise by any competent national or international judicial authority of criminal jurisdiction over those alleged to have perpetrated them, without regard to the traditional factors upon which such jurisdiction is usually based.⁵¹⁵ It is well to recall that the principle of universal jurisdiction “received its most significant judicial affirmation” by the Supreme Court of Israel “in litigation involving [its] right to prosecute” Nazi war criminal Adolf Eichmann.⁵¹⁶ Today, a growing number of states have begun to enact domestic legislation empowering their courts to invoke universal jurisdiction in accordance with their obligations under article 146.⁵¹⁷ Accordingly, universal jurisdiction exercised at the national level would seem to hold out one possibility of enforcing the Fourth Geneva Convention in the OPT.

Another enforcement mechanism internal to the Fourth Geneva Convention is its provision for the appointment of Protecting Powers. Under article 9, Protecting Powers have the duty “to safeguard the [humanitarian] interests of the Parties to the conflict.”⁵¹⁸ It is implied that such Protecting Powers are appointed by agreement of the parties.⁵¹⁹ In the absence of agreement, the ICRC may substitute for the Protecting Powers under article 11. Among other things, Protecting Powers must “lend their good offices” in order to settle disagreements “between the Parties to the conflict as to the application or interpretation of the provisions of” the convention;⁵²⁰ they

514. Michael P. Scharf & Thomas C. Fischer, *Forward to Symposium, Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 227, 227 (2001).

515. These traditional factors include the principles of (1) territoriality (where the state assumes jurisdiction over crimes committed in its territory); (2) protection (where the state assumes jurisdiction over crimes prejudicial to its national security, even if committed by non-nationals extra-territorially); (3) active personality (where the state assumes jurisdiction over crimes committed by its nationals, even if committed extra-territorially); and (4) passive personality (where the state assumes jurisdiction over extra-territorial crimes committed by non-nationals against its nationals). See Research in International Law of Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435 (Supp. 1935).

516. Schabas, *supra* note 513, at 76. Adolf Eichmann headed the Nazi Gestapo during World War II. Israeli secret service agents forcibly abducted him from Argentina and transferred him to Israel to stand trial for the genocide of millions of Jews in Nazi Germany and Nazi-occupied Europe during World War II. The defense argued that the court did not have jurisdiction because Eichmann had been abducted in a foreign state in violation of international law. The court relied, in part, on the doctrine of universal jurisdiction to dismiss the defense argument. It stated:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its foundations. The State of Israel therefore was entitled, *pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement*, to try the appellant.

Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 304 (S. Ct. 1962) (Isr.) (emphasis added).

517. For a survey of state practice, see generally AMNESTY INT’L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION, ch. 6 (2001) (“Crimes Against Humanity: State Practice at the National Level”), [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/IOR530092001ENGLISH/\\$File/IOR5300901.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/IOR530092001ENGLISH/$File/IOR5300901.pdf).

518. FOURTH GENEVA CONVENTION, *supra* note 6, art. 9.

519. Delparaz, *supra* note 16, at 50.

520. FOURTH GENEVA CONVENTION, *supra* note 6, art. 12.

must “be informed of any transfers and evacuations” of protected persons by the occupying power “as soon as they have taken place”;⁵²¹ they “are at liberty to verify the state of the food and medical supplies in the occupied territories”;⁵²² they must be informed by the occupying power of all judicial proceedings taken against protected persons and, with few exceptions, have the right to attend such proceedings;⁵²³ and they are entitled “to go to all places where protected persons are, particularly to places of internment, detention and work,” and to privately interview them without limit as to duration and frequency.⁵²⁴

Notwithstanding the extensive enforcement role envisioned for Protecting Powers by the framers of the Fourth Geneva Convention, the mechanism itself “has virtually remained a dead letter.”⁵²⁵ At no point over the course of Israel’s thirty-five-year occupation has any Protecting Power been appointed. Although the ICRC has maintained a permanent presence in the OPT since 1967,⁵²⁶ its attempts to substitute as the Protecting Power pursuant to article 11 have never materialized.⁵²⁷ While the ICRC has rendered “valuable humanitarian services” by visiting detainees and providing medical assistance,⁵²⁸ its efforts have ultimately proved inadequate to meet the tremendous needs of the protected persons in the OPT. To ensure the safety of all parties, the PLO has repeatedly requested the international community to send some form of multi-national peacekeeping or observer force to the OPT. These efforts have been particularly intensive since the outbreak of the al-Aqsa intifada, but Israel and the United States have consistently rejected them.⁵²⁹ In light of the current crisis unfolding in the OPT, the revival of the institution of Protecting Powers is one further enforcement mechanism that the international community should develop, either by seeing to the appointment of certain High Contracting Parties to the position, or by providing the ICRC with the necessary diplomatic, economic, and political support to accomplish this task.

Among the mechanisms of enforcement that are external to the Fourth Geneva Convention is the newly established International Criminal Court (ICC). The ICC was formed by an international conference that met at Rome in 1998, and represents “a milestone in the development of international

521. *Id.* art. 49.

522. *Id.* art. 55.

523. *Id.* arts. 71, 74, 75.

524. *Id.* art. 143.

525. Statement of Hussein A. Hassouna, Permanent Observer for the League of Arab States, to the United Nations International Meeting, *supra* note 13, at 57, 59.

526. Delparaz, *supra* note 16, at 50.

527. UNCEIRPP, *supra* note 5, at 11. *See also* G.A. Res. 2851, U.N. GAOR, 26th Sess., Supp. No. 29, 2027th plen. mtg. at 48, U.N. Doc. A/8429 (1971).

528. UNCEIRPP, *supra* note 5, at 11. *See also* Delparaz, *supra* note 16, at 50.

529. In March 2001 (seven months following the outbreak of the al-Aqsa intifada), the United States vetoed a draft Security Council resolution, tabled by Ireland, Britain, Norway, and France, to establish an international observer force for the OPT. *See* Noam Chomsky, *Foreward* to THE NEW INTIFADA, *supra* note 22, at 6, 18.

law.”⁵³⁰ It was designed with the aim of providing the international community with a permanent judicial forum in which those accused of the most serious international crimes (i.e., war crimes, crimes against humanity, genocide) could be brought to justice. Thus, article 8 of the Rome Statute “contains an extensive list of acts constituting war crimes”⁵³¹ that includes those acts defined as “grave breaches” in article 146 of the Fourth Geneva Convention, as well as “[o]ther serious violations of the laws and customs applicable in international armed conflict.”⁵³² Although the ICC obtained the sixty ratifications required for its entry into force on April 11, 2002,⁵³³ 28 states have “either voted against” it “or abstained” from the adoption process altogether.⁵³⁴ Among those states who voted against was Israel, “stating specifically that the drafters had gone beyond the customary enumeration of war crimes by including the issues of transfer of populations to occupied territories.”⁵³⁵

Accordingly, Israel is not a State Party to the Rome Statute, making it difficult, though not impossible, for any of its nationals to be brought to justice before the ICC for war crimes. Under article 13(b) of the Rome Statute, the ICC may exercise jurisdiction over crimes committed by, or in the territory of, non-parties if the U.N. Security Council, acting under chapter VII of the U.N. Charter, refers a case to the Prosecutor.⁵³⁶ The position of the United States on the council makes such a referral unlikely, but this option is theoretically open to the world community and is worthy of exploration at least at the diplomatic level.⁵³⁷ The ICC’s temporal jurisdiction may present another difficulty, though not a fatal one. Under article 11, the court “has jurisdiction only with respect to crimes committed after the entry into force of [the] Statute.”⁵³⁸ Because the Rome Statute entered into force on July 1, 2002, it is possible that an adjudication before the ICC of any war crimes committed by Israeli nationals between 1967 and that date will be barred *ratione temporis*. One way around this potential impediment, would be to argue that Israel’s war crimes amount to “continuing offences” at law, because, although they “may consist of separate acts or a course of conduct,” such conduct can be said to arise from a “singleness of thought, purpose or action which may be deemed a single impulse.”⁵³⁹ Given Israel’s ongoing

530. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 668.

531. *Id.*

532. ROME STATUTE, *supra* note 239, art. 8, § 2(b).

533. The ICC officially entered into force on July 1, 2002. Leila Nadya Sadat, *ASIL Insights: The International Criminal Court Treaty Enters into Force* (Apr. 2002), <http://www.asil.org/insights/insigh86.htm>.

534. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 668.

535. Schabas, *supra* note 513, at 74.

536. ROME STATUTE, *supra* note 239, art. 13(b). *See also* 1998 *Rome Statute of the International Criminal Court: Extracts: Prefatory Note*, DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 668, 669.

537. *But see infra* text accompanying notes 569–573.

538. ROME STATUTE, *supra* note 239, art. 11, § 1.

539. BLACK’S LAW DICTIONARY 321–22 (6th ed. 1990).

record and stated policies concerning torture, deportation, land confiscation, and settlement construction, this argument would seem plausible.

A related external mechanism for enforcing the Fourth Geneva Convention in the OPT is to have resort to the ICJ. The ICJ was established in 1945 by the U.N. Charter “as the principal judicial organ of the United Nations.”⁵⁴⁰ Accordingly, all members of the United Nations, including Israel, are parties to the ICJ Statute and may therefore make use of the court.⁵⁴¹ The jurisdiction of the ICJ is limited to adjudicating “contentious” cases between states, and issuing “advisory opinions.”⁵⁴² The court’s contentious jurisdiction derives from article 36(1) of the ICJ Statute, which provides that it may hear “all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”⁵⁴³ Although the Fourth Geneva Convention contains no specific clause referring potential disputes to the ICJ, the Geneva Diplomatic Conference of 1949 expressly recommended “that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavour to agree between themselves to refer such dispute to the ICJ.”⁵⁴⁴

Nevertheless, the contentious jurisdiction of the ICJ is confronted with two considerable obstacles. First, because Palestine is not yet a full Member of the United Nations (and by extension the ICJ Statute), nor a High Contracting Party to the Fourth Geneva Convention,⁵⁴⁵ it cannot agree with Israel to refer a case to the ICJ pursuant to either the ICJ Statute or the recommendation of the Geneva Diplomatic Conference. Second, and in any event, Israel has “specifically stipulated that it will not admit the jurisdiction of the Court in relation to matters pertaining to belligerent occupation.”⁵⁴⁶ Thus, it would seem unlikely that the contentious jurisdiction of the ICJ could be invoked to consider the enforcement of the Fourth Geneva Convention in the OPT.

The same is not so with respect to the ICJ’s advisory jurisdiction, however. Under article 65(1) of the ICJ Statute “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”⁵⁴⁷ Under article 96(1) of the U.N. Charter, both the Security Council and the General Assembly are authorized to request an ad-

540. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ STATUTE].

541. DAMROSCH ET AL., *supra* note 130, at 854.

542. McCoubrey Statement, *supra* note 480, at 71.

543. ICJ STATUTE, *supra* note 539, art. 36(1).

544. Resolution 1 of the Geneva Diplomatic Conference of 1949, *quoted in* McCoubrey Statement, *supra* note 480, at 71.

545. *But see supra* note 252.

546. McCoubrey Statement, *supra* note 480, at 71.

547. ICJ STATUTE, *supra* note 539, art. 65(1).

visory opinion.⁵⁴⁸ Likewise, under article 96(2), the General Assembly may authorize any other U.N. organ or specialized agency to request an advisory opinion, provided the subject matter of the request falls “within the scope of their activities.”⁵⁴⁹ Thus, an advisory opinion may be sought from the ICJ on any number of matters, including the questions of the applicability of the Fourth Geneva Convention to the OPT and international responsibility regarding its enforcement.⁵⁵⁰ Although the ICJ has shown a reluctance to render advisory opinions on “matters which are in reality contentious cases,” its recent judgment in the *1996 Advisory Opinion on the Threat or Use of Nuclear Weapons* may be indicative of a shift in policy.⁵⁵¹ The greatest strength of the Advisory Opinion option is that the General Assembly may act independently of the Security Council, which is so often unable to act given the United States’ policy on the issue.⁵⁵² Therefore, this option should “be studied carefully,”⁵⁵³ if not for the possibility that it may provide a final answer to the question of the enforcement of the Fourth Geneva Convention in the OPT, than for the prospect that it might provide the international community with a step in the right direction.⁵⁵⁴

Another enforcement mechanism external to the Fourth Geneva Convention is the creation of an ad hoc international criminal tribunal. Criminal tribunals of this sort first appeared in 1945 with the establishment of the International Military Tribunals at Nuremberg and Tokyo by the Allied Powers.⁵⁵⁵ Thereafter, no similar tribunals were created to prosecute violations of the laws and customs of war for nearly half a century. In 1993, the United Nations Security Council established the ICTY to try individuals alleged to have committed war crimes and crimes against humanity during the wars associated with the dissolution of that country in the early 1990s.⁵⁵⁶ The following year, the International Criminal Tribunal for Rwanda (ICTR) was created to prosecute those responsible for the genocide of “an estimated half a million to one million people” in Rwanda in 1994.⁵⁵⁷ Because both the ICTY and ICTR possess specialized temporal and subject-matter jurisdiction, it is not possible for them to preside over the prosecution of war crimes committed in the OPT. Nevertheless, they provide models for the creation of a similar ad hoc tribunal for the OPT, which would be in keeping with current trends in international criminal law and the global struggle against impunity. In January 2002, the United Nations and the

548. U.N. CHARTER art. 96(1).

549. *Id.* art. 96(2).

550. *See, e.g.,* Van Baarda, *supra* note 265.

551. McCoubrey Statement, *supra* note 480, at 71.

552. *But see infra* text accompanying notes 569–573.

553. Statement of Paul Tavernier, Director, Research and Studies Centre for Human Rights and Humanitarian Law, to the United Nations International Meeting, *supra* note 13, at 61, 62.

554. *Id.* at 71.

555. DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 565.

556. *Id.* at 565–66. *See* ICTY STATUTE, *supra* note 239.

557. *Id.* at 615. *See* ICTR STATUTE, *supra* note 239.

government of Sierra Leone agreed to establish a specialized criminal tribunal for war crimes committed during its ten-year civil war,⁵⁵⁸ and calls for the establishment of an ad hoc court to try war crimes stemming from Indonesia's prolonged military occupation of East Timor have been circulating for well over a year.⁵⁵⁹ Of course, given the unlikely prospect of agreement by Israel to the creation of an ad hoc criminal tribunal, the establishment of such a court would likely only be possible with the active participation of the Security Council. Thus, although the prospect is theoretically possible and should be given serious consideration, it must "be thought vanishingly small" in the present political climate.⁵⁶⁰

Yet another external mechanism that may be employed to enforce the Fourth Geneva Convention in the OPT is the use of various "forms of economic pressure," such as restrictions on trade, foreign investment, and foreign aid.⁵⁶¹ Israel currently enjoys preferential trade agreements with a number of states and regional entities, including Canada, the European Union, and the United States.⁵⁶² Even more importantly, Israel has been "the largest cumulative recipient of U.S. aid since World War II."⁵⁶³ According to conservative estimates, Israel currently receives over \$3.2 billion per year, and, since 1949 it has received a total of over \$91 billion.⁵⁶⁴ There is little question that much of this money directly underwrites Israeli's military occupation, not to mention the construction of colonies, bypass roads, and the like.⁵⁶⁵

Among other approaches, the exertion of economic pressure on Israel can take place at both the national level by individual states, as well as at the regional level, by bodies such as the European Union, where states can act in concert to deprive Israel of the benefits of an open trade policy so long as it continues to violate the Fourth Geneva Convention in the OPT. Similarly, such pressure may be exerted internationally by the United Nations. Under chapter VII of the U.N. Charter, if the Security Council determines that a conflict constitutes a threat to international "peace and security" it may require all Member States to apply measures short of the use of force to rem-

558. Chris McGreal, *Unique Court to Try Killers of Sierra Leone*, GUARDIAN (London), Jan. 17, 2002, at 15.

559. Mark Devenport, *Proposal for Timor Tribunal*, BBC NEWS, Dec. 22, 1999, <http://news.bbc.co.uk/1/hi/world/americas/574490.stm>. See also Human Rights Watch, *World Report 2001: East Timor: Human Rights Developments* (2001), <http://www.hrw.org/wr2k1/asia/etimor.html>.

560. McCoubrey Statement, *supra* note 480, at 71.

561. Tavernier, *supra* note 553, at 62.

562. See FREE TRADE AGREEMENT, CAN.-ISR., July 31, 1996, <http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp>; EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES AND THE STATE OF ISRAEL, NOV. 20, 1995, http://www.moit.gov.il/root/sachar_hutz/heskermin_ben/eumedagr.htm; AGREEMENT ON THE ESTABLISHMENT OF A FREE TRADE AREA, ISR.-U.S., Apr. 22, 1985, 24 I.L.M. 653.

563. Shirl McArthur, *A Conservative Total for U.S. Aid to Israel: \$91 Billion—and Counting*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, Jan.-Feb. 2001, at 15, 15.

564. *Id.*

565. *Id.*

edy the matter, including the use of economic sanctions.⁵⁶⁶ Although the Security Council has historically been reluctant to resort to chapter VII powers in this manner, recent years have witnessed the emergence of a changing trend. Thus,

[w]hereas the Council had only imposed sanctions twice in the first forty-five years of its existence, against Rhodesia in 1966 and South Africa in 1977, during the 1990s, the Security Council imposed comprehensive or partial sanctions against Iraq (1990), the former Yugoslavia (1991, 1992, and 1998), Libya (1992), Liberia (1992), Somalia (1992), parts of Cambodia (1992), Haiti (1993), parts of Angola (1993, 1997, and 1998), Rwanda (1994), Sudan (1996), Sierra Leone (1997), and Afghanistan (1999).⁵⁶⁷

The sanctions regimes recently imposed have not been perfect. As the cases of Iraq and Haiti demonstrate, the effect of sanctions can sometimes go beyond the intended political objective to create humanitarian disasters far beyond anything imagined.⁵⁶⁸ For this reason, any sanctions regime imposed on Israel must be limited in scope and directed toward the single objective of bringing it into a state of full compliance with the terms of the Fourth Geneva Convention in the OPT. Economic sanctions focused on Israel's military or colonial settlement development may be a good first step. Because the mechanism of international sanctions must conventionally pass through the Security Council, the United States' veto power presents a considerable political obstacle. Although the option of economic sanctions is therefore theoretically available, the current political climate in the Security Council would not seem to lend itself favorably to the possibility of it coming to fruition any time soon.

One possible solution would be to invoke the General Assembly's deemed residual responsibility over the maintenance of international peace and security in accordance with its "Uniting for Peace" resolution of November 3, 1950.⁵⁶⁹ Article 24 of the U.N. Charter provides that the Security Council shall have "*primary* responsibility for the maintenance of international peace and security."⁵⁷⁰ Against the backdrop of the Cold War conflict in Korea, the General Assembly argued "that this did not preclude [it] from exercising a secondary or residual responsibility."⁵⁷¹ Accordingly, it passed the Uniting for Peace resolution in which it "asserted authority to act in matters relating to international peace and security if the Security Council could not dis-

566. U.N. CHARTER art. 41.

567. CORTRIGHT & LOPEZ, *supra* note 484, at 1–2.

568. *Id.* at 2. See also GEOFF SIMONS, THE SCOURGING OF IRAQ (1998); George E. Bisharat, *Sanctions as Genocide*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379 (2001).

569. G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

570. U.N. CHARTER art. 24(1) (emphasis added).

571. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 224–25 (6th ed. 1991).

charge its 'primary' responsibility because of lack of unanimity among the permanent members."⁵⁷² Although the extent of the General Assembly's power to act is merely recommendatory, since Korea "the resolution has had limited but significant application, notably with respect to the creation of the United Nations Emergency Force in the wake of the Suez crisis of 1956."⁵⁷³

In point of fact, the Uniting for Peace formula was used by the General Assembly in Resolution ES-10/6 of February 9, 1999 at its tenth emergency special session to call for the convening of an international conference on measures to enforce the Fourth Geneva Convention in the OPT.⁵⁷⁴ The Conference of High Contracting Parties to the Fourth Geneva Convention, as it was officially called, was convened at Geneva by the government of Switzerland in its capacity as the depositary of the convention on July 15, 1999.⁵⁷⁵ Aside from its immediate importance to protecting the civilian population of the OPT, the conference was significant as the first time in the Fourth Geneva Convention's history that the High Contracting Parties met to discuss matters of enforcement.⁵⁷⁶ The conference thus held out the possibility of having "historical precedence" not only for the OPT, but also "for the direction of international humanitarian law and the future success of the convention in protecting civilians under future occupations."⁵⁷⁷ Unfortunately, however, the convening of the meeting was accompanied by tremendous political pressure levied by the United States and Israel, both of whom boycotted the event arguing that the meeting "would interfere with the peace process."⁵⁷⁸ By the eve of the meeting, international political support had waned to the point that the PLO decided to "request" the High Contracting Parties to adjourn the conference *sine die*.⁵⁷⁹

The international human rights community reacted swiftly. Amnesty International issued a press release in which it expressed absolute consternation for what transpired:

Amnesty International is appalled by a 10 minute meeting of the High Contracting Parties to the Geneva Conventions, convened today in Geneva, which failed to consider enforcement measures to ensure that Israel respect its obligations under the Fourth Geneva Convention.

572. DAMROSCH ET AL., *supra* note 130, at 1012.

573. *Id.* at 1013.

574. *Introduction to United Nations International Meeting*, *supra* note 13, at 1.

575. Amnesty Int'l, *Israel: Fourth Geneva Convention Meeting: An Abdication of Responsibility* (July 15, 1999), <http://www.amnesty-usa.org/news/1999/51504799.htm>.

576. Pacheco, *supra* note 22, at 200.

577. *Id.*

578. *Id.*

579. *Id.* at 201. Pacheco notes that the PLO actually presented its decision to request an adjournment as "a good will gesture to Israel's new government" under Ehud Barak, who had just then defeated Benjamin Netanyahu for the premiership of Israel. *Id.*

The High Contracting Parties have only met to decide to defer their responsibilities. It is a supreme irony that, on the 50th anniversary of the Geneva Conventions, a conference that was set up to bring back to the limelight the plight of the protected population in the Occupied Territories lasts only 10 minutes. Today marks a scandalously missed opportunity to reaffirm international humanitarian law. . . .

Israel, as a High Contracting Party, has been violating the Fourth Geneva Convention for more than 30 years, when it carries out wilful killings extrajudicially, when it tortures or when it indiscriminately uses force The High Contracting Parties themselves however have violated their obligation enshrined in Article 1 of the Convention, to ensure respect for the Fourth Geneva Convention.⁵⁸⁰

The High Contracting Parties were afforded an opportunity to redeem themselves following the outbreak of the al-Aqsa intifada, when the General Assembly confirmed the Swiss government's request to re-convene the conference in Resolution ES-10/7 of October 20, 2000, again adopted pursuant to the Uniting for Peace formula.⁵⁸¹ Accordingly, the High Contracting Parties met once more at Geneva on December 5, 2002 for the resumption of the earlier meeting. The resumed conference was successful in so far as it provided the High Contracting Parties an opportunity to reaffirm the de jure applicability of the Fourth Geneva Convention to the OPT, as well as to "call upon all parties, directly involved in the conflict or not, to respect and to ensure respect for the Geneva Conventions in all circumstances, [and] to disseminate and take measures necessary for the prevention and suppression of breaches of the Conventions."⁵⁸² The conference did not, however, "agree on concrete measures" to enforce the convention.⁵⁸³ To be sure, the closing statement of the Chair of the meeting reminded those in attendance that "[t]he real follow-up to this Conference must be the implementation of humanitarian law. Nothing more or less."⁵⁸⁴ Until the High Contracting Parties take substantive action to implement, not merely re-state, the Fourth Geneva Convention, they will remain in breach of their duty under article 1

580. Amnesty Int'l, *supra* note 575.

581. Opening Statement of Ambassador Peter Maurer of Switzerland to the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, Switzerland (Dec. 5, 2001), http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0004.UpFile.pdf/mg_011205_4gcclopstm2_e.pdf.

582. Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, Switzerland (Dec. 5, 2001), http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg_011205_4gcdeclarn_e.pdf.

583. Press Release, Amnesty Int'l, *Israel: Respect for the Fourth Geneva Convention Must be Ensured by High Contracting Parties Meeting in Geneva* (Dec. 4, 1999), <http://www.amnesty-usa.org/news/2001/israel12042001.html>.

584. Closing Statement of Ambassador Peter Maurer (Switz.) to Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, Switzerland (Dec. 5, 2001), http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0004.UpFile.pdf/mg_011205_4gcclopstm2_e.pdf.

to “ensure respect” for the convention. In this regard, it is well to note the ICRC commentary regarding the object and purpose of article 1:

[t]he use . . . of the words “and to ensure respect for” was, however, deliberate; they were intended to emphasize the responsibility of the Contracting Parties It follows, therefore, that in the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally

It is clear that Article 1 is no mere empty form of words, but has been deliberately invested with imperative force. It must be taken in its literal meaning.⁵⁸⁵

V. CONCLUSION

This Article has attempted both to reaffirm and reexamine the role international humanitarian law must play in protecting civilian populations subject to foreign military occupation. To this end, it has focused on Israel’s thirty-five-year military occupation of the OPT, and the paramount function of the Fourth Geneva Convention in accomplishing this task. Promulgated in response to the atrocities of World War II, the primary purpose of the Fourth Geneva Convention is to ameliorate the effects of war on civilian populations. In many respects, the Convention “may be considered as the expression of the international community’s sense of revulsion at the treatment accorded to Jews who came under the Nazi regime” in occupied Europe.⁵⁸⁶ It is not without irony, therefore, that Israel has refused to recognize its responsibilities as an occupying power under the Fourth Geneva Convention, or even that the Convention applies *de jure* to the OPT. Since 1967, Israel “has flagrantly and defiantly contravened both the letter and spirit of” the Fourth Geneva Convention without hindrance or let⁵⁸⁷ including the systematic commission of very serious war crimes.

Equally significant, however, has been the international community’s inadequate response to Israel’s behavior. Israel’s occupation of the OPT provided “the first occasion on which the value of the [Fourth Geneva] Conven-

585. ICRC COMMENTARY TO THE IV GENEVA CONVENTION 16–17 (Jean S. Pictet ed., 1958), *quoted in* Pacheco, *supra* note 22, at 200.

586. *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, ¶ 41, U.N. Doc. A/18089 (Oct. 5, 1970) [hereinafter *Report of the Special Committee*].

587. Falk & Weston, *supra* note 150, at 135.

tion itself and the genuineness of individual nations' adherence to it could be put to the test."⁵⁸⁸ By all accounts, the High Contracting Parties to the Convention have failed to meet this test. Apart from the consistent reaffirmation of the de jure applicability of the Fourth Geneva Convention to the OPT, as well as Israel's responsibilities thereunder, the international community has done very little to ensure its respect in the manner that was intended by its framers. This Article has canvassed some, though not all, of the available enforcement mechanisms for realizing this goal. At this critical juncture, the international community's "failure to act effectively will strike a blow at the Convention norms and at the entire scheme of international humanitarian law."⁵⁸⁹ In the final analysis, if the letter and spirit of the Convention are to be salvaged in any meaningful way, the international community must see to its immediate enforcement in the OPT.

588. *Report of the Special Committee*, *supra* note 586, ¶ 42.

589. Schabas, *supra* note 513, at 77.