

## NOTES AND COMMENTS

### THE WEST BANK AND INTERNATIONAL HUMANITARIAN LAW ON THE EVE OF THE FIFTIETH ANNIVERSARY OF THE SIX-DAY WAR

By *Theodor Meron*\*

#### I. INTRODUCTION

The West Bank and the Settlements, again? Readers may have had enough of this subject. But these are exceptional times. The adoption by the Security Council of Resolution 2334 on December 23, 2016,<sup>1</sup> the unprecedented speech by Secretary Kerry delivered shortly thereafter,<sup>2</sup> and the immediate rejection of both by Prime Minister Netanyahu,<sup>3</sup> combined with the approach of the fiftieth anniversary of the Six-Day War in June 2017 and the continued march toward an inexorable demographic change in the West Bank, not to mention the nomination as U.S. Ambassador to Israel of a person reportedly supporting an active settlement policy and annexation:<sup>4</sup> the confluence of these events demands our renewed attention.<sup>5</sup> And while these developments undoubtedly have powerful political dimensions, they also call upon those of us who care about international law to speak up in support of its requirements and application.

That is what I did right after the Six-Day War. At that time, at the age of 37, I had just been appointed the Legal Adviser of the Israel Ministry of Foreign Affairs, replacing Professor Shabtai Rosenne, following my service in New York as counselor of the Israel Mission to

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<sup>1</sup> SC Res. 2334 (Dec. 23, 2016).

<sup>2</sup> See Glenn Kessler, *Fact-Checking John Kerry's Speech on the Israeli-Palestinian Conflict*, WASH. POST (Jan. 3, 2017), at [https://www.washingtonpost.com/news/fact-checker/wp/2017/01/03/fact-checking-john-kerrys-speech-on-the-israeli-palestinian-conflict/?utm\\_term=.03500f6e609f](https://www.washingtonpost.com/news/fact-checker/wp/2017/01/03/fact-checking-john-kerrys-speech-on-the-israeli-palestinian-conflict/?utm_term=.03500f6e609f).

<sup>3</sup> See Peter Beaumont, *Israel Rejects 'Shameful' UN Resolution Amid Criticism of Netanyahu*, GUARDIAN (Dec. 24, 2016), at <https://www.theguardian.com/world/2016/dec/24/israel-rejects-shameful-un-resolution-amid-criticism-of-netanyahu>.

<sup>4</sup> See Daniella Diaz & Tal Kopan, *Trump Picks Campaign Adviser Friedman as US Ambassador to Israel*, CNN POLITICS (Dec. 16, 2016), at <http://edition.cnn.com/2016/12/15/politics/trump-picks-campaign-adviser-friedman-as-us-ambassador-to-israel>.

<sup>5</sup> I also note that in recent years Palestine has gained recognition of attributes of statehood and has formally adhered to the Geneva Conventions. See, e.g., GA Res. 67/19, para. 2 (Dec. 4, 2012); International Committee of the Red Cross, *Treaties, States Parties and Commentaries: Palestine* (online database), at [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=PS&nv=4](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS&nv=4).

the United Nations. It was in this new role that I was asked to address some of the international legal implications that followed from the Six-Day War.<sup>6</sup> On September 14, 1967, I stated in an Opinion submitted to the government of Israel (and which came to light in 2006 upon its discovery in state archives by the historian Gershom Gorenberg) that the establishment of civilian settlements in the occupied West Bank and other conquered territories violates the Fourth Geneva Convention related to the protection of victims of war and, specifically, its prohibition on settlements (Article 49(6)).<sup>7</sup> This prohibition, I wrote, is categorical and “not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonization of conquered territory by citizens of the conquering state.”<sup>8</sup> Any steps to place citizens in occupied land could only be done “by military bodies and not civilian ones [on military] bases” clearly temporary in nature.<sup>9</sup> With reference to the position of the government of Israel that the West Bank was disputed territory, and therefore not “occupied territory,” I opined that this position had not been accepted by the international community, which regards the territory concerned as normal occupied territory.<sup>10</sup> Israeli settlements in the area of “Etzion Bloc” would be viewed as evidence of an intent to annex that area, I warned.<sup>11</sup> As regards the Golan Heights, which lay outside mandatory Palestine,<sup>12</sup> they undoubtedly constituted occupied territory and thus were subject to the prohibition of settlements.<sup>13</sup>

As to military bases too, I stated that the Hague Convention No. IV requires respect for private property and prohibits its confiscation.<sup>14</sup> And even public lands are subject to the Hague Convention’s rules: the occupant may use such lands (usufruct), but not behave as if it were their owner.<sup>15</sup>

The following year, on March 13, 1968, I opined that the demolition of houses of Arabs suspected of subversive activities and/or the deportation of these individuals from the West Bank likewise violated the Fourth Geneva Convention, which was, as I explained, fully applicable.<sup>16</sup> Such demolition would also constitute collective punishment under Article 33 of the

<sup>6</sup> See generally Theodor Meron, *A Life of Learning* (Charles Homer Haskins Prize Lecture, ACLS, Occasional Paper 65, 2008).

<sup>7</sup> See Gershom Gorenberg, *Israel’s Tragedy Foretold*, N.Y. TIMES (Mar. 10, 2006), at <http://www.nytimes.com/2006/03/10/opinion/israels-tragedy-foretold.html>. Excerpts from the Opinion, in Gorenberg’s translation, are contained in Gorenberg’s book: GERSHOM GORENBERG, *THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967–1977*, at 99 (2006).

<sup>8</sup> See GORENBERG, *supra* note 7, at 101.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 101–02.

<sup>11</sup> See *id.* at 102.

<sup>12</sup> The League of Nations, *The Palestine Mandate*, June 24, 1922, available at [http://avalon.law.yale.edu/20th\\_century/palmanda.asp](http://avalon.law.yale.edu/20th_century/palmanda.asp).

<sup>13</sup> *Id.*

<sup>14</sup> See GORENBERG, *supra* note 7, at 101.

<sup>15</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Art. 55, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention No. IV]. References to the Hague Convention No. IV here include references to articles of the annexed regulations.

<sup>16</sup> Memorandum from Theodor Meron, Legal Adviser, Ministry of Foreign Affairs of Israel to Director General, Prime Minister’s Office on Geneva Convention: Blasting Homes and Deportation (Mar. 12, 1968), translation provided by HaMoked: Center for the Defence of the Individual, at [http://www.hamoked.org/files/2015/1159122\\_eng.pdf](http://www.hamoked.org/files/2015/1159122_eng.pdf) [hereinafter Memorandum from Theodor Meron].

Fourth Geneva Convention.<sup>17</sup> This Opinion was discovered in 2015 in the state archives by Akevot, an NGO.<sup>18</sup>

The demolition of houses belonging to persons suspected of subversive activities was justified by Israeli authorities based on British mandatory emergency regulation 119, (which Israel continues to consider as being in force in the West Bank).<sup>19</sup> I opined that under the Hague Convention No. IV, the destruction of even enemy property not imperatively demanded by the necessities of war is prohibited and private property may not be confiscated.<sup>20</sup>

As regards the argument that the British mandatory regulation applies as a matter of domestic law, I pointed out that, according to the ICRC Commentary to Article 64 of the Fourth Geneva Convention, in case of conflict between domestic penal legislation and the Convention, as in this case, the latter must prevail.<sup>21</sup> As I explained, this position simply confirmed the primacy of norms of public international law over conflicting provisions of domestic law.<sup>22</sup> This primacy is particularly important with regard to a conflict between humanitarian principles and internal law. I insisted that the Convention is a humanitarian Convention that aims to protect the rights of the civilian population.<sup>23</sup> Narrow or technical interpretations will not be accepted to exonerate the conquering state from the absolute prohibition upon deportations, whatever their reason.<sup>24</sup>

It is a matter of history that these opinions were ignored by the government of Israel and in the years that followed, the divergence between the requirements of international law and the situation on the ground in the West Bank has become, if anything, more pronounced.

The Oslo Accords of 1993 and 1995 divided the West Bank into Areas A, B, and C, the former two, broadly speaking, being placed under Palestinian authority, the last under Israeli control. As portrayed by the Israeli human rights organization B'Tselem in June 2016, Area C, which comprises about 60 percent of the West Bank, has since then been “used to expand the settlements, whose population has more than tripled since the Oslo accords. . . . Hundreds of thousands of Israeli citizens currently live in more than 200 settlements and unauthorized outposts. . . .”<sup>25</sup> In particular,

<sup>17</sup> *Id.*

<sup>18</sup> Gershom Gorenberg, *Israel Knew All Along that Settlements, Home-Demolitions Were Illegal*, HAARETZ (May 19, 2015), at <http://www.haaretz.com/opinion/.premium-1.657167> (last accessed May 19, 2015) [hereinafter Gorenberg, *Israel Knew All Along*].

<sup>19</sup> See, e.g., Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. INT'L L. 871, 885–87 (2002); B'Tselem, *Punitive House Demolitions from the Perspective of International Law* (Jan. 1, 2011), at [http://www.btselem.org/punitive\\_demolitions/legal\\_basis](http://www.btselem.org/punitive_demolitions/legal_basis).

<sup>20</sup> Memorandum from Theodor Meron, *supra* note 16.

<sup>21</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION IV OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 336 (Jean Pictet ed., 1958) [hereinafter 1958 COMMENTARY IV]; Memorandum from Theodor Meron, *supra* note 16.

<sup>22</sup> Memorandum from Theodor Meron, *supra* note 16.

<sup>23</sup> *Id.*

<sup>24</sup> Gorenberg, *Israel Knew All Along*, *supra* note 18; see also Memorandum from Theodor Meron, *supra* note 16.

<sup>25</sup> B'Tselem, *17,898 Days: Almost Fifty Years of Occupation* 4 (June 2016), at [http://www.btselem.org/publications/201606\\_reality\\_check](http://www.btselem.org/publications/201606_reality_check).

[t]ens of thousands of hectares, including pastureland and farmland, have been seized from Palestinians . . . and generously allocated to settlements. A significant portion of these lands has been declared [by Israel to be] state land . . . [in] disregard for the fact that public land is meant to serve the Palestinian population. . . . Additional lands have been confiscated from Palestinians to build hundreds of kilometers of bypass roads for settlers [and] . . . much Palestinian farmland . . . has become effectively off-limits to its owners. . . .<sup>26</sup>

In sum, “Israel . . . treats the West Bank as if it were part of its sovereign territory: grabbing land . . . and building permanent settlements.”<sup>27</sup> In my opinion, these measures deny contiguity and viability to any future independent Palestinian entity, not to mention a state.

Disrespect for international law is, alas, not unusual in the affairs of states. It is rare, however, that disrespect of an international convention would have such a direct impact on the elimination of any realistic prospects for reconciliation, not to mention peace. And it is rarer still that such disrespect of international law should subsist given the number of authoritative pronouncements on the matter. Even on most disputed questions, a clear pronouncement by the International Court of Justice (as has been issued on the status of the West Bank as a territory under belligerent occupation, on the applicability of the Fourth Geneva Convention, and equally clearly on the illegality of the settlements<sup>28</sup>), supported by a score of Security Council resolutions, the International Committee of the Red Cross, and a rare consensus of the international community, should have rendered any controversy moot, if not settled. Furthermore, the Israeli Supreme Court itself has routinely defined the situation on the West Bank as a territory under belligerent occupation subject to the provisions on occupation in the Hague Convention No. IV.<sup>29</sup>

Nevertheless, the legacy of Professor Blum<sup>30</sup> and Attorney General/later Supreme Court Justice and eventually Chief Justice Meir Shamgar, who first developed the arguments on the *sui generis* character of the West Bank and against the applicability of the Fourth Geneva Convention,<sup>31</sup> continues to prosper in wide circles of Israeli public opinion and has gained supremacy in the current policies of Israel, supporting far-reaching changes in the occupied territory,<sup>32</sup> despite the character of the Convention as a people-oriented, humanitarian instrument that supports the status quo.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 ICJ Rep. 136, para. 120 (July 9).

<sup>29</sup> See, e.g., HCJ 7015/02, Ajuri v. The Commander of IDF Forces in the West Bank, 56(6) PD 352, paras. 13, 21, 22 (2002) (Isr.); HCJ 2056/04, Beit Sourik Village v. The Government of Israel and the Commander of the IDF Forces in the West Bank, 58(5) PD 805, para. 1 (2004) (Isr.).

<sup>30</sup> Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 293 (1968).

<sup>31</sup> Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 266 (1971) [hereinafter Shamgar, *Observance of International Law*].

<sup>32</sup> Cf. Yael Ronen & Yuval Shany, *Israel's Settlement Bill Violates International Law*, JUST SECURITY BLOG (Dec. 20, 2016), at <https://www.justsecurity.org/35743/israels-settlement-regulation-bill-violates-international-law/>; Ian Fisher, *Israel Passes Provocative Law to Retroactively Legalize Settlements*, N.Y. TIMES (Feb. 6, 2017), at <https://www.nytimes.com/2017/02/06/world/middleeast/israel-settlement-law-palestinians-west-bank.html?smid=nytcore-ipad-share&smprod=nytcore-ipad>; see generally Regulation of Settlement in Judea and Samaria Law, 5777-2017, SEFER HAHUKIM, No. 2604, p. 394, Art. 3, available at <http://www.justice.gov.il/Units/>

In this Editorial Comment, written nearly a half century after I first gave the Opinions described above, I wish to take the opportunity to consider the arguments raised since then as to the applicability of the Fourth Geneva Convention and international humanitarian law to the situation in the West Bank.<sup>33</sup> I will discuss the situation of the West Bank as a matter of public international law, both in general and in relation to particular provisions of the Convention. I will not address Jerusalem, confining my discussion to the same region as that on which I focused in my 1967 Opinion. I will not address arguments made by those who justify the policy of Prime Minister Netanyahu and his predecessors on grounds of religious or biblical entitlements. Nor will I deal with defense or strategic issues or discuss Israeli national law; Article 27 of the Vienna Convention on the Law of Treaties makes it abundantly clear that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

## II. THE LEGAL STATUS OF THE WEST BANK AND THE APPLICABLE INTERNATIONAL HUMANITARIAN LAW

### *Fourth Geneva Convention*

The universally ratified Fourth Geneva Convention is regarded by the international community and the United Nations as the gold standard of humanitarian law and the Convention has been largely recognized as constituting customary law.<sup>34</sup> Articles 146 and 147 of the Convention provide for criminal liability for grave breaches. In addition, the jurisprudence of international criminal tribunals has treated, and continues to treat, some violations of the Convention as triggering the individual criminal responsibility of the perpetrators.<sup>35</sup>

The general acceptance of the Fourth Geneva Convention as customary law notwithstanding, Israel has not recognized it as such. Nor has it incorporated the Convention by legislation into its domestic law. Of course, none of this affects Israel's international obligations, nor its ability to implement the Convention.

These facts have not stopped successive Israeli governments, and many others, from denying the Convention's applicability to the West Bank, often relying on the Blum-Shamgar theories which, despite the passage of time, are still driving the Israeli narrative concerning the West Bank.

Briefly, the Blum-Shamgar thesis is that conquered territory becomes occupied territory only when it belongs to a legitimate sovereign that has been ousted. As the proponents of

[Reshomot/publications/Pages/BookOfLaws.aspx](https://www.cambridge.org/core/Reshomot/publications/Pages/BookOfLaws.aspx) (stating, *inter alia*, that the custodian of government property in the Judea and Samaria shall acquire the rights of private land on which a settlement has been built in cases where: (1) the settlement was built in good faith or built with the state's approval; and (2) the military authorities found that the costs invested in building the settlement were greater than the value of the private land at the time of building).

<sup>33</sup> The Golan Heights and the Sinai Peninsula were, of course, under undisputed Syrian and Egyptian sovereignty, respectively. As regards Gaza, with the withdrawal of Israeli *settlements* and Israeli military presence there, most of the relevant questions related to settlements have become moot.

<sup>34</sup> THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 104 (2006).

<sup>35</sup> See, e.g., *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, para. 147 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) ("[a]cts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law. Pillage is explicitly prohibited in Article 33 of Geneva Convention IV . . .").

this theory dispute the status of Jordan as such a sovereign of the West Bank, the assumption of the concurrent existence of an ousted legitimate sovereign and a belligerent occupant is, in their view, refuted, making the Convention inapplicable *de jure*.<sup>36</sup> Neither are the reversionary rights of the ousted sovereign relevant. In these circumstances, the government of Israel, inspired by the Blum-Shamgar thesis, has simply decided, in the absence of an international obligation to do so, to act *de facto* in accordance with the humanitarian provisions of the Convention.<sup>37</sup>

These theories, which appear to invoke general international law, are buttressed by their proponents' interpretation of Article 2(2) of the Fourth Geneva Convention.<sup>38</sup> Article 2(2) provides that "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." In the view of those who claim that the Convention is not applicable *de jure* in the West Bank, the reference to the territory of a high contracting party means that for an occupation to come into being, the territory must have already belonged to an ousted state.

In my opinion, this is not what paragraph 2 of Article 2 means, and moreover, it is not relevant to the situation of the West Bank. Rather, the occupation of the West Bank is governed by Article 2(1), which provides in relevant part that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." In the *Wall* Advisory Opinion, the International Court of Justice made clear that under customary international law, the territory situated between the Green Line (1949 Armistice line) and the former eastern boundary of Palestine under the Mandate is occupied territory in which Israel has the status of occupying power.<sup>39</sup>

As Professor Roberts observes, paragraph 2 of Article 2 applies *only* to occupations not opposed militarily, such as the occupations of Denmark in 1940 and Bohemia and Moravia just before World War II.<sup>40</sup> In my view, the reference to the territory of a high contracting party is factual and descriptive and is not meant to make a judgment on the legal entitlements to the territory concerned. In other words, I believe that Article 2(2) does not differ from Article 42 of the Hague Convention No. IV, which defines territory as occupied when it is actually placed under the authority of a hostile army, without any reference to the

<sup>36</sup> Blum, *supra* note 30, at 293; Shamgar, *Observance of International Law*, *supra* note 31, at 265–66; Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government: The Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS* 13, 32–43 (Meir Shamgar ed., 1982) [hereinafter Shamgar, *Legal Concepts and Problems*].

<sup>37</sup> Shamgar, *Legal Concepts and Problems*, *supra* note 36, at 42–43.

<sup>38</sup> *Id.* at 37–40.

<sup>39</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, *supra* note 28, para. 78.

<sup>40</sup> Adam Roberts, *What Is a Military Occupation?*, *BRIT. Y.B. INT'L L.* 249, 253 (1984); *see also* *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, *supra* note 28, para. 95 ("The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties."); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 104, para. 286 (2016) [hereinafter 2016 COMMENTARY I]. References to the general clauses of the Geneva Conventions draw on the 2016 COMMENTARY I to the First Geneva Convention.



legal status of the occupied territory. A hostile army in this context means, of course, the armed forces of Israel. Article 43 of the Hague Convention No. IV speaks of “[t]he authority of the legitimate power having in fact passed into the hands of the occupant. . . .” Jordan would certainly be considered as the legitimate power, even under the Armistice Agreement of April 3, 1949.<sup>41</sup> Moreover, the Supreme Court has acknowledged the applicability of the Hague Convention No. IV, as customary law, to the West Bank.<sup>42</sup>

Justice Shamgar supports an interpretation whereby occupations are not covered by paragraph 1, but only by paragraph 2 of Article 2.<sup>43</sup> With respect, I find it difficult to reconcile such an interpretation with the inclusion of the word “also” in paragraph 2, suggesting that the two paragraphs are complementary, not disjunctive. Moreover, his interpretation is in conflict with the 1958 ICRC Commentary, which states that paragraph 2

does not refer to cases in which the territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph refers only to cases where the occupation has taken place without a declaration of war and without hostilities. . . .<sup>44</sup>

The 2016 ICRC Commentary is even clearer: Paragraph 2 “complements paragraph 1 of Article 2, which covers situations of occupation resulting from hostilities between States.”<sup>45</sup>

It has never been disputed that the West Bank has been invaded and occupied in hostilities that were part of an international armed conflict between sovereign states, and any invocation of paragraph 2 to buttress the Israeli government’s argument against the West Bank becoming an occupied territory to which the Convention is applicable is, in my view, fundamentally flawed. As Professor Roberts rightly insists,<sup>46</sup> it is the first paragraph of Article 2 that applies in cases of belligerent occupation. That Article only requires an armed conflict between contracting parties, not the existence of a legitimate sovereign.

Notably, the 2016 ICRC Commentary concerning Article 2 makes a *renvoi* to Article 42 of the Hague Convention No. IV:

[T]he applicability of the relevant norms of the Conventions is predicated on the definition of occupation laid down in Article 42 of the Hague Regulations. . . . As stipulated [in Article 154 of the Convention], the Fourth Convention is supplementary to the Hague Regulations. . . . [T]he Fourth Convention builds on the Hague Regulations but does not replace them for the purposes of defining the notion of occupation.<sup>47</sup>

Significantly, the Commentary rejects the notion that the Fourth Geneva Convention applies only to territories over which sovereignty has been clearly recognized:

<sup>41</sup> Jordan Kingdom-Israel: General Armistice Agreement, Rhodes, Apr. 3, 1949.

<sup>42</sup> See, e.g., HCJ 393/82, Jam’iat Iscan v. Commander of the IDF in Judea and Samaria, 37(4) PD 785, 792, para. 11 (1983) (Isr.).

<sup>43</sup> Shamgar, *Legal Concepts and Problems*, *supra* note 36, at 38–40.

<sup>44</sup> 1958 COMMENTARY IV, *supra* note 21, at 21.

<sup>45</sup> 2016 COMMENTARY I, *supra* note 40, at 69, para. 193.

<sup>46</sup> Roberts, *supra* note 40, at 253.

<sup>47</sup> 2016 COMMENTARY I, *supra* note 40, at 106–07, para. 296. Article 42 of the Hague Convention No. IV defines territory as occupied when it is actually placed under the authority of the hostile army, without any reference to the legal status of the occupied territory.

Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory. It does not matter who the territory was taken from. The occupied population may not be denied the protection afforded to it because of disputes between belligerents regarding sovereignty over the territory concerned.<sup>48</sup>

The Commentary concludes with a statement that has a very special resonance for the situation of the West Bank:

Any other interpretation would lead to a result that is unreasonable as the applicability of the law of occupation would depend on the invading State's subjective considerations. It would suffice for that State to invoke the controversial international status of the territory in question in order to deny that the areas in question are occupied territory and thus evade its responsibilities under the law of occupation.<sup>49</sup>

It is true that the Commentaries to the Geneva Conventions are not binding on states parties, but since the publication of the Pictet Commentaries, they have been regarded as authentic or authoritative interpretations of the Conventions' text and have been widely used by states parties, including by Israel itself (though, at times, rather cavalierly, such as Israel's interpretation with regard to Article 49(6) of the Fourth Geneva Convention).

Obviously, accepting that the Fourth Geneva Convention requires that an ousted state's sovereignty over occupied territory be established would mean that the Convention would have no *de jure* applicability in all cases where sovereignty or title to the territory are contested. In such circumstances, what would prevent every conquering state from contesting the sovereignty of every defeated state, even where no legitimate doubts about that sovereignty arise? Such a result would undermine the purpose and endanger the viability of one of the most important, if not the most important, humanitarian convention.

#### *Hague Convention No. IV*

Some contemporary followers of Blum-Shamgar go even further than the thesis outlined above. Thus, the Levy Commission's 2012 Report on the Legal Status of Building in Judea and Samaria asserts that "Israel has had every right to claim sovereignty over these territories, as maintained by all Israeli governments."<sup>50</sup> The Regulation Bill passed by the Knesset on February 6, 2017 would authorize, under certain conditions, the expropriation of even private Palestinian property on the West Bank, purportedly to legalize construction on private Arab land of Israeli settlements, in violation of the Hague Convention No. IV.<sup>51</sup> Whether the law survives an eventual Supreme Court scrutiny

<sup>48</sup> 2016 COMMENTARY I, *supra* note 40, at 115, para. 324.

<sup>49</sup> *Id.*, para. 327.

<sup>50</sup> E.E. Levy, Tehiya Shapira, Alan Baker (the Levy Commission), *The Levy Commission Report on the Legal Status of Building in Judea and Samaria* 12–13, para. 9 (June 21, 2012), translation provided by Regavim, available at <http://www.regavim.org/levy-report-translated-into-english> [hereinafter The Levy Commission Report].

<sup>51</sup> Regulation of Settlement in Judea and Samaria Law, *supra* note 32, Art. 3. Yael Ronen and Yuval Shany write: "Article 46 of the Hague Regulations not only expressly prohibits confiscation, but also obligates the occupant to respect private property. While this does not preclude the imposition of limitations on the right, such limitations must meet, according to the jurisprudence of the Israeli Supreme Court, tests of necessity and proportionality. Discriminatory legislation which, *in effect*, authorizes the taking of land only from residents of the occupied territory for the benefit of nationals of the occupant (Article 1 of the Regulation Bill states that its purpose is 'to



or not, its passage has been deemed a sign of assertiveness of the pro-settlements movement.<sup>52</sup>

The Hague Convention No. IV contains an important chapter on occupation. It is to be noted that the Nuremberg tribunals have recognized the substantive provisions of this Convention as declaratory of customary international law.<sup>53</sup> Indeed, so did the Israeli Supreme Court, which has also recognized the applicability of the Hague Convention No. IV as customary law to the West Bank.<sup>54</sup> This conclusion appears not to have been directly challenged by successive Israeli governments, although such applicability can only be understood in the context of belligerent occupation, and there is thus a clear contradiction between that conclusion and Israel's position questioning the status of belligerent occupation under the Fourth Geneva Convention.

Israel's acceptance, albeit ambivalent,<sup>55</sup> of the applicability of the Hague Convention No. IV may perhaps be explained by the fact that the Convention defines territory as occupied when it is actually placed under the authority of the hostile army,<sup>56</sup> avoiding any reference to the legal status or sovereignty of the occupied territory. This notwithstanding, the Hague Convention No. IV contains several provisions of particular importance for the West Bank.

First, there is the status quo provision in Article 43, which requires respect, unless absolutely prevented, for the laws in force in the country. Does the long duration of the occupation of the West Bank<sup>57</sup> make respect of this provision impractical? In my view, practical solutions must work within the framework of the governing law. I note that Article 43 of the Hague Convention No. IV establishes no maximum time for its temporal applicability.<sup>58</sup>

Then there is the requirement of respect for private property in Article 46, which has been supported by the Supreme Court.<sup>59</sup> Nevertheless, encroachments on private land have been reported.<sup>60</sup> Expropriation of private property on discriminatory grounds constitutes, of course, a violation of fundamental human rights and humanitarian law, which, in appropriate circumstances, may trigger the responsibility of those involved under international criminal law.<sup>61</sup>

regulate settlement in Judea and Samaria and enable the continuation of its establishment and development') does not plausibly meet such requirements." *Supra* note 32.

<sup>52</sup> Fisher, *supra* note 32 (reporting that "Israel's Parliament passed a provocative law late Monday that would retroactively legalize Jewish settlements on privately owned Palestinian land, pressing ahead with a statement of right-wing assertiveness despite the likelihood that the country's high court will nullify the legislation.").

<sup>53</sup> MERON, *supra* note 34, at 10.

<sup>54</sup> Jam'iat Iscan v. Commander of the IDF in Judea and Samaria, *supra* note 42, para. 11.

<sup>55</sup> Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 63 (1990).

<sup>56</sup> Hague Convention No. IV, *supra* note 15, Art. 42.

<sup>57</sup> See generally David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 219–22 (2012); Roberts, *supra* note 55; see also Jam'iat Iscan v. Commander of the IDF in Judea and Samaria, *supra* note 42, para. 22.

<sup>58</sup> This provision should be read together with Article 6(3) of the Fourth Geneva Convention, which provides that the occupying power shall be bound for the duration of the occupation by most of the substantive provisions of the Convention (thus including the Convention's general clauses as well as Articles 4 and 49).

<sup>59</sup> Ronen & Shany, *supra* note 32.

<sup>60</sup> B'Tselem, *Expel and Exploit: The Israeli Practice of Taking Over Rural Palestinian Land* 14 (Dec. 2016), at <http://www.btselem.org/publications> (documenting the use of privately owned land for the construction of a road to serve settlers' interests); *id.* at 18 (documenting the cultivation of plots of privately owned Palestinian land by a number of settlements).

<sup>61</sup> Prosecutor v. Blaškić, *supra* note 35, paras. 144–49.

Significantly, Article 56 provides that the property of municipalities, and that of institutions dedicated to religion, charity and education, and arts and sciences, even when state property, shall be treated as private property.

Equally, if not more, important are the Convention's provisions on public property. Thus, Article 55 provides that the occupying state must safeguard and administer real estate belonging to the hostile state in accordance with the rules of usufruct.<sup>62</sup> To allow such property to be massively used for Jewish settlements constitutes a violation of that Article, not to mention the fact that it gives rise to broader implications for the human rights of the Arab population.

In conclusion, Israel has taken liberties with the provisions of the Hague Convention No. IV, thereby frustrating the Convention's primary role as a status quo instrument designed to protect the population of occupied territories.

### III. THE FOURTH GENEVA CONVENTION AS A PEOPLE-ORIENTED CONVENTION

As I have set forth above, theories as to the nonapplicability *de jure* of the Fourth Geneva Convention to the West Bank often rest on what I respectfully consider to be an erroneous interpretation of Article 2. But those who argue for the nonapplicability *de jure* of the Fourth Geneva Convention to the West Bank on the ground of the disputed character of the territory also, and importantly, disregard the character of the Geneva Convention as a humanitarian convention *par excellence*, i.e., a convention that is not concerned with legal or formal claims to a territory, but that has as its principal object and purpose the protection of the civilian population of occupied territories.

The Vienna Convention on the Law of Treaties clearly recognizes the special character of such conventions when it speaks of "provisions relating to the protection of the human person contained in treaties of a humanitarian character."<sup>63</sup> The Fourth Geneva Convention not

<sup>62</sup> On the notion of "usufruct," see U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL, para. 11.18.5.2 (June 2015), available at [archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf](https://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf) ("The term usufruct means literally 'to use the fruit.' The Occupying Power may use and enjoy the benefits of public real (immovable) property belonging to an enemy State, but does not have the right of sale or unqualified use of such property. As administrator or usufructuary, the Occupying Power should not exercise its rights in such a wasteful and negligent manner as seriously to impair the property's value. The Occupying Power may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war."); see also Human Rights Watch, *Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights* 22 (Jan. 19, 2016), at <https://www.hrw.org/report/2016/01/19/occupation-inc/how-settlement-businesses-contribute-israels-violations-palestinian> [hereinafter Human Rights Watch, *Occupation, Inc.*] ("In almost all cases, settlements entail an additional international humanitarian law violation: Israel's confiscation of Palestinian land and other resources in violation of the Hague Regulations of 1907. Article 55 of the Hague Regulations makes public resources in occupied territory, including land, subject to the rules of usufruct. A generally accepted legal interpretation of these rules is that 'the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the [occupied] population.'"); Iain Scobbie, *H<sub>2</sub>O After Oslo II: Legal Aspects of Water in the Occupied Territories*, 8 PALESTINE Y.B. INT'L L. 79, 92 (1995) ("The doctrine of usufruct is derived from Roman law, and may be defined as the right to enjoy and take the fruits of another's property, but not to destroy it or fundamentally alter its character. Some implications of the doctrine for the purposes of Article 55 are clear: while the occupant must respect the substance or capital of publicly owned immovable property, it also has the right to the proceeds or produce the property provides. Accordingly, the occupant may lease or use State buildings, sell or consume the crops grown on public land, and fell and sell the timber of State forests. On the other hand, the doctrine of usufruct prohibits the destruction of publicly owned immovable property."); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 76–77, 81–82 (2012).

<sup>63</sup> Vienna Convention on the Law of Treaties, Art. 60(5), May 23, 1969, 1155 UNTS 331 [hereinafter Vienna Convention on the Law of Treaties].

only creates a system of individual rights, it also provides for their inalienability.<sup>64</sup> Throughout, it states the primacy of individual rights.<sup>65</sup> Nowhere does it even hint at the subjection of such rights to questions pertaining to title to territory.

The humanitarian character of the Convention is, of course, widely recognized and practically never contested. As Stephen Boyd observed early on, “the Fourth Geneva Convention was intended to be, and should be interpreted as, a people-oriented Convention, and not a territory-oriented Convention.”<sup>66</sup> And in his masterful article on occupation, Professor Roberts wrote that “the Convention embodies important general rules for the protection of civilians from a foreign military power in whose hands they are, and these rules should be faithfully observed irrespective of whether the situation is designated as an ‘occupation’ or as something else.”<sup>67</sup>

Adopted in the aftermath of the atrocities committed against civilians in World War II, the Fourth Geneva Convention establishes a new balance between the rights of the occupant and the rights of the population of the occupied country. If the Hague Convention No. IV established important limitations on the occupier’s permissible activities, the Fourth Geneva Convention obligates the occupier to assume active responsibility for the welfare of the population under its control. Indeed, the Fourth Geneva Convention contains detailed provisions on the protection to be afforded to civilians—aliens, general population, vulnerable groups such as children and women, and internees—in occupied territories,<sup>68</sup> and it notably does so by reference to individual “rights.”

I would note in this respect that while even the early Geneva Conventions conferred protections on individuals, as well as on states, whether those protections belonged to the contracting states or to individuals themselves was unclear at best. The treatment to which those persons were entitled was not necessarily seen as creating a body of rights. The 1929 POW Convention paved the way for recognition of individual rights by using the term “right” in several provisions.<sup>69</sup> It was not until the 1949 Geneva Conventions, however, that “the existence of rights conferred on protected persons was affirmed”<sup>70</sup> through several key provisions.<sup>71</sup>

<sup>64</sup> MERON, *supra* note 34, at 38.

<sup>65</sup> See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Arts. 7, 8, 27, 38, Aug. 12, 1949, 75 UNTS 287 [hereinafter Fourth Geneva Convention].

<sup>66</sup> Stephen Boyd, *The Applicability of International Law to the Occupied Territories*, 1 ISR. Y.B. HUM. RTS. 258, 260 (1971).

<sup>67</sup> Roberts, *supra* note 40, at 279.

<sup>68</sup> MERON, *supra* note 34, at 6.

<sup>69</sup> See, e.g., Convention Relative to the Treatment of Prisoners of War, Geneva, Arts. 42, 62, 64, July 27, 1929, 118 LNTS 343.

<sup>70</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 82 (Jean S. Pictet ed., 1952).

<sup>71</sup> See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Arts. 6, 7, 40, Aug. 12, 1949, 75 UNTS 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Seas, Arts. 6, 7, Aug. 12, 1949, 75 UNTS 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Arts. 6, 7, 57, Aug. 12, 1949, 75 UNTS 135 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 65, Arts. 7, 8.

These provisions are of cardinal importance: they clarified that rights are granted to the protected persons themselves and they introduced into international humanitarian law an analogy to *jus cogens*, which is so central to human rights law. This analog in humanitarian law preceded by two decades the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties.<sup>72</sup>

According to common Article 6/6/6/7, agreements by which either states or individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect. Common Article 6/6/6/7 reads in part, in its Fourth Geneva Convention version: “No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.” Like *jus cogens*, this norm is supposed to bring about the nullity of the proscribed agreements. Unlike *jus cogens*, however, it derives from explicit provisions in the Geneva Conventions rather than from customary law itself, raising potential conflicts between the invalidity of a subsequent agreement and potential responsibility for violations of the Convention. Of course, most provisions of the Convention are declaratory of customary law and some rise to the level of *jus cogens*. Agreements restricting the rights of protected persons may thus in some cases violate the classic concept of *jus cogens*.<sup>73</sup>

The 1958 ICRC Commentary suggests that the provision also applies to agreements concluded after the close of hostilities or even independently of war.<sup>74</sup> It bears noting in this context that common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as that between Germany and the Vichy government, which, under pressure by the former, deprived French POWs of certain protections under the 1929 POW Convention.<sup>75</sup> States participating in the 1949 conference resolved not to leave the produce of their labor to “the mercy of modifications dictated by chance, events or under the pressure of war time circumstances.”<sup>76</sup>

Common Article 7/7/7/8 further provides: “[Protected Persons] may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.” The 2016 ICRC Commentary states that this Article is a safeguard so that a state could not excuse a failure to respect its obligations under the Geneva Conventions on the grounds that it has based its action on the will of the protected persons concerned.<sup>77</sup> The Commentary adds that adopting or being given the nationality of the detaining or occupying power may not deprive a protected person of the protection of the Conventions.<sup>78</sup>

I recognize that with regard to the implementation of projects such as building roads designed to serve the settlers, including bypassing Arab villages for security reasons, the argument is sometimes made that such projects would also serve the Palestinian population, and that some projects affecting the geographic nature of the West Bank may be compelled by the

<sup>72</sup> MERON, *supra* note 34, at 38.

<sup>73</sup> *Id.* at 38–40.

<sup>74</sup> 1958 COMMENTARY IV, *supra* note 21, at 70.

<sup>75</sup> MERON, *supra* note 34, at 39.

<sup>76</sup> 1958 COMMENTARY IV, *supra* note 21, at 71.

<sup>77</sup> 2016 COMMENTARY I, *supra* note 40, at 361, para. 988.

<sup>78</sup> *Id.* at 365, para. 998.

length of the occupation.<sup>79</sup> I would think that in such cases, a credible and transparent process to ensure that there is no detriment to the rights of the local population is necessary, at a minimum.

Furthermore, the ICRC Commentary states that the prohibition upon the renunciation of rights is absolute.<sup>80</sup> This prohibition was adopted in light of experience showing that persons may be pressured into making a particular choice, but that proving duress or pressure is difficult. The Geneva Conventions' use of the language of "rights," "privileges," "entitlements," or "claims"<sup>81</sup> only serves to reinforce the idea that such rights may not be waived by individuals or otherwise eliminated by states.

Article 4 of the Fourth Geneva Convention defines persons protected by the Convention 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." The ICRC Commentary observes that the expression "in the hands of" does not suggest that one has to be in enemy hands directly, and that the mere fact of being in the territory of a party to the conflict or in occupied territory implies that one is in the power of the occupier.<sup>82</sup> There is no question, as the Supreme Court has acknowledged on many occasions,<sup>83</sup> that members of the Arab population of the West Bank are persons protected by the Convention. Conversely, however, Jewish settlers on the West Bank, as citizens of the occupant, to whom they owe allegiance, are not protected persons. Any discrimination between the two groups can only be justified when the Arab population, as constituting protected persons, benefits from additional rights accorded by the Convention. In reality, however, it is the Arab population that is subjected to discrimination.<sup>84</sup>

<sup>79</sup> Kretzmer, *supra* note 57, at 220.

<sup>80</sup> 2016 COMMENTARY I, *supra* note 40, at 362, para. 990.

<sup>81</sup> See, e.g., First Geneva Convention, *supra* note 71, Arts. 6, 7, 40; Second Geneva Convention, *supra* note 71, Art. 42; Third Geneva Convention, *supra* note 71, Arts. 33, 68, 105; Fourth Geneva Convention, *supra* note 65, Arts. 5, 20.

<sup>82</sup> 1958 COMMENTARY IV, *supra* note 21, at 47.

<sup>83</sup> See, e.g., HCJ 785/87, Afu et al. v. Commander of IDF Forces in the Judea and Samaria et al., 42(2) PD, para. 106 (1988) (Isr.), *discussed in* Kretzmer, *supra* note 57, at 215.

<sup>84</sup> U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Israel 2015 Human Rights Report 108 (2015), at [https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=252929&year=2015#wrapper](https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=252929&year=2015#wrapper) ("Many NGOs alleged Israeli actions in the West Bank and Gaza amounted to racial and cultural discrimination, citing legal differences between the treatment of Palestinians and Jewish settlers in the West Bank."); *id.* at 116 ("Access to social and commercial services in Israeli settlements in the West Bank, including housing, education, and health care, was available only to Israelis. Israeli officials discriminated against Palestinians in the West Bank and Jerusalem regarding access to employment and legal housing by denying Palestinians access to registration paperwork. In both the West Bank and Jerusalem, Israeli authorities often placed insurmountable obstacles in the way of Palestinian applicants for construction permits, including the requirement they document land ownership in the absence of a uniform post-1967 land registration process, high application fees, and requirements that new housing be connected to often unavailable municipal works."); see also Human Rights Watch, *Occupation, Inc.*, *supra* note 62, at 2 ("Israel's settlement project violates international human rights law, in particular, Israel's discriminatory policies against Palestinians that govern virtually every aspect of life in the area of the West Bank under Israel's exclusive control, known as Area C, and that forcibly displace Palestinians while encouraging the growth of Jewish settlements."); *id.* at 6 ("Israel's confiscation of land for settlements and settlement businesses violates international law, regardless of whether the land was previously privately held, 'absentee land' or so-called 'state land.' Businesses operating on these unlawfully confiscated lands are inextricably tied to the ongoing abuses perpetuated by such confiscations."); see generally Human Rights Watch, *Separate and Unequal: Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories* (Dec. 2010), at

I now turn to Article 47 of the Fourth Geneva Convention, entitled “Inviolability of Rights” in the ICRC Commentary, which states that protected persons in the 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 a 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.<sup>85</sup>

The ICRC Commentary states that the text in question is “of an essentially humanitarian character; its object is to safeguard human beings. . . .”<sup>86</sup> Changes introduced by the occupying power in the institutions or government of the occupied territory must not lead to protected persons being deprived of their rights and safeguards.

This review of the provisions of the Fourth Geneva Convention leads me to a clear conclusion that neither agreements nor unilateral measures, such as the denial of the applicability of the Convention, may justify any deprivation of rights of the protected persons under the Convention. Not all would agree, however.

Then Attorney-General Shamgar himself recognized that “[h]umanitarian law concerns itself essentially with human beings in distress and victims of war, not States or their special interests,”<sup>87</sup> which led him, however, only to support the government’s position to act “*de facto* in accordance with the humanitarian provisions of the Convention.”<sup>88</sup> With regard to both the Hague and Geneva Conventions, he argued that the rule of law means *de facto* observance of their humanitarian rules.<sup>89</sup>

Nevertheless, he had no difficulty in denying the applicability of Article 49 of the Fourth Geneva Convention prohibiting deportations—a humanitarian provision *par excellence*.<sup>90</sup> Article 49(1) of the Convention is, of course, categorical and is not made subject to any exception whatsoever. Moreover, this Article reflects a norm of customary law which Israel is, in my view, obliged to apply in occupied territories.<sup>91</sup> Going even further in the *Afu* case, then Chief Justice Shamgar held that, while Article 49(1) could be interpreted in two different ways, “the Court should adopt the interpretation that is least restrictive of the state’s sovereignty.”<sup>92</sup> Professor Kretzmer points out correctly that such a principle of interpretation is not mentioned in the Vienna Convention on the Law of Treaties and is “totally out of tune with fundamental principles in interpretation of international conventions that deal with human rights or humanitarian law. . . .”<sup>93</sup>

<https://www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied>.

<sup>85</sup> Fourth Geneva Convention, *supra* note 65, Art. 47; 1958 COMMENTARY IV, *supra* note 21, at 272.

<sup>86</sup> 1958 COMMENTARY IV, *supra* note 21, at 274.

<sup>87</sup> Shamgar, *Observance of International Law*, *supra* note 31, at 263.

<sup>88</sup> *Id.* at 266.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 272.

<sup>91</sup> THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 48–49 (1989).

<sup>92</sup> See Kretzmer, *supra* note 57, at 215; *Afu v. Commander of IDF Forces in the Judea and Samaria*, *supra* note 83, discussed in Kretzmer, *supra* note 57, at 215.

<sup>93</sup> Kretzmer, *supra* note 57, at 215.



At first blush, the cherry-picking position whereby Israel agrees to apply *de facto* humanitarian provisions of the Convention might appear to offer some pragmatic advantages and represent an improvement over a total rejection of the Convention both *de jure* and *de facto*. Moreover, I recognize that I am addressing an opaque subject, on which information is not easily obtainable. This opacity is made worse by the reluctance of Israel to divulge in public the list of the Fourth Geneva Convention's humanitarian provisions which it is prepared to apply. However, I find unacceptable a *de facto* application of some, ill-defined provisions of the Convention.

First, the compatibility of such an *à la carte* approach to international law is questionable. The principle of *pacta sunt servanda* means that treaties are binding on states that have ratified them as a matter of law, not of discretion, and that treaties are binding in whole, not in part. Subject to customary law and the provisions of the Vienna Convention on the Law of Treaties, states may be able to exclude by reservations some provisions of treaties, but Israel has ratified the Convention without any relevant reservations. What is more, the Geneva Conventions have, of course, their own robust version of the principle of *pacta sunt servanda* in common Article 1, which reads: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The related Commentary explains that "the words 'in all circumstances' mean that as soon that one of the conditions of application for which Article 2 provides, is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety."<sup>94</sup>

Second, the *de facto* formula purports to give an unrestricted, and thus potentially arbitrary, discretion to Israel as to which provisions to apply in a given case as humanitarian. International law does not allow for such unfettered discretion. Some provisions that the government of Israel has refused to apply, such as the provision of Article 49(1) prohibiting deportations, are binding on Israel as a matter of both conventional and customary law.

I thus fully agree with Professor Roberts that "formal applicability versus *de facto* applicability is not always a distinction without a difference."<sup>95</sup> This is because Israel has never clarified whether the humanitarian provisions of the Convention encompass all of the provisions of the Convention, or only those that Israel chooses to apply on the basis of undefined criteria. Obviously, Israel's policy clearly supports the latter approach. The vagueness of this "commitment" makes it fundamentally flawed.

Finally, the government's commitment to apply the humanitarian provisions of the Convention has made it easier for the Israeli Supreme Court to avoid ruling on the duty of Israel to apply the Convention *in toto*.<sup>96</sup> A prominent example of such an evasion, which appears frequently in the Supreme Court's jurisprudence, is the case of *Gaza Coast Regional Council v. Knesset*,<sup>97</sup> wherein the Court alluded to the dispute about the applicability of the Fourth Geneva Convention, but opted not to address it because of the position of the government, as stated to the Court, that it was applying the Convention's humanitarian provisions.

<sup>94</sup> 1958 COMMENTARY IV, *supra* note 21, at 16.

<sup>95</sup> Roberts, *supra* note 40, at 283.

<sup>96</sup> HCJ 1661/05, *Gaza Coast Regional Council v. Knesset*, PD 59(2) 481 (2005) (Isr.).

<sup>97</sup> *Id.* at 517.

## IV. LEGALITY OF SETTLEMENTS

In my Opinion of September 14, 1967, I addressed the question of the legality of the settlements in light of the applicability of the Fourth Geneva Convention, still persistently questioned by the proponents of settlements, and stated that the prohibition upon the transfer of the population of the occupant to the occupied territory is categorical and not conditioned upon the purposes or motives of the transfer.<sup>98</sup> I would like to look at this latter point again, focusing, once more, on the text of the Convention itself.

The relevant provision of the Fourth Geneva Convention is Article 49(6), which reads: “The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” The proponents of the settlements’ legality often invoke the following statement of the legislative history of Article 49(6), contained in the 1958 ICRC Commentary, to support their position:<sup>99</sup> “It is intended 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.”<sup>100</sup> They argue that this text suggests a state-organized or forced transfer of population, in contrast to the Israeli settlers, who, the argument goes, have moved voluntarily, hence making the text irrelevant to the settlements.<sup>101</sup> Thus, the 2012 Levy Commission Report on the Legal Consequences of Building in Judea and Samaria asserts: “[T]he predominant view appears to be that . . . article [49] was indeed intended to address the harsh reality dictated by certain countries during World War II when portions of their populations were forcibly deported and transferred into the territories they seized. . . .”<sup>102</sup>

The official website of the Israeli Ministry of Foreign Affairs makes the same point:

Quite apart from the question of whether the Fourth Geneva Convention applies *de jure* to territory such as the West Bank over which there was no previous legitimate sovereign, the case of Jews voluntarily establishing homes and communities in their ancient homeland . . . does not match the kind of forced population transfers contemplated by Article 49(6).<sup>103</sup>

The idea of force was quite logically used in Article 49(1), which concerns the deportation of the population of an occupied territory. However, to graft the requirement of force onto Article 49(6), which concerns the occupant’s own population, makes little sense and is anchored in no authority.<sup>104</sup> Paragraph 1 is not a *chapeau* provision for the entire Article.

<sup>98</sup> GORENBERG, *supra* note 7, at 101.

<sup>99</sup> See, e.g., The Levy Commission Report, *supra* note 50, para. 5; see also Shamgar, *Observance of International Law*, *supra* note 31, at 272–73.

<sup>100</sup> 1958 COMMENTARY IV, *supra* note 21, at 283.

<sup>101</sup> See BENVENISTI, *supra* note 62, at 240.

<sup>102</sup> The Levy Commission Report, *supra* note 50, para. 5.

<sup>103</sup> Israel Ministry of Foreign Affairs, Israeli Settlements and International Law (Nov. 30, 2015), at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>.

<sup>104</sup> BENVENISTI, *supra* note 62, at 240 (“The settlement policy has been criticized as a breach of international law by the ICJ, the Security Council, the ICRC, and various countries and commentators. On the other hand, an Israeli interpretation of this Article asserted that the settlements did not contravene the GCIV since ‘Arab inhabitants have not been displaced by Israeli settlements,’ and that the Article ‘refers to State actions by which the government in control transfers parts of its population to the territories concerned. This cannot be construed to cover the voluntary movement of individuals . . . not as a result of State transfer but of their own volition and as an expression of their personal choice.’ This interpretation is doubtful, since the purpose of the Article

While paragraphs 1 through 5 of Article 49 concern compulsory movement of protected persons from the occupied territory, paragraph 6 is the only paragraph of Article 49 that deals with the population of the occupant, not of protected persons, and with movement of population from the territory of the occupant to the occupied territory. Movement of population of the occupant is, of course, unlikely to be compulsory or forced. It was therefore deliberate that the word “forcible” was not included in paragraph 6. Indeed, the ICRC Commentary suggests that it would have been more logical to make paragraph 6 into a provision separate from the rest of Article 49, so that the entire, remaining Article would have dealt with “the compulsory movement of protected persons from occupied territory.”<sup>105</sup>

In the *Wall* Advisory Opinion, the International Court of Justice clearly rejected the argument that Article 49(6) applies only to forcible transfers or movement: “[Article 49(6)] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”<sup>106</sup> The Court went on to explain: “In this respect, the information provided to the Court shows that . . . Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6. . . .”<sup>107</sup>

It is to be noted that Article 49(6), in contrast to Article 49(1), makes no reference to a forcible transfer of the occupant’s population to the occupied territory and that the claim of force is anchored solely in attempts to distinguish between the situations that gave rise to Article 49(6) according to the 1958 ICRC Commentary and those pertaining to the settlements on the West Bank. In this respect, I am not persuaded that *all* the German citizens who moved East during World War II were forced to move, rather than being attracted by tracts of land and other benefits offered by the Nazi authorities. And while it is true that Jewish settlers have moved voluntarily to the West Bank, this has happened only with massive state encouragement, organization, and material and budgetary incentives, not to mention heavy security protection and increasingly the construction of bypass roads—as acknowledged by the Israeli Supreme Court in the case of *Gaza Coast Regional Council v. Knesset*,<sup>108</sup> narrowing the difference between the two situations.

must be to protect the interests of the occupied population—rather than the population of the occupant—and therefore whether the settlers move freely to the occupied territory is beside the point.”).

<sup>105</sup> 1958 COMMENTARY IV, *supra* note 21, at 283.

<sup>106</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, *supra* note 28, para. 120; BENVENISTI, *supra* note 62, at 240 (“While the Israeli authorities did not forcefully deport their nationals to the occupied areas, the movement was not merely voluntary: both the Israeli government and the military commanders were heavily involved in the settlements project.”).

<sup>107</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, *supra* note 28, para. 120. The movement of settlers into the West Bank is not *deus ex machina*, as proponents of settlements seem to suggest. In criticizing the ICJ’s statement on the illegality of settlements, Kontorovich suggests that “encouragement” of civilian settlers is, in itself, insufficient to bring the state into the purview of Article 49(6). See Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territories*, Northwestern University School of Law 11 (Northwestern Public Law Research Paper, No. 16–20, Sept. 7, 2016). As the text above indicates, the ICJ did not limit itself to “encouragement” and mentioned other actions as well. Moreover, in a separate proceeding, the Israeli Supreme Court itself cited a government submission to the Court whereby the establishment of settlements was described as dependent on government authorization, and on budgetary allocations. See *Gaza Coast Regional Council v. Knesset*, *supra* note 96, at 524. Even that statement, however, does not fully reflect the massive involvement by the government in promoting settlements.

<sup>108</sup> *Gaza Coast Regional Council v. Knesset*, *supra* note 96, at 524.

In any event, as the prohibition contained in Article 49(6) is clear, the provision should have been interpreted in good faith in accordance with the ordinary meaning of its terms, in its context and in the light of its object and purpose, as required by Article 31(1) of the Vienna Convention on the Law of Treaties. Recourse to supplementary means of interpretation, including the preparatory work of the treaty is therefore questionable.<sup>109</sup> Moreover, the humanitarian object of the Fourth Geneva Convention was surely not only to protect the civilian population against Nazi-type atrocities alone, but to provide for the broadest possible humanitarian protection of civilian population in other wars and occupations, with their ever-changing circumstances,<sup>110</sup> which certainly encompasses colonization of occupied territories. Thus, the text was to protect not the settlers, but the prior inhabitants.<sup>111</sup> I observe that violations of Article 49(6) are criminalized as war crimes in the Statute of the International Criminal Court,<sup>112</sup> which, notably, does not include a reference to a forced or forcible nature of the transfer.

Unfortunately, the Supreme Court has limited its role to insisting that settlements not be built on private land,<sup>113</sup> avoiding ruling on the legality of the use of public lands for settlements and proceeding without questioning whether Article 55 of the Hague Convention No. IV (the usufruct article) allows construction of settlements on public land. I agree with Professor Kretzmer, that “[w]hile [the Supreme Court] did not expressly grant legal imprimatur to the settlements, its very refusal to rule on the issue was certainly perceived as legitimization by omission.”<sup>114</sup> The Court preferred to view Article 49(6) as conventional, not customary, law and (as it had not been incorporated into national law) as nonjusticiable.<sup>115</sup>

## V. CONCLUSION

I recognize that Israel is, of course, not the only state to challenge or reject the application of the Fourth Geneva Convention to a particular situation. The applicability of the Convention has been contested in other situations as well, including—to mention just a few—in Kuwait by Iraq, and in East Timor by Indonesia. In Iraq, the United States and the United Kingdom have recognized the status of occupation,<sup>116</sup> but appear to have taken liberties with both the

<sup>109</sup> Vienna Convention on the Law of Treaties, *supra* note 63, Art. 31.

<sup>110</sup> Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348, 364 (1987).

<sup>111</sup> BENVENISTI, *supra* note 62, at 240.

<sup>112</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(viii), July 17, 1998, 2187 UNTS 90.

<sup>113</sup> HCJ 277/84, Ayreiv v. Appeals Committee et al., 40(2) PD, para. 9 (1986) (Isr.).

<sup>114</sup> Kretzmer, *supra* note 57, at 224.

<sup>115</sup> *See id.* at 224; HCJ 4481/91, Bargil et al. v. Government of Israel et al., 47(4) PD (1993) (Isr.), *discussed in* Kretzmer, *supra* note 57, at 214.

<sup>116</sup> *See* SC Res. 1483, at 2 (May 22, 2003) (addressing the situation between Iraq and Kuwait and recognizing “the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the ‘Authority’),” and paragraph 5 “*call[ing] upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”); SC Res. 1546, at 2 (June 8, 2004) (addressing the formation of a sovereign Interim Government of Iraq and noting “the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations”). In a letter by Colin J. Powell annexed to UN Security Council Resolution 1546, the then U.S. Secretary of State wrote: “In addition, the forces that make up the M[ultinational] F[orce] are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.”

Fourth Geneva Convention and the Hague Convention No. IV. It has been argued that they have failed to establish law, order and safety, and effective law enforcement, and that they have made far-reaching changes in the civil service.<sup>117</sup> Indeed, the elimination of police forces in Iraq has had lasting destabilizing consequences.<sup>118</sup>

Richard Baxter has noted that “[t]he first line of defense against international humanitarian law is to deny that it applies at all.”<sup>119</sup> And George Aldrich has observed that the refusal to apply the Geneva Conventions in situations where they should be applied is “often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted.”<sup>120</sup> As I have set forth above, such denials or refusals with respect to the application of international humanitarian law in the West Bank cannot, in my view, be accepted. Those of us who are committed to international law, and particularly to respect for international humanitarian law and the principles embodied therein, cannot remain silent when faced with such denials or self-serving interpretations.

But if the continuation of the settlement project on the West Bank has met with practically universal rejection by the international community, it is not just because of its illegality under the Fourth Geneva Convention or under international humanitarian law more generally. Nor is it only because, by preventing the establishment of a contiguous and viable Palestinian territory, the settlement project frustrates any prospect of serious negotiations aimed at a two-state solution, and thus of reconciliation between the Israelis and the Palestinians. It is also because of the growing perception that individual Palestinians’ human rights, as well as their rights under the Fourth Geneva Convention, are being violated and that the colonization of territories populated by other peoples can no longer be accepted in our time.

<sup>117</sup> David J. Scheffer, *Beyond Occupation Law*, 97 AJIL 842, 854–56 (2003); see also Knut Dörmann & Laurent Colassis, *International Humanitarian Law in the Iraq Conflict*, 47 GERMAN Y.B. INT’L L. 293, 305 (2004); Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT’L & COMP. L.Q. 27, 28 (2005).

<sup>118</sup> See Robert Weiler, *Eliminating Success During Eclipse II: An Examination of the Decision to Disband the Iraqi Military* 14–18 (Mar. 26, 2009) (Master’s Thesis, Marine Corps University).

<sup>119</sup> Richard Baxter, *Some Existing Problems of Humanitarian Law*, in THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974), cited in THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE 43 (1987).

<sup>120</sup> George Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL PROC. 141, 142 (1973).