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# The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*

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When demonstrations against Israel's occupation of the West Bank and Gaza erupted in Gaza in December 1987, and shortly thereafter spread to the West Bank, few perceived that what was in the making was a resistance quite unlike the sporadic "riots" that had aggravated Israeli-Palestinian relations since the Six Day War and the beginning of the occupation in 1967. By late February 1988, even the Israeli General Staff had adopted the Arabic word *intifada*,[1] the term preferred by the Palestinians themselves to define what was happening.[2] As Middle East expert Don Peretz wrote in the summer of 1988: "December 1987 may have been a Palestinian version of the 1916 'Easter Rising,' a revolt which opened a struggle that lasted years before its goals were approached."[3]

In the last year, however, the *intifada* has suffered at least temporary setback. An acknowledgment in November-December 1988 by the Palestine National Council (P.N.C.) and the Palestine Liberation Organization (P.L.O.) of Israel's right to exist and their simultaneous renunciation of anti-civilian terrorism[4] failed to bring about an Israeli government more responsive to Palestinian claims than the Likud Government currently in power. Accelerating Jewish emigration from the Soviet Union has put renewed pressure upon Israel to increase the pace and scale of Jewish settlement in East Jerusalem and throughout the occupied territories. In addition, Yasir Arafat's tilt towards Iraq following Saddam Hussein's invasion of Kuwait,[5] widely perceived outside the P.L.O. as an imprudent diplomatic move if not also a P.L.O. endorsement of aggressive force, has clearly weakened governmental and popular support for the Palestinian cause around the world. That this "pro-Iraqi" stance can be understood best as an expression

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1. From the Arabic verb "to shake loose."

2. Persons sympathetic to the "uprising" have seen it as the functional equivalent of a civil war relative to the whole of Palestine (Israel, the West Bank, and Gaza) or, alternatively, as a war of national liberation against a colonial oppressor, leading to the birth of a new Palestinian state. Critics have seen it as the outward manifestation of an unseen, generation-long battle between the P.L.O. and King Hussein of Jordan for control of the Palestine Arab nation.

3. Don Peretz, *Intifadeh: The Palestinian Uprising*, 66 FOREIGN AFF. 964, 980 (1988). The "Easter Rising" of 1916 crushed the last English illusion that Ireland could be pacified as a colony, yet the subsequent grant of sovereignty to the Irish people has not ended the struggle over the eventual status of the six northern counties, so-called Northern Ireland.

4. On November 15, 1988, in Algiers, the P.N.C., upon proclaiming an independent State of Palestine, (*see* Palestine National Council's Declaration of Independence, in U.N. Doc. A/43/827-S/20278, Annex III (1988), *reprinted in* 27 INT'L L. MATS. 1668 (1988)), implicitly accepted the existence of Israel and a two-state solution to the Israeli-Palestinian problem by proposing an international conference on the Middle East on the basis of U.N. Security Council Resolutions 242 (Concerning Principles for a Just and Lasting Peace in the Middle East), U.N. Doc. S/INF/22/Rev. 2, at p. 8 (1967) and 338 (Concerning the October War), U.N. Doc. S/INF/29, at p. 10 (1973), each of which accepted Israel's right to exist (and for this reason were viewed with great suspicion by the P.L.O. for many years). The text of the P.N.C. resolution, relating to the acceptance of Israel's existence, affirmed:

> The necessity of holding an effective international conference concerning the Middle East issue and its essence, the Palestinian cause, under the auspices of the United Nations and with the participation of the permanent member states of the United Nations Security Council and all the parties to the struggle in the region, including the Palestine Liberation Organization, the sole legitimate representative of the Palestinian people, on an equal footing, and by considering that the international conference will be held on the basis of United Nations Security Council Resolutions 242 and 338 and the assurance of the legitimate national rights of the Palestinian people and, first and foremost, their right to self-determination in application of the principles and provisions of the United Nations charter concerning [the] right of peoples to self-determination and the inadmissibility of seizing the lands of others by force or military invasion, and in accordance with the resolutions of the United Nations regarding the Palestinian and Arab territories that it [Israel] has occupied since 1967, including Arab Jerusalem.

*As quoted in* N.Y. Times, Nov. 17, 1988, at A8, col. 2 ("an unofficial translation from the Arabic by the United States Government"). The text of the clause on violence read:

> The Palestine National Council renews its commitment to the United Nations resolutions that affirm the right of peoples to resist foreign occupation, colonialism and racial discrimination and their rights to struggle for their independence. It again declares its rejection of terror in all its forms, including state terror, confirming its commitment to its previous resolutions in this regard, to the resolution of the Arab Summit in Algiers in 1988, United Nations resolutions 42/159 of 1967 and 61/40 of 1985, and to what appeared in the Cairo declaration issued on Nov. 7, 1985, in this regard.

*Id.* at col. 3. Subsequent clarifications by P.L.O. Chair Yasir Arafat relative to the existence of Israel made explicit what had been implicit and additionally reiterated the statement renouncing anti-civilian terrorism. *See* Steve Lohr, *Arafat Says PLO Accepted Israel*, N.Y. Times, Dec. 8, 1988, at A1, col. 1; *Statement by Arafat and Jews*, at A10, cols. 5–6. For a helpful summary of the nineteenth P.N.C. session in Algiers, see 35 KEESING'S RECORD OF WORLD EVENTS 36,438 (Jan. 1989).

5. *See Arab's Summit Meeting Off; Iraqi Units in Kuwait Dig In; Europe Bars Baghdad Oil: U.S. Voices Concern*, N.Y. Times, Aug. 5, 1990, at A1, col. 6.

of profound Palestinian frustration, betrayal, and despair seems not to have crossed the minds of many, at least not until the Al Aqsa Mosque/Temple Mount tragedy of last October 8, when twenty-one Palestinian demonstrators were killed and scores wounded by what the U.N. Security Council unanimously determined to be an excessive use of Israeli force.[6]

Of course, the overall situation in the region is volatile. Contradictory forces are at work. It therefore is impossible to predict whether the Palestinian resistance will continue to weaken or strengthen. For example, it is unclear as of this writing whether the Persian Gulf crisis will extend concern for the Iraqi occupation of Kuwait to the Israeli occupation of the West Bank and Gaza in an enduring way. Initially proposed by Saddam Hussein, such "linkage" of the issues was immediately widely dismissed, in the non-Arab world especially, as diversionary propaganda.[7] On the other hand, subtler, more influential currents released by the Gulf crisis may induce the international community (Western governments in particular) to acknowledge the importance to the future stability of the region and world of working effectively to end Israel's near quarter-century occupation of the West Bank and Gaza—and to do so in a manner that will display sensitivity to the widespread Arab belief, without giving in to the polemical insistence that Israel's invasion and occupation of the West Bank and Gaza is equivalent to Iraq's invasion and occupation of Kuwait, that the West (especially the United States) adheres to a double standard when it comes to the forceful occupation of a foreign territory and compliance with international law and United Nations authority.

We believe that ending Israel's occupation of the West Bank and Gaza comports not only with the future peace and stability of the Middle East and world, but, as well, with the requirements of international law and justice. While the events of the last year, including the P.L.O.'s expressed sympathy for Iraq during the 1990-91 Persian Gulf crisis, clearly portend *political* consequences for the Israeli-Palestinian conflict, they do not alter the objective *legal* assessment that can be made of that conflict. Whatever setbacks the cause of Palestinian self-determination may suffer over time and whatever expressions of

6. *See* U.N. Security Council Resolution 672, adopted unanimously by the Security Council on October 12, 1990, wherein the Council "[c]ondemns especially the acts of violence committed by the Israeli security forces . . . ," "[c]alls upon Israel . . . to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention, which is applicable to all the territories occupied by Israel since 1967," and "[r]equests . . . the Secretary General to send [an investigative] mission to the region . . . ," *as reprinted in* the N.Y. Times, Oct. 14, 1990, § 1, at 10, cols. 4–5. For related comment, see *infra* note 10.

7. *See Text of Iraqi's Demand for U.S. Withdrawal*, N.Y. Times, Aug. 20, 1990, at A6, col. 1; *U.S. to Call 40,000 Reserves to Support Saudi Trooplift; Rejects Iraqi Offer to Talk: Behind Bush's Hard Line*, N.Y. Times, Aug. 22, 1990, at A1, col. 4.





disillusionment and letdown may result as a consequence, there is a strong legal case to be made on behalf of the *intifada*, a case that is based on events that long preceded the current wider Middle East turmoil. It also is a case that, for the most part and though treated sympathetically in the professional literature, has been but dimly understood in the United States.[8]

## I. THE ISRAELI OCCUPATION AND INTERNATIONAL LAW

A useful place to begin is to ask why the Palestinian *intifada*, a new variant of mass civil resistance that is without precedent in the long history of the Israeli-Palestinian conflict, happened; why it has been so pervasive; and why, thus far, it has endured so long. What has led the Palestinians to so high a degree of unity and intensity?

There are some obvious candidates for explanation: (1) cramped cities and towns as well as refugee camps made worse by high birth rates and restrictions upon Arab urban and rural expansion; (2) squalid social and economic conditions exacerbated by declining employment opportunities (among the Palestinian youth especially), by confiscated natural and financial resources, and by a consequent dependency upon an increasingly colonizing Israeli economy; (3) draconian governmental practices that have resulted in stifled cultural and political expression, and swollen detention centers and jails; and (4) a lethal mixture of humiliation, frustration, and anger from years of foreign rule (Ottoman, British, Egyptian, and Jordanian as well as Israeli), abetted by a profound disillusionment about the will and capability of the outside world—including, perhaps most importantly, the outside Arab world—to provide a solution. Few of the total Palestinian population of the occupied territories have known anything other than these crabbed conditions. Almost none of the youth have known anything else.[9]

Perhaps less apparent, but no less an answer, because it fuels the *intifada* with that same sense of righteousness of which successful revolutions are made, is a conviction of profound legal as well as moral wrongdoing on Israel's part, a wrongdoing established not merely by Arab accusations but also by the minimum standards of an entire world community that slowly but steadily struggles to temper the conduct of war and otherwise limit human suffering. Civil resistance

8. For notable recent exceptions, see JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE (1990) and Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990). *See also* FRANCIS BOYLE, THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY, ch. 5 (1989).

9. For a vivid, depressing account by an Israeli of the realities and perceptions of various residents of the West Bank, including Jewish settlers, see DAVID GROSSMAN, THE YELLOW WIND (1988).

by almost the entire Palestinian population is seen to be justified—indeed mandated—by the long duration and especially the harshness of the Israeli occupation, an occupation that has included and continues to include large-scale, severe, and persistent violations of the law of belligerent occupation and systematic deprivations of fundamental human rights, perhaps most importantly the right of self-determination.

The perception of extensive Israeli violation is, we believe, a correct one. Numerous informed individuals, organizations, and governmental agencies—including, for example, the United Nations Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Populations of the Occupied Territories,[10] the United States Department of State, Al Haq/Law in the Service of Man,[11] Amnesty International, B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories),[12] the International Commission of Jurists,[13] the International Committee of the Red Cross, the National Lawyers Guild,[14] the Palestine Human Rights Center, the Phys-

10. Candor compels acknowledging that the work of the Special Committee has been highly controversial. According to many Israelis, the Committee was biased against Israel from the time of its founding and its investigative reports have been one-sided. *See, e.g.*, Tat-Aluf Dov Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980: THE LEGAL ASPECTS 285 (Meir Shamgar ed. 1982) [hereinafter "MILITARY GOVERNMENT"]. *See also* Richard L. Alderson, John W. Curtis, Robert J. Sutcliffe and Patrick J. Travers, *Protection of Human Rights in the Israeli-Occupied Territories*, 15 HARV. INT'L L.J. 470, 481–82 (1974). Yoram Dinstein has written that "Israel is averse to proposals that the legality of the measures taken by its military government in the occupied territories [should] be subjected to scrutiny by international organizations (especially the United Nations, which it regards as totally dominated by hostile countries) . . . ." Yoram Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 ISR. Y.B. HUM. RTS. 173, 174 (1988). A prominent recent demonstration of this Israeli viewpoint may be seen in Israel's denunciation of an October 12, 1990, U.N. Security Council resolution to investigate the October 8 deaths of 21 Palestinians at Al Aksa Mosque/Temple Mount (*see supra* note 6) and its declaration that, notwithstanding Israel's U.N. Charter obligations, it would not cooperate with such a mission. *See* N.Y. Times, Oct. 15, 1990, at A1, col. 6.

11. *See, e.g.*, AL-HAQ/LAW IN THE SERVICE OF MAN, BRIEFING PAPERS ON TWENTY YEARS OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA (1987). Al Haq/Law in the Service of Man is the West Bank affiliate of the International Commission of Jurists based in Geneva, Switzerland.

12. *See, e.g.*, B'TSELEM/THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, ANNUAL REPORT 1989: VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED TERRITORIES (1989); B'TSELEM/THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, THE MILITARY JUDICIAL SYSTEM IN THE WEST BANK (1989). B'Tselem, meaning "in the image of" (from *Genesis* 1:27), is a privately funded, Jerusalem-based organization founded in February 1989 by a group of well-known Israeli lawyers, intellectuals, journalists, and Knesset members to investigate and report independently on human rights violations in the occupied territories.

13. *See, e.g.*, JORDAN PAUST, GERHARD VON GLAHN & GÜNTER WORATSCH, INQUIRY INTO THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED WEST BANK AND GAZA (Int'l Comm'n Jurists, 1989).

14. *See, e.g.*, REPORT OF THE NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION, TREATMENT OF PALESTINIANS IN ISRAELI-OCCUPIED WEST BANK AND GAZA (1978).





icians for Human Rights,[15] the Swiss League for Human Rights, and the West Bank Data Base Project[16]—have abundantly and persuasively documented Israel's violation of the limited rights that the law of war assures an occupied people; and they have done the same, too, regarding Israel's failure to uphold the international human rights of the Palestinian people in general.[17] The settlement of more than 90,000 of Israel's Jewish citizens in the West Bank and Gaza as of June 1990 (plus more than 100,000 in East Jerusalem) and the establishment of approximately 140 settlements there; the refusal to repatriate thousands of Palestinians displaced during the 1967 fighting; the summary deportation of prominent Palestinian citizens from many walks of life (including lawyers "guilty" of attempting to safeguard Palestinian rights through official legal channels); systematic arbitrary arrests, detentions and the denial of procedural rights with respect to alleged security violations; the imposition of collective punishments, especially in the form of the destruction of family residences; and the mistreatment (including torture) of detainees—all these and other abusive policies and practices directed at the Palestinian population as a whole are a matter of record.[18] So too are the beatings, killings, and related

15. PHYSICIANS FOR HUMAN RIGHTS, THE CASUALTIES OF CONFLICT: MEDICAL CARE AND HUMAN RIGHTS IN THE WEST BANK AND GAZA STRIP (1988).

16. *See, e.g.*, MERON BENVENISTI, THE WEST BANK DATA BASE PROJECT 1987 REPORT (1987). The West Bank Data Base Project is a privately funded, Jerusalem-based organization founded in 1982 by Meron Benvenisti, an Israeli former Vice-Mayor of Jerusalem, to collect and catalogue data relative to Israeli policy in the West Bank. The publications of the Project have become a standard reference for persons concerned about human rights conditions in the West Bank.

17. *See also* JOOST HILTERMANN, ISRAEL'S DEPORTATION POLICY IN THE OCCUPIED WEST BANK AND GAZA (Al Haq/Law in the Service of Man, 1986); INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: THE WEST BANK AND GAZA 1967–1987 (Emma Playfair ed., forthcoming); EMMA PLAYFAIR, ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK (Al Haq/Law in the Service of Man, 1986); QUIGLEY, *supra* note 8; RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (1985); RAJA SHEHADEH & JONATHAN KUTTAB, THE WEST BANK AND THE RULE OF LAW (1980); THE LEGAL ASPECTS OF THE PALESTINE PROBLEM (H. Kochler ed. 1981); and the authorities cited in note 19, *infra*.

18. *See, e.g.*, the authorities cited in notes 11–17, *supra*, and 19, *infra*. *See also* Allegra A. Pacheco, *Occupying an Uprising: The Geneva Convention and the Israeli Administrative Detention Policy During the First Year of the Palestinian General Uprising*, 21 COLUM. HUM. RTS. L. REV. 515 (1990); Richard Drury & Robert Winn (with Michael O'Connor), The Economics of Occupation: Israeli Control Over Palestinian Agriculture in the West Bank (unpublished research project conducted under the auspices of the Orville Schell Center for International Human Rights, Yale Law School, May 25, 1990).

In addition, the United Nations Security Council, on January 5, 1988, about one month after the commencement of the *intifada*, voted *unanimously* to condemn as a violation of international law Israel's deportation of nine Palestinians from the West Bank and Gaza described by Israel as "leading activists and organizers involved in incitement and subversive activities on behalf of [the P.L.O.]." Significantly, the U.S. voted *for* the resolution, the first time it had voted to condemn Israeli policy since the annexation of the Golan Heights in 1981. *See* 34 KEESING'S RECORD OF WORLD EVENTS 35,858 (April 1988). *See also supra* note 6. Similarly, on February 8, 1988, the European Communities Council of (Foreign) Ministers, the only

deprivations resulting from Israel's "Iron Fist" policy, applied since August 1985 and conspicuous since the beginning of the *intifada* in December 1987 thanks to the once unrelenting TV camera and the testimony of such nongovernmental organizations as Al Haq/Law in the Service of Man, Amnesty International, B'Tselem/The Israeli Information Center for Human Rights in the Occupied Territories, the Physicians for Human Rights, and the National Lawyers Guild.[19] Also on record are the provocative justifications of cruel and repressive violence by such top Israeli leaders as Prime Minister Yitzhak Shamir and former Defense Minister Yitzhak Rabin.[20] An objective application of the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land ("Hague IV")[21] and the 1949 Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"),[22] the primary embodiment of the law that is applicable to this situation,[23] reinforce these findings. Further-

institution of the European Communities that directly represents the member governments, approved unanimously a resolution calling for an end to "repressive" measures by Israel and "deeply deplored the violation of human rights." *Id.* at 35,860.

19. *See, e.g.*, AL HAQ/LAW IN THE SERVICE OF MAN, PUNISHING A NATION: HUMAN RIGHTS VIOLATIONS DURING THE PALESTINIAN UPRISING, DECEMBER 1987–DECEMBER 1988 (1988); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES—THE MISUSE OF TEAR GAS BY ISRAELI ARMY PERSONNEL IN THE ISRAELI OCCUPIED TERRITORIES (1988); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES— EXCESSIVE FORCE: BEATINGS TO MAINTAIN LAW AND ORDER (1988); AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES—ADMINISTRATIVE DETENTION DURING THE PALESTINIAN INTIFADA (1989); B'TSELEM/THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, THE SYSTEM OF TAXATION IN THE WEST BANK AND THE GAZA STRIP: AS AN INSTRUMENT FOR THE ENFORCEMENT OF AUTHORITY DURING THE UPRISING (1990); B'TSELEM/THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, THE USE OF FIREARMS BY THE SECURITY FORCES IN THE OCCUPIED TERRITORIES (1990); LAWYERS COMMITTEE FOR HUMAN RIGHTS, AN EXAMINATION OF THE DETENTION OF HUMAN RIGHTS WORKERS AND LAWYERS FROM THE WEST BANK AND GAZA AND CONDITIONS OF DETENTION AT KETZIOT (1988); PHYSICIANS FOR HUMAN RIGHTS, HEALTH CARE IN DETENTION: A STUDY OF ISRAEL'S TREATMENT OF PALESTINIANS (1990); 1988 REPORT OF THE NATIONAL LAWYERS GUILD, INTERNATIONAL HUMAN RIGHTS LAW AND ISRAEL'S EFFORTS TO SUPPRESS THE PALESTINIAN UPRISING (1989).

20. *See, e.g.*, 34 KEESING'S RECORD OF WORLD EVENTS 35,859 (April 1988).

21. Done at The Hague, Oct. 18, 1907., 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 129 (B. Weston, R. Falk & A. D'Amato, 2d ed. 1990) [hereinafter "BASIC DOCUMENTS"]; THE LAWS OF ARMED CONFLICTS 63 (D. Schindler & J. Toman eds. 1988) [hereinafter "SCHINDLER & TOMAN"]; DOCUMENTS ON THE LAWS OF WAR 43 (A. Roberts & R. Guelff 1982) [hereinafter "ROBERTS & GUELFF"]; THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100 (J. Scott 3d ed. 1918).

22. Done at Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 170; ROBERTS & GUELFF, *supra* note 21, at 271; SCHINDLER & TOMAN, *supra* note 21 at 495.

23. Other pertinent agreements, some of the provisions of which are viewed as embodying customary international law, are the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977) ("Geneva Protocol I") and the Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the





more, these human rights violations in Israel and the Occupied Territories may be seen objectively to conflict with the international standards set by the 1978 Camp David Accords[24] and the United Nations Charter[25] along with the widely accepted customs and conventions comprising international human rights law generally.[26] Israeli

Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 (1977) ("Geneva Protocol II"). For convenient texts, see BASIC DOCUMENTS, *supra* note 8, at 230 and 247; ROBERTS & GUELFF, *supra* note 21, at 389 and 449; SCHINDLER & TOMAN, *supra* note 21 at 621 and 689. *See also* the Hague Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* ROBERTS & GUELFF at 340; SCHINDLER & TOMAN at 741.

24. A Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Egypt-Israel-United States, 78 STATE DEP'T BULL. 7 (Oct. 1978), *reprinted in* 17 I.L.M. 1463 (1978). The Camp David Accords contain many provisions for a "self-governing authority" in the West Bank and Gaza. At the time of their adoption at Camp David, however, they were strongly criticized by other Arab governments, the P.L.O., and the residents of the West Bank and Gaza, and accordingly never were implemented.

25. Done at San Francisco, June 26, 1945, 1976 Y.B.U.N. 1043, *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 16. *See especially* Articles 1(2) & (3), 55, and 56.

26. The Israeli Government has frequently voiced skepticism about the applicability of international human rights instruments in the occupied territories. *See*, for example, the memorandum of September 12, 1984 prepared by the Office of the Legal Adviser in the Israeli Foreign Ministry for, and contained in, ADAM ROBERTS, BOEL JORGENSEN & FRANK NEWMAN, ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION 80 (World University Service/Int'l Comm. Jurists, 1984) wherein the Office of the Legal Adviser contended that the so-called international bill of human rights—the Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 298; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 371, and the International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 376—does not apply to the Israeli-occupied territories because the "classical situation" of human rights law, concerning "the relationship between the 'citizen' and his government" does not obtain in the circumstance of foreign occupation. This position is at least implicitly undermined, however, by the Israeli assertion in the same memorandum that Israeli policy in the West Bank and Gaza was in accord with several other important international human rights instruments (including, questionably, the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* BASIC DOCUMENTS, *supra* note 8 at 364), thereby conceding that human rights law need not be thus restricted. In addition, international tribunals have affirmed on at least two occasions the applicability of international human rights customs and conventions in occupied territories. In its advisory opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, at 46, 55 and 57, the International Court of Justice did so implicitly; and in *Cyprus v. Turkey*, 1975 Y.B. EUR. CONV. ON HUM. RTS. 82 (Nos. 6780/74 and 6950/75, Decision of May 26, 1975) and 1978 *id.* at 100 (No. 8007/77, Decision of July 10, 1978), the European Commission of Human Rights did so explicitly. Finally, as Adam Roberts has astutely cautioned, "It is doubtful whether human rights law only applies in 'a classical situation' . . ." inasmuch as "[a] very strong case can be made for asserting the general applicability of human rights standards to military occupations . . . ." Roberts, *supra* note 8, at 72. Roberts cites, among others, ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982 (1985) who usefully observes, at 29, that "[t]he concept of human rights was taken into account in drafting the [1949] Geneva Conventions" and that therefore, "in certain areas not covered by [Geneva IV], such as economic rights . . . , the concept of human rights can serve to breathe new life into an otherwise

policies and practices over the last twenty-three years cannot convincingly be reconciled with these rules and standards of international law.[27] Indeed, by its severity and cumulative impact, the pattern of Israeli transgression appears to violate, with historic irony, even principles of criminal accountability laid down at Nuremberg in 1945 to establish a framework binding upon all governmental leadership.[28]

Predictably, the Israeli Government and international lawyers sympathetic to Israel argue against such allegations, usually at high levels of abstraction and often with artful ingenuity. Their arguments fall into two main clusters of contention: first, that the international law of war as embodied in Geneva IV does not apply to Israel's presence in the West Bank and Gaza because that presence is not properly regarded as an instance of belligerent occupation (although Israel has shifted its ground on the status of its occupation when it has announced its intention to adhere *voluntarily* to humanitarian legal standards insofar as those standards, as expressed in the Hague IV Regulations, pertain to the occupied territories);[29] and second, that Israel is, in any

stalemated situation," providing a helpful policy guide for an occupying power. For extensive treatment of the question of the applicability of human rights law in the Israeli-occupied territories, see Theodor Meron, *The International Convention on the Elimination of All Forms of Racial Discrimination and the Golan Heights*, 8 ISR. Y.B. HUM. RTS. 222 (1978); Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 *id.* at 106 (1979). *See also* Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542 (1978); Adam Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 REV. INT'L STUD. 39 (1987).

27. By far the most detailed analytical account is in SHEHADEH and SHEHADEH & KUTTAB, *supra* note 17. For helpful overview, see Adam Roberts, *Decline of Illusions: The Status of Israeli Occupied Territories Over 21 Years*, 64 INT'L AFF. 345. *Cf. also* Roberts, *supra* note 8.

28. The common Israeli practice of deportation, for example, which is absolutely prohibited by article 49 of Geneva IV, *supra* note 23, is defined in article 6(c) of the Nuremberg Charter as a "crime against humanity." *See* Agreement for the Prosecution and Punishment of the Major War Criminals ("The London Agreement"), Aug. 8, 1945, 82 U.N.T.S. 279, *reprinted in* BASIC DOCUMENTS, *supra* note 8, at 138; ROBERTS & GUELFF, *supra* note 21, at 155; SCHINDLER & TOMAN, *supra* note 21, at 913, 914. For related comment, see *supra* note 18 and *infra* note 92 and accompanying texts. *See also* HILTERMANN, *supra* note 17.

29. The basic official Israeli position, involving a stated willingness to observe the Hague IV Regulations and, *de facto* but not *de jure*, the "humanitarian provisions" of Geneva IV, was first expressed at a 1971 symposium at Tel Aviv University by then Israeli Attorney General Meir Shamgar in *The Observance of International Law in the Administered Territories*, 1 ISR. Y. B. HUM. RTS. 262 (1971). *See also* Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in 1 MILITARY GOVERNMENT, *supra* note 10, at 48. COHEN, *supra* note 26, at 43, asserts that "no problem arises in regard to the Hague Regulations" because "[t]he official Israeli position is that these Regulations are applicable to the Israeli-occupied territories [of the West Bank and Gaza]," a position that is confirmed by the Israeli High Court of Justice in at least one case, *Dwikat v. Government of Israel*, P.D. 34(1)1 (1979) ("the Hague Rules, which bind the military administration in Judea and Samaria, being part of customary international law . . ."). *See also* PAUST, VON GLAHN & WORATSCH, *supra* note 13, at 9, 11 (also applying estoppel theory). Problems do arise, however, relative to the applicability of the Hague IV Regulations in East Jerusalem and the Golan Heights which Israel has claimed to annex. *See* COHEN, *supra* note 26, at 43, 51 & 58. Nevertheless, we concur with Adam Roberts that "Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of [these]





event, authorized to pursue its present policies and practices in the West Bank and Gaza for reasons of "security," as construed according to the dictates of military necessity, which by legal tradition confer considerable discretion upon an occupying belligerent government.[30]

### A. *The Alleged Inapplicability of Geneva IV*

Regarding the contention that Geneva IV does not apply to Israel's presence in the West Bank and Gaza, the Israeli Government appears to have relied upon and adopted the argument of the "missing reversioner" advanced in 1968 by Professor Yehuda Z. Blum, then a lecturer in international law at the Hebrew University of Jerusalem, later Israel's Permanent Representative to the United Nations during the administration of Menachem Begin.[31] The crux of this argument is that the law of belligerent occupation in general, and Geneva IV in particular, presupposes that the belligerent occupant shall have displaced a "legitimate sovereign" (to whom the territory in question shall revert following the cessation of hostilities); that neither Jordan in the West Bank nor Egypt in Gaza were legitimate sovereigns (or "reversioners") in 1967 because of their acts of alleged unlawful aggression during Israel's "War of Independence" in 1948-49; and that, therefore, the Government of Israel is released from the constraints of the law of belligerent occupation in general and Geneva IV in particular. According to this argument, Israel's presence in the West Bank and Gaza is not an "occupation" that displaces a sovereign power, but an "administration" in the absence of a sovereign, unaccountable to Geneva IV and the law of belligerent occupation generally—although the argument is sometimes made, too, that Israel is present in the West Bank and Gaza as a result of a "defensive conquest" that confers legal title in the absence of a prior sovereign. Since 1977, when the Likud was first elected to power, Israel has insisted that the occupied territories fall within Israel's exclusive sovereign domain, that they form an integral part of "Greater Israel," comprising ancient Judea

international legal standards" and "for cooperating with the International Committee of the Red Cross," in stark contrast to the Soviet Union in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979), and to South Africa in Namibia. Roberts, *supra* note 8, at 63. A more recent contrast is Iraq in Kuwait.

30. For pertinent discussion, see COHEN, *supra* note 26, at 72–76.

31. *See* Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279 (1968). For indication that the Government of Israel has adopted Professor Blum's thesis, see Shamgar, *The Observance of International Law in the Administered Territories*, *supra* note 29.

and Samaria, in respect of which the humanitarian laws of war are inapplicable.[32]

Somewhat analogously, albeit less to escape the constraints of the humanitarian law of war than to ensure the legitimacy of the West Bank and Gaza, Professor Eugene V. Rostow, Professor Emeritus of the Yale Law School, now at the United States Institute of Peace in Washington, D.C., takes the view that the failure of the international community so far to achieve any final resolution of the underlying territorial status of the West Bank and Gaza results in a continuing lease on life for the Palestine Mandate, authorizing Jews to settle throughout the mandate territory, which includes the West Bank.[33] Relying upon analogies drawn from the Namibia advisory opinions of the International Court of Justice, including the Advisory Opinion on the International Status of South-West Africa,[34] Professor Rostow thus contends that the 1917 Balfour Declaration,[35] calling for a Jewish "national home" in Palestine and repeated in the 1922 League of Nations Mandate for Palestine,[36] is the law applicable in the occupied territories, not Geneva IV or the law of belligerent occupation generally.

Finally, there is Professor Allan Gerson's argument that the special, prolonged character of Israel's occupation—now over twenty-three years—renders Israel a "trustee-occupant" rather than a "belligerent-occupant" of the West Bank and Gaza.[37] Professor Gerson acknowledges that the Palestinian inhabitants possess a legal entitlement to some reasonable form of autonomy (to be shaped by an eventual settlement of the Israeli-Palestinian dispute); but the effect of his argument, which would terminate the status of belligerent occupation, is to give Israel greater discretion during the period of Israel's continuing occupation than is conferred by Geneva IV. Israel becomes the *de facto* sovereign power according to this line of thinking.

32. For helpful summary of the evolving Israeli approach to the occupied territories, see SHEHADEH, *supra* note 17, at 3–14. For a more general treatment of Israel's international law status, see WILLIAM MALLISON & SALLY MALLISON, THE PALESTINE PROBLEM: INTERNATIONAL LAW AND WORLD ORDER 240–75 (1986); *see also* QUIGLEY, *supra* note 8.

33. *See* Eugene V. Rostow, *"Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUDIES IN WORLD PUBLIC ORDER 147 (1979).

34. International Status of South-West Africa, 1950 I.C.J. 128 (Advisory Opinion of July 11).

35. For convenient text, see THE ARAB-ISRAELI CONFLICT—READINGS AND DOCUMENTS 484–85 (J.N. Moore ed. 1977) [hereinafter "MOORE"]; also W. MALLISON & S. MALLISON, *supra* note 32, at 427–29.

36. *See* 2 REPORT TO THE GENERAL ASSEMBLY OF THE UNITED NATIONS SPECIAL COMMITTEE ON PALESTINE—ANNEXES, APPENDIX AND MAPS 18–22, U.N. Doc. A/364 Add. 1 (Sept. 9, 1947), *reprinted in* MOORE, *supra* note 35, at 891–901.

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





These and similar arguments are in our view strained and artificial, and have commanded little to no respect among "highly qualified publicists" or within the organized international community. Professor Blum's "missing reversioner" thesis, in addition to requiring a method of treaty interpretation unknown to international law (*i.e.*, a disregard of the expressed purposes and cognate negotiating history of Geneva IV)[38] is premised on the wrong provision of Geneva IV,[39] and in any event is unsupported by authority or practice.[40] Professor Rostow's "continuing mandate" argument makes light of both the terminating acts of Great Britain as mandatory power and the unanimous authoritative decision of the United Nations mandate, which itself provides one of the firmest legal grounds for Israel's own status as a sovereign State.[41] In addition, Professor Gerson's "trustee-occupant" theory rests

38. Professor Blum disregards the fact that Geneva IV is concerned with protecting an occupied people from the abuses of the occupying power at least as much as it is concerned with protecting the ousted sovereign's reversionary interest. *Cf.* COHEN, *supra* note 26, at 53. Gerhard von Glahn writes that protection of the reversionary interest of the ousted sovereign is only of secondary importance, behind military necessity for security and the protection of the occupied population. *See* GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY . . . A COMMENTARY ON THE LAW AND PRACTICE OF ENEMY OCCUPATION 34 (1957).

39. Professor Blum relied erroneously on the *second* paragraph of article 2, which addresses an occupation that "meets with no armed resistance," a circumstance quite unlike that which greeted the commencement of Israel's occupation of the West Bank and Gaza, which began during the 1967 Six Day War. Professor Blum should have relied instead on the *first* paragraph of article 2, which addresses an occupation that begins in "cases of declared war or of any other armed conflict . . . ." *See, e.g.*, PAUST, VON GLAHN & WORATSCH, *supra* note 13, at 10–11. For authoritative commentary on Article 2, see COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (Jean Simon Pictet 1958), which leaves little doubt that the first paragraph is the one relevant to the occupied territories.

40. Most leading scholars, including some leading Israeli scholars, dispute Israel's "missing reversioner" defense against Geneva IV's application to the occupied territories. *See, e.g.*, COHEN, *supra* note 26, at 51–56; J. RUSSELL GAINSBOROUGH, THE ARAB-ISRAELI CONFLICT: A POLITICAL-LEGAL ANALYSIS 159 (1986); Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 105, 106 - 08 (1978); Roberts, *supra* note 8, at 62–68; Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV U. STUD. IN L. 61, 63–67 (1988). *See also* PAUST, VON GLAHN & WORATSCH, *supra* note 17, at 9–12; Pacheco, *supra* note 18, at 524–33; Drury & Winn (with O'Connor), *supra* note 18, at 86–101. In addition, if votes in the U.N. may be relied upon as a guide, so also do most of the member states of the international community. For convenient summary, see Roberts, *supra*, at 69–70. Professor Roberts also points out that Israel's "missing reversioner" thesis (1) "has not been advanced consistently: similar objections could be, but seldom have been, made about the applicability of the Hague Regulations"; (2) "ignores or understates the precedents for viewing the laws of war, including the law on occupations, as being formally applicable even in cases that differ in some respect from the conditions of application spelled out in the Hague Regulations and the Geneva Conventions"; and (3) engages "a little-noted logical muddle" of justifying Israel's jurisdiction in Gaza "with reference to the law of belligerent occupation, including the Hague Regulations," even though there has been no state of belligerency between Israel and Egypt since the Israeli-Egyptian Peace Treaty of March 26, 1979, thus demonstrating "that Israel itself, when it chooses, is prepared to depart from its own strict legal logic about the circumstances in which the relevant rules and conventions are applicable." *Id.* at 65.

41. For additional criticism, see text following note 54, *infra*.

essentially on the personal authority of Professor Gerson himself, having no support in the relevant legal literature or the appraisals of territorial status made by competent international institutions and being unpersuasive as a matter of policy.[42] For all the ingenuity these lines of argument display, they are not juridically credible and have been influential neither with the wider community of international law specialists, including scholars more or less sympathetic to Israel,[43] nor with diplomats.[44] Not even the United States, Israel's principal ally and benefactor, gives credence to these arguments.[45]

To be sure, the character of belligerent occupation always has been somewhat problematic, and it has been complicated in the present instance by the confused and overlapping claims to sovereign identity that have attached to the West Bank and Gaza both prior to and since the 1967 Six Day War. King Hussein's decision in July 1988 to respect "the wish of the P.L.O., the sole legitimate representative of the Palestinian people, to secede from us in an independent Palestinian state," and consequently to break Jordan's legal and administrative ties to the West Bank,[46] added a further layer of perplexity even as it simplified, for the moment, the number of political actors asserting sovereign rights in the territories.[47]

42. As Adam Roberts has aptly written of Gerson's idea of "trustee occupation":

> Gerson himself leaves some doubt about what body of law would apply in such a case. In fact . . . , under its common Article 2, the fourth Geneva Convention is applicable to a wide range of occupations and not just to "belligerent occupation" narrowly defined. Moreover, some idea of "trusteeship" is implicit in all occupation law anyway. Finally, the central question, which has become even more difficult since Gerson wrote, is whether Israel could be viewed, either by Palestinians or by the international community, as an appropriate trustee for Palestinian interests.

Roberts, *supra* note 8, at 68. Roberts adds: "However, [Gerson] does frankly accept that Israel has not in fact assumed the role of 'trustee occupant.'" *Id.*

43. *See, e.g.*, COHEN, *supra* note 26, at 51–56; Dinstein, *supra* 37; Rubinstein, *supra* note 40.

44. *See, e.g.*, the discussion on the international community's views concerning the applicability of Geneva IV in the Israeli-occupied territories in Roberts, *supra* note 8, at 69–70. For the views of the international community relative to Israel's 23-year occupation itself, see *id.* at 74–79.

45. Although the U.S. has a mixed voting record with respect to U.N. Security Council and General Assembly resolutions declaring the applicability of Geneva IV to the Israeli-occupied territories, it has consistently stated that it views the Convention as applicable. *See, e.g.*, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, 101st Cong., 2d Sess. 1432 (1990): "The United States considers Israel's occupation [of the West Bank, the Gaza Strip, the Golan Heights, and East Jerusalem] to be governed by the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War." *See also* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987, 100th Cong., 2d Sess. 1189 (1988); COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, 101st Cong., 1st Sess. 1376 (1989).

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

47. At the 19th session of the Palestine National Council, held in Algiers on November 12–15, 1988, the P.N.C. declared an independent sovereign State of Palestine. For details, see *supra* note 4.





Nevertheless, in its essence, the institution of belligerent occupation, however prolonged, represents an acknowledgment by governments (relatively recent, historically speaking) that territorial changes may not normally be effected by force of arms. It represents a step away from the notion that there is a right to territory acquired by conquest; it reinforces and complements the contemporary legal notion that war, regardless of circumstance, no longer provides a legal foundation for territorial claims.[48] However instituted, belligerent occupation connotes only a temporary, provisional circumstance and an implicit duty to withdraw once hostilities have been brought to an end.

Thus, while a belligerent occupant clearly has certain rights—for example, to assert some practical claims against the indigenous population and to protect its own security interests, as acknowledged in Hague IV[49]—the conventional and customary law of war requires the belligerent occupant to defer to the pre-belligerency political identity of the occupied territory and to act as if the territory's former status had not been superceded or even suspended for the duration of hostilities.[50] This conception of belligerent occupation obliges the occupant to sustain the pre-occupation character of all facets of civilian life, respecting the dignity and well-being of the occupied people as much as possible. Exceptions may be made only to the extent that they are *reasonably* required for the security of the occupation—and even then, doing so in a manner that places minimum burdens on the occupied population.[51] The ultimate purpose of the law of belligerent occupation, it may be said, is to facilitate the prospects for an eventual peace agreement.[52]

In sum, the forcible occupation of a territory beyond its existing boundaries is treated by the modern law of war, *including the customary law of war that applies in the current era*, as a temporary, provisional,

48. *Cf.* MYERS S. MCDOUGAL & FLORENTINE P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 82–86, 732–832 (1961) and Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 1950 BRIT. Y.B. INT'L L. 235; *see also* Roberts, *supra* note 8, at 45–46. For extended treatments of the law of belligerent occupation, see, *e.g.*, DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY (1949); VON GLAHN, *supra* note 38.

49. Hague IV, *supra* note 21.

50. *See, e.g.*, Hague IV, *supra* note 21, at art. 44, which declares that "[a] belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the arms of the other belligerent, or about its means of defense." To similar effect, article 45 states that "[i]t is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power," and article 46 states that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected," adding that "[p]rivate property cannot be confiscated."

51. *See, e.g.*, the entire set of legal standards in Section III of Geneva IV, *supra* note 22, entitled "Occupied Territory."

52. *Cf., e.g.*, GRABER, *supra* note 46, at 37–40.

reversible incident of ongoing hostilities.[53] It is on the basis of this normative judgment that an overwhelming majority of the world community, including on several occasions the United States government, endorses the view that Israel's maximum legal claim on the West Bank and Gaza is based on its temporary supervisory control of these territories pursuant to the law of belligerent occupation, which entails a duty to comply with Hague IV and, more significantly, Geneva IV.[54] It is not merely the Arab countries, the Islamic world, or even the Third World generally, but the entire United Nations—excepting Israel—that resists Israel's arguments to the contrary.

It is, thus, only a diversion to argue, as professors Blum and Rostow do, that the disputed sovereignty of the occupied territories releases Israel's occupation of the West Bank and Gaza from assessment according to the standards imposed by the international law of belligerent occupation in general, and Geneva IV in particular. And, we would add, it is indecorous to contend, as Professor Rostow does, that the 1971 Namibia litigation before the World Court, sustaining the survival of South Africa's mandate in South-West Africa (Namibia) so as to avoid the extension of South Africa's *apartheid* system,[55] supports also the survival of the Palestine Mandate, in this instance to avoid the humanitarian safeguards of Geneva IV. Indeed, if one is to accept the survival of the Palestine Mandate (as some scholars do, on the grounds that, by failing to implement the U.N. Partition Resolution of 1947, the U.N. General Assembly never terminated the Mandate),[56] an objective reading of the Namibia decision would lead one to affirm, as Professor Boyle contends, the General Assembly's legal competence to supervise the West Bank and Gaza and the applicability of Geneva IV along the road to independent Palestinian self-governance.[57] In any event, more pertinent is Judge Ammoun's endorsement in his separate opinion in the Namibia case of the legitimacy of armed resistance in an occupied territory,[58] and the action taken by the political organs of the United Nations to revoke South Africa's authority as mandatory power and to replace it with the authority of the organized interna-

53. *See, e.g.*, the authorities cited in *supra* note 48.
54. *See supra* notes 39–40, 43–45 and accompanying text.
55. *See* Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Advisory Opinion Of June 21).
56. *See* Boyle, *Create the State of Palestine*, 25 AMERICAN-ARAB AFF. 85 (Summer 1988). For historical details regarding the U.N. Partition Resolution, see WALTER LAQUEUR, A HISTORY OF ZIONISM, ch. 11 (1972); QUIGLEY, *supra* note 8, at ch. 4.
57. *Accord*, Drury & Winn (with O'Connor), *supra* note 18, at 103–07.
58. Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 70 (Advisory Opinion Of June 21) (Separate Op. Ammoun).





tional community (as embodied in the United Nations), invoking the widely accepted reasoning that there was no other way to carry out "the sacred trust of civilization" on the primary issue of the well-being of the inhabitants of Namibia.[59]

In sum, Israel cannot credibly claim exemption from—indeed, is unequivocally bound by—the requirements of Geneva IV and other obligations comprising the modern-day law of belligerent occupation. It has defiantly contravened both the letter and spirit of these requirements and obligations by way of the harsh character of its administration in the West Bank and Gaza over the last twenty-three years. And it has but aggravated its failed responsibility toward the Palestinian people by the length of its occupation, by its establishment of Jewish settlements, by its refusal to commit itself to eventual withdrawal, and, not least, by its opposition to negotiating within the normative framework deemed reasonable by an overwhelming consensus of the international community. Such a record not only warrants severe criticism but casts doubt on whether Israel actually retains its status as legitimate belligerent occupant.

### B. *The Cogency of the Plea of Security Concerns (or Military Necessity)*

Traditionally, the law of war has sought to delineate the legal limits of belligerent conduct by balancing the customary principle of military necessity, on the one hand, against the customary principles of humanity and chivalry, on the other. In our modern era of mechanized warfare, the principle of chivalry, "a somewhat romantic inheritance from the Medieval Ages"[60] that denounces and forbids resort to "[d]ishonourable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict,"[61] is said to have diminished in its distinctiveness relative to the principle of humanity.[62] And in the tension ever present between the remaining two principles, manifested in the customary principles of discrimination and proportionality, the line of compromise, again because the conduct of war has become more and more impersonal, has "tended to be located closer to the polar terminus of necessity than that of humanity."[63] Nevertheless, except insofar as it imposes a duty of obedience on the part of the inhabitants of a militarily occupied territory *vis-à-vis* the

59. *See, e.g.*, RICHARD FALK, REVIVING THE WORLD COURT, ch. 4 (1986).
60. MCDOUGAL & FELICIANO, *supra* note 48, at 522.
61. ROBERTS & GUELFF, *supra* note 21, at 5 (quoting U.S., Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, NWP 9, Washington, DC, July 1987, p.5-1).
62. *See* MCDOUGAL & FELICIANO, *supra* note 48, at 522.
63. *Id.* at 523.

commands of the occupying authorities,[64] the law of war insists absolutely upon the principle of humanity over that of military necessity in the administration of a belligerent occupation, emphasizing the principles of discrimination and proportionality. While "the administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration,"[65] the protection and humane treatment of the inhabitants of a militarily occupied territory remain fundamental to the international law of belligerent occupation,[66] and a long list of the rights guaranteed such inhabitants is carefully spelled out principally in Hague IV and Geneva IV,[67] and in the 1977 Protocol Additional I to the 1949 Geneva Conventions as well.[68]

In both word and deed, however, the Government of Israel, though declaring in veiled form its willingness to observe the humanitarian provisions of Geneva IV *ex gratia*,[69] denies virtually all legal responsibility for the suffering caused to the Palestinians of the West Bank and Gaza. Routinely, the Israeli authorities cite "security concerns" (presumably as the functional equivalent of the venerable defense of military necessity) for many of the actions they take,[70] and on this basis justify a number of the fundamental features of their occupation, including: land confiscation and the establishment of settlements; the introduction of Jewish civilian settlers; radical changes in the administrative structure of the occupied territories; and punitive measures against the Palestinian population such as restrictions upon freedom of movement, harsh curfews, arbitrary arrest and detention, the demolition and sealing of houses of families of individuals suspected of resistance activity, and other acts of collective punishment. Because Israel contests the applicability of international humanitarian law to its occupation, Israeli authorities have strained to avoid arguing that the occupied Palestinians are under a legal duty to obey their military orders. Ordinarily, a belligerent occupant relies heavily on such a duty to justify actions against any signs of defiance by the local population.[71]

64. *See generally* VON GLAHN, *supra* note 38, at ch. 5.

65. 2 LASSA OPPENHEIM, INTERNATIONAL LAW 437 (H. Lauterpacht 7th ed. 1952).

66. *See, e.g.*, authorities cited in notes 49–52 *supra*. For summary review, see Roberts, *supra* note 8, at 45–47.

67. *See* Hague IV, *supra* note 21, arts. 42–56, and Geneva IV, *supra* note 22, arts. 47–78.

68. *See* Articles 48–79 of Geneva Protocol I, *supra* note 23.

69. *See supra* note 29 and accompanying text.

70. The government of Israel has been consistently vague about specifying these security concerns. They also do not rely upon the language of "military necessity," probably because they do not wish to present themselves in any way beholden to international law. For Israeli practice, see SHEHADEH, *supra* note 17. For background and effects, see GEOFFREY ARONSON, CREATING FACTS: ISRAEL, PALESTINIANS AND THE WEST BANK (1987).

71. *See, e.g.*, VON GLAHN, *supra* note 38, at 45–56.





The question therefore arises: may Israel properly invoke security concerns (or military necessity) to release itself from tortious and/or criminal responsibility that under international humanitarian law would result from its treatment of the Palestinian population subject to its military control? In keeping with our foregoing discussion, the question presupposes, naturally, the applicability of the law of belligerent occupation, in general, and Hague IV and Geneva IV, in particular.

It is of course true that Israel has substantial security concerns. Ever since its birth in 1948, it has been beset by hostile, typically violent, acts at the hands of Palestinians and other Arabs throughout the Middle East, against not only its people and territory (however defined) but, as well, its very claim to lawful existence. The controversial history of this challenge, stemming from the persisting debate about the controversial attack by the Arab armies in 1948 and the related expulsion of Palestinians from pre-1967 Israel,[72] is so well known that it needs no elaboration here.

Until very recently, however, aside from the periodic wars in the region, by far the majority of the violence directed against Israel has been planned and perpetrated not by the actual subjects of the Israeli occupation but by exiled liberation forces outside Israel-controlled territory. It is true that there have been a variety of splits and shifts of position among the various Palestinian factions on the issue of appropriate tactics and resistance. But before the *intifada*, the indigenous Palestinian population as such rarely challenged Israeli occupation policy by direct action.

On the other hand, even if the inhabitants of the West Bank and Gaza were principally responsible for the anti-Israeli violence that has taken place in the past, and granting that a general terrorist threat may justify certain emergency measures from time to time, the doctrine of military necessity, while helping to clarify permissible acts of repression and deprivation, never has been internationally recognized as an unqualified license to disregard the well-being of an occupied people or as a pretext to undermine their underlying sovereign rights. Indeed, it is precisely to guard against such excesses that Geneva IV (as well as the other three 1949 Geneva conventions and the two 1977

72. For documentary narrative through 1967, see DOCUMENTS ON THE MIDDLE EAST (R. Magnus ed. 1969). *See also* MOORE, *supra* note 35. For historical discussion critical of Israel, see MALLISON & MALLISON, *supra* note 32, at 18–239; QUIGLEY, *supra* note 8, *passim*. *See also* the sensitive treatment given to the 1948 Arab attack by the late Simha Flapan, National Secretary of Israel's Mapam Party from 1954 to 1981, in SIMHA FLAPAN, THE BIRTH OF ISRAEL—MYTHS AND REALITIES 119–52 (1987). Summarizes Flapan: "My research indicates that the Arab states aimed not at liquidating the new state [of Israel], but rather at preventing the implementation of the agreement between the Jewish provisional government and [the pro-British Hashemite Emir of Transjordan] Abdallah for his Greater Syria scheme." *Id.* at 9.

Protocols Additional) was negotiated and made law. The purpose was to ensure a measure of discrimination and proportionality in the administration of belligerent occupation and, in so doing, to overcome the discredited *Kriegsraison* theory of military necessity that had been championed by German publicists before World War I and practiced by the German General Staff thereafter through World War II.[73]

Yet many of the legally dubious policies and practices pursued by Israel exceed the legitimate reach of military necessity and therefore may be associated more with suppressing Palestinian resistance to Israeli annexationist programs (e.g., the establishment of settlements populated by Israeli Jews) than with safeguarding Israeli society. Illustrative in this regard are individual and group deportations; collective punishment in the form of, for example, the extra-judicial demolition and sealing of suspect houses; indiscriminate administrative detentions of individuals without charge or trial for renewable periods of six months; intensive interrogations by prison personnel coupled with serious beatings and other forms of maltreatment and humiliation; the prevention of the reunification of families; the confiscation of land; the destruction of crops (mainly olive orchards); the diversion of scarce water resources; and so forth. Even granting Israel the benefit of the doubt that its continued occupation is itself legal, its suppression of (1) Palestinian resistance to Israeli annexationist policies and practices, and (2) Palestinian efforts to sustain Palestinian cultural and political identity, is in no way excused by appeals to security concerns (or military necessity). To be sure, it is difficult to identify precisely and differentiate among the various claims of the Palestinian population and its representatives, just as it is difficult to identify precisely and differentiate among the various claims of the Israeli population and its official leadership. But interference with legally guaranteed rights imposes a heavy burden upon an occupying power to connect its use of force and other suppressive policies with the requirements of occupation *per se*.[74] Having remained in the occupied territories for more than twenty-three years, Israel's refusal to confirm Palestinian sovereignty rights—rights recognized, for example, in United Nations

73. It is true that, generally speaking, the principle of military necessity "is of the proximate military order of *raison de guerre* rather than of the final political order of *raison d'état*." William V. O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 51 (1960). At all times, however, but especially when delineation between these two orders proves difficult or impossible, it is shaped by what all agree, after Aristotle, is the proper object of war—namely, the bringing about of those conditions that are needed to establish a just and lasting peace.

74. On the extent to which international legal rules (such as those contained in Geneva IV) are "formally applicable" and "practically relevant" to prolonged military occupation, as Adam Roberts has written, "the burden of proof lies on an obligated state to show, if it can, that in the actual situation a given commitment does not apply." Roberts, *supra* note 8, at 44. *See also* U.S. DEP'T OF ARMY FM 27-10, THE LAW OF LAND WARFARE, at 4, para. 3 (1956).





General Assembly Resolution 181 of November 29, 1947[75]—and its undertaking of such practices as the appropriation of land and water and the transfer to the West Bank and Gaza of Israeli Jews with promises of permanent settlement, virtually invalidate any claim it may make to use force for any reason other than the discriminating and proportionate requirement of direct defense against attack. The whole point of the framework of belligerent occupation is to distinguish cases of defense from the more wide-ranging tolerance of force associated with belligerent operations in general—and the more is this true the more the occupation is prolonged.[76] Whatever security concerns Israel may raise in defense of its policies and practices, they must bend to this fundamental precept.

However, it is not simply the test of proportionality that informs the principle of military necessity (or security) and against which Israeli policies and practices in the West Bank and Gaza must be measured. Israel's prerogatives as belligerent occupant are conditioned as well, we submit, by its good-faith willingness to acknowledge and act upon its international legal duty to respect the rights of the indigenous Palestinian population and to remain no longer than the occasion of hostilities reasonably mandates. Also qualifying, in other words, is a test of fairness or justness which presupposes that the policies and practices carried out by a belligerent in the name of military necessity (or security) are not themselves—however proportionate to their immediate provocation—an expression of unreasonable or illegitimate purpose. Whether rooted in the modern-day version of the just war doctrine, which seeks to distinguish between legal and illegal war,[77] or in some general principle of estoppel recognized by civilized nations that insists upon "clean hands" in the assertion of justificatory claims, this test precludes a belligerent from bootstrapping the defense of military necessity to exonerate acts meant to advance improper or illegal objectives. A plea of military necessity (or security) is imperfectly assessed, that is, stripped of its originating context.

It is thus important to appreciate that, from the time of its birth in 1948 and especially since the Six Day War in 1967, Israel, in

75. G.A. Res. 181 (II) (Concerning the Future Government of Palestine), 2 U.N. GAOR, Resolutions Sept. 16–Nov. 29, 1947, at 131–32, U.N. Doc. A/519 (Jan. 8, 1948), *reprinted in* MOORE, *supra* note 35, at 907.

76. *See* Roberts, *supra* note 8, at 51–53, 95–97.

77. Because of the extreme subjectivities it set into motion, the classical just war doctrine was virtually abandoned during the eighteenth century. Its modern-day version, however, which distinguishes between legal and illegal wars, is manifest in the Covenant of the League of Nations, and in the Kellogg-Briand Pact, the Nuremberg Charter, the UN Charter, and the Resolution on the Definition of Aggression. The main documentation is in CRIMES OF WAR 31–176 (R. Falk, G. Kolko & R. Lifton eds. 1971); *see also* BASIC DOCUMENTS, *supra* note 8.

defiance of U.N. General Assembly Resolution 181[78] and Security Council Resolutions 242 and 338,[79] has consistently pursued the Zionist dream of a Jewish State essentially coextensive with the boundaries of the British Palestine Mandate[80] and, to this end, has consistently refused the Palestinian inhabitants of the West Bank and Gaza (as well as Palestinians deported or otherwise involuntarily abroad) their international right to self-determination. Contrary to popular mythology, which poses Israel from its beginnings as an altogether innocent victim of Arab intransigence, recalcitrance, and revenge, Israel has been engaged in a long-term and large-scale effort at territorial expansion and annexation, dating back to the land acquisitions begun even before its birth in Basle under the auspices of the World Zionist Organization at the end of the nineteenth century. Influenced by a mixture of powerful religious and geopolitical convictions and—never to be forgotten!—a notorious history of persecution, Israel's objective has been to unite the Land of Israel to the greatest extent possible, avoiding thereby the inconvenience and uncertainties that would arise from a territorial compromise with the Palestinian Arabs.[81]

Zionism speaks, of course, with many voices on the crucial question of the rightful extent of Israeli territory. The Likud Party is far more dogmatic than the Labour Party; it associates Israel essentially with the full reach of the British Mandate in Palestine, whereas Labour has tended to be more pragmatic, regarding the boundaries of Israel as flexible, conditioned by opportunities and related to security needs. Yet Labour as well as the Likud has endorsed annexationist occupation policies. While maintaining a formal willingness to trade "territory for peace," it has not challenged the appropriation of land and water resources, the establishment of settlements, or the continued longevity of the occupation. From the perspective of international law, the Israeli government, despite some variations in diplomatic stance, has maintained a unified position relative to the West Bank and Gaza.

78. *See supra* note 75.

79. *See supra* note 4. For convenient text, see MOORE, *supra* note 35, at 1083–84, 1188–89.

80. It may be noted that in 1919, two years after Britain issued the Balfour Declaration, *supra* note 35, the World Zionist Organization proposed a "homeland" to the Paris Peace Conference with borders extending not only over the whole of Palestine but also over territories exceeding even those of today's "Greater Israel" (*i.e.*, the 1948 State of Israel plus the West Bank, the Gaza strip, the Golan Heights, and East Jerusalem).

81. For some of this controversial revisionist history, drawn from recently declassified Israeli materials, *see* FLAPAN, *supra* note 72; *see also* QUIGLEY, *supra* note 8; IAN LUSTICK, FOR THE LAND AND THE LORD: JEWISH FUNDAMENTALISM IN ISRAEL (1988); NOAM CHOMSKY, THE FATEFUL TRIANGLE: THE UNITED STATES, ISRAEL AND THE PALESTINIANS (1983); EDWARD SAID, THE QUESTION OF PALESTINE (1979).





Not to be overlooked either, not least because it has abetted Israel's posture toward the West Bank and Gaza, is the actuality of Palestinian and other Arab opposition to the very idea of a Jewish homeland, not to mention the idea of a distinct state. This opposition, which dates back to the period of the British Mandate, manifestly contributed to the armed hostilities with the Israeli entity that took place in 1948 when implementation of the United Nations Partition Plan was attempted, and thereafter to the long-term maintenance of a state of belligerency and continued withholding of diplomatic recognition of the State of Israel. Actions such as these, howevermuch debated, make it exceedingly difficult to perceive Israel's intentions clearly, much less to bring about the conditions that are needed to establish a just and lasting peace.

But reconstructing the history of the Israeli-Palestinian conflict is bound to be inconclusive, except for the fact that neither side can plausibly contend that its sovereign domain is on legally firm ground while that of its adversary is not. To avoid weighing this fact and its associated history in the balance of relevant legal considerations, controversial though this fact and history surely are, is fundamentally to misunderstand the comprehensive basis upon which Israel's plea of military necessity must be judged. If it can be empirically substantiated, as indeed it can be, that Israel's unlawful policies and practices *vis-à-vis* the West Bank and Gaza are themselves the principal cause of the violence against which Israel retaliates on grounds of military necessity (or security), then clearly Israel's efforts at legal and moral justification ring exceedingly hollow. Israel is estopped from pleading a defense in respect of acts that have been provoked primarily by its own illegal policies and practices and for which it has ultimately itself to blame.

## II. PALESTINIAN RESISTANCE AND A PATH TO SELF-DETERMINATION

This assessment of Israel's legal position relative to the West Bank and Gaza is reinforced by the character of its coercive policies towards the *intifada* itself: inflicting casualties in a one-sided manner, using combat tactics rather than methods of riot control, abusing Palestinian civilians held in detention for long periods, challenging symbolic expressions of Palestinian patriotism such as songs and flags, interfering with the educational and religious life of the Palestinian people, deporting Palestinians who appear to represent the popular will of the community (including prominent advocates of Palestinian non-violence), and so forth. In our view, such a record does not suggest a

program associated with the maintenance of security for the purpose of a temporary administration incident to hostilities, particularly in the absence of any credible attempt on the part of the Israeli authorities to demonstrate a need for the *specific* policies upon which they rely to respond to the security threat they perceive in the occupied territories. Rather, it reinforces an impression of an Israeli design to subjugate the Palestinian inhabitants of the West Bank and Gaza altogether.

There are here as elsewhere, of course, some extremely complicating aspects to the overall situation that need to be taken into account. External Palestinian forces have resorted to terrorist tactics at various times, and mass resistance by the Palestinian inhabitants of the West Bank and Gaza has confronted the Israeli authorities with a daunting, and to a large extent unparalleled, challenge during the period of the *intifada*. But even after acknowledging these complexities, we are not inclined to alter our firm conclusions about the illegal nature of Israel's practices and the overall character of its occupation, and notwithstanding that belligerent occupants traditionally enjoy a wide measure of discretion in defining and responding to security threats. Threats and acts of Palestinian terrorism, even if they could be proven to have been planned and perpetrated entirely within the occupied territories, do not warrant violence or retaliation against the occupied Palestinian population as such, although they surely justify greater precaution. The Palestinian resistance, it seems obvious, is directed as much against Israel's evident intention to exceed its rights as belligerent occupant and the consequent erosion of Palestinian sovereignty rights as it is against the Israeli occupation *per se*. The excessiveness of Israel's suppressive tactics and their cruelty are incompatible with the contention that Israel is acting within the "margin of appreciation" or discretion authorized an occupying power, a conclusion that is only reinforced by Israel's having long ago repudiated the duties associated with the status of occupying power under international law in favor of a claim to sovereign or quasi-sovereign control of the occupied territories.

It is, in any event, this history of prolonged and oppressive Israeli occupation of the West Bank and Gaza, marked by systematic and repeated serious breaches of Israel's duties as a belligerent occupant and member of the international human rights community, that accounts for the pervasiveness and durability as well as the fact of the *intifada* as it has unfolded so far. Furthermore, because Israel has failed over the years to respond adequately to complaints made on behalf of Palestinian rights—claims often validated by formal actions by various organs of the United Nations—the nature of the occupation provides an underlying legal justification for a right of resistance against the





Israeli authorities who, in essence, have abandoned their status as belligerent occupant by abusing the populations of the West Bank and Gaza in systematic and severe ways.

As established earlier,[82] it is widely accepted that the West Bank and Gaza constitute occupied territory within the compass of Hague IV and Geneva IV, and that these treaty instruments constitute legal undertakings that are, in any event, declaratory of customary international law (especially relative to the general tenor of deference to the pre-belligerency status of the occupied territory and the unchanged underlying allegiance of the civilian population). It is widely accepted, as well, to the point of virtual unanimity, that Israel's rights are circumscribed by (1) the upper limits of legal right fixed by Israel's status as belligerent occupant, and (2) the locus of sovereignty for the territories residing in the Palestinian people. Even the Israeli Government has partially acknowledged these boundaries by its acceptance of the Camp David framework that included an autonomy plan for the occupied territories, however vague, as an integral element.[83] By accepting an autonomy plan in a solemn international instrument, the Israeli government at the very least acknowledged conclusively the Palestinian character of the territories and confirmed its own fundamental duty to refrain from incorporating them into Israel, including indirectly by eroding their Palestinian character through population transfers in the form of either Palestinian deportations or Israeli settlements.

Thus, what remains unresolved legally is an authoritative process of implementation of Palestinian self-determination. The question is not whether there is a legal basis for Palestinian self-determination, even to the extent of full statehood, but how to terminate the Israeli occupation and provide an appropriate format for the exercise of Palestinian sovereign rights. Given the history of relations in the Middle East, it is reasonable and desirable to bring security considerations into any negotiations to shape an Israeli-Palestinian solution. But it is essential to do so *mutually*. Israel, to be sure, has ample reason to protect itself against renewals of Arab militarism; but Palestine, too, has grounds for fearing Israeli military intervention. Possibly only a combination of superpower, United Nations, and regional security

82. *See supra* text accompanying notes 29–45.

83. Of course, the autonomy plan envisaged and autonomy as a status can be viewed as more consistent with Israeli than Palestinian formal sovereignty. It is too often overlooked, but must be appreciated, that the representatives of the Palestinian people never participated in the Camp David process; that all of their principal Arab allies, including even Jordan, boycotted and rejected the process; and that the main objective of the negotiations concerned the Egyptian-Israeli bargain over Sinai and the diplomatic normalization of relations between those two states alone.

guarantees regarding the inviolability of both political entities can address the valid security requirements of both sides.

As of this writing, the prospect of terminating Israeli occupation and establishing Palestinian rights by voluntary agreement seems remote, perhaps even impossible. This is due to the refusal of each of the main political parties in Israel to either accept the P.L.O. as the legitimate representative of the Palestinian people or to agree to the establishment of a Palestinian state as a vehicle for the realization of Palestinian rights. It arises, as well, but to a far lesser extent, from the Arab/P.L.O. failure so far to recognize the legitimacy of Israel's existence altogether unambiguously. But the main barrier to a negotiated solution results from persistent patterns of Israeli conduct that, in deed if not always in word, reject not only the law of belligerent occupation, in general, and Geneva IV, in particular, but even a minimal acceptance of the conditions needed to implement Palestinian autonomy rights as provided in the Camp David Accords. Conspicuous examples include the establishment of some 140 Israeli settlements inhabited by over 200,000 Jewish settlers in the West Bank, Gaza, and East Jerusalem, and the appropriation of large portions of the occupied land and its dedication to purposes implying a permanent Israeli presence.[84] Theoretically, of course, Israeli settlements and investments are reversible, even compatible with the eventual fulfillment of Palestinian claims. But not as a practical matter. Practically speaking, the combination of an Israeli political consensus that rejects minimal Palestinian demands and Israeli policies of almost a quarter-century duration that look toward the permanency of Israeli occupation make it implausible that a negotiated settlement acceptable to representative Palestinian leaders will be reached in the foreseeable future. This prognosis is reinforced by the refusal of Israel to accept the authority of the United Nations and by the failure of the United States government, as Israel's principal aid donor, to exert sufficient pressure on Israel either to withdraw from the West Bank and Gaza or to negotiate in good faith within the parameters of the United Nations consensus—to wit, with the P.L.O. as the legitimate representative of the Palestinian people and a Palestinian state as the eventual embodiment of self-determination.

It is against this backdrop that we must address the situation of the Palestinians, particularly those in the West Bank and Gaza. They are victims of an occupation that violates both fundamental norms of

84. For authoritative confirmation, see the studies of The West Bank Data Base Project, the most recent of which is MERON BENVENISTI, 1987 REPORT: DEMOGRAPHIC, ECONOMIC, LEGAL, SOCIAL AND POLITICAL DEVELOPMENTS IN THE WEST BANK (1987). *See also* Drury & Winn (with O'Connor), *supra* note 18.





the law of war and basic human rights, an occupation that seems conclusively opposed to the exercise of the right of self-determination. At the same time, positive international law is more or less silent on these matters. There is no legal analysis offered in Hague IV or Geneva IV (or even in the Geneva Protocols of 1977) to address the situation of a belligerent occupant that is a serious violator or that converts the condition of temporary presence into one of indefinite duration under claims of at least quasi-sovereign right.[85]

Under these circumstances, it should come as no surprise that the efforts of the *intifada* are not restricted to demonstrations and the throwing of stones, but that they involve, since January 1988 (about a month after the uprising began), the coalescence of the Unified National Leadership of the Uprising, an underground command comprised of representatives from each of the main P.L.O. factions committed to the development of an "internal front" and the nurturing of Palestinian statehood.[86] And it should come as no surprise, either, that in light of the evidence of a widely shared Palestinian commitment to engage in struggle on behalf of their rights, including above all their pursuit of self-determination, that there exists now the moral and legal foundation for a positive endorsement of their struggle. If political theory is generally supportive of a "right of revolution" to oppose tyranny and domestic oppression, then surely such a right exists in relation to *alien* forms of oppression.[87]

It remains to consider the legal implications. The late Richard R. Baxter, among the most authoritative interpreters of the law of war in our time and an adherent to a rather strict variant of positivist thinking, offered some additional guidance in a pathbreaking article on belligerent occupation. "The fundamental question of the relationship existing between the inhabitant and the occupying Power," he wrote, "remains for the most part a problem of the common law of war and is illuminated only fitfully by explicit provisions of the new Geneva Convention."[88] In Baxter's view, in other words, the content of the law of war in general, and the law of belligerent occupation in particular, is to be derived largely from past practice and general ethical directive despite the existence of comprehensive treaties. This

85. *But see* Roberts, *supra* note 8 at 54–58.

86. The main factions of the P.L.O. consist of Yasir Arafat's Fatah, the largest; George Habash's Popular Front for the Liberation of Palestine; Nayef Hawatmeh's Democratic Front for the Liberation of Palestine; the Palestine Communist Party; and the Islamic Jihad.

87. For a much-respected exploration of the right of resistance in instances of belligerent occupation, see Baxter, *supra* note 48. *Cf. also* Paust, *infra* note 91.

88. Baxter, *supra* note 48, at 235. These duties are elaborated more fully in Geneva Protocol I, *supra* note 23, but the legal regime is nowhere extended to circumstances of prolonged occupation in sustained violation of both conduct norms and respect for underlying sovereign rights of the inhabitants.

orientation is strengthened by Baxter's further observation that "[t]he protection of the civilian population of occupied areas against oppression by the occupant has consistently been a guiding principle of the law of belligerent occupation."[89]

Concededly, Baxter's further observation is qualified to some extent by the confirmed rights of the occupier to uphold its security. As noted earlier,[90] however, threats to the occupier arise in the instant case primarily, and especially in the most recent period, from a pronounced and sustained failure to restrict the belligerent character of its occupation and to terminate that occupation so as to restore the sovereign rights of the inhabitants. By its substantial violation of Palestinian rights, the Israeli occupation has itself operated as an inflaming agent that threatens the security of its administration of the territory, inducing reliance on more and more brutal practices to restore stability that in turn provoke the Palestinians even more. In effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance in the population. This right of resistance is an implicit *legal* corollary of the fundamental legal rights associated with the primacy of sovereign identity and assuring the humane protection of the inhabitants.[91]

It might of course be useful to have such a legal right of resistance embodied in the form of a declaration of principles issued by, say, the International Law Commission, or better yet in a widely endorsed convention, draft or otherwise, on the legal consequences of gross abuses of the status of belligerent occupation, especially when prolonged.[92] In the meanwhile, however, the legal relations of the parties in the West Bank and Gaza support the claims and tactics of the *intifada*, especially the reliance on mass recourse by the Palestinian population to essentially non-violent forms of resistance, and including recourse to the limits established by the laws of war safeguarding especially the sanctity of civilian life. In our judgment, resistance to the activities of Israeli military forces under these circumstances is a

89. Baxter, *supra* note 48, at 235.

90. *See* text accompanying notes 52–55, *supra*.

91. For clarification of issues bearing on this point, see Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545 (1983). *See also* Baxter, *supra* note 48; Paust, *Aggression Against Authority: The Crime of Oppression, Politicide, and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L. L. 283 (1986). For a qualified view, see Roberts, *supra* note 8, at 79–83.

92. This argument draws upon Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank* (Oxford University conference paper, July 8–10, 1988). For a dissenting view of the utility or efficacy of an international convention on prolonged occupation, see Roberts, *supra* note 8, at 79.





legitimate exercise of Palestinian rights of self-determination. Israel's continuing actions in defiance of the rights of civilians involves more than violations of the law of war and of human rights. The cumulative effect of Israel's inhumanity toward the Palestinian inhabitants of the territory, aggravated by the absence of a security rationale that is wholly persuasive and legitimate, amounts to patterns of continuing crimes against humanity in the Nuremberg sense, and thus, in our judgment, makes Israeli civilian leaders and military commanders personally liable for patterns of conduct that are violative of governing rules and standards of international law.[93]

## III. CONCLUSION

International law is challenged by the character of the prolonged Israeli occupation of the West Bank and Gaza. The literal situation, it is true, has not been adequately anticipated in the treaty framework set forth in the modern law of war, even though it can be persuasively assessed from a perspective that relies upon relevant international legal principles, doctrines, and rules.

Insofar as conventional international law is concerned, however, the Israeli government has pursued policies and practices that challenge severely the humanitarian provisions of Hague IV and Geneva IV, the human rights provisions of the United Nations Charter as authoritatively interpreted by the competent organs of the United Nations,[94] and the increasingly authoritative "international bill of human rights" comprising the Universal Declaration of Human Rights,[95] the International Covenant on Economic, Social and Cultural Rights,[96] and the International Covenant on Civil and Political Rights,[97] each of which pledge humane treatment and the self-determination of peoples as a *de minimis* of civilized society. As far as customary international law is concerned, the Israeli authorities have violated traditional human rights policies to a degree that in the past has served to justify "humanitarian intervention"[98] and that today, as we have argued,

93. Our point here is not to equate the Israeli subjugation of the Palestinian people with the Nazi persecution of Jews during the holocaust, but rather to observe that one cannot—must not—allow an unquestionably notorious history of persecution to obscure deeds that shock the conscience and violate the fundamental norms of modern civilization.

94. *See* the Preamble and articles 1(2) & (3), 13(1)(b), 55, and 56 of the U.N. Charter, *supra* note 25.

95. *Supra* note 26. For convenient text, see BASIC DOCUMENTS, *supra* note 8.

96. *Supra* note 26. *See*, in particular, Articles 1 and 2. For convenient text, see BASIC DOCUMENTS, *supra* note 8.

97. *Supra* note 26. *See*, in particular, Articles 1 and 2. For convenient text, see BASIC DOCUMENTS, *supra* note 8.

98. For a range of views about humanitarian intervention, see HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973).

justifies a Palestinian right of resistance.[99] And as far as "general principles of law recognized by civilized nations" are concerned, the Israelis have violated the principle of good faith by failing to make effective their assurances, given to the international community at various times, of just treatment of the Palestinian inhabitants of the occupied territories. Each of these established "sources" of international law thus provides authoritative guidance for the judgment rendered here, and the status of this guidance is underwritten by an overwhelming consensus of governments, manifest in a stream of formal pronouncements from diverse organs of international authority and control, especially the United Nations, as well as by the weight of impartial expert commentary.

In such circumstances, there is no acceptable excuse for invoking a condition of legal indeterminacy or—worse—deferring to the *de facto* circumstances imposed by Israeli annexationist designs. As with the international campaign against *apartheid*, the moral clarity of the legal situation suggests the appropriateness of mobilizing as much international pressure as possible to end the circumstance of unlawful occupation and to encourage the proper fulfillment of Palestinian claims of self-determination, a process that is fully compatible with Israel's own legitimate rights of statehood and security.[100] Ending Israel's occupation of the West Bank and Gaza, we stated at the outset, comports not only with the future peace and stability of the Middle East and the world but, as well, with the requirements of international law and justice. The reverse emphasis is likewise true. Ending Israel's occupation of the West Bank and Gaza comports not only with the requirements of international law and justice but, as we have seen in the on-going Persian Gulf crisis, with the future peace and stability of the Middle East and world.

99. Qualified acceptance of this conclusion may be found in Roberts, *supra* note 8, at 79–83.

100. This position is further strengthened by the repeated assurances of the most authoritative Palestinian leaders, including Yasir Arafat, that legitimate Israeli sovereign and security rights will be protected in the course of establishing a Palestinian State. For authoritative reference, *see supra* note 4.