

**THE MIDDLE EAST AND THE LEGALITIES SURROUNDING
THE PRINCIPLE OF OCCUPATION:
CAN ISRAEL'S CONTROL OVER THE WEST BANK AND GAZA BE DEFINED AS
AN 'ILLEGAL OCCUPATION' IN TERMS OF THE CURRENT INTERNATIONAL LAW
FRAMEWORK GOVERNING BELLIGERENT OCCUPATION**

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CHAPTER 1

INTRODUCTION

The Israel/Palestine conflict has been ongoing since the inception of the Jewish State in 1949, culminating in the Six Day War in 1967 and the subsequent shift in control over certain territories in the region.

Despite the fact that the 6-day war occurred 5 decades ago, little attention, academically, has been given to whether or not the resultant occupation of The West Bank and Gaza by Israel was legal, and if so whether same has, over time, become illegal. This prompted Orna Ben-Naftali, Aeyal M. Gross and Keren Michaeli to, in their article titled “Illegal Occupation: Framing the Occupied Palestinian Territory”, write the following in their introductory paragraph:

‘Curiously, amongst the wealth of legal writings on various aspects of this occupation, most concern Israel’s compliance or noncompliance with its obligations as an occupying power; virtually no attention has been paid to the question of the legality of the occupation itself.’

There is a seeming perception that referring to Israel’s actions within the occupation as illegal, equates to declaring the occupation itself illegal. There are various examples of the international community declaring an act of, or policy pursued by, Israel as illegal, and condemning them for this. Despite this, western nations continue to toe the line of attacking specific acts carried out by the Israeli government rather than attacking the legality of the occupation itself. This is also the stance seemingly taken consistently by the International Court of Justice and UN Secretary Generals since the inception of the occupation.

In light of this, the basic premise of the dissertation, as a starting point, is to determine whether Israel’s deemed occupation over the West Bank and Gaza (herein after referred to as ‘Occupied Palestinian Territories’) is in fact an occupation as defined by international law (and specifically The Hague Regulations and Fourth Geneva Convention).

Thereafter I will attempt to ascertain the legal status of the Israeli control over the Gaza and West Bank territories, with specific reference to the evolution of the definition of 'occupation', international law governing occupation, the adequacy thereof, the emergence of the principle of self-determination and the indefinite basis on which the current situation is formed. The legitimacy of an occupation created through force carried out in self-defence will also be examined as well as the scenario where sovereign claims to the area directly prior to the occupation are disputed or unclear.

In answering these questions, I will investigate the legal framework in which occupations fall. The development of this international law will be looked at from the inception of the modern day concept of occupation, at the beginning of the 20th century, through to the legal framework applicable today and relevant to the region. The shifting views in the international community surrounding the concept of occupation, and the impact this has had on the development of the law in this field will also be investigated.

The premise of this dissertation being the legal status of the occupation itself, the specific actions of either Israel and the OPT populations, in the context of obligations incurred as a result of there being an occupation, will not be discussed in great deal, except to the extent that they affect the legality of the occupation itself. The study will focus largely on the rules and principles that define and govern the occupation.

CHAPTER 2

HISTORICAL BACKGROUND

1. The Formation of a Jewish State and Events Leading up to 1967

Before delving into the legal intricacies surrounding the situation in the Middle East it is prudent to first look at the historical background of the region and specific events which resulted in the current situation coming into being. Historical or religious claims to the region will not be considered and only claims to the region in terms of international law will be assessed. I will therefore start at the first meaningful international document to affect the legal status of the area, the Balfour Declaration of 2 November 1917.¹

The Balfour Declaration formed the foundation for the creation of a Jewish State in the region and was expressed by the British Foreign Secretary, Arthur James Balfour, to Lionel Walter Rothschild, the unofficial leader of British Jews of the time, whereby he declared the British Governments desire to set up a Jewish homeland in Palestine.²

The first legitimate realization of the sentiment expressed in the statement occurred after the conclusion of World War II and the victory of the Allied Powers,³ authority over Palestine being transferred from the Ottoman Empire to Britain as a mandate territory in terms of Article 22 of the Covenant of the League of Nations.⁴

Britain was however unable to implement the mandate, resulting in the UN General Assembly adopting The Partition Resolution 181 [herein after referred to as “The Partition Plan”], on the recommendation of the United Nations Special Committee on Palestine [herein after referred to as “UNSCOP”], on November 29 1947.⁵

¹ Yoram Dinstein “The Arab-Israeli Conflict from The Perspective of International Law (1994) 43 University of New Brunswick Law Journal 301 at 303

² Balfour Declaration United Kingdom [1917] <https://www.britannica.com/event/Balfour-Declaration>; Dinstein, supra note 1, at 303

³ Ardi Imseis “On the Fourth Geneva Convention and the Occupied Palestinian Territory” (2003) 44 Harvard International Law Journal 65 at 73

⁴ Imseis, supra note 3, at 73; W. Thomas Mallison; Sally V. Mallison The Palestine Problem in International Law and World Order (1986) at 47.; Dinstein, supra note 1, at 304

⁵ GA Resolution 181 UN Document A/310 (1947); see Imseis, supra note 3, at 75; Dinstein, supra note 1, at 305-306; Avi Beker *The United Nations And Israel: From Recognition To Reprehension* (1988) at 29;

The Partition plan proposed a solution whereby the Palestine Mandate be terminated and replaced with a newly established Jewish and Arab state within the territory.⁶ The respective states would be created after a nine-month transition period, with UNSCOP administering the region during this time.⁷

The partition plan inevitably resulted in an almost immediate civil war in the region, fought between Arab and Jewish communities and lasting from 30 November 1947 to 14 May 1948, when Israel declared its independence.⁸ May 15, 1948 marks the day Israel officially declared independence, at which point surrounding Arab nations declared war on the new state, wars which would collectively come to be known as Israel's War of Independence.⁹

The wars resulted in the UN Security Council passing Resolution 62 in an attempt to stifle the hostilities and in essence froze the positions of all armies calling upon all involved to seek an alternative, peaceful solution.¹⁰ Hostilities came to an end in accordance with the Resolution by the signing of various armistice agreements between Israel, Egypt, Jordan, Lebanon and Syria [herein after referred to collectively as "The Armistice Agreements"], which froze the situation as it was and ensured that all military activities ceased.¹¹ The war resulted in the boundaries prescribed by the Partition Plan being changed, and expanded, in Israel's favour. It is important to note that the Armistice Demarcation Lines were "not to be construed in any sense as a political or territorial boundary." but at the same unalterable except by mutual agreement.¹²

As a result of the Armistice Agreements, the territory forming what was the British Mandated Palestine was divided into three territories, being: Israel, the West Bank of the

⁶ Bob Labes "The Law of Belligerent Occupation and the Legal Status of the Gaza Strip" (1988) Michigan Year Book of International Legal Studies 383 at 388

⁷ Imseis, supra note 3, at 75; Labes, supra note 6, at 388

⁸ Dinstein, supra note 1, at 307; Imseis, supra note 3, at 75

⁹ Dinstein, supra note 1, at 307; Labes, supra note 6, at 388; Ann Mosely Lesch *The Gaza Strip: Heading toward a dead end (UFSI reports)* (1984)

¹⁰ SC Resolution 62, 3 UN SCOR, UN Document S/1080 (1949); SC Resolution 61, 3 UN SCOR, UN Document S/1070 (1949); Labes, supra note 6, at 390

¹¹ General Armistice Agreements 1949: Israel-Egypt in 42 United Nations Treaty Series at 251; Israel-Lebanon in 42 United Nations Treaty Series at 287; Israel-Jordan in 42 United Nations Treaty Series at 303; Israel-Syria in 42 United Nations Treaty Series at 327 [herein after collectively referred to as the Armistice Agreements]; see also Dinstein, supra note 1, at 308; Amos Shapira "The Six-Day War and The Right of Self-Defence" (1971) 6 Israeli Law Review 65 at 65; Labes, supra note 6, at 390

¹² Dinstein, supra note 1, at 308

Jordan River and the Gaza Strip, with the demarcation strip being referred to as the "Green Line", and no new Arab state being declared.¹³

In the years that followed, Jordan annexed the West Bank.¹⁴ Egypt assumed control of the Gaza Strip but, unlike Jordan, had no intention of annexing the region or attempting to further its own borders rather seeing their control over the Gaza Strip as an administrative authority under military supervision, ensuring legal frameworks were maintained.¹⁵

2. The 1967 "Six Day War", Its Repercussions and The International Communities Reaction

The next major shift in status quo occurred in 1967. The first half of the year saw increased tensions between the people in the region, resulting in a sharp increase in violence on various boundaries, with Arab and Israeli leaders accusing each other of sparking the hostilities and carrying out violent acts.¹⁶ The Egyptian government reacted to the statement by positioning army personnel along the Sinai border.¹⁷

Governments in the region continued to up the ante throughout May and all United Nations Emergency Force troops remaining in the region were ordered to leave immediately by the Egyptian Government.¹⁸ Rising tensions inevitably came to a head on June 5 1967, when the Israeli Air Force destroyed various Arab military air fields, marking the formal beginning of what came to be known as the "Six Day War".¹⁹

¹³ George Barrie "The International Law Relating to Belligerent Occupation in the advent of the Twenty First Century" (2012) *Journal of South African Law* 433 at 442; Imseis, supra note 3, at 77; Labes, supra note 6, at 388; Ann Mosely Lesch, supra note 9;

¹⁴ See implementation of the Act of Union in April 1950, whereby persons living in the West Bank gaining citizenship within the Jordan Kingdom – it should also be noted that only Pakistan & Great Britain recognized this annexation as valid. Imseis, supra note 3, at 78; Asi Shlaim *The Iron Wall: Israel and the Arab World* (2000) at 43; Barrie, supra note 13, at 443,444 Allan Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West Bank" (1973) 14 *Harvard international law journal* 1 at 38; Eyal Benvenisti *The International Law of Occupation* (1993) at 108, 112.

¹⁵ In essence, the Egyptian control over the West Bank could be construed as the first occupation in the region; Imseis, supra note 3, at 78; Emma Playfair *International Law and The Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (1992) at 4; Meir Shamgar *Military government in the territories administered by Israel, 1967-1980: the legal aspects* (1982) at 74-78; Anis F Kassim, "Legal Systems and Developments in Palestine" (1984) I *Palestinian Yearbook of International law* 19 at 29; Adam Roberts, "What is A Military Occupation?" (1985) 55 *British Year Book of International Law* 18

¹⁶ See statement by Israeli Prime Minister Levi Eshkol on May 11 and 13 addressing the issue; Shapira, supra note 11, at 66

¹⁷ Shapira, supra note 11, at 66

¹⁸ Labes, supra note 6, at 398

¹⁹ Shapira, supra note 11, at 67

On the 9th and 10th of June 1967 a ceasefire was reached between Israel, Egypt and Syria respectively, with Israel having again expanded its borders past the Armistice Agreement lines, assuming control over the West Bank, The Gaza Strip, the Sinai Peninsula and the Golan Heights.²⁰

Israel claimed that their attacks were carried out in self-defence, and as such fell under the exception of Article 1 of the UN Charter.²¹ More important to note is the international reaction to the war in contrast to reactions to previous hostilities in the region.²²

The UN Security Council attempted to construct its first reactive resolution on June 14, with a draft resolution being put forward by the Soviet Union, condemning Israel's aggression and expansion and calling for an immediate withdrawal of Israeli troops to behind the Armistice Agreement lines.²³ Tellingly however, the Resolution failed to pass, with only 4 affirmative votes.²⁴ The fact that the UN Security Council was not willing to condemn Israel's actions outright and call for an immediate withdrawal, showed an important difference with regards to how the UN Security Council viewed this conflict in relation to its predecessors in the region, tacitly confirming that Israel was not seen as the aggressor on this occasion.²⁵

The Security Council did however later pass Resolution 242 confirming "the inadmissibility of the acquisition of territory by war". The Resolution went on to demand that Israel "withdraw its armed forces from territories occupied in the recent conflict".²⁶

²⁰ UN Document S/P.V. 1351 (UN SCOR, 22nd year, 1351st meeting, 8 June 1967, New York); see Labes, supra note 6, at 398; Shlaim, supra note 15, at 241-50; Imseis, supra note 3, at 79

²¹ This idea of a pre-emptive strike in self defence is generally accepted as being valid, Israel's attack having been referred to as probably the clearest example of a legitimate case of pre-emptive self defence, see Thomas M Franck "Who Killed Article 2(4)?" (1970) 64 American Journal of International Law at 821; see also Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82 Michigan Law Review 1620 at 1634 where he states "if the imminence of an attack [be] so clear and the danger so great that defensive action is essential for self-preservation"; See also Yoram Dinstein's analogy for a pre-emptive strike, Yoram Dinstein, "Zion Shall Be Redeemed by International Law" (1971) 27 Hapraclit 5 at 5; Gerson, supra note 14, at 18; Imseis, supra note 3, at 80; Shlaim, supra note 15, at 241;

²² Labes, supra note 6, at 400

²³ UN Document S/P.V. 1369 (UN SCOR, 22nd year, 1369th meeting, 24/25 October 1967, New York); Labes, supra note 6, at 400

²⁴ Labes, supra note 6, at 400

²⁵ See example Resolution 1124 and 1125 passed as a result of the Arab Israeli war in 1956 whereby Israel's actions were condemned, they were deemed the aggressor and directed to withdraw their troops immediately to the Armistice Agreement lines, confirming that the benefits of occupation not be bestowed upon an aggressor; See also aide memoire from Secretary of State John Foster Dulles to Israeli Ambassador Abba Eban (1957) at 392-93; Labes, supra note 6, at 394, 396, 397, 400;

²⁶ SC Resolution 242, UN SCOR, UN Document (S/RES/242) (1967); SC Resolution 252, UN SCOR, UN Document. S/RES/252 (1968); Imseis, supra note 3, at 81

Israel was however not expected to immediately withdraw, with the resolution allowing them to remain in the OPT in an attempt to reach a peaceful solution moving forward.²⁷

It would seem from the above that the international community in general deemed Israel's actions as having been necessary and went as far as acknowledging that an immediate withdrawal, without ensuring security needs were met and a peaceful solution found, would diminish the purpose of the occupation. The international community recognized the legitimate creation of the occupation in the OPT, but it must be noted that they confirmed the principle that land could not be gained through force, and that no matter what the justification for the use of the force, the boundaries as set out in the Armistice Agreements would not, and could not, be altered unilaterally.²⁸

²⁷ Labes, supra note 6, at 400

²⁸ Dinstein, supra note 1, at 310

CHAPTER 3

THE EVOLUTION OF THE LAW OF OCCUPATION

1. Introduction

In attempting to understand the consequences, rights and obligations brought about as a result of the historical background outlined in the previous chapter, one need first look at the legal framework governing the phenomenon of occupation; the international law of war.¹

Although it can be said that there is an extensive amount of codified international law dedicated to the issue of occupation, the application of the law to various scenarios has been highly contentious, with various legal instruments drafted in an attempt to define and regulate it.² From a historical context, the largest shift in emphasis towards what we deem applicable today, occurred towards the end of the 19th century. Before this period, occupation was seen as a situation whereby “enemy territory occupied by a belligerent was in every point considered his state property, so that he could do what he liked with it and its inhabitants”.³ This basic premise was however greatly changed by the Fourth Hague Convention of the Laws and Customs of War on Land [herein after referred to as The Hague Regulations], and the regulations attached thereto, drafted as a result of The Hague Peace Conferences of 1899 and 1907.⁴

2. The Hague Regulations

The Hague Regulations attempted to define and regulate occupation, setting out a formal definition of occupation which entailed a scenario occurring only during, or as a

¹ Bob Labes “The Law of Belligerent Occupation and the Legal Status of the Gaza Strip” (1988) Michigan Year Book of International Legal Studies 383 at 384

² Adam Roberts, “What is A Military Occupation?” (1984) 54 British Year Book of International law 249 at 250;

³ , Lassa Francis Lawrence Oppenheim *International Law: A Treatise: Disputes, War and Neutrality* (1944), at 432; Avinoam Sharon “Why Is Israel’s Presence in The Territories Still Called “Occupation”?” an expansion on Avinoam Sharon “Keeping Occupied: The Evolving Law of Occupation” (2009) 1 Regent Journal of Law & Public Policy 145 at 5 - 6

⁴ Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 42-56, October 18, 1907 [herein after referred to as The Hague Regulations]; Sharon, supra note 3 at 5; Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli “Illegal Occupation: Framing the Occupied” (2005) 23 Berkeley Journal of International Law 551 at 562

consequence of, war, resulting in control of a state's territory by the hostile army of another state's armed forces.⁵

The Hague Regulations redefined occupation and form the foundations of the modern understanding of what an occupation entails, with the aforementioned articles outlining the following main characteristics present during an occupation:⁶

- (a) the occupation is undertaken by a belligerent state
- (b) it is over a territory of an enemy belligerent state
- (c) it occurs during the course of war or armed conflict; and,
- (d) before any armistice agreement is concluded.
- (e) the occupation extends only to those areas over which the occupant exercises effective control⁷
- (f) the occupier holds the territory with the final aim of returning it to the prior sovereign⁸

The Hague Regulations sought to define occupation as a temporary state of affairs in which the occupier ousted the legitimate authority and sovereignty of the territory, a large shift from what occupation entailed prior to its inception.⁹ An occupation was also only present to the extent that territory was placed under the actual control and authority of the hostile army, with the assumption that this would be done directly through the occupiers armed forces.¹⁰

⁵ See article 42, read with article 43; Article 42 of the 1907 Hague Regulations defined the term belligerent occupation by codifying the definition as found in article 1 of the Brussels Declaration (Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874)); Roberts, supra note 2, at 251-252; Sharon, supra note 3 at 5, Labes, supra note 1, at 385, 386

⁶ Adam Roberts "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967" (1990) 84 American Journal of International Law 44; Ben-Naftali, Gross & Michaeli, supra note 4, at 563; Thomas Kuttner "Israel and the west bank: aspects of the law of belligerent occupation" (1977) 7 Israeli Year Book of International Law 166 at 169; Labes, supra note 1, at 385

⁷ There is an assumption that an occupier must exercise such authority directly through its armed forces and that this aspect is central to The Hague Regulations definition of military occupation. See Roberts, supra note 2, at 251

⁸ Sharon, supra note 3, at 5

⁹ See note 3 supra

¹⁰ Article 42 of The Hague Regulations; It should be noted that in modern time occupation a test incorporating the concept of effective control has also been formulated and applied; Susan Power "War, Invasion, Occupation? A Problem of Status On the Gaza Strip" (2009) 12 Trinity College Law Review 25, at 30; Roberts, supra note 2, at 252;

The principles pronounced in Hague Regulations were however largely ignored during WWI, highlighting flaws and inadequacies in the Regulations, resulting in the perception that they were in dire need of review.¹¹

Clarification and development of the international law of occupation was necessary and led to the drafting of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹² (herein after referred to as the Fourth Geneva Convention) to supplement The Hague Regulations.¹³

3. The Fourth Geneva Convention

The Fourth Geneva Convention extended the framework of law in which occupation falls, most importantly in the form of the first and second paragraph of common article 2.¹⁴ Common Article 2 sought to directly address the issues faced by the previous definition of occupation, expanding the applicability of the laws of occupation to further situation.¹⁵

The Fourth Geneva Convention also shifted the focus of an occupation from the occupier to the occupied, broadening the spectrum of obligations imposed on the occupier, while increasing the rights of those residing in the occupied territories.¹⁶

This development of the law of occupation resulted in the following additional characteristics being incorporated:¹⁷

- (1) Occupiers are obliged to protect the inhabitants of the occupied territory;

¹¹ See examples of noncompliance from situations having arose in both Denmark and Czechoslovakia, where the rigid definitions allowed states to escape the obligations impose; In Denmark, German armies encountered little to no resistance to their armed incursion and in Czechoslovakia the territory was not subsequently administered by German armed forces; Roberts, supra note 2, at 252; Ben-Naftali, Gross & Michaeli, supra note 4, at 564; Sharon, supra note 3, at 7; Eyal Benvenisti *The International Law of Occupation* (1993) at 5 - 6;

¹² 12 August 1949

¹³ Roberts, supra note 2, at 252; Sharon, supra note 3, at 7; Ben-Naftali, Gross & Michaeli, supra note 4, at 564

¹⁴ Ben-Naftali, Gross & Michaeli, supra note 4, at 564; Roberts, supra note 2, at 253

¹⁵ For example, extends the application to scenarios whereby a hostile force is met with little to no resistance, where a territory not belonging to a party state is involved, or where a formal declaration of war has not occurred; Labes, supra note 1, at 386; Ben-Naftali, Gross & Michaeli, supra note 4, at 564; Julius Stone *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War Law* (1974) at 250; Roberts, supra note 2, at 268

¹⁶ This is immediately evident from the title of the Fourth Geneva Convention addressing the "Protection of Civil Persons in Times of War." Examples include article 6, which discusses occupations continuing once Military operations have ended; article 47 takes into account the possibility of an occupation in which the Authorities of the occupied territory remain in post, and where an occupation can lead to the attempted annexation of the land so occupied. Roberts, supra note 2, at 253; Benvenisti, supra note 11, at 99-100; Ben-Naftali, Gross & Michaeli, supra note 4, at 564

¹⁷ Labes, supra note 1, at 385; Kuttner, supra note 6, at 169; examples of this could be Art 46 and 50 of the Hague Regulations.

(2) An occupier had the right to ensure its safety and protect itself by not requiring withdrawal of their armed forces until such time that a peaceful agreement had been reached. Adversely, the occupier is expected to negotiate in good faith and attempt to facilitate such an agreement and not be an obstacle to same. and

(3) the occupier is obliged to safeguard the status and reversionary interest of the sovereign ousted by the occupant.

Despite this attempt to broaden the laws of occupation, it must be borne in mind that the Fourth Geneva Convention does not attempt to redefine occupation maintaining the definition under international customary law, and as incorporated in The Hague Regulations.¹⁸ The Convention also enforced the idea that an occupation could only arise as a result of armed conflict between, or involving the territories of, two high contracting parties.¹⁹

It would thus seem that the Fourth Hague Convention still seems to apply only to, in practice, belligerent occupations.²⁰ Once again, in attempt to address these perceived faults, further legal instruments were drafted.

4. 1977 Additional Protocols to the Geneva Conventions of 1949²¹

The decades following WWII saw a shift in the international legal system towards the recognition of the principle of self-determination, culminating in various International Court of Justice opinions (herein after referred to as the ICJ), international conventions on human rights and United Nations (herein after referred to as the UN) resolutions.²²

¹⁸ See International Committee of the Red Cross (herein after referred to as the 'ICRC') commentary as per article 154 of the Fourth Geneva Convention; Sharon, supra note 3, at 8;

¹⁹ the second paragraph of article 2 of the Fourth Geneva Convention refers to a territory of a high contracting party.; Ben-Naftali, Gross & Michaeli, supra note 4, at 565

²⁰ Ben-Naftali, Gross & Michaeli, supra note 4, at 265; Sharon, supra note 3, at 8; See for example Gerhard von Glahn *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957) at 273

²¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (herein after referred to as the First Additional Protocol); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 (herein after referred to as the Second Additional Protocol)

²² Ben-Naftali, Gross & Michaeli, supra note 4, at 265 – 266 where they cite various examples SC Resolution 276, UN SCOR, UN Document S/INF/25 (1970). International Court of Justice Advisory Opinion Legal Consequences for States of the Continued

The recognition of this principle inadvertently resulted in the need for a further evolution of the law of occupation in recognizing the rights of indigenous peoples to challenge foreign domination by, for instance, colonisers or occupiers, leading to the adoption of Article 1(3) and (4) of the First Additional Protocol.²³

Although it is largely seen that Article 1 was adopted as a direct result of the struggle of various populations on the African continent against colonialism, it has also been suggested that the Additional Protocols were drafted as a direct answer to Israel's refusal of the recognize the *de jure* applicability of the Fourth Geneva Convention in the OPT.²⁴ However for the purposes of this dissertation the customary law status of the Additional Protocols will not be discussed in any detail, Israel not having ratified same, and having persistently objected to articles which may be deemed relevant to the OPT.²⁵

The Additional Protocols however add to the continuing attempts by states to gradually develop the law of occupation, transforming them to conform to ever evolving times. The obvious shift in emphasis can be seen from what Oppenheimer proclaimed the pre 19th century definition of occupation to be, compared to the modern definition as espoused by Eyal Benvenisti: ²⁶

that occupation amounts to the "the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.

Presence of South Africa in Namibia (21 June 1971); International Covenant on Economic, Social and Cultural Rights (16 December 1966); Declaration on the Granting of Independence to Colonial Countries and Peoples, (14 December 1960)

²³ Ben-Naftali, Gross & Michaeli, supra note 4, at 566

²⁴ Specifically, Article 4 of the First Additional Protocol; which article It is suggested, along with the First and Second Additional Protocol, attempted to close the loophole in Common Article 2, used by Israel to deny the *de jure* applicability of the Fourth Geneva convention, Roberts, supra note 2, at 254 - 255; Ben-Naftali, Gross & Michaeli, supra note 4, at 566;

²⁵ Specifically rejecting the most applicable provisions to the OPT inclusive of Article 1, with specific reference to paragraph 4 - The United States has also failed to ratify the protocols; Antonio Cassese "The Geneva Protocols Of 1977 On The Humanitarian Law Of Armed Conflict And Customary International Law" (1984) 3 University of California at Los Angeles Pacific Basin Law Journal 55 at 69, 114; Ian Brownlie *Principles of Public International Law* (1979) at 10-11, Ben-Naftali, Gross & Michaeli, supra note 4, at 566; Theodor Meron, "The Time Has Come For The United States To Ratify Geneva Protocol 1" (1994) 88 American Journal of International Law 678 at 683

²⁶ See note 3 above; Benvenisti, supra note 11, at 4; International Humanitarian Law and International Human Rights Law (Edited by Orna Ben-Naftali, 2011) at 133

CHAPTER 4

THE RELATIONSHIP BETWEEN THE HAGUE REGULATIONS, THE GENEVA CONVENTIONS, THE ADDITIONAL PROTOCOLS AND CUSTOMARY INTERNATIONAL LAW

1. Introduction

As has now been shown, any occupation is in essence regulated largely by three legal instruments, The Hague Regulations, The Geneva Conventions and The Additional Protocols. Israel accepts the application of The Hague Regulations in the OPT but it's application of the Fourth Geneva Convention in the region is the topic of most debated.

In accordance with the previous chapter, the customary law status of the Additional Protocols will not be discussed.¹

The Hague Regulations status will likewise not be discussed in detail as its application in the OPT is not disputed. Despite attempts by States to avoid the obligations in the Regulations in the early part of the 20th Century, they have seemingly gained universal recognition as being declaratory of international customary law before and since WWII.² This was confirmed in the judgment of the Nuremberg International Military Tribunal³ where it was stated that:⁴

The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of 'war,'" which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war

¹ See supra note 25, chapter 1.

² Eyal Benvenisti "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective" (2003) 1 Israeli Defence Force Law Review 19 at 27; Bob Labes "The Law of Belligerent Occupation and the Legal Status of the Gaza Strip" (1988) Michigan Year Book of International Legal Studies 383 at 385; Yoram Dinstein, "The International Law of Belligerent Occupation and Human Rights" (1978) 8 Israeli Year Book of Human Rights at 104; Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli "Illegal Occupation: Framing the Occupied" (2005) 23 Berkeley Journal of International Law 551 at 562

³ Judgment of the Nuremberg International Military Tribunal (30 Sept. 1946), in "Trial of The Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946" (1948) [herein after referred to as "The Nuremberg Tribunal"];

⁴ The Nuremberg Tribunal at 497; Naftali, Gross & Michaeli supra note 2, at 562; Theodor Meron "The Geneva Conventions as Customary Law" (1987) 81 American Journal of International Law 348 at 359;

The view was likewise taken in the Far East International Military Tribunal⁵ and was concurred with by the Israeli High Court of Justice's confirming of its application in the OPT.⁶

Unlike The Hague Regulations, Israel refuses to accept the applicability of the Fourth Geneva Convention to the OPT on a *de jure* basis and simultaneously denies its status as forming part of international customary law.⁷ Israel's stance is taken in direct contrast to overwhelming international sentiment to the contrary.

This raises interesting and complicated questions about the relationship between treaty law and international customary law in assessing the status of instruments such as The Hague Regulations and the Geneva Conventions.

2. The Relationship Between Treaty Law and International Customary Law

When analyzing the customary status of any treaty it is necessary to first briefly analyze the general relationship between international customary law and treaty law. This is especially important when dealing with instruments that fall within the framework of the laws of war, a field of law made up of various treaties, unwritten norms and international customary law.⁸

Antonio Cassese summarized the impact that treaties have on the creation of general rules of international law into 5 categories.⁹

⁵ The Tokyo judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948

⁶ The tribunal referred to the Hague Regulations "as good evidence of the customary law of nations, to be considered by the Tribunal" - at 356, 366; See also International Court of Justice Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons* (8 July, 1996) at 226, 257-58 for another example; This is the basis upon which the Israeli domestic legal system has accepted the Hague Regulations as international customary law, see Israeli High Court judgment H.C. 610/78, *Oiev v. Minister of Defense*; Eyal Benvenisti supra note 2, at 27; Meron, supra note 1, at 359; Yoram Dinstein, "The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order" in Michael Bothe "National Implementation of International Humanitarian Law" (1990) at 31-33; Ardi Imseis "On the Fourth Geneva Convention and the Occupied Palestinian Territory" (2003) 44 *International Law Journal* 65 at 99.

⁷ Meron, supra note 1, at 349; Esther Cohen "Justice for Occupied Territory? The Israeli High Court of justice Paradigm" (1986) 24 *Columbia Journal of Transnational Law* 471 at 484-89 (1986); Adam Roberts, "What is A Military Occupation?" (1984) 54 *British Year Book of International Law* 249, at 253; Theodor Meron "Applicability of Multilateral Conventions to Occupied Territories" (1978) 72 *American Journal of International Law* 542 at 543, 548-50; See also chapter 5

⁸ Antonio Cassese "The Geneva Protocols Of 1977 On The Humanitarian Law Of Armed Conflict And Customary International Law" (1984) 3 *University of California at Los Angeles Pacific Basin Law Journal* 55 at 57

⁹ Cassese, supra note 8, at 58-68

1. Treaties as Evidence of Customary Rules
2. Treaties that Codify International Customary Rules
3. Treaties that Develop and Supplement Customary Rules in a Way Binding Upon All States Irrespective of Ratification
4. Treaty Provisions Embodying Customary Rules Evolved within a Diplomatic Conference on the Occasion of the Negotiations
5. Treaty Provisions that Generate Customary Rules

Confirmation of the first 2 relationships can be found in the 1969 Vienna Convention on the Law of Treaties¹⁰ (herein after referred to as the “Vienna Convention”), and more specifically Article 38 and 43.¹¹ The remaining relationships are more complicated and difficult to identify.

When looking at the relationships as a whole there is evidence to confirm that it is accepted practice that when attempting to codify existing international law, the codification amounts to more than merely writing the law as it is, with an attempt to rather more precisely define the relevant law, sometimes resulting in the customary law itself being developed to some extent.¹²

This practice has evolved into an ever developing relationship between treaty law and international customary law where multilateral treaties are drafted and concluded to codify pre-existing international customary law and at the same time develop norms.¹³

¹⁰ Vienna Convention on the Law of Treaties, 23 May, 1969

¹¹ Cassese, supra note 8, at 58 - 59;

Article 38 reads:

[Rules in a treaty becoming binding on third States through international custom] Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Article 43 reads:

[Obligations imposed by international law independently of a treaty] The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

¹² Cassese, supra note 8, at 59; A good example of this can be found at Article 15 of the Statute of the International Law Commission (Adopted by the General Assembly in resolution 174 (II) of 21 November 1947) where it is stated that ‘The expression ‘codification of international law’ is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there are already had been extensive State practice, precedent and doctrine.’

¹³ Cassese, supra note 8, at 59; Meron, supra note 1, at 350

This form of development was confirmed in the ICJ's Advisory Opinions on Namibia¹⁴ and the Fisheries Jurisdiction.¹⁵ In the Namibia Opinion the court declared that Article 60 paragraph 3 of the Vienna Convention amounted to a codification of existing international law, despite it not having come into force as yet.¹⁶ Likewise in its Fisheries Opinion the court referred to Article 52 of the Vienna Convention, holding that the article formed part of general international law, despite the fact that the provision was clearly not an exact codification of customary international law as it was at the time.¹⁷ The provisions can be said to have been innovative in their drafting, Article 52 for instance, expanding the grounds for invalidity of a treaty from the rigid definition previously recognizing only coercion of a state representative actively involved in the negotiations of the drafting.¹⁸

Prior to these opinions, the ICJ, in its judgment in the North Sea Continental Shelf case,¹⁹ also attempted to more clearly define this relationship and the requirements needing to be met to attain the status of a norm of international customary law. The court listed following the requirements:²⁰

- (1) That there be widespread and representative participation in the convention leading to the drafting of the treaty, inclusive of States whose interests are specially affected; (generality) and
- (2) that there be virtually uniform practice (consistent and uniform usage) undertaken in a manner that demonstrates
- (3) a general recognition of the rule of law or legal obligation. (opinion juris)

The court simultaneously dismissed the notion that the passing of a considerable length of time was a necessary requirement for this evolution to occur.²¹

¹⁴ International Court of Justice Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (21 June 1971) [herein after referred to as the "Namibia Opinion"];

¹⁵ International Court of Justice Advisory Opinion *Fisheries Jurisdiction (U.K. v. Ice.)* (25 July 1974) [herein after referred to as the Fisheries Opinion]; Cassese, supra note 8, at 61, 62

¹⁶ Namibia Opinion at 47; Cassese, supra note 8, at 61

¹⁷ Fisheries Opinion at 14; Cassese, supra note 8, at 61

¹⁸ Cassese, supra note 8, at 62; Lassa Francis Lawrence Oppenheim & Hersch Lauterpacht, *International Law: a Treatise* (1955) at 891; See Ian Brownlie, supra note 1, at 612

¹⁹ International Court of Justice Advisory Opinion *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (20 February 1969) ICJ Reports 1969, p.3

²⁰ The court listed these requirements as an explanation to its denial of Article 6 of the The Geneva Convention on the Continental Shelf, 29 April 1958, as an article amounting to a codification of international customary law or as one having, subsequent to its drafting, attained this status. The article was central to the dispute before it; Ruwanthika Gunaratne "North Sea Continental Shelf Cases (Summary)" (2008) Public International Law viewed at <https://ruwanthikagunaratne.wordpress.com/2014/02/28/north-sea-continental-shelf-cases-summary/>; see Continental Shelf Case at para 40-43, 77;

²¹ Gunaratne, supra note 20; Continental Shelf Case at para 43

The Court used these requirements in coming to its conclusion that the article central to the dispute before it, did not amount to customary law.²² The judgment is important in that it confirms that state practice alone is not sufficient, but that states need to feel legally bound and obligated to enforce the rule.²³

The ICJ again pronounced on the relationship between treaty law and international customary law in the *Military and Paramilitary Activities in and against Nicaragua* (herein after referred to as “The Nicaragua case”).²⁴ The court concurred with its *North Sea Continental Shelf Case* judgment, adding that inconsistent state practice does not automatically render a norm as falling outside the ambit of international customary law, as long as the action is seen as a breach.²⁵

It was further confirmed in the *Nicaragua* judgment that the opinion juris of a state should not only be deduced from states practice, but from various other acts, including statements by state representatives, obligations undertaken by participating states in international forums, the International Law Commission’s (herein after referred to as the “ILC”) findings and multilateral conventions.²⁶ The court also went on to opine an important further characteristic, stating that²⁷

the burden of proof to be discharged in establishing custom in the field of human or humanitarian rights is ... less onerous than in other fields of international law.

It is clear that the ICJ has actively attempted to clarify the relationship between treaty law and international customary law, laying down criteria it believes essential, also confirming

²² Gunaratne, supra note 20

²³ Gunaratne, supra note 20

²⁴ International Court of Justice Advisory Opinion *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (27 June 1986) I.C.J. Reports 1986, p. 14

²⁵ The *Nicaragua* case at para 186, it should also be noted at this time that the criteria as set down by the court also plays into the view that the Hague Regulations forming part of international customary law, with states (when not applying the them) using the rigid definitions of the treaty to avoid application, rather than denying their relevance or status; Ruwanthika Gunaratne “*Nicaragua Vs United States: An Analysis Of Jurisprudence On Customary International Law*” 2008 Public International Law viewed at <https://ruwanthikagunaratne.wordpress.com/2014/03/19/nicaragua-case-summary/>

²⁶ Gunaratne supra note 25; Eyal Benvenisti “*The Applicability Of Human Rights Conventions To Israel And To The Occupied Territories*” (1992) 26 *Israeli Law Review* 24 at 26; Theodor Meron *Human Rights and Humanitarian Norms as Customary Law* (1989) at 95-100

²⁷ Benvenisti, supra note 26, at 26 ; Meron, supra note 26, at 113

principles that allow us to understand the interplay between international customary law and treaty law.²⁸

It must however also be borne in mind that if a customary international law is evolved through the process of, for example, a conference (as The Hague Regulations, Geneva Conventions and Additional Protocols were), states not party to the conference cannot be deemed bound, unless it can be inferred from their behavior that they believe themselves bound.²⁹ A persistent objector to a customary law is consequently not bound, should their intention to not be bound be made clear from the outset.³⁰

When it comes to the Fourth Geneva Convention, it would seem that the debate as to whether the Convention qualifies as international customary law would be a simple one. The Fourth Geneva Convention has attained seemingly universal acceptance, with more states being bound to it than the United Nations Charter. Despite this, Israel pursues a policy of denying the *de jure* applicability of the Fourth Geneva Convention in the OPT on the basis that the convention is not reflective of international customary law, amongst other reasons.³¹

Israel's stance is important when considering the domestic legal system in the country, as Israeli law distinguishes between treaty law and customary international law.³² Customary international law is seen as the general practice of states, defined by the Israeli courts as³³

[a] fixed mode of action, general and persisting ... which has been accepted by the vast majority of those who function in the said area of law.

Laws and norms deemed to have met this criterion are thus deemed international customary law, automatically forming part of the domestic law.³⁴

²⁸ Cassese, *supra* note 8, at 64

²⁹ Cassese, *supra* note 8, at 64

³⁰ Cassese, *supra* note 8, at 64

³¹ See note 8 *supra*

³² Ruth Lapidoth, "International Law within the Israel Legal System (1990) 24 Israeli Law Review 451 at 452

³³ HCJ 69/81 - Abu Aita et al. v. Regional Commander of the Judea and Samaria Area et al (1983) at 36

³⁴ Benvenisti, *supra* note 26, at 25; Imseis, *supra* note 6, at 99

The Supreme Court of Israel has maintained that the Fourth Geneva Convention does not meet this threshold, amounting only to treaty law as opposed to customary law, thus not forming part of Israeli domestic law.³⁵ The courts therefore reject the application of the Geneva Conventions to any situation arising within the OPT.³⁶ Israel instead chooses to uphold and apply the Geneva Conventions on a *de facto* basis in the OPT.³⁷

3. Do The Geneva Conventions Form Part of International Customary Law.

The Geneva Conventions conform to the requirements of the test laid down by the court in the both the Nicaragua and North Sea Continental Shelf case as well as the Namibia Opinion. The conventions boasting a large contingent of signatory states with ratification by almost 200 States,³⁸ with no dissenting views,³⁹ and various pronouncements by states⁴⁰ affirming their belief that same fall within the realm of customary law binding all states thereto.⁴¹ Israel seemingly also believes that the Geneva Conventions are binding on them, to some extent, applying and complying with the treaty on a *de facto* basis in the OPT, despite their long held views that the Geneva Conventions are not *de jure* applicable to the region, all adding to the argument that the treaty is universally accepted as being reflective of international customary law.⁴²

There is also general consensus between states, jurists and writers on the international customary law status of the Fourth Geneva Convention.⁴³ Various writers have also stated that international practice reveals that Common Article 3 has been referred to and relied

³⁵ The convention has also not been incorporated into domestic law by the Israeli legislature. Imseis, supra note 6, at 99

³⁶ Imseis, supra note 6, at 99; Roberts, supra note 7, at 283; Eyal Benvenisti *The International Law of Occupation* (1993) at 112;

³⁷ Imseis, supra note 6, at 93; Yehuda Blum, "The Missing Reversionary Reflections on the Status of Judea and Samaria" (1968) 3 *Israeli Law Review* 279, at 293-94. Meir Shamgar, "The Observance of International Law in the Administered Territories" (1971) 1 *Israeli Year Book of Human Rights*. 262 at 266. Yoram Dinstein "The Arab-Israeli Conflict from The Perspective of International Law" (1994) 43 *University of New Brunswick Law Journal* 301 at 314;

³⁸ https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380; <http://www.jpost.com/Arab-Israeli-Conflict/126-signatories-of-Geneva-Convention-call-on-Israelis-Palestinians-to-respect-humanitarian-law-385009>

³⁹ An important factor when assessing the customary status of a treaty according to the ICJ in its Advisory Opinion on Namibia; Cassese, supra note 8, at 68

⁴⁰ For example, at the Vienna Diplomatic Conference on the Law of Treaties, the representative from Switzerland referred to the Conventions as, "virtually universal" and a "general law of nations." States went further, declaring the entire convention, or a majority of the provisions therein, had acquired the status of *jus cogens*, Lebanon, stating that "norms generally regarded as being part of *jus cogens*" were codified in the conventions, referring to such provisions as "the wartime treatment of prisoners and wounded and of the civil population," Poland, which referred to "some of the rules of warfare," Cassese, supra note 8, at 67

⁴¹ with specific reference to Common Article 3, Cassese, supra note 8, at 68

⁴² See supra note 7

⁴³ See for example South Africa's stance, statement of Miranda Joubert to the United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory, including Jerusalem, 43, 44, Cairo (June 14-15, 1999), see also statement of Jordan Paust at 20,21; Imseis, supra note 6, at 90; Roberts & Guelff, supra note 37 at 68, 196; Benvenisti, supra note 35 at 98.

upon on various occasions.⁴⁴ This has occurred despite states seemingly disregarding the article in certain instances, due to the fact that at no point has any state acknowledging or admitted to transgressing same.⁴⁵ This leads to the conclusion that the article has crystalized into one deemed fundamental by all states, regardless of whether or not ratification of the conventions has occurred.⁴⁶ It has further been suggested that various provision of the Geneva Conventions, at least in common article 3, have undeniably attained the status of *jus cogens*⁴⁷ the Geneva Conventions having gradually over time asserted themselves as rules to be followed by all states, who deem the provisions therein fundamental and non-derogable.⁴⁸

The Fourth Geneva Conventions undeniably forms part of international customary law. Israel's denial thereof is also not absolute, and the merits of their stance will be evaluated in the next chapter.

⁴⁴ Cassese, supra note 8, at 108

⁴⁵ See supra note 25; Cassese, supra note 8, at 108

⁴⁶ Theodor Meron, "On a Hierarchy of International Human Rights" (1986) 80 American Journal of International Law 1 at 15; Meron, supra note 1, at 355;

⁴⁷ Meron, supra note 46 at 15.; Meron, supra note 1, at 355; Cassese, supra note 8, at 67

⁴⁸ the Court mentioned the common articles on denunciation (Common Article 63/62/142/158) as examples of this; See confirmation in Nicaragua case at 114 - the court applying various articles of the Conventions on the basis that they reflected international customary law; Meron, supra note 1, at 352 Meron, supra note 1, at 352; Cassese, supra note 8, at 108

CHAPTER 5

IS THERE AN OCCUPATION AND IS IT LEGAL?

1. Can an Occupation Created as A Result of a War in Self Defence Be Valid?

It has long been held by numerous Arab Nations in the region, as well as some writers, that the occupation is intrinsically unlawful and illegal.¹ Considering the discussion on the defined legal framework in which occupation falls, it would seem improbable that all occupations are intrinsically unlawful.²

There are however more valid arguments to this end, for instance that of Jordan, who's official position is that Israel is an aggressor occupant.³ Jordan has long argued that Israel illegally entered the OPT in 1967 in that their actions were in direct contravention of Article 2(4) of the UN charter which prohibits the use of force.⁴ The argument then follows that the benefits of occupation will not be afforded to a state who attains such status illegally.

While the argument is a talking point it has not garnered international support and is questionable on various fronts. In addition to SC resolution 242, 252 and 478 were also passed all confirming that Israel only need withdraw its troops upon the establishment of "a just and lasting peace", rather taking aim at Israel's specific actions, calling on them to halt same and labelling them "invalid" and a "violation of international law", but stopping short of calling the occupation itself illegal.⁵ A policy which the UN Security Council has upheld until today.⁶

¹ Yoram Dinstein, "The Arab-Israeli Conflict from The Perspective of International Law" (1994) 43 University of New Brunswick Law Journal 301 at 313

² Dinstein, supra note 1, at 315

³ Allan Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West Bank" (1973) 14 Harvard international law journal 1 at 7; See Statement of the Permanent Representative of Jordan, Muhamed H. El-Farra, to the Security Council, June 8, 1967, available at [https://www.un.org/en/sc/repertoire/66-68/Chapter%208/66-68_08-8-Situation%20in%20the%20Middle%20East%20\(I\).pdf](https://www.un.org/en/sc/repertoire/66-68/Chapter%208/66-68_08-8-Situation%20in%20the%20Middle%20East%20(I).pdf);

⁴ Gerson, supra note 3, at 7

⁵ SC Resolution 478, UN SCOR, UN Document S/RES/478 (preamble) (1968). Robbie Sabel, "The Palestine Question in International Law" (2009) 42 Israeli Law Review 628 at 631; Ariel Zemach "Can Occupation Resulting from a War of Self Defence Become Illegal?" (2105) 24 Minnesota Journal of International Law 313 at 328-329;

⁶ See for example, Secretary General's remarks made in 2002 to "end the illegal occupation" – remarks which were heavily criticized and subsequently retracted as a misunderstanding of what the Secretary General was in fact calling illegal – Israel's actions. <https://www.un.org/press/en/2002/SC7324.doc.htm>; George P. Fletcher, *Annan's Careless Language*, NY Times, March 21, 2002 (<http://www.nytimes.com/2002/03/21/opinion/annan-s-careless-language.html?mcubz=1>); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli "Illegal Occupation: Framing the Occupied" (2005) 23 Berkeley Journal of International Law 551 at 552

The international court of Justice in its opinion titled “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”⁷ [hereinafter referred to as “The Wall Opinion”], similarly criticized and labelled various Israeli policies and actions as illegal, while failing to define the occupation itself as illegal.⁸

Israel’s argument is based on the reading of Article 51 of the UN Charter which creates an exception to the breaching of Article 2(4) and the prohibition of the use of force.⁹

Article 51 directly incorporates the “inherent” right to self defence, maintaining the customary law definition, which does not require an actual attack to occur but rather requires a proportional act of defence necessary to terminate the hostility.¹⁰ The article was also drafted with the explicit understanding that the UN Security Council was, and would be, capable of abiding by and enforcing "collective security" as set out in chapter VII of the Charter.¹¹

As Allan Gerson writes, the right to anticipatory self defence cannot be denied to a state any more so than it could be denied to an individual in domestic law.¹² In making out such an argument he refers to the Caroline case in which it was stated that to justify an attack in self defence, one need only show a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".¹³

Writers on the topic seem to also generally agree on this point, expressing views encompassing this principle. Eyal Benvenisti has written that an occupation cannot be seen as inherently illegal, but rather becomes so upon the abuse of the rights afforded to the occupier in such a scenario.¹⁴ He furthers this point by referring to UN Security Council Resolution 1483 of May 22, 2003, which he claims justifies the point that occupation laws are alive and well, with the resolutions calling upon "all concerned to comply fully with

⁷ Advisory Opinion, 2004 I.C.J. Report

⁸ Ben-Naftali, Gross & Michaeli, supra note 6, at 552

⁹ Allan Gerson “War, Conquered Territory, and Military Occupation in the Contemporary International Legal System” (1977) 18 Harvard International Law 525 at 545

¹⁰ Gerson, supra note 9, at 547; Yael Ronen “Illegal Occupation and Its Consequences” (2008) 41 Israeli Law Review 201 at 206

¹¹ Kenneth Thompson *Collective Security Re-examined, in from collective security to preventive diplomacy: Readings in international organization and the maintenance of peace* (1965) at 285;

¹² Gerson, supra note 9, at 547

¹³ See also 1974 Definition of Aggression adopted by the General Assembly in 1974 which follows this premise; Gerson, supra note 3, at 17; David Kretzmer, “The Inherent Right to Self Defence and Proportionality in *Jus Ad Bellum*” (2013) 24 European Journal of International Law 1, 235–282;

¹⁴ Eyal Benvenisti, “The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective” (2003) 1 Israeli Defence Forces Law Review 19 at 28; Ben-Naftali, Gross & Michaeli, supra note 6, at 558

their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907".¹⁵

Even writers such as Antonio Cassese who seem to claim that all occupations are in one sense or another inherently illegal acknowledge that an occupation as a result of self defence may be valid, albeit temporarily.¹⁶

It is clear that the occupation that occurred as a result of the 1967 was achieved in a legal manner. It is another question altogether though whether Israel's actions since this time have tainted the occupation and rendered it illegal.

2. Israel's Position

After determining that a legitimate occupation was created in the immediate aftermath of the Six Day War, it is prudent to then assess the various outlooks of those involved and investigate these standpoints, starting with that of Israel's. In terms of what framework of law does Israel proclaim its control over the OPT is regulated, and in terms of what does it justify its status and actions in the region?

Israel has long claimed that the labelling of its control over the OPT as an "occupation" is unfounded on the basis that there is uncertainty as to the rightful sovereign to the territories.¹⁷ Israel has gone as far as arguing that they have a legitimate claim to the OPT.¹⁸

Israel's main reasoning for this stance is found in the wording of Common Article 2 of the Geneva Conventions

the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party

¹⁵ Benvenisti, supra note 14, at 28; Ben-Naftali, Gross & Michaeli, supra note 6, at 558

¹⁶ Antonio Cassese *Self Determination of Peoples: A Legal Reprisal* (1995) at 99; Ben-Naftali, Gross & Michaeli, supra note 6, at 557;

¹⁷ Richard Falk, "Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank" (1989) 2 *Journal of Refugee Studies* 40 at 44; Gerson, supra note 3, at 42

¹⁸ See argument of Yehuda Blum and Ian Brownlie for OPT being deemed *res nullius* or *terra nullius* territory. Yehuda Blum *Secure Boundaries and Middle East Peace* (1971) at 91; Ian Brownlie *International Law and the Use of Force by States* (1966) at 23; Falk, supra note 17, at 48; Gerson, supra note 3, at 9, 42; Lassa Francis Lawrence Oppenheim & Hersch Lauterpacht *International Law: a Treatise*. (1955) at 40; Adam Roberts "Prolonged Military Occupation: The Israeli Occupied Territories Since 1967" (1990) 84 *American Journal of International Law* 44 at 63

which definition, Israel claims, does not encompass the OPT as neither the West Bank, nor the Gaza Strip, formed part of the “territory of a High Contracting Party”.¹⁹ This view forms the basis for Israel’s continued non-acceptance of the Fourth Geneva Conventions applicability in the OPT on a *de jure* basis, Israel choosing to rather apply same on a *de facto* basis.²⁰ The continued implementation of this policy and confirmation and application of same within the Israeli court system, stems back to the decision taken by then attorney general, Meir Shamgar, at a Human Rights symposium in Tel Aviv in 1971, and follows the argument that humanitarian provisions alone need be applied in such circumstances.²¹

It must also be pointed out that Israel has as many political or ideological reason, as it does legal, to justify its position that it not be classified an occupier, and these motivations also inevitably play a role in Israel’s decisions as to how they approach their control over the OPT.²² As Shamgar notes:²³

[A]utomatic application of the Fourth Convention would create unintentionally a change in the political status quo by according to Egypt and Jordan... the standing of an ousted sovereign whose reversionary rights have to be respected and safeguarded. Since the whole idea of the restriction of powers of the military government by the Convention is based upon the assumption that there is a sovereign who was ousted and that he has been a legitimate sovereign, the automatic and unqualified application of the Convention could have enhanced the legal rights of Egypt and Jordan, and this, paradoxically, from the date of the termination of their military government.

Israel would also be seen to simultaneously be abandoning its own claim to sovereignty over the OPT by acknowledging the fact that they were merely occupying another

¹⁹ Meir Shamgar, “Legal Concepts and Problems of the Israeli Military Government-The Initial Stage”, in *Military Government In The Territories Administrated By Israel 1967- 1980* (1982) at 13, 33-34; Yehuda Blum “The Missing Reversionary: Reflections on the Status of Judea and Samaria” 3 (1968) *Israeli Law Review* 279 at 294; Ben-Naftali, Gross & Michaeli, supra note 6, at 567; Hani Sayed “The Fictions of the “Illegal” Occupation in the West Bank and Gaza”(2014) 16 *Oregon Review of International Law* 79 at 120; Roberts, supra note 18, at 63; Wall Opinion at 90

²⁰ Shamgar, supra note 19, at 13, 33-34, 264,266; Blum, supra note 19; Ben-Naftali, Gross & Michaeli, supra note 6, at 567; Sayed, supra note 19, at 120; Roberts, supra note 18, at 59, 62-63; Hans-Peter Gasser “Notes of the Law on Belligerent Occupation” (2006) 45 *Military Law and Law of War Review* 229

²¹ See Yehuda Blum’s argument, Blum, supra note 19; Avinoam Sharon “Why Is Israel’s Presence in The Territories Still Called “Occupation?”” an expansion on Avinoam Sharon “Keeping Occupied: The Evolving Law of Occupation” (2009) 1 *Regent Journal of Law & Public Policy* 145 at 9; Meir Shamgar, supra note 20, 262, 266; Roberts, supra note 18, at 59; Gasser ,supra note 20; George Barrie “The International Law Relating to Belligerent Occupation in the advent of the Twenty First Century” (2012) *Journal of South African Law* 433 at 449

²² Avinoam Sharon “Keeping Occupied: The Evolving Law of Occupation” (2009) 1 *Regent Journal of Law & Public Policy* 145 at 153 – 154; Shamgar, supra note 19, at 13

²³ Sharon, supra note 21 at 9; Shamgar, supra note 19, at 37

sovereign's territory, rather than claiming back its own land.²⁴ In addition to this, they could potentially be seen to be tacitly accepting the 1949 Armistice Agreement lines as international borders.²⁵

Israel's stance is however unsatisfactory, no alternative, legally based argument, as to what their control over the OPT constitutes being put forward by the Israeli government, rather instead only by Israeli writers.²⁶

3. The Fourth Geneva Convention and Its Applicability to The Opt

Considering Israel's official position when it comes to the OPT, their criticism thereto, and the conclusion that the occupation was created legally... where does this leave the applicability of the Geneva Conventions?

While on the face of it, it may seem that the argument over the *de jure* applicability of the Geneva Conventions to the OPT is a moot point due to Israel's application of the convention on a *de facto* basis, the policy brings about various problems.

Israel has failed to defined exactly what it means by 'humanitarian provisions', leaving space for the rejection of a provision on the basis that same does not fall into this definition. The Israeli government's stance also directly affects the domestic judicial system, in essence prohibiting Israeli courts from applying the Geneva Conventions to situations arising in the OPT.²⁷ By taking this stance Israel also seems to imply that only provisions it deems relevant will be applied, and only in situations it deems applicable, leaving open the possibility of disregarding provisions and justifying their actions with reference to their own definition. The government's stance has been largely criticized and finds little to no support from writers and the international community.²⁸

Israel's argument based on the wording of Common Article 2 is rejected by various writers on the topic.²⁹ It is argued that the term 'territory of a High Contracting party' in no way

²⁴ Shamgar, supra note 19, at 37; David Yahav *Israel, the Intifada and the Rule of Law* (1993) at 21.

²⁵ Shamgar, supra note 19, at 37 and counter argument by Adam Roberts in Roberts, supra note 18, at 68

²⁶ See argument that the occupation be seen in a distinct category of 'trustee occupation' in Gerson, supra note 3; Allan Gerson *Israel The West Bank and International Law* (1978) at 78-82; Roberts, supra note 18, at 68

²⁷ See supra note 32, 34, 35 chapter 3

²⁸ Yoram Dinstein, "The International Law of Belligerent Occupation and Human Rights" (1978) 8 Israeli Year Book on Human Rights 106 at 108; Roberts, supra note 18, at 66; Russell Gainsborough *The Arab-Israeli conflict: a politico-legal analysis* (1986) at 159

²⁹ See infra note 31

refers to a full legal title, but rather points to a *de facto* title over the territory, a category under which both Jordan and Egypt would therefore be recognized.³⁰

This argument is predicated on the basis that the drafters of the Geneva Conventions could not have conceivably intended to allow the occupier the discretion of investigating the validity of the title or claim of the ousted sovereign. In addition to this Israel seemingly ignores the first paragraph of article 2, which refers to “any other armed conflict which may arise between two or more of the High Contracting Parties”, with no reference to territory.³¹

The view that the Geneva Conventions be applied on a *de jure* basis has also received almost universal acceptance, with the ICRC, UN General Assembly and the UN Security Council regularly and seemingly without fault, calling upon the conventions to be applied on a *de jure* basis and was also confirmed by the ICJ in its wall opinion.³²

It is interesting to note Adam Roberts observation that Israel has a somewhat contradictory stance when it comes to the application of The Hague Regulations in the OPT, having accepted same as customary international law and its courts having applied same as such.³³ Israeli writers have stated that the status of belligerent occupation as formed in terms of the Hague Regulations is based on the assertion that there is ongoing hostilities between two states.³⁴ This justification was similarly put forward in 1978, the Israeli Supreme Court ruling that the basis for the application of the Hague Regulations was formed on a state of belligerency.³⁵

This reasoning, although seemingly making sense, comes into direct contradiction with Israel’s reasoning for the rejection of the *de jure* application of the Geneva Conventions,

³⁰ W. Thomas Mallison & Sally V. Mallison *The Palestinian Problem in International Law and World Order* (1986) at 254; Ben-Naftali, Gross & Michaeli, supra note 6, at 567

³¹ Ben-Naftali, Gross & Michaeli, supra note 6, at 567 - 568; Mallison & Mallison, supra note 30, at 254; See also argument of Bothe in Michael Bothe *Occupation after Armistice* in *III Encyclopaedia of Public International Law* (1992) at 764; Sharon, supra note 21, at 12; See also argument in Roberts, supra note 18, at 63; Jean Pictet *Commentary - The Geneva Convention Relative to The Protection of Civilian Persons in The of War* (1958) at 20-22;

³² Roberts, supra note 18, at 68; Barrie, supra note 21, at 455; see Ben-Naftali, Gross & Michaeli, supra note 6, at 567 listing various examples since 1977 whereby the only negative vote was that cast by Israel: GA Resolution 3092A (XXVIII) (Dec. 7, 1973) (120-0-5) GA Resolution 3240B (XXIX) (Nov. 29, 1974) (121-0-7) GA Resolution 32/5 (Oct. 28, 1977) (131-1-7) GA Resolution 35/122A (Dec. 11, 1980) (141-1-1) GA Resolution 38/79B (Dec. 15, 1983) (146-1-1) GA Resolution 41/63B (Dec. 3, 1986) (145-1-6) GA Resolution 43/58B (Dec. 6, 1988) (148-1-4)

³³ Roberts, supra note 18, at 65

³⁴ See argument Dinstein, supra note 28, at 106; Roberts, supra note 18, at 65

³⁵ Roberts, supra note 18, at 65; Justice Witkon, judgment in the Beth-El case (H.C. 606/78 and 610/78) at 371, 374

due to the fact that since the Israeli-Egyptian Peace treaty, signed in 1979, no hostilities exist between the 2 states in the Gaza Strip. It cannot therefore be argued that The Gaza Strip forms part of the “territory of a hostile state”, or that hostilities with another state continue, yet Israel still justifies its powers and decisions in the region by referring to the laws of belligerent occupation and The Hague Regulations.³⁶

The non-recognition by Israel of the Geneva Conventions as being *de jure* applicable to the OPT seems to rather be politically motivated than legally so, with evidence that Israel is willing to move away from their strict interpretation as soon as it is not politically advantageous for such a rigid stance to be followed.

It is however also argued that Israel does apply all the provisions of the convention and deem themselves bound by same regardless of whether they are applied on a *de jure* or a *de facto* basis. It has also been pointed out that despite the fact that the Geneva Conventions do not find place in the domestic legal system of Israel, the Supreme Court has nevertheless applied and attempted to interpret same.³⁷

Regardless of this, it is clear that the Geneva Conventions should be applied on a *de jure* basis in the OPT and any argument to the contrary falls short. In addition to this, Israel even on its own flawed policy binds itself to ensuring the application of the Geneva Conventions.

4. Is The Occupation Illegal?

If we look at the above, and we consider that there the occupation was created legally, and falls within the ambit of the Geneva Conventions which are applied, albeit on a *de facto* basis, is there any reason to deem the occupation illegal?

Writers on the topic often cite 2 general norms which are deemed transgressed when justifying why an occupation becomes illegal. The first is the disregard for the prohibition on the use of force, in order to create an occupation, or if created legally, to maintain

³⁶ Roberts, *supra* note 18, at 65

³⁷ Dinstein, *supra* note 1, at 314

same.³⁸ The other norm which is stifled is the right of the people in the territory to self-determination.³⁹

This view is taken by both Benvenisti and Cassese who argue that a prolonged occupation that pursues policies in bad faith, with no attempt to proactively end the occupation, can become illegal, as the control over the territory should then be seen as a protracted act of aggression and a violation of the prohibition of the use of force due to there no longer being a situation whereby self defence can be justified as an exception.⁴⁰

In addition to the above, it is largely held by scholars that for one reason or the other, occupations in general are of a temporary nature, resulting in a further argument, put forward by Ben-Naftali, Gross and Michaeli, claiming that an occupation which is not of a temporary nature is automatically to be deemed illegal.⁴¹

When looking at international bodies, the conclusion that a prolonged occupation is automatically illegal is harder to concluded.⁴² The indecisive nature of the UN's stance on the legality of the occupation in the OPT is reflected in a recent report by the UN Special Rapporteur, whereby he proposed that the ICJ be requested to give an opinion on "the legal consequences of a prolonged occupation that ... has violated many of the basic obligations imposed on an occupying Power".⁴³

In line with this, various international statements surrounding the occupation seem to focus rather on the illegality or invalidity of policies implemented by Israel in the OPT, than labelling the occupation itself illegal.⁴⁴

³⁸ Ronen, supra note 10, at 206; Zemach, supra note 5, at 319

³⁹ Ronen, supra note 10, at 207; Zemach, supra note 5, at 319

⁴⁰ Cassese, supra note 16, at 55, 99; Eyal Benvenisti, *The International Law of Occupation* (1993) at 17 187, 216 at 245-246; Ronen, supra note 5, at 208; Zemach, supra note 5, at 314, 319

⁴¹ See also argument by Doris a. Graber, "The Development of the Law of Belligerent Occupation 1863-1914-A Historical Survey" (1949) at 15; Zemach, supra note 5, at 321; Ben-Naftali, Gross & Michaeli, supra note 6, at 554, 555, 570-79, 592-99, 600-605; Ronen, supra note 10, at 208;

⁴² See note 35 supra; Zemach, supra note 5, at 329

⁴³ Ronen, supra note 10, at 208; The Mandate of the Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967 (Mr. S. Michael Lynk, 2016) available at <http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/PS/Pages/SRPalestine.aspx>

⁴⁴ See for example "Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards", Official Journal of the European Union, 19 July 2013 available at http://eeas.europa.eu/delegations/israel/documents/relatedlinks/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf; Zemach, supra note 5, at 334;

The ICJ too has refrained from referring to the occupation itself as illegal, only declaring various actions and policies implemented by Israel, illegal.⁴⁵ It has been argued that this was not a mere coincidence but rather an endorsement of the view that Israel's illegal actions do not taint the occupation itself with illegality.⁴⁶

It is also important to note that arguments declaring that the occupation has become illegal due to its prolonged nature admit that the relevant legal framework in which occupations operate, does not explicitly limit the duration of an occupation.⁴⁷ A point used by Israeli writers to argue that this fact alone renders the argument of illegality as a result of a prolonged occupation moot in that it can continue indefinitely until such time as a peaceful solution is reached.⁴⁸

In considering these arguments, it is important at this point to remember that the occupying power is not only vested with obligations but is also the subject of certain rights.⁴⁹ These rights include the entitlement to the obedience of the local population and the ability to implement regulations and policies necessary to administer the territory.⁵⁰ More importantly, the occupying power is also afforded the right of ensuring its security interests are met through the continuation of the occupation during negotiations to secure same.⁵¹ An occupant is in essence afforded the right to ensure that its legitimate security needs are met and fulfilled before concluding the occupation.⁵²

The occupying power must however ensure that this right is counterbalanced by the fact that the it administers the territory on a temporary trustee basis. It is essential that policies pursue legitimate security concerns and do not amount to a *de facto* annexation of the territory, directly or indirectly.⁵³

⁴⁵ Ben-Naftali, Gross & Michaeli, supra note 6, at 552.

⁴⁶ Zemach, supra note 5, at 334; Sabel, supra note 5, at 631

⁴⁷ See this sentiment expressed by Benvenisti and former ICJ Judge Rosalyn Higgins; Benvenisti, supra note 40, at 245; Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council" (1970) 64 American Journal of Law 1 at 8; Shamgar, supra note 19, at 13, 43; Zemach, supra note 5, at 326

⁴⁸ See argument by Shamgar - Shamgar, supra note 19, at 13,43; Zemach, supra note 5, at 326; Yoram Dinstein *The International Legal Dimensions of the Arab-Israeli Conflict*, in Robert M. Danin *Israel Among the Nations* (1998) 137 at 150; Michael Curtis, "International Law and the Territories" (1991) 32 Harvard International Law Journal 457 at 464-65

⁴⁹ See supra note 17 chapter 2;

⁵⁰ Barrie, supra note 21, at 434

⁵¹ Zemach, supra note 5, at 318

⁵² Zemach, supra note 5, at 326; Bob Labes "The Law of Belligerent Occupation and the Legal Status of the Gaza Strip" (1988) Michigan Year Book of International Legal Studies 383 at 403; Meir Shamgar supra note 19; Gerson, supra note 9, at 540

⁵³ Zemach, supra note 5, at 318; Labes, supra note 51, at 403; Meir Shamgar "supra note 51.

When determining the legality of Israel's actions, and the occupation as a whole, the principle of self-determination and the prohibition on the use of force need to be looked at in this light. Has Israel in attempting to address its security concerns, illegally overstepped that line and infringed upon international norms and, if so, is the illegality thereof confined to the specific action or policy or to the occupation as a whole.⁵⁴

5. Israel's Security Concerns in Light of the Principle of Self-Determination and Prohibition of the Use of Force

When discussing the right of the people living within the OPT to self-determination there seems to be very little disagreement, with the most ardent of Israeli writers acknowledging the right.⁵⁵

The right to self-determination has crystalized into international customary law and reference to the right can be found in Article 1, Section 2 of the United Nations Charter.⁵⁶ This right was further recognized in the UN Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the UN Charter and has been acknowledged in international covenants on human rights, declarations of states, UN General Assembly and Security council resolutions, and the ICJ.⁵⁷ The international community has also maintained the importance of the right in various instances outside of the Middle East, including in Kampuchea, Namibia and Western Sahara.⁵⁸

The acknowledgement of this right by Israel can also be inferred from their peace treaty with Egypt in which both states agreed to the goal of reaching a situation whereby the OPT were self-governed by an authority elected by the inhabitants of the region.⁵⁹

Arguments basing the illegality of an occupation squarely on the infringement of the right to self-determination are however not abundant and the principle is used rather in

⁵⁴ Falk, supra note 17, at 44

⁵⁵ Dinstein, supra note 37, at 314

⁵⁶ GA Resolution 2625, UN GAOR, (25th year, 1970), UN Document A/8028 at 121; Labes, supra note 51, at 407;

⁵⁷ See Ben-Naftali, Gross & Michaeli, supra note 6, at 566 for a list of examples; see also Resolution of the heads of government and ministers of foreign affairs of the European Council (Venice Declaration), 13 June 1980, calling for "recognition of two principles-the right to existence of all the states in the region and the legitimate rights of the Palestinian people;"

⁵⁸ Roberts, supra note 18, at 75

⁵⁹ Section A(I)(a) of the Camp David accords agreements between Israel and Egypt signed on September 17, 1978; Labes, supra note 51, at 407; Falk, supra note 17, at 48;

amplification of arguments focusing on the breaching of the prohibition of the use of force.⁶⁰

Ben-Naftali, Gross & Michaeli however argue that infringing a people's right to self-determination through occupation can result in the occupation being deemed illegal. The argument is based on 3 legal principles:⁶¹

- Sovereignty and title of the occupied territory is not vested in the occupying power and under modern international law, the title is vested in the people in the region as a result of the principle of self-determination.
- As a result of this right to self-determination, the people under occupation are the beneficiaries of a trust like control the occupier has over the region
- Occupation is never indefinite and always a temporary situation

Their argument is formulated on the basis that should an occupation be anything but temporary, it will automatically result in a transgression of one of the first 2 principles, rendering the occupation itself illegal.⁶²

This is in line with the view taken by the ICJ in the Wall Opinion, that the ultimate objective of an occupation is the realization of the persons within the territories achieving self-determination.⁶³ While not stating that the length of an occupation is in any way limited explicitly in international law, they argue that limitations are a direct result of the first 2 principles, which are explicit.⁶⁴ They also point to the fact that time limits affecting an occupation are implied in the Geneva Conventions when looking at the convention's underlying principles.⁶⁵

The most important article used to support this view is article 6 of the Geneva Convention paragraph 3 which states that the Convention will cease to apply after a period of 1 year, save for certain provisions.⁶⁶

⁶⁰ See supra note 40

⁶¹ Ben-Naftali, Gross & Michaeli, supra note 6, at 553

⁶² Ben-Naftali, Gross & Michaeli, supra note 6, at 553

⁶³ Wall Opinion at 88; Ben-Naftali, Gross & Michaeli, supra note 6, at 577, 592; Zemach, supra note 5, at 321

⁶⁴ Ben-Naftali, Gross & Michaeli, supra note 6, at 593

⁶⁵ Ben-Naftali, Gross & Michaeli, supra note 6, at 593 where they refer to article 47, which confirms that annexation will not be recognized, and paragraph 6 of article 49, which prohibits the formation of settlements by the occupier within the occupied territory, as examples amongst others.

⁶⁶ Ben-Naftali, Gross & Michaeli, supra note 6, at 594

When assessing the paragraph in the Wall Opinion, the ICJ concluded that the provisions formed a distinct set of rules only applicable during military operations, not for the duration of the entire occupation.⁶⁷

This conclusion however seems nonsensical, as it would imply that the occupying powers responsibility towards the occupied people diminishes as the occupation continues, in direct contrast with the principles of the Geneva Conventions.⁶⁸ It would not make sense to free the occupier of its obligations to, for instance "facilitate the proper working of all institutions devoted to the care and education of children" and "the duty of ensuring the food and medical supplies of the population."⁶⁹

It is argued that the only logical conclusion when assessing the purpose of the paragraph is that same is reflective of the drafter's intention that an occupation should at all times be temporary, with responsibilities and obligations referred to in these provisions being handed over to local authorities in time.⁷⁰ They argue that the principle relating to any similar time limit set by law should apply, that of 'reasonable time' in terms of the legal principle of "reasonableness".⁷¹ The position that an occupation can be indefinite, is argued to be an inadequate alternative to this issue, being contrary to the Geneva Conventions basic principles.⁷²

Under this argument what is to be seen as reasonable would be ascertained with reference to the nature, purpose, and circumstances of the occupation.⁷³ This again basically turns on the premise that the occupation should not be prolonged as a result of negotiations in bad faith and tacit, or even explicit, attempts to annex land.⁷⁴

It is seemingly fairly common place that an occupation which seeks to go further than merely ensuring the occupiers security concerns are met, and evolves into something

⁶⁷ Ben-Naftali, Gross & Michaeli, supra note 6, at 595; Wall Opinion at 125;

⁶⁸ Ben-Naftali, Gross & Michaeli, supra note 6, at 595

⁶⁹ Article 50 and 55 respectively. Ben-Naftali, Gross & Michaeli, supra note 6, at 595-596; See Roberts argument that the paragraph be written off as a 'legal oddity' - Roberts, supra note 18, at 57;

⁷⁰ Ben-Naftali, Gross & Michaeli, supra note 6, at 596

⁷¹ Ben-Naftali, Gross & Michaeli, supra note 6, at 599

⁷² See supra note 131 for Shamgar's argument; Ben-Naftali, Gross & Michaeli, supra note 6, at 597; Shamgar, supra note 19, at 43.

⁷³ Ben-Naftali, Gross & Michaeli, supra note 6, at 599

⁷⁴ Ben-Naftali, Gross & Michaeli, supra note 6, at 601

resembling a *de facto* annexation, is a violation of the right to self-determination and the prohibition on the use of force.⁷⁵

It is paramount to note that all these arguments acknowledge that an occupier may occupy a territory as a result of self-defense, and as a result will incur interests of their own regarding their security.⁷⁶

Israel has wide discretion in ensuring these security concerns are met.⁷⁷ It is also argued that SC resolution 242 confers on Israel the right to go beyond this right and also demand certain interests be met, such as formal recognition as a state.⁷⁸

The justification of an action being carried out to meet security needs must however not be used to justify any measure, but rather only legitimate measures aimed solely at this purpose.⁷⁹ This brings us to the largest area of contention with regards to Israel's actions that they deem to fall under this justification, the construction of the West Bank Wall and the creation of settlements in the OPT.

6. Settlements in the OPT and The Wall

Having noted the balance needing to be struck by an occupier, Israel's security policies must at all times been scrutinized. Israel's stance in allowing, and at times even pursuing a policy of erecting Jewish settlements in the occupied territories, as well as their decision to build a wall within the boundaries of The West Bank, has greatly brought into focus Israel's intentions with regards to their ambitions in the OPT.⁸⁰

⁷⁵ See note 69 Supra; Zemach, supra note 5, at 335

⁷⁶ When it comes to Israel's security concerns it is hardly an argument whether Israel has legitimate concerns in the region, a point recently highlighted again in the last decade after the withdrawal of the Israeli army in the Gaza Strip resulted in a barrage of rockets being launched into Israel from the territory. The West Bank poses an even greater concern than The Gaza Strip in that it is located near large population centers, see *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks* (Human Rights Watch Aug. 2009), at 1, available at <https://www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks>; Zemach, supra note 5, at 341; Ben-Naftali, Gross & Michaeli, supra note 6, at 575

⁷⁷ Falk, supra note 17, at 45

⁷⁸ Zemach, supra note 5, at 343

⁷⁹ Falk, supra note 17, at 45

⁸⁰ Israel's policy of erecting settlements in the OPT can be traced back to 1967, where it was justified as necessary to ensure security, but later evolved into policies based on ideological and religious claims to the region under the Likud Party; Ben-Naftali, Gross & Michaeli, supra note 6, at 579, 601; Meron Benvenisti *The West Bank Data Project: A Survey of Israel's Policies* (1984) at 30-36; John Quigley, "Living in Legal Limbo" (1998) 10 PACE International Law Review 1 at 6; Roberts, supra note 18, at 84

The settlements within the OPT are extensive and with good reason not ignored, making up 59% of the West Bank when looked at in conjunction with the bypass roads connecting them, military controlled and confiscated land.⁸¹

Israel has long proclaimed that the settlements are not illegal as they serve an important security purpose and are done so solely to ensure that their security concerns are met, being only temporary and erected with no intention to change borders in the future.⁸²

The Geneva Conventions are however very specific when it comes to settlement of peoples in occupied territories, paragraph 6 of Article 49, with no explicit exceptions, rendering Israel's argument baseless.⁸³

In reference to Article 49, Israel claims that settlements not erected for security purposes are not as a result of 'transferring' of their population, but rather voluntary movement by its people.⁸⁴ The argument attempts to rely on a seeming technicality which it is quite clear would be in direct contradiction with the purpose of the Geneva Conventions.⁸⁵ The argument also makes no sense when looked at in light of Israel's active policy of pursuing settlements in the OPT during the 1980s.⁸⁶ In addition to this, the settlements have seemingly done the opposite of their claimed purpose and have incited tension in the region, contributing to further issues and tensions in the area which the Israeli Defence Force is expected to oversee.⁸⁷

The Special Rapporteur of the UN Commission on Human Rights went as far as claiming that the settlement policy employed by Israel was *prima facie* evidence of Israel attempting a 'territorial expansion, *de facto* annexation or conquest' and brought into

⁸¹ It is also important to note that growth in the OPT is 3 times that of the growth within Israel; Ben-Naftali, Gross & Michaeli, *supra* note 6, at 580

⁸² See for example statements by 2 Judges during judgment in the Beth-El case (H.C. 606/78 and 610/78); Ben-Naftali, Gross & Michaeli, *supra* note 6, at 603; Wall Opinion at 116; Roberts, *supra* note 18, at 90

⁸³ "The Occupying Power shall not... transfer parts of its own civilian population into the territory it occupies"; Ben-Naftali, Gross & Michaeli, *supra* note 6, at 604

⁸⁴ Dinstein, *supra* note 28, at 124; Roberts, *supra* note 18, at 84

⁸⁵ Roberts, *supra* note 18, at 85

⁸⁶ This point was also raised by the ICJ in its Wall Opinion when advising that the settlements were in its eyes illegal, in breach of international law and in violation of article 49, Wall opinion at 120; Meron Benvenisti *The West Bank Data Base Project, 1987 report: demographic, economic, legal, social, and political developments in the West Bank* (1987) at 51-65; Roberts, *supra* note 18, at 85-86; Barrie, *supra* note 21, at 456; Ben-Naftali, Gross & Michaeli, *supra* note 6, at 582;

⁸⁷ Roberts, *supra* note 18, at 85

question the good faith with which Israel claims to occupy the territory and implement policy to ensure security.⁸⁸

The erecting of settlements becomes more problematic when looked at in conjunction with Israel's decision to build the Israeli-West Bank wall, which barrier was the subject of the ICJ Wall Opinion.

The wall is built within OPT and has between itself and the green line at least 17% of the territory making up the West Bank.⁸⁹ Israel claims that the wall is built, again, to ensure its security and is basically a 'security barrier' of a temporary nature.⁹⁰

The ICJ however came to the conclusion that the wall, as a result of encompassing such a vast part of the West Bank between itself and the green line, amounted to a *de facto* annexation and breached the Palestinian people's right to self-determination.⁹¹

The court went on to opine that, despite Israel's assurances that the wall and settlements were temporary, looked at in conjunction it would be unwise to ignore the logical conclusion that Israel intends a situation whereby the "route of the wall will prejudice the future frontier between Israel and Palestine" and that settlements could then be integrated through access control, amounting in essence to a *de facto* annexation.⁹²

At the end of the day the question remains, does the policy of allowing the continued erecting of settlements within the OPT fall within the confines of ensuring that Israel's security needs are met? ⁹³ The answer is quite simply no, it is self-evident that the settlements are illegal and that no justification of the continued erecting of same can validly be put forward.⁹⁴ The Geneva Conventions, as well as the intention behind the transfer paragraph, are very clear... the settlement of the Jewish population within the OPT is prohibited and by claiming that they are voluntary and not in line with any policy

⁸⁸ Question of The Violation of Human Rights in The Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, UN Commission on Human Rights, Question of the violation of human rights in the occupied Arab territories, including Palestine, 12 August 2004, A/59/256, available at: <http://www.refworld.org/docid/4267b5d14.html>; Ben-Naftali, Gross & Michaeli, supra note 6, at 602;

⁸⁹ Barrie, supra note 21, at 455

⁹⁰ Barrie, supra note 21, at 455; Ben-Naftali, Gross & Michaeli, supra note 6, at 602

⁹¹ Barrie, supra note 21, at 455

⁹² Ben-Naftali, Gross & Michaeli, supra note 6, at 602

⁹³ Ben-Naftali, Gross & Michaeli, supra note 6, at 603

⁹⁴ Roberts, supra note 18, at 85

is blatantly not true and also an attempt to work within a grey area in direct contention with the Geneva Conventions purpose.

The advent of the wall, in conjunction with these settlements puts forward the very obvious and blatant fear that the Israeli government is attempting to encapsulate the entire region under a 'Greater Israel' which would illegally incorporate the West Bank.⁹⁵ It also points to the logical conclusion that Israel's actions are seemingly being carried out in bad faith and it is hard to find a reason to believe that Israel has a genuine intention of ending the occupation without staking a greater claim to the OPT that it legally has.

⁹⁵ Falk, *supra* note 17, at 45

CHAPTER 6

CONCLUSION

From this brief investigation it is evident that some issues surrounding Israel, The West Bank and The Gaza Strip are easier to answer than others. An example of this would be the fact that, regardless of arguments to the contrary, occupations are not intrinsically illegal in every instance. International law has recognized the right to pursue an occupation in certain circumstances, and this right stretches back over a century. The argument therefore that Israel's occupation of OPT is unlawful on the basis that no state has the right to occupy a territory other than their own, is incorrect.

Each occupation throughout history needs to be looked at on its own merit, and in terms of the circumstances in which it arises and continues. It would seem in respect of Israel's occupation that the creation of the occupation was done legally. This was also recognized by the international community, as evidenced by the UNSC's reaction to the situation.

Despite the fact that the occupation was seemingly created in a legal manner this does not mean that the occupation is ultimately legal in all aspects and can continue to be, indefinitely. Israel's refusal to acknowledge the Geneva Conventions as being *de jure* applicable, and their insistence on applying same on a *de facto* basis, is clearly not in line with the purpose of the instruments and cannot be accepted, or even considered as a legitimate option. Israel's arguments justifying this stance lack any substance or credibility and it is clear to see that their reasons for this are based more on political considerations than legal ones. Despite this stance, Israel still endeavors to apply the conventions, something no other state in modern history has attempted to do, a point that should not be ignored.

Israel's unilateral decision as to when and how they apply the conventions raises the obvious problem that they will apply same sparingly or tactically in the region to situations which suit them. This has allowed for acts to be carried out that are seemingly in direct conflict with the content and purpose of the conventions. This then raises the question of whether acts contravening the laws governing occupation make the occupation itself illegal.

It is clear that the framework governing occupations, was created on the basis that an occupation should be of a temporary nature, allowing the occupying state the opportunity to secure its right of ensuring its security needs are met. Ben-Naftali, Aeyal M. Gross and Keren Michaeli argue that this concept so intrinsically forms the basis of an occupation, that any occupation that is not temporary is automatically illegal.

Israel's continual pursuance of the creation of settlements in OPT clearly fuels the argument that they have no intention of ensuring that the occupation has a definitive end, never mind that it is temporary. The building of the West Bank Wall only further compounds this, adding a permanence to the situation, a permanence that will not easily be reversed. There is no valid argument for Israel's actions, and the fact that the government not only allows the creation of new settlements, but has in the past actively pursued this in terms of policy, further worsens the perception of Israel's intentions being *mala fides*.

It would seem that Israel's actions have resulted in the perception that they do not intend coming to an amicable agreement with the authorities or peoples of the OPT, and that the occupation is by all means indefinite.

Despite this, I do not agree with Ben-Naftali, Aeyal M. Gross and Keren Michaelis' argument that the prolonged nature of the occupation, automatically renders same illegal. This argument is based on the fact the instruments governing occupation point to the fact that same should be temporary in nature, as well as the fact that a prolonged occupation results in the hindrance of indigenous peoples right to self-determination. When reading the Geneva Conventions, it is clear from numerous provisions invoked by these writers, that the drafters foresaw an occupation as being temporary. I think it is however quite a leap to then assume that on this basis, any occupation that is not temporary becomes illegal.

The argument also seems to ignore the fact that during an occupation the occupied people's rights will always be infringed to some extent, due to the occupying power attempting to secure its own security interests. Although this is meant to be done as quickly as possible and in good faith, there is no precedent for suggesting that failure to

do so in a certain amount of time renders the occupation illegal, despite security concerns remaining.

The argument that an occupation which is not temporary is illegal on the basis that due to its prolonged nature there is an assumption that the security risk of the occupier must have subsided or dissipated, likewise falls short. In the Middle East this is clearly not the case, and this point was highlighted immediately upon Israel's withdrawal from the Gaza Strip. It is clear Israel still has security concerns in the area.

The fact that the ICJ, UNSC and various western states have failed to outright call the occupation illegal is no coincidence, but rather an acknowledgement that the current legal framework in which occupations dwell has not adequately foreseen or addressed the issue.

The crux of the matter is that Israel's occupation of the OPT is a unique situation, and this has resulted in seeming confusion as to how same should be defined. There is an occupation which was brought about legally and was acknowledged as such. Various actions carried out by Israel are in clear violation of international customary law and should be condemned as illegal. The idea that the occupation will be temporary in nature has long since been abandoned. This fact, coupled with Israel's illegal acts do not however, in turn, automatically taint the occupation with illegality.

Israel's security concerns are still very much present, and their right to have this addressed must therefore be upheld. Their insistence however on failing to engage the OPT in terms of amicably ending the occupation, as a result of continuous illegal acts and policies, sees them moving ever closer to a scenario whereby the situation will transition from an occupation to an illegal *de facto* annexation of the territories.

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