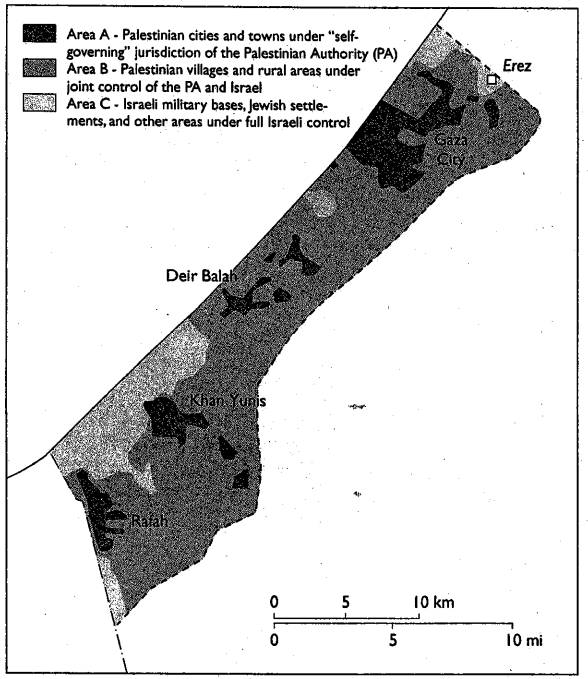

Gaza Strip under Oslo II Interim Agreements (1995).

Courting Conflict

The Israeli Military Court System in the West Bank and Gaza

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The Changing Conflict

The larger, long-term consequences of the 1967 war were dramatic, notably an escalation of the Israeli-Palestinian dimension of the Arab-

Israeli conflict. The defeat of the Arab regimes emboldened the Pales tinian resistance movement, composed of a number of militant politica factions based in the surrounding Arab states, to assume leadership of th national struggle.[12] The Palestine Liberation Organization (PLO), cre ated in 1964 by the Arab regimes, was taken over and transformed int an umbrella organization by these factions after the war. Ahme Shuqueiry, the appointed PLO leader, was replaced by Yasir Arafat, hea of the largest faction, Fatah. Despite the further fragmentation of th Palestinian people as a result of the war, the "new" PLO provided a increasingly popular symbol of national solidarity and a vehicle o national liberation.[13]

The political agenda of the PLO conformed to prevailing tendencie across the region to interpret the stakes of the conflict in zero-sun terms; Palestinian victory was envisioned as a thorough defeat of Isra and the creation of a Palestinian state in all of historic Palestine. Israe political discourse also propounded zero-sum visions; there was national consensus opposing an independent Palestinian state, and Israe officials sought to offset the growing popularity and influence of the PL by promoting a states-only framework for conflict resolution. While mos of the international community came to recognize the PLO as the legit imate national representative of the Palestinian people by the mid-1970s the Israeli state was at the forefront of efforts to disqualify the PLO fron playing a role in regional and international relations on the grounds tha it was nothing but a terrorist organization. As far as most Jewish Israeli were concerned, Palestinians had no independent, legitimate representa tive, and those who supported the PLO were in effect proponents of ter rorism.[14] However, Israel did recognize the PLO in one regard: as a part to the conflict.

The Construction of a Legal Doctrine for Governing the Territories

In the early years, the idea of retaining permanent control of the Wes Bank and Gaza, especially the large Palestinian population centers, wa not seriously entertained within Israeli decision-making circles.[15] How ever, from the outset, Meir Shamgar constructed a legal doctrine to legit imize permanent Israeli retention of at least part of the conquered areas Prior to 1967, Shamgar had conceived that that the extension of Israe rule over any additional part of *Eretz Israel* (i.e., the West Bank and Gaza would not constitute a "foreign occupation" because Jews had histori

rights in these areas and because no other state had sovereign claim to them. After 1967, he used his position as a high-ranking policy maker to institute his views as the cornerstone of official Israeli doctrine on the legal status of the territories.

This doctrine incorporated a number of interrelated components and premises, which together reflected selective use and "original" interpretations of international humanitarian law (i.e., laws of war). First, Shamgar reasoned that Israeli control of the West Bank and Gaza did not constitute an "occupation" because the displaced rulers, Jordan and Egypt, were themselves occupants who had seized control during the first Arab-Israeli war in 1948. This was premised on the assertion that territory is "occupied" in war only if it has been part of the sovereign domain of the defeated and expelled state. According to Shamgar's formulation, Israel was not "occupying" but "administrating" these "disputed" areas, whose legal status was sui generis.[16]

A second component, building on the first, held that the Fourth Geneva Convention, the most important humanitarian law pertaining to occupation of conquered territories and their civilian population, was not applicable to Israeli rule on a de jure basis. Shamgar reasoned that if Israel were to regard the Fourth Geneva Convention as applicable, this would constitute an acknowledgment of Israel's own status as an "occupant," which, in turn, would both give Jordan and Egypt an ex post facto status as displaced sovereigns that they had not enjoyed prior to their defeat, and would compromise or jeopardize Israeli prospects to claim permanent control over (all or some of) the territories in the future.[17] The history and language of the Geneva Conventions bear upon this interpretation; they were promulgated in the aftermath of World War II to prohibit the grotesque "liberties" that the Axis powers had exercised in the areas they occupied during the war. The Fourth Geneva Convention delineates the rights and duties of "High Contracting Parties" (i.e., signatory states) vis-à-vis territories and populations of other High Contracting Parties. Since Jordan and Egypt had been occupants rather than sovereigns in the West Bank and Gaza, according to Shamgar's reasoning, they did not have the status as High Contracting Parties *in these areas*. And while Israel was a High Contracting Party to the Geneva Conventions, this would have no bearing on territories that were not "occupied."

A third and somewhat contradictory component of Shamgar's doctrine was that Israel would abide by the Fourth Geneva Convention on a de facto basis, namely to respect its "humanitarian provisions." However, Israeli officials have never specified which provisions of the

convention they do — or do not — regard as "humanitarian,"[18] whereas th International Committee of the Red Cross (ICRC), official guardian the Geneva Conventions, regards them as humanitarian in their entire and rejects any attempts to interpret this legislation selectively.[19] Shamg noted but dismissed the relevance of the ICRC's views: "From the ve outset of the military government, Israel and the International Commi tee of the Red Cross arrived at diametrically opposed conclusions co cerning the applicability of the Fourth Geneva Convention to the admi istered areas. This difference of views was mainly and primarily of a leg and theoretical nature, because the Israeli Governmental [sic] authoritie stated several times that Israel had decided to distinguish *a priori* betwee the formal legal conclusions arising from its approach and the actu observance of the humanitarian provisions of the Convention."[20]

A fourth component of the doctrine held that the Fourth Gene Convention could not be binding on Israel even if there were no dispu over the status of the West Bank and Gaza because at least part of the co vention constituted "conventional" rather than "customary" intern tional law.[21] Therefore, even if the convention were deemed applicable o a de jure basis, it would not supersede "local" laws unless the Israe Knesset enacted the convention as domestic legislation or until the sta recognized that it had ripened into customary international law. How ever, the international community overwhelmingly regards the Gene Conventions as customary international law.[22]

A crucial aspect of this doctrine is the way in which Palestinian stat lessness was made legally significant. Interpreting international human tarian laws as pertaining exclusively to the rights and duties of sovereig states ("High Contracting Parties") made it possible to argue that stat less people in militarily conquered areas were not their intende beneficiaries. This assumed that because there never had been an ind pendent state of "Palestine," the Palestinian people could not be the righ ful sovereigns of the West Bank and Gaza because nothing in intern tional law prescribed the recognition of sovereignty to a "nonstate" an nothing demanded the creation of a heretofore nonexistent state in te ritories seized in war. Nodding to the de facto applicability of undefine "humanitarian provisions" in the Fourth Geneva Convention was means of acknowledging that Palestinians had rights as individuals bu not as a national entity.[23] According to this doctrine, Israel was under n *legal obligation* to withdraw from any part of the West Bank and Gaza t allow them to revert back to their pre-1967 status[24] or to concede to th creation of a Palestinian state.

Shamgar's focus on the status of land (holding that it was sui generis) rather than the population (with national rights to self-determination) was a strategic legal maneuver to separate the land from the people residing there. The doctrine and the interpretations of international law on which it was based came to define official Israeli legal discourse and policy making regarding the state's rights and duties in the West Bank and Gaza and was reinforced by rulings of the Israeli High Court of Justice (HCJ).[25] Within a domestic Israeli context, HCJ support was crucial to legitimizing these interpretations and gaining public sanction for activities and policies that violated the letter and/or spirit of the Fourth Geneva Convention, such as the settlement of Israeli citizens in the territories, the deportation of Palestinians, house demolitions, and other forms of collective punishment. However, the international community never accepted the official Israeli interpretation that the West Bank and Gaza were not occupied or that Israeli rule was not governed by the Fourth Geneva Convention and other international laws.

This contradiction between international opinion and the official Israeli position suggests a larger tension between the rights of sovereign states and the trend in international legal discourse since World War II, which seeks to curb the excesses of state autonomy. In charting such an original course for itself, the Israeli state has reinforced its own sovereign authority locally and internationally by resisting or ignoring the authority of the international community in the interpretation of humanitarian laws governing states in war and conflict. However, Israel has not rejected the importance of legality to assessments of its rule in the West Bank and Gaza. Rather, officials and state supporters have maintained that Israeli policies and practices are legally viable, if different from international opinion; that Israel has the right, as a sovereign state, to interpret its obligations independently because these interpretations arise out of actual conditions on the ground (including claims of historic Jewish rights and the imperatives of national security); and that the state cannot be forced to accept alternative interpretations because these are advanced in an attempt to constrain Israel politically (and perhaps to benefit its enemies).[26] Moreover, international criticism of Israel has been countered with criticism of the international community, whose historic hostility and/or indifference to the rights and the fate of Jews culminated in the Nazi Holocaust. Criticisms have been taken as evidence of an enduring global anti-Semitism, a perception reinforced by Israel's treatment as a pariah by the General Assembly of the United Nations[27] and by international recognition and support for the PLO.

The (Limited) Role of the High Court of Justice

Meir Shamgar's other crucial contribution to the administration of th West Bank and Gaza was instituted after 1968 when he became attorne general. He established Palestinians' right to submit petitions to the HC to challenge the administrative policies and practices of any state institu tion, including the military. He did this by never raising "the plea of a lac of *locus standi* of alien enemies who were inhabitants of territory nc under Israeli sovereignty."[28] This contributed significantly to Israeli claim and pronouncements that the administration of the territories wa "enlightened," "benign," and unique in the history of war: Israel wa under no legal obligation to subject the military administration to domes tic judicial oversight. To do so, Shamgar argued, demonstrated the state commitment to the rule of law: "Military government did not succum to the dangers inherent in the exercise of absolute power. . . . Furthei more, the individuals manning the diverse positions in military govern ment, were inevitably the products of their culture and carried with ther the impact of the legal and moral concepts of their society. . . . It seem that the institutional pluralism and the dispersion of power in the Israe political system and to a very large extent the supervisory powers of th Supreme Court of Justice, imposed additional constraints and ensure the prevention or correction of transgressions."[29]

Although the role of the HCJ is parenthetical to the subject of the mil itary court system,[30] it does pertain to questions and debates about th legality of Israeli rule in the West Bank and Gaza. Using legal concepts c "reasonableness," "justicability," and "necessity," the HCJ has reviewed th activities of the military administration when petitioned to do so. In prac tice, however, the HCJ rarely has rendered decisions that provide sub stantive relief to Palestinian petitioners, tending either to find in favor c the state or to dismiss the petitions on the grounds that they raise issue that are not justiciable.[31] For example, in a 1972 case *(Abu Hilu et al. v Government of Israel)*, the HCJ decision states: "The court is not th proper place to decide whether a military-security operation . . . — i grounded in law and undertaken for reasons of security — was indeed war ranted by the security situation or whether the security problem coul have been resolved by different means. . . . [I]ssues related to the arm and defense, similar to issues of foreign affairs, are not among the subject fit for judicial review."[32]

The HCJ has played an important role in supporting and sanctionin military and administrative policies that have negatively affected Pales

tinians. The availability of judicial review maintains a perception among the majority of Jewish Israelis, who hold the court in the highest regard, that such oversight guarantees that Palestinians' rights are adequately safeguarded under the prevailing circumstances and that the ways the state interprets its own rights and duties in the territories are legal. This perception has been fortified by the fact that over the decades Palestinians have brought thousands of petitions before the HCJ.[33]

The actual record of the HCJ, however, has not restrained the state in its policies toward Palestinians in the West Bank and Gaza. According to David Kretzmer, who published a detailed study of cases from the occupied territories, "The Court has not seen itself as a body that should question the legality under international law of policies or actions of the authorities, or should interpret the law in a rights-minded fashion. On the contrary, it has accepted and legitimized policies and actions the legality of which is highly dubious and has interpreted law in favor of the authorities."[34]