

# The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel

MAZEN QUPTY

## Introduction

DOES the Israeli Supreme Court sitting as the High Court of Justice apply international law to the activities of the military government and civilian administration in the Occupied Territories? Does it examine whether the activities of those authorities conflict with the provisions of international law that apply to an occupied territory?

Which international laws are applicable in an occupied territory? And which international laws are applicable in the territories occupied by Israel?

Is the officially declared policy of the State of Israel, whereby it applies customary international law-in particular the regulations annexed to the Hague Convention of 1907 as well as the humanitarian provisions of the Fourth Geneva Convention of 1949-to the activities of the military government in the Occupied Territories, limited to a declaration of policy, or is international law actually implemented in practice, serving as a guiding light for the military commander of the Occupied Territories in his administrative activities?

We will attempt to answer these questions and others in the following article by way of a detailed examination of Israeli High Court Judgments in regard to the application of international law in the Occupied Territories, and by citing other opinions which conflict with Supreme Court practice, be they the minority opinions of the same Court, or the opinions of Israeli scholars.

The following examination will reveal that, practically speaking, the dominant tendency in Israeli Supreme Court rulings is one of non-application of international law in the Occupied Territories, for considerations and reasons with which we will deal below. In cases in which the court is inclined or ready to agree to examine a given administrative action in light of the provisions of international law, we will show how the court interprets specific provisions to suit the requirements of the occupation authorities. Whether by a broad interpretation or a narrow one, the occupation authorities are thus able to reconcile their administrative activities with the provisions of international law.

We will devote the larger part of the following paper to the Fourth Geneva Convention of 1949 and the Hague Regulations of 1907, touching only briefly on the Universal Declaration of Human Rights of 1948. In accordance with the measure of application of each of the above-mentioned conventions in the Occupied Territories, we will begin our discussion with the 1907 Hague Regulations, followed by the Fourth Geneva Convention, and end with the Universal Declaration of Human Rights.

## I. The 1907 Hague Regulations Regarding the Laws and Customs of War on Land

### *The Applicability of the Regulations to the Occupied Territories*

Seven years after Israel occupied the territories, the Supreme Court formulated its position in regard to the application of the Hague Regulations of 1907 in the well-known judgment of <sup>1</sup> Up to that time, the Supreme Court had been irresolute in its attitude to the Hague Regulations~ as is apparent in the judgment of <sup>2</sup>, in which the Supreme Court treated the Hague Regulations of 1907 (as well as the Fourth Geneva Convention) as 'undertakings between nations which are signatories to them and which oblige states to one another under international law <sup>3</sup>.

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<sup>1</sup> HC 302/72, HC 306/72, PO 27 (2)169.

<sup>2</sup> HC 337171, PO 26 [1] 574.

<sup>3</sup> Ibid. 580. Note, Israel is not among the signatories of the Fourth Hague Convention of 1907 and the Regulations annexed thereto.

The Supreme Court, in the words of Judge Sussman, had left open the question of whether the Convention also constituted legislation on the basis of which the Israeli Supreme Court could render judgment in 'internal' disputes between the state and its citizens. The state attorney had agreed to the Supreme Court examining the orders of the area commander on the assumption that the Hague Regulations did apply to the Occupied Territories, or alternatively that, even if they did not, the provisions of Article 43 constituted a 'standard of legislative behavior which the commanders of the Israeli Defence Forces had adopted as their own'<sup>4</sup>. The state attorney reiterated this same position in the later judgment in the case of the *Jerusalem District Electricity Company Inc. v. The Minister of Defence* ('the first Jerusalem District Electricity Company case',<sup>5</sup> in which the Supreme Court examined an action of the West Bank military commander in the light of international law solely on the basis of the state attorney's consent.

In the wake of these two rulings, Professor Yoram Dinstein, of the Department of International Law at Tel Aviv University, published two critical analyses of the manner in which the Supreme Court had treated the Hague Regulations and the Fourth Geneva Convention.<sup>6</sup> Dinstein tried to instil in the Supreme Court the idea that the Fourth Hague Convention and the annexed regulations form part of internal Israeli law and that the Supreme Court does not need the goodwill of the state attorney in order to examine the activities of the military government in the territories in light of international law. Dinstein wrote:

Once again the court has not attended to the declarative nature of the Hague Regulations, which reflect international law. This customary practice is obvious and is based on countless authorities, the principal one being the important ruling of the international military tribunal of Nazi war criminals in Nuremberg which clearly established that the Hague Regulations are recognized by all enlightened nations and are declarative in respect of the laws and conduct of war. Those who desire an Israeli authority can find one in the judgment of the Supreme Court (with five judges on the bench) in the Eichmann trial<sup>7</sup> where it was stated that the Hague Convention of 1907 ... only declared the rules of war as dictated by accepted humanitarian principles. This being the case, the Hague Regulations are automatically absorbed into internal Israeli law.<sup>8</sup>

So it was that in the *Hilu* case-on the basis of Dinstein's above-mentioned remarks and a prior ruling of the Supreme Court-the Supreme Court judges consolidated the practice, still in force in Israel to this day, whereby customary international law, unless contradictory to another provision in internal law, is considered to have been absorbed into Israeli law without the need for any special legislation.<sup>9</sup> This position was further clarified in the Supreme Court ruling in the case of *Ayyoub v. Minister of Defence* ('the Beit El case').<sup>10</sup> In the words of Judge Witkon, the Hague Convention has come to give expression to law which is accepted as a matter of course by all enlightened nations and thus regarded as customary international law.<sup>11</sup> Judge Barak summed up the position of the Supreme Court in respect to the Fourth Hague Convention and the Regulations annexed thereto in the case of *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*, in the following manner:

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<sup>4</sup> Ibid. 580, 586.

<sup>5</sup> HC 256172, PO 27 [1]124, at 136.

<sup>6</sup> Y. Oinstein, 'Legislative Authority in the Administered Territories' (in Hebrew), *Eyunai Mishpat* (Tel Aviv University Law Review) 2 (1972), 505; Oinstein, 'Judicial Review of the Actions of the Military Government in the Administered Territories' (in Hebrew), *Eyunai Mishpat* 3 (1974), 330, 332. Also see Oinstein's *International Law and the State* (Tel Aviv, 1971), 128 ff., esp. 143.

<sup>7</sup> *The Attorney-General v. Eichmann*, Criminal Appeal 3364/1961, PO 16, 2033, at 2054; *Butterworth's International Law Reports*, 36, 277 ff. See ch. 5, text at n. 60, and n. 64 below, for the relevant passage from this judgment.

<sup>8</sup> Dinstein, 'Judicial Review', 332.

<sup>9</sup> HC 302172, HC 306172, 180.

<sup>10</sup> HC 606/78, 610/78, PO 33 [2] 113.

<sup>11</sup> Ibid. 120.

The rights of a resident of the area under military government vis-a-vis the military commander-rights subject to judicial review in a court of law .of the occupying state-stem from the rules governing belligerent occupation In customary international law and contractual International law, Insofar as they have been assimilated into the internal law of the occupying state by a valid internal act of legislation. In respect to Israel's belligerent occupation, and in the absence of legislation which internalizes the principle norms of the laws of war relating to belligerent occupation, [the rules in force] are those Included In the [Hague] Regulations ... Even though the Hague Regulations serve as an authority in this respect, the accepted attitude-which has also been accepted by this court-is that the Hague Regulations are declarative in nature an~ reflect customary international law, applicable in Israel without an act of Israeli legislation.<sup>12</sup>

Thus the official position of the State of Israel, as expressed by the representatives of the state attorney before the High Court of Justice and in the position taken by the Israeli Supreme Court, IS that the Hague Regulations of 1907, being part of customary international law, are part of internal Israeli law. Hence, the Supreme Court has the authority to examine the actions of the military commander of the Occupied Territories on the basis of the provisions and regulations of the Hague Regulations-so long as the military commander In the Occupied Territories is an 'Israeli army officer who bears the appropriate constitutional responsibility'<sup>13</sup> Moreover,

[S]ince officials in the military government are subordinate to the executive authority of the state, the court has the authority to review their activities under section 7(b)(2) of the Court Law 1957.<sup>14</sup>

In light of this position of the Israeli Supreme Court, how does that court apply the Hague Regulations in practice *vis-a-vis* the actions and operations of the military commanders in the Occupied Territories? We will attempt to answer this question below.

### *Israel's Application of the Hague Regulations of 1907*

In practically every discussion of a petition related to the Occupied Territories,<sup>15</sup> the argument is put forward that the actions of the military government contravene the Hague Regulations and should therefore be overturned. This holds in regard to the refusal to unify families;<sup>16</sup> to the authority of the military commander to alter existing laws in the territories<sup>17</sup> to the expropriation of private land;<sup>18</sup> to the

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<sup>12</sup> HC 393/82, PO 37 [4] 785, 793

<sup>13</sup> Y. Dinstein, 'Judgment Regarding Pithat Rafiah', *Eyunal Mishpat (Tel AVIV University Law Review)* 3 (1974), 934, 936.

<sup>14</sup> HC 606/78, 610/78, the *Beit El* case, 126.

<sup>15</sup> Hundreds of petitions have been submitted to the Israeli Supreme Court by residents of the Occupied Territories. As of December 1987, 62 judgments had been published in the official publication of the Judgments of the Israeli Supreme Court. In a research project carried out by Avishai Ehrlich, published in *Israeli Democracy*, May 1987, the researcher states that between July and December 1986, 59 petitions were submitted by residents of the Occupied Territories to the Supreme Court.

<sup>16</sup> HC 13/86, HC 58/86, *Shahin et al. v. The Military Commander of the Judea and Samaria Region*, PO 41 [1]197.

<sup>17</sup> HC 393/82, the *Teachers' Housing Cooperative* case, 784' HC 256/72 the first *Jerusalem District Electricity Company* case, 124.

<sup>18</sup> HC 606/78, the *Beit El* case, 113; HC 390/79 *Dweikat v. The State of Israel et al.* ('the Elon Moreh case'), PD 34 [1]1.

declaration of land as state land;<sup>19</sup> to labour conflicts;<sup>20</sup> to the supply of electricity;<sup>21</sup> to the Imposition of value added tax;<sup>22</sup> to deportation from the territories;<sup>23</sup> and to the demolition of homes.<sup>24</sup>

The attitude of the Supreme Court has been, consistent throughout its rulings. On the one hand, the court recognizes the Hague Regulations as part of Internal Israeli law and examines the actions of the military authorities on the basis of the Regulations. However, when it comes to their practical application, the court interprets them in a narrow sense, in order to legalize the action in question from the standpoint of international law. This is true in relation to the majority of published judgments of the Supreme Court that deal with the Occupied Territories.<sup>25</sup>

The interpretation of Article 43 of the Hague Regulations gives a telling illustration of the application of the Regulations by the Supreme Court. At the beginning of the occupation, the court's interpretation of the article was not unreasonable, while, in this author's view, that given in the minority opinion of Judge Haim Cohn was accurate<sup>26</sup> As the occupation continued, the court was drawn into making very broad interpretations, allowing its decisions to sanction the actions of the military governor. In certain instances, Article 43, as interpreted by the court, was used to legalize actions of the military governor which were clearly prohibited by other provisions of the Hague Regulations.

The case of The Christian Society for the Holy Places was the first petition in which the interpretation of Article 43 was discussed in the Supreme Court. The court was split between Judge Sussman and Judge Y. Cohen, and Judge H. Cohn, who was in the minority.<sup>27</sup> In this judgment, the Supreme Court attempted to amplify the authority of the Israeli military governor on the basis of the argument that his authority under Article 43 in a prolonged occupation is broader than it would be under a brief occupation. The majority opinion held that:

In an area where military occupation lasts for a prolonged period until peace is achieved, the occupant's duty *vis-a-vis* the civilian population even obliges it to alter the law, for the needs of the society change with time and the law must meet those changing requirements.<sup>28</sup>

In contrast to the opinion of Judge Sussman, Judge H. Cohn, in a minority opinion, defined Article 43 narrowly. According to him:

The first thing which comes to light is that authority is granted in order to restore (*retabli*) public order and civil life, and they are not to be restored to anything other than what they were... Only if 'absolutely prevented' from

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<sup>19</sup> HC 277/84, *A'aryab v. The Appeal Committee*, under an order regarding state property, PO 40 [2] 57; HC 285/81, *Al-Nazir v. The Military Commander of the Judea and Samaria Region*, PO 36 [1] 701.

<sup>20</sup> HC 337/71, the *Christian Society for the Holy Places* case, 574.

<sup>21</sup> HC 256/72; and HC 351180, HC 764180, *The Jerusalem District Electricity Company Inc. v. The Minister of Energy and Planning et al.* ('the second Jerusalem District Electricity Company case'), PO 35 [2] 673.

<sup>22</sup> HC 69/81, *Abu Aita et al. v. The Military Commander of the Judea and Samaria Region* PD 37 [2]197.

<sup>23</sup> HC 97/79, *Abu Awad v. The Military Commander of the Judea and Samaria Region* PD 33 [3] 309.

<sup>24</sup> HC 897/86, *Jaber v. The Central Area Commander*, PO 41 [2] 522.

<sup>25</sup> Among all the judgements published by the Supreme Court to the end of 1987, the time of writing, the court accepted three petitions: (1) HC 802179, *Samra et al. v. The Commander of the Judea and Samaria Region*, PD 34 [4] 1, in which the judgment does not deal at all with the question of the application of the Hague Regulations of 1907; (2) HC 351180, the second Jerusalem District Electricity Company case, in which the Supreme Court cancelled the decision of the West Bank Area Commander to annul the Jerusalem Electricity Company's concession on the supply of electricity to the area of the West Bank, on the grounds that such a decision contravenes customary international law, especially Art. 43; and (3) HC 390/79, the *Elon Moreh* case, wherein the Supreme Court cancelled the decision of the West Bank Area Commander to expropriate private land, on the grounds that the expropriation was to be carried out for the purpose of establishing a civilian settlement without there being any military reason that demanded the expropriation of land, which was in contravention of Art. 52 of the Hague Regulations.

<sup>26</sup> HC 337/71, the *Christian Society for the Holy Places* case, 588

<sup>27</sup> *Ibid.* 582.

<sup>28</sup> *Ibid.*

restoring the order without changing these laws can they be altered, and then only to the extent absolutely necessary...

The authority granted under Article 43 is not simply 'for restoring' but also 'for ensuring' public order and civil life. In the view of the respondent, ensuring public order and civil life may necessitate different or additional means than those thought necessary by the previous administration ...

Firstly, it seems to me that these two objectives 'to restore and to ensure' should be considered as one. Hence, it is the responsibility and the obligation of the occupying administration to restore public order and civil life and to ensure their existence in the future; it is not enough to restore them, they must also be upheld... Secondly, it is possible that public order and civil life under a military government will, in many ways and by the nature of things, be different from the public order and civil life under the previous administration... And thirdly, it is possible that the public order and civil life which existed under the previous administration will not be considered by the military administration to constitute either public order or civil life ... in that case, there is nothing to 'restore' but there is something to 'ensure'.<sup>29</sup>

The judge summed up his position by saying:

The authority given to the respondent in accordance with Article 43 is not to set the world aright and establish an ideal order and life in the territories, or even a form of public order and civil life which appears to him to be the most desirable; the authority is to restore the same public order and civil life that existed previously and to ensure their existence in the future.<sup>30</sup>

In the wake of this ruling, Dinstein published his reflections in an article,<sup>31</sup> in which he attacked both minority and majority opinions of the Supreme Court. He argued that the judges' interpretation of Article 43 is so narrow that it 'fetters the occupied population' and that the Court's 'interpretations are not underpinned by any authority'. In Dinstein's opinion:

Since, according to the conclusion of Article 43 of the Hague Regulations, the legislative authority of the occupier is contingent on the existence of [his being] 'absolutely prevented', the question arises what this term means. First of all, it is generally agreed that the adjective 'absolutely' is not as absolute as it may sound and does not really add or detract anything. The proper and accepted interpretation is that 'absolutely prevented' is to be understood in terms of necessity ...<sup>32</sup>

Laws of war generally make for a delicate balance between two magnetic poles: on the one hand, military necessity, and on the other hand, humanitarian considerations. However, with respect to this issue, absolute prevention-i.e. necessity-can arise either from the legitimate interests of the occupier or from concern for the occupied population. *It* can be truthfully stated that the legitimate requirements of the occupier are more comprehensible in this context than concern (which is not always real) for the occupied population ...

In actual fact, occupation and the requirements of the occupier do not negate the needs of the local population, and the legislative authority granted to the occupier IS broad enough to take these needs into account.

The needs of the local population, as correctly stressed in the majority opinion, are more valid and more meaningful when the occupation is of long duration: the economic and social situation changes and it is inconceivable that the legislation in force should be frozen without taking the changing times into account.<sup>33</sup>

A few months after the ruling in the *Christian Society for the Holy Places* case was given, the Supreme Court returned to deliberate over the validity of the legislative acts of the Military Governor of the West Bank in light of Article 43 of the Hague Regulations. In the first Jerusalem District Electricity Company case, the question arose whether the supply of electricity to meet the needs of the local

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<sup>29</sup> Ibid. 586-7.

<sup>30</sup> Ibid. 588.

<sup>31</sup> Dinstein, 'Legislative Authority in the Administered Territories', 505 ff.

<sup>32</sup> These words of Dinstein's were adopted in He 69/81, the *Abu Aita* case, 310.

<sup>33</sup> Dinstein, 'Legislative Authority in the Administered Territories', 509-11.

population was the responsibility of the military government, as part and parcel of its duty to ensure the public welfare of the population.

The court, in answering the question in the affirmative and in establishing that Article 43 of the Hague Regulations had not been violated in practice, established that the responsibility of the military governor is not only to tend to the economic welfare of the population of the region (that is, the native inhabitants of the occupied territory), but also to tend to the needs of the residents of the Jewish settlement of Kiryat Arba. These residents are citizens of the occupying state living in the occupied territory, but 'to this end, the residents of Kiryat Arba should be viewed as persons added to the local population who are 34 likewise eligible to receive a regular supply of electricity'<sup>34</sup>

On the basis of the authority vested in the military government in Article 43, as interpreted by the Supreme Court, the court validated a number of administrative actions, including the prohibition on the circulation of the East Jerusalem *Al-Talza* weekly newspaper.<sup>35</sup> In the *Al-Talia Weekly Magazine v. The Minister of Defence et al.* judgment, Judge Shamgar stated:

Since the establishment of the military government, it has been obliged and permitted to adopt measures which could allow the new administration to fulfill its obligations in accordance with Article 43 and to ensure the safety of our military forces, including the military government. This is so even if these measures are not based upon laws that were in force in the area on the eve of the establishment of the military government, or if their imposition required that changes be made to the existing law ... The obligation to preserve security and public order and to ensure the safety of the residents of the area provides the military administration with, *inter alia*, the authority to prohibit political activity and to limit and even ban political publications.<sup>36</sup>

In other instances the court not only established that it was the obligation of the military administration to preserve security and ensure the safety of the residents of the area on the basis of Article 43; it also established that this regulation served as the basis for the rejection of the argument that another provision of the Hague Regulations prohibits certain actions.

In the *Beit El* case,<sup>37</sup> Article 43 served as a conduit for squeezing the concept of 'ensuring public order and safety' (arising from Article 43) into Article 52 of the Hague Regulations, which prohibits the seizure of private land unless carried out for the 'needs of the army of occupation'. The court further established that the settlement of civilian residents of the occupying power in the occupied territory is in fact required by the occupying army in accordance with Article 52, as it ensures the public order and safety which the regional governor is charged with preserving under Article 43.

In the words of Judge Landau:

The principal role imposed on the army in the administered territory is to ensure public order and safety', as stated in Article 43 of the Hague Regulations. What is required to achieve these objectives is by definition required for the *administering army, as implied in Article 52*. The preservation of security in Judea and Samaria imposes on the army special tasks and it is obliged from time to time to undertake military operations even in times of comparative peace, to forestall the danger of terrorist acts originating outside the administered territory or within. (emphasis added)<sup>38</sup>

In another case, Article 43 of the Hague Regulations served as one of the bases for the rejection of the argument that the deportation of a West Bank resident violates Article 49 of the Fourth Geneva Convention. In the opinion of the Supreme Court:

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<sup>34</sup> HC 256/72, 138.

<sup>35</sup> HC 619/78 PO 33 [3] 505.

<sup>36</sup> Oinstein, 'Legislative Authority in the Administered Territories', 510.

<sup>37</sup> HC 606/78, 113.

<sup>38</sup> Ibid. 130-1. A similar attempt occurred in the *Hilu* case, HC 302/72, 178. In that judgment, the Supreme Court employed Art. 43 in order to validate the actions of the governor, which violated Arts. 46 and 23(g) of the Hague Regulations.

[The Fourth Geneva Convention] does not diminish the obligation of the administering power to tend to the preservation of public order in the administered area, in keeping with Article 43 of the Hague Convention of 1907, nor from its right to employ measures necessary for its own security.<sup>39</sup>

Finally, we will consider three important judgments in which the Supreme Court dealt with Article 43 or parts thereof, interpreting the regulation in so broad a manner that at present the military governor is practically unrestricted in his ability to legislate any law he wishes, or to implement actions which violate other provisions of the Hague Regulations.

First, we will cite the case contesting the imposition of value added tax, the *Abu Aita* case.<sup>40</sup> In this case the petitioners argued that, on the basis of Article 43 of the Hague Regulations, the military commander is obliged to respect the existing law, save *if* absolutely prevented from doing so. Such circumstances did not exist, they claimed, in the imposition of value added tax.

The Supreme Court determined that, in regard to this specific case, absolute prevention did actually exist, and that the military commander was authorized to legislate for a value added tax, under the interpretation of the term 'restoration and maintenance of public order'. Speaking on behalf of the court, Judge Shamgar adopted the interpretation which he himself had used in an article he had written.<sup>41</sup> He said:

The expression 'restoration and maintenance of public order' (*la vie publique*) is, it would seem, a paraphrase of the words 'normalization and rule of law'. 'Rule of law', in its turn, is based on the defined norms of a given legal system<sup>42</sup>

The Supreme Court also raised the question of the obligations of the occupying power when the resources at its disposal through the collection of taxes cannot cover the costs of administering the territory. Does such a situation oblige the military government, in light of Article 43, to make up the difference by drawing on its own resources in order to fulfill its obligation 'to restore and ensure, as far as possible, public order and safety'?<sup>43</sup>

In other words, while the petitioners argued that the military commander is barred by force of Article 43 from legislating a military order whereby a new tax will be imposed in the area, the Supreme Court examined the question of whether the military commander is not obliged, under Article 43, to legislate precisely such a law.

The Supreme Court did not answer the question, making do with raising it for debate, as 'such an argument was not put forward by any of the parties'.<sup>44</sup> On the other hand, the court did adopt the viewpoint that the authority vested in the occupying administration to impose a new tax falls under its general legislative authority. An action carried out in accordance with Article 43 of the Hague Regulations and interpretations of that article,<sup>45</sup> in the opinion of the court, cannot conflict with the provisions of Article 48 of the Hague Regulations, which is solely intended to regulate the specific issue of existing tax collection and does not bar the implementation, in so far as it is necessary, of the stated provisions of Article 43 for the purpose of corrective or new fiscal legislation.<sup>46</sup> In fact Articles 48 and 49, according to the Court, are subordinate to the general provision of Article 43 which is not

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<sup>39</sup> HC 97/79, the *Abu Awad* case, at 316.

<sup>40</sup> He 69/81, PO 37 [2]197. See further discussion of this case in ch. 11

<sup>41</sup> M. Shamgar, 'The Observance of International Law *m* the Administered Territories', IYH~ 1 (1971), 262, 266.

<sup>42</sup> He 69/81, 229.

<sup>43</sup> *Ibid.* 261.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* 293, 308; see also 324.

<sup>46</sup> *Ibid.* 294

encroached on by them.<sup>47</sup>

The second ruling was in the case of *Tabib et al. v. The Minister of Defence*.<sup>48</sup> In this case, the legality of expropriating the private land of the petitioners in order to build a road linking the various settlements in the occupied West Bank was discussed by the court. The petitioners argued that the expropriation of land for the purpose of building a road contravened international law applicable to occupied territory. In dealing with Article 43, from which the military government derives its authority, the court interpreted the term 'ensuring public life'

to mean the provision of an administration which protects the rights of citizens and tends to the maximum welfare of the population. If the realization of this objective demands deviation from existing laws, it is permissible and even obligatory to deviate from them.

In the opinion of the court,

[T]oday, 14 years after the [beginning of the] occupation, one can no longer speak about 'the restoration of order and public life' -they were restored long ago. Hence, one must speak about 'ensuring' them, i.e., operating an orderly administration and all its departments, as is customary in an enlightened country, including security, health, education, welfare, and also, *inter alia*, quality of life and transportation.<sup>49</sup>

The final ruling concerns the *Teachers' Housing Cooperative* case.<sup>50</sup> This petition dealt with the authority of the military commander to expropriate the petitioner's land for the purpose of building roads in the West Bank which, *in the future*, would link towns in the West Bank with Israel.

In this case, the Supreme Court reiterated the practice established in two preceding cases-the *Abu Aita* case and the *Tabib* case-placing special emphasis on the effect of the lengthy occupation on the authority vested in the military commander by dint of Article 43, and further stating that actually, this authority was broader in scope than Article 43 itself provided for, owing to the fact that *it* had considered solely occupations of short duration. In the words of the court:

In establishing the scope of the authority of the military government in accordance with the formula 'the regulation of public life', it would appear to be obvious that a distinction must be drawn between a military government of short duration and a military government of long duration ... This distinction between a military government of short duration and a military government of long duration has great ramifications for the manner in which 'public life and order' is to be ensured ... [I]t is only natural that under a short term military occupation, military and security requirements are paramount. In contrast, under a long-term military occupation, the requirements of the local population are given greater validity. Hence, legislative practices which would be inappropriate under a short-term military government may become appropriate under a long-term military government.<sup>51</sup>

The conclusion the court drew from this was as follows:

This distinction between types of military government, made on the basis of duration, may constitute a proper political consideration in regard to all those instances in which there is room to develop such a policy within the context of the Regulations themselves. A clear example of this is Article 43. Public life and order require consideration of the time element and the fact that all the Regulations were formulated for short-term military governments should not prevent practical developments from taking place in regard to the scope of authority of a long-term military government, within the broad and flexible framework which Article 43 of the Hague Regulations engendered.<sup>52</sup>

Hence:

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<sup>47</sup> See Y. Dinstein's article on this judgment: 'Value Added Tax in the Administered territories (in Hebrew), *Eyunai Mzshpat* (Tel Aviv University Law Review) 10 (1985) 159.

<sup>48</sup> He 202/81, PO 36 [2] 622.

<sup>49</sup> *Ibid.* 629.

<sup>50</sup> HC 393/82

<sup>51</sup> *Ibid.* 800-1.

<sup>52</sup> *Ibid.* 802.

[T]he authority of a military administration applies to taking all measures necessary to ensure growth, change, and development.<sup>53</sup>

### *Will the Hague Regulations Continue to be Applied in the Occupied Territories?*

Although we have examined the practices of the Supreme Court in regard to the application of the Hague Regulations of 1907 and their practical implementation in various judgments rendered on the issue, there remains the question of whether the Supreme Court, after so long a period of occupation, and in the wake of dozens, possibly hundreds of judgments on the issue, will establish that there is no longer any reason to impose the Hague Regulations on the territories occupied by Israel, particularly in the West Bank and the Gaza Strip.

While the likelihood of such a development may be slight, it is my opinion that existing tendencies among some of the Supreme Court judges should not be ignored. There are indeed some judges who have said that the Hague Regulations should be treated in the same manner as the Fourth Geneva Convention of 1949, that is to say, that these regulations should not be applied to occupied territory which was not under sovereign rule prior to the occupation. They argue that, as Israel claims that the West Bank and the Gaza Strip were not under Jordanian or Egyptian sovereignty prior to the Israeli occupation, the Hague Regulations and the Fourth Geneva Convention should not be applied to them. To apply them, it is argued, would be tantamount to *de facto* recognition of the sovereignty of these two states over the territories in question, something which Israel opposes.

The claim that the territories of the West Bank and Gaza Strip were not under sovereign rule prior to their occupation by Israel has been argued a number of times before the Supreme Court. The court chose not to render a ruling on the issue as the petitions submitted did not require its resolution.<sup>54</sup> So it remained until the judgment in *Elyakim Ha'etzni v. The State of Israel*<sup>55</sup> in which, for the first time, the court expressed a clear position in favor of this claim. The court, in the words of Judge Landau, stated:

The fact that Jordan was never the legal sovereign in the areas of Judea and Samaria is correct, but this should not lead one to think that the regional commander could not declare the laws that existed in the region prior to the entry of the IDF to be valid.<sup>56</sup>

This leads to the question of whether the Supreme Court may actually decide that the Hague Regulations are not applicable in the Occupied Territories-particularly in the West Bank-as the territories were not under sovereign rule when occupied.

The likelihood of such a development begins to prove worrisome when there appear hints in Supreme Court judgments according to which the Hague Regulations should not be applied if they conflict with either local Israeli law or the local law of the occupied territory. In the event of a conflict between local law and the Hague Regulations, his argument runs, the provisions of local law should be preferred and not vice versa.

*It is our opinion that, up to now, the Supreme Court has sought and found a variety of ways to justify the practical non-application of the Hague Regulations of 1907. Likewise, it would not come as a surprise if one day it were to employ the arguments used to justify the non-application of the Fourth Geneva Convention, to be discussed more fully below, against the application of the Regulations. The President of the Supreme Court, for one, has expressed support for this argument in his private capacity.*<sup>57</sup>

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<sup>53</sup> Ibid. 804. See ch. 1, text at n. 156 in this volume for the rest of this passage.

<sup>54</sup> See *He 390/79*, the *Elan Mareh* case, 13; see also *He 302/72*, the *Hilu* case, 179; and *HC 606/78*, the *Beit El* case, 129.

<sup>55</sup> *He 61180*, PD 34 [3] 595

<sup>56</sup> Ibid. 597; see also *He 69/81*, the *Abu Aita* case, 229.

<sup>57</sup> M. Shamgar, 'Legal Concepts and Problems of the Israeli Military Government: the Initial Stage', in Shamgar (ed.) *Military Government in the Territories Administered by Israel 1967-1980*, i: *The Legal Aspects* (Jerusalem, 1982), 38 n. 48.

This impression is buttressed by a judgment rendered in May 1987 and published in December 1987 regarding the case of *Ramzi Hana Jaber v. OC Central Command*,<sup>58</sup> which will be discussed more fully in the following section. This petition dealt with the authority of the central region army commander to order the demolition of a room on the roof of the petitioner's house by dint of the authority vested in him under Article 119 of the Defence (Emergency) Regulations of 1945.

The petitioner argued that the exercise of the authority granted to the military commander under the above-mentioned Article 119 is in contravention of the provisions of the Hague Regulations of 1907 and the Fourth Geneva Convention.<sup>59</sup> In rejecting the petitioner's arguments, the Supreme Court established for the first time that the authority vested in the regional commander under the internal law of the occupied territory cannot be challenged by the provisions of international law, and that the authority of the commander cannot be subject to review by force of international law.<sup>60</sup>

So long as this position of the Supreme Court continues to be upheld, the Israeli position, whereby the Hague Regulations apply to the Occupied Territories, is stripped of all meaning. The Defence (Emergency) Regulations of 1945, which include the above-mentioned Article 119, provide the military governor with extremely broad authority. *If* these regulations are underpinned by law against challenges made on the basis of the Hague Regulations, the day is not far off when the Hague Regulations may become no more than a 'legal catchword' rather than a means for the efficient legal supervision of the activities of the military government.

## II. The Fourth Geneva Convention of 1949 Relative to the Protection of Civilians in Times of War

The Israeli position and the position of the Supreme Court in regard to the Hague Regulations of 1907 was that these Regulations were to be applied to the Occupied Territories. However, with the passage of time, there has been a marked tendency-which has become more pronounced over the years, particularly in the decisions of the Supreme Court-whereby the scope of the practical application of the Regulations has been made extremely narrow, as shown in the first section of this paper. In respect to the Fourth Geneva Convention, the Israeli attitude has always been clear-cut. Since the beginning of the occupation, Israel has maintained that the Fourth Geneva Convention cannot be applied to the territories occupied by Israel for reasons which shall be explained below. Any legal attempt to apply this Convention is doomed to failure.

In the following, we will present the position of the Israeli government on the issue and the legal explanations given by the Supreme Court for the non-application of the Convention-which we will deal with at length. Next, we will turn to the interpretations given to Article 49 of the Geneva Convention by the Supreme Court both to justify the deportation of residents of the territories and to show that such acts are in keeping with the provisions of the Geneva Convention. In this section we will examine the position of the Supreme Court in regard to the provisions of the Convention in the wake of the state attorney's agreement to allow the court to deliberate on the issue. And finally, we will review some of the arguments put forward by Israeli scholars who believe that both the State of Israel and the Supreme Court are mistaken in their refusal to apply the Fourth Geneva Convention in the Occupied Territories. We will examine the question of whether such views are likely to influence the Supreme Court to apply the Convention in the territories and the manner in which the Convention could be applied.

The Official Israeli Position Regarding the Non-Application of the Fourth Geneva Convention in the Occupied Territories

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<sup>58</sup> HC 897/86, PD 41 [2] 522.

<sup>59</sup> *Ibid.* 524.

<sup>60</sup> *Ibid.* 525-6. Note that this position totally conflicts with the remarks of Judge H. Cohn in the minority judgment in HC 698/80, Qawassmeh et al. v. The Minister of Defence et al., PD 35 [1] 617, 645. There, Judge Cohn says that since Art. 112 of the Defence Regulations, which authorizes the military commander to deport a resident of the Occupied Territories, conflicts with the rules of international law, in this case with Art. 49 of the Geneva Convention, Art. 112 is overruled by Art. 49.

The official Israeli position regarding the non-application of the Fourth Geneva Convention in the Occupied Territories can be summed up by a few principles according to which: (a) Article 2 of the Geneva Convention stipulates that the Convention is to be applied to occupied territories captured from states which held sovereignty over those territories; (b) the territories of the West Bank and the Gaza Strip were never under Jordanian or Egyptian sovereignty-Jordan's status in the West Bank was one of an occupying state replete with a military government, while the Gaza Strip was, at most, under Egyptian administration; (c) if Israel were to agree to the application of the Fourth Geneva Convention it would be tantamount to Israeli recognition of Jordanian and Egyptian sovereignty over these territories.<sup>61</sup>

The President of the Supreme Court, Judge M. Shamgar, wrote an article in which he gave a detailed explanation of the Israeli position.<sup>62</sup> He explained that:

Israel's position was that as a signatory of the Fourth Convention it was generally bound by the Convention; but in relation to every convention ... a second question always arises as a corollary, namely whether the convention ... actually applies to the specific set of circumstances under consideration. In order to decide this issue one has to refer to the provisions relating to the application of the Convention ...

According to the Israeli position, the question that should be posed is:

(Whether the actual words and context of the Convention involve its applicability to each and every factual situation of military occupation or only to the occupation of territory which was under the sovereignty of another High Contracting Party prior to its occupation.<sup>63</sup>

Judge Shamgar goes on to examine the text of Article 2 of the Fourth Geneva Convention<sup>64</sup> and attempts to provide a legal foundation for the Israeli position that, on the basis of this Article, the Convention is not applicable to the Occupied Territories, as they were not under sovereign rule. While the first paragraph of the Article, which deals with peacetime and situations of armed conflict, refers to all cases of war or armed conflict between High Contracting Parties, the second paragraph, dealing with occupation, refers only to occupation of the territory of a High Contracting Party. The question Shamgar poses is as to whether these paragraphs are to be read conjunctively or independently. He concludes that:

If the paragraphs are independent and not of a cumulative effect, and only the second paragraph defines the extent of the application to occupied territory, the one and only conclusion arising is that the Convention applies merely to the occupation of the territory of a High Contracting Party and not generally to territories held under military occupation.<sup>65</sup>

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<sup>61</sup> Regarding the legal status of the West Bank, much has been written. See E. Lauterpacht, *Jerusalem and the Holy Places* (London, 1968), 46-7; J. Stone, *The Middle East Under Cease fire: Notes on the Legal Position Before the Security Council in October 1967* (Sydney, 1967), 12, and *No Peace-No War in the Middle East: Legal Problems of the First Year* (Sydney, 1969), 17; S. M. Schwebel, 'What Weight to Conquest?', *AJIL* 64 (1970), 344; S. Boyd, *The Applicability of International Law to the Occupied Territories*, *IYHR* 1 (1971), 258; A. Gerson, *Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank*, *HILJ* 14 (1973), 1, and *Israel, the West Bank and International Law* (London, 1978), 7~; T. S. Kuttner, 'Israel and the West Bank-Aspects of the Law of Belligerent Occupation', *IYHR* 7 (1977), 175; Y. Dinstein, 'Zion to be Ransomed by International Law' (in Hebrew), *Hapraklet* 27 (1971), 5, and 'And the Ransom has not been Redeemed, or, Not Demonstrations but Action' (in Hebrew), *Hapraklet* 27 (1971), 519; Y. Blum, *East Jerusalem is not Occupied Territory* (in Hebrew), *Hapraklet* 28 (1972), 182, and 'Zion Ransomed by International Law' (in Hebrew), *Hapraklet* 27 (1971), 315.

<sup>62</sup> Shamgar, 'Legal Concepts and Problems', 13-59.

<sup>63</sup> *Ibid.* 32-4

<sup>64</sup> For text of Art. 2, see ch. 1, text at n. 56.

<sup>65</sup> Shamgar, 'Legal Concepts and Problems', 37-8. Emphasis in the original.

This position has never been deliberated upon in the Supreme Court since the state attorney has never subjected it to the judicial review of the Supreme Court.<sup>66</sup> In the *Ha'etzni* judgment, however, the Supreme Court expressed its support of this position even though it did not examine it.<sup>67</sup>

Israel's official position has been subjected to harsh criticism which has also come from inside Israel. In the opinion of Professor Dinstein, this position of the government of Israel

is based on shaky legal foundations; but it is especially difficult to understand on account of the fact that the Fourth Geneva Convention is not contingent on recognition of property rights.

In his opinion:

There is not a state in the world which is ready to accept this strange position and the entire issue of the application of the Fourth Geneva Convention in the Occupied Territories has become a whip which Israel consistently flogs.<sup>68</sup>

As mentioned earlier, this position has never served as the legal basis for the non-application of the Fourth Geneva Convention to the Occupied Territories by the Supreme Court. For this reason we shall not delve into the above position, but have presented it in the context of a comprehensive review of the issue.

#### *The Application of the Humanitarian Provisions of the Fourth Geneva Convention*

In order to deflect harsh international criticism of Israel's refusal to apply the Fourth Geneva Convention to the Occupied Territories for the reasons stated above, the Attorney-General of Israel declared on behalf of the Government in the course of a symposium held at Tel Aviv University that Israel had decided that in practice it would act in accordance with the humanitarian provisions of the Fourth Geneva Convention.<sup>69</sup>

What are the humanitarian provisions of the Fourth Geneva Convention? In the opinion of the Israeli Attorney-General at that time, 'Humanitarian law concerns itself essentially with human beings in distress and victims of war, not states or their special interests.'<sup>70</sup> But does this position have any legal meaning?

The Israeli position does not allow one to conclude that the Supreme Court is authorized to examine on its own accord whether the activities of the military government are in keeping with the Fourth Geneva Convention. Only if the state attorney agrees to such a judicial review can the Supreme Court examine the actions of the governor in light of the provisions of the Convention.<sup>71</sup>

In the opinion of the court in the *Hilu* case, the state attorney customarily allows the examination of the actions of the military government in light of the Fourth Geneva Convention. Such agreement is occasionally granted in regard to defined issues and without any obligation that it will be given in every petition, something which 'makes our deliberations into a kind of arbitration which is contingent on the agreement of the respondent'.<sup>72</sup>

In the *Elon Moreh* case as well, the state representative requested that the Supreme Court 'confirm that in respect to the Fourth Geneva Convention, no reproach could be lodged against the authorities for transferring land to settlers for their settlement'. The state attorney argued that the action did not contravene the humanitarian provisions of the Convention which are accepted by the

<sup>66</sup> See HC 390/79, the *Elon Moreh* case, and HC 606/78, the *Beit El* case 127.

<sup>67</sup> HC 61180, 597.

<sup>68</sup> Dinstein, 'Judgment ~egarding Pithat Rafiah', 938. See also B. Rubin, 'The Adoption of International Conventions by Israel in Israeli Courts' (in Hebrew), *Meshpatiem* 13 (1983), 210, 231; also see Y. Dinstein, *The Laws of War* (in Hebrew) (Tel Aviv, 1983), 212.

<sup>69</sup> See also Shamgar, 'The Observance of International Law', 261, 263, 266; and Shamgar, 'Legal Concepts and Problems', 42.

<sup>70</sup> Shamgar, 'The Observance of International Law', 263

<sup>71</sup> Dinstein, 'Judgment of Pithat Rafiah', 939; HC 369/79, *Ben Zion v. The Military Commander of the Judea and Samaria Region*, PO 34 [1]145, 150.

<sup>72</sup> HC 302/72, the *Hilu* case, 181.

government of Israel. The court, in rejecting the request, established that the 'humanitarian' provisions in the Convention do not simply apply to the 'protection of human life, health, liberty or dignity', but also to the protection of property.<sup>73</sup>

As stated above, the assertion that the humanitarian provisions' of the Geneva Convention are applied has no real legal meaning since they are not applied automatically. They are applied only if and when the State of Israel agrees to their application, and only in cases in which the state attorney is convinced that the interpretation given by the Supreme Court to a specific provision covers the action against which the High Court of Justice has been petitioned. This will be discussed more fully below.

#### *The Geneva Convention as Part of Contractual International Law*

It took the Supreme Court a not inconsiderable time to formulate the position whereby the Fourth Geneva Convention is not considered part of internal Israeli law, being contractual rather than customary international law. *It was the case of the Beit El settlement which prompted Judge Witkon to distinguish between the Hague Regulations of 1907 and the Fourth Geneva Convention, in the following manner:*

[T]he first question which we must answer is: do the petitioners, as protected persons, have the right to demand, on their own behalf, their rights in accordance with these conventions-and to do so in a 'municipal' (internal) court of the occupying state. Or are only the states which are parties to these conventions authorized to demand the rights of protected persons, and to do so, of course, solely in an international context.

The answer to this question is contingent on another question, namely: has this same provision in an international convention which we are being requested to enforce, become part of the municipal law of the state whose court is being petitioned in regard to the matter; or has this provision remained an agreement among states and only states and not been assimilated into internal municipal law?

In the first instance we are speaking about 'customary' international law recognized in municipal courts so long as there does not exist a provision of municipal law which conflicts with it; while in the second instance we are speaking about 'contractual' international law which, as previously stated, solely obliges states to one another.<sup>74</sup>

Since the *Beit El* case, until the present time, the Supreme Court has reiterated this position whenever it has been argued in court that the provisions of the Geneva Convention apply to the matter under discussion. This position has taken root in Supreme Court judgments to the point where it is difficult to believe that the Supreme Court will alter it, even though other views have been put forward by Israeli scholars.<sup>75</sup>

The practice which has crystallized in dozens of judgments was summed up by Judge Barak in the Teachers' Housing Cooperative Society case. After confirming that the Hague Regulations are indeed part of customary law applicable in Israel,<sup>76</sup> he continued as follows:

The same does not apply to the [Fourth] Geneva Convention ... which, even if applicable to Israel's belligerent occupation of Judea and Samaria-a question which is extremely controversial and which we will not address-constitutes above all else a constitutive convention which does not adopt existing international customs, but generates new norms whose application in Israel demands an act of legislation.<sup>77</sup>

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<sup>73</sup> HC 390179, 29.

<sup>74</sup> HC 606/78, PO 33 [2]119-20.

<sup>75</sup> Rubin, 'The Adoption of International Conventions', 241; see also T. Meron, 'West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition', *IYHR* 9 (1979), 111-12.

<sup>76</sup> See text at n. 52.

<sup>77</sup> HC 393/82, 793. Note also the opinion of Judge Witkon in the *Elan Mareh* case: 'It is a mistake to think that the Geneva Convention does not apply to Judea and Samaria. It does apply, even though ... it is not within the jurisdiction of this court', HC 390/79,29; see also the similar view of Dinstein in *Laws of War*, 213.

As mentioned earlier, the position of the Supreme Court is clear-cut. *It* is opposed to the application of the Fourth Geneva Convention to the actions of the military government in the Occupied Territories. However, in spite of this, do there exist ways whereby it is possible to circumvent the practice of the Supreme Court and convince it to examine the acts of the government in light of the Geneva Convention?

One of the ways this can be done is through acquiring the agreement of the state attorney to examine the actions of the military government, turning the court into a kind of arbitrator between the parties. Another way is "to attempt to prove to the Supreme Court that the Fourth Geneva, Convention has, to all intents and purposes, become part of customary international law, or that specific provisions (such as Article 49, which prohibits deportation) have become part of customary international law; thus such provisions reflect international declarative law and, in keeping with the practice of the court, should be applied. A third way is to show that the practice of the Supreme Court, according to which the Geneva Convention cannot be applied in Israel because it is a contractual international convention, is incorrect. *It* can be argued that, while international conventions of a contractual nature do not automatically apply to internal Israeli law, this does not affect the application of conventions which are legislative in nature, such as the Geneva Convention. Another way is to ascertain whether the provisions of the Fourth Geneva Convention can already be considered part of internal Israeli law, under the orders of the General Staff, in particular General Staff Order No. 33.0133. Finally, the question of whether the Geneva Convention is part of the internal law of the Occupied Territories should be considered, whether by means of military legislation or by legislation existing prior to 1967 on the basis of Jordan's becoming a party to the Fourth Geneva Convention in 1958.

Before examining these methods we wish to discuss another obstacle encountered recently to any attempt to apply the Geneva Convention to the actions of the military governor, or at least to those actions carried out under the Defence (Emergency) Regulations of 1945, issued during the British Mandate.

In the *Jaber* case<sup>78</sup> the O.C. Central Command issued an order under the authority vested in him by Article 119 of the Defence Regulations, to demolish a room on the roof of Jaber's house and seal up the second floor. The petitioner argued that the military commander's order contravened the provisions of the Hague Regulations of 1907 and the Fourth Geneva Convention. In rejecting this argument the court established that:

Article 119 is part of the law that applied to Judea and Samaria on the eve of the establishment of IDF rule. In accordance with the principles of public international law, which also found expression in the Proclamation Regarding the Regulation of Administration and Law (Judea and Samaria) (No.2) of 1967..., local law was preserved, save for certain restrictions which do not concern the issue now before us. Hence, the authority vested under the above-mentioned Article 119 is within the bounds of the local law which exists and is applied in Judea and Samaria, since during the previous administration or that of the military government [the Defence Regulations] were not rescinded, and we have not been presented with legal arguments for considering them to have been rescinded now.<sup>79</sup>

According to this position of the Supreme Court, so long as there exists an internal law in the territories, the internal law outweighs the provisions of the Geneva Convention and the Hague Regulations as well, and in such instances there is no need to examine the activities of the military government in accordance with the standards established by international law.

This position of the Supreme Court actually conflicts with the practice established in the *Qawassmeh* case.<sup>80</sup> In this judgment the court ruled that it was doubtful whether the Defence Regulations of 1945 were still in force in the West Bank on the eve of the IOF's entry into the area in light of Article 9(1) of the Jordanian Constitution of 1952.<sup>81</sup>

In the opinion of the court, the Defence Regulations were in force in the area of the West Bank owing to the area commander's legislation of February 1968, at which time he issued the Order

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<sup>78</sup> HC 897/86, 522

<sup>79</sup> Ibid. 525-6.

<sup>80</sup> HC 698/80 (n. 60 above).

<sup>81</sup> Ibid. 625.

Regarding Interpretations (Additional Provisions) (No. 5) (Judea and Samaria) (No. 224) 1968, Which established in Article 2 that 'emergency legislation, as understood in accordance with Article 3 of the 1945 Regulations, is annulled only by legislation which clearly establishes, by direct reference, that it is annulled'. When the legislation of the area commander carried out under the authority vested in him under Articles 112 and 119 of the Defence Regulations comes up against a rule of customary international law, it is accepted that the rule laid down by customary international law overrules the legislation of the area commander.<sup>82</sup>

If in the end the position put forward by Judge Shamgar in the *Jaber* case is accepted-that is, that the Defence Regulations are part of internal law rather than imposed by legislation of a military commander-this additional obstacle may come to constitute an immovable impediment to any attempt to apply the Geneva Convention to the actions of the military commander in the Occupied Territories. The powers given under the Defence Regulations encompass so many administrative actions-including demolition of houses, deportation, closure of areas, administrative detention, etc.-and are so widely invoked by the military commander that, in view of the ruling of the Supreme Court that in the case of a conflict between international law and local law, the local law should be preferred, there may be no case in which the Convention could override local law. In the meantime, until there are new developments in regard to Supreme Court judgments, we will amplify the discussion of the possible ways in which the Geneva Convention can be applied in the Supreme Court.

#### *The Application of the Convention Following the Agreement of the State Attorney*

The very first time a petition was submitted to the High Court of Justice about an issue related to the Occupied Territories, the question of the application of the Geneva Convention arose. Did the Convention have the status of a law according to which the court could rule in internal controversies between a citizen and the state? Even at that time, the state representative chose not to put these questions before the court. Instead, he agreed to examine the actions of the area commander in light of the Geneva Convention, arguing that the commander had acted in accordance with the Convention.<sup>83</sup>

State representatives have agreed to do this in every case in which the specific provisions of the Geneva Convention, as interpreted by the State of Israel, did not, in the eyes of the state, conflict with the action taken by the military government<sup>84</sup>. However, no assurance was ever given that this would always be the case.

In the opinion of the Supreme Court, this agreement-granted from time to time in regard to defined issues and without any obligation to grant it for each and every petition-turned the role of the court into one of arbitration, contingent on the agreement of the state.<sup>85</sup> In the *Beit El* case, the court refused to examine the actions of the military government in light of the Geneva Convention on the following grounds:

[I]f I was convinced that the Conventions have not been made part of municipal law, *it* would not be right, nor would it be fitting, for us to discuss them, even if the parties were agreed that we should do so. In my opinion, *it* is not our role to wrap ourselves in the cloak of an arbitrator or of a professor of law expressing his expert opinion about an issue which is essentially academic.<sup>86</sup>

When the state representative agrees to apply the provisions of the Geneva Convention, it can lead to the cancellation of the act of the military commander; such was the case in the deportations of

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<sup>82</sup> Ibid. 645.

<sup>83</sup> HC 337/71, the *Christian Society for the Holy Places* case, 580.

<sup>84</sup> For a case in which the state representative did not consent to the examination of the military government's actions in the light of the Geneva Convention, see HC 698/80, the *Qawassmeh* case (n. 60 above).

<sup>85</sup> HC 302/72, the *Hilu* case (n. 1 above), 181.

<sup>86</sup> Remarks of Judge Witkon in HC 606/78, the *Beit El* case, 120. Recently, the State Attorney has expressed his willingness to examine the right of residents of the territories to family reunification in light of the provisions of the Fourth Geneva Convention. See HC 13/86, 58/86, the *Shahin* case (n. 16 above), 197.

Mayors Mohammed Milhem and Fahd Qawassmeh. However, in this case the state attorney did not agree to the Supreme Court examining the act of deportation in light of Article 49 of the Geneva Convention.<sup>87</sup>

In the judgment, Judge Landau, the president of the court, presented a variety of arguments regarding the legality of the act of deportation, but avoided ruling on the question, since the Geneva Convention

does not constitute a part of customary international law and therefore was not contravened as the deportation orders were issued under the internal law of the State of Israel and the Judea and Samaria area, in accordance with which this court renders judgment.<sup>88</sup>

Even when the state attorney agreed to the actions of the military government being judged in light of the Geneva Convention, the court interpreted it in a manner which validated the actions of the military government,<sup>89</sup> as is readily apparent in the attitude of the court to the provisions of Articles 49(1) and 49(6) of the Geneva Convention, prohibiting deportations of protected persons and transfer of the occupier's own civilian population into the occupied territory respectively.<sup>90</sup>

Article 49(6) of the Convention was discussed in the *Beit El* case and the *Elon Moreh* case. While in the *Elon Moreh* case, the court refused to discuss the issue of the application and interpretation of Article 49(6) of the Convention,<sup>91</sup> in the *Beit El* case, though ruling that the actions of the military government should not be examined in light of the Geneva Convention, the court tended to accept the interpretation of Article 49(6) according to which this article is not applicable to the voluntary transfer of citizens of the occupying power to the occupied territory.<sup>92</sup>

The Supreme Court has had many opportunities to discuss Article 49(1) of the Geneva Convention. Each time, the argument that an action of the military government is in contravention of the provisions of the article has been rejected. In the *Abu Awad* case,<sup>93</sup> the court established that Article 49(1) was intended to prevent atrocities like those perpetrated by the Germans in World War II. The Germans deported millions of people from their homes for a variety of reasons. Generally they were brought to Germany to serve as forced labourers for the enemy, and Jews and others were deported to concentration camps to be tortured and exterminated.<sup>94</sup> Thus, it is argued, the provisions of the article

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<sup>87</sup> HC 698/80, 636. In this judgment, Judge H. Cohn gave a minority opinion that the deportation should be cancelled on account of the provisions of Art. 49 of the Geneva Convention, which is part of customary international law. Also see Rubin, 'The Adoption of International Conventions', 236; and see HC 606/78, the *Beit El* case, 113; and Y. Dinstein, 'Settlements and Deportation in the Administered Territories' (in Hebrew), *Eyunai Mishpat* (Tel Aviv University Law Review) 7 (1979), 188, 190.

<sup>88</sup> HC 698/80, 627.

<sup>89</sup> In respect to internal Israeli law, the scope of intervention permitted to the High Court of Justice against the deportation orders issued by a military commander is very narrow. The Supreme Court, in hearing the petition of a person against whom a deportation order has been issued, 'does not know and should not know what security factors require the deportation of the petitioner from the country ... In regard to every thing that concerns the security justifications of deportation orders, for the court the case is closed.' (HC 17/71, *Morzar v. the Minister of Defence*, PD 25 [1] 141, 142-3). Likewise, the court does not review the effectiveness and the wisdom of the decision taken, on the basis that this deviates from the bounds of judicial review and belongs within the bounds of political decision-making (HC 698/80, the *Qawassmeh* case, 634-5). And if the considerations of the military commander have passed the review of the Advisory Board, the court will not intervene in these considerations (HC 97179, the *Abu Awad* case, 317); only if the court is convinced that the area commander did not take substantive account of the considerations given in Art. 108 of the mandatory Defence (Emergency) Regulations of 1945, will the court be prepared to intervene in the commander's judgement, no matter what the recommendations of the Advisory Board are (HC 698/80, the *Qawassmeh* case, 635).

<sup>90</sup> See ch. 1, text at n. 124.

<sup>91</sup> HC 390179, 14.

<sup>92</sup> HC 606, 610/78, 128. In Dinstein's opinion, this interpretation of Art. 49(6) is mistaken: '[W]hen a clearly civilian settlement is located in Samaria, in accordance with the direct decision of the Israeli government and in the wake of the expropriation of private land, it is difficult not to consider this to be a violation of the Geneva agreement. See Dinstein, 'Settlements and Deportation in the Administered Territories', 189.

<sup>93</sup> HC 97179, 309.

<sup>94</sup> *Ibid.* at 316.

do not apply to the deportation of a lone individual. In the *Qawassmeh* case, it was established that the deportation of a West Bank resident who is a citizen of Jordan to Jordan itself does not contravene Article 49(1).<sup>95</sup> This position was reiterated in the *Nazal* case and in the *Kasrawi* case.<sup>96</sup> In the latter the court said that Article 49

does not relate, in any of the legal versions known to us to the deportation of a person from a territory which he consciously entered illegally following the establishment of military rule in the territory. In accordance with its accepted interpretation, it cannot relate to someone who infiltrated the line which divides two sides war with each other.<sup>97</sup>

An equally surprising position was taken by the Supreme Court in the *Abu Awad* case when *it* ruled that deportation in this instance was intended to protect public order and safety, and that this was a Legitimate reason to deport a person. In the opinion of the court, the Geneva Convention

does not reduce the obligation of the occupying power to tend to the preservation of public order in the administered territory as dictated by Article 43 of the Hague Convention of 1907, nor does it [reduce] its right to employ measures necessary to preserve its own security.<sup>98</sup>

#### *The Geneva Convention as Part of Customary International Law*

We have already reviewed the practice of the Supreme Court according to which an Israeli court must apply customary international law and only customary international law, as part of internal Israeli law. Customary international law expresses the international rules of conduct that exist, and which are accepted by the nations of the world, whereas constitutive contractual law is intended to legislate new international rules of conduct and does not constitute part of internal Israeli law, unless it has been adopted by special Israeli legislation, in the view of the Supreme Court.

The Supreme Court also ruled that the Fourth Geneva Convention in contrast to the Hague Regulations of 1907, is part of constitutive contractual international law and not part of declarative customary law. As such, the Geneva Convention does not constitute part of internal Israeli law. Hence, a petitioner cannot base his argument on it when coming before the High Court of Justice. The circumvention of this court practice can occur if the court becomes convinced that the Fourth Geneva Convention is part of declarative customary international law, or that, between its legislation and the present time, the Convention has become part of customary international law, or that specific provisions of the Convention have become generally accepted as being among the rules of customary international law which also bind Israeli courts.

A number of international legal scholars have already expressed their view in favour of the position whereby the Geneva Convention is considered to be part of customary law. For instance, Jean Pictet:

The Convention does not, strictly speaking, introduce any innovation in this sphere of international law. *It* does not put forward any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war—a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt.<sup>99</sup>

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<sup>95</sup> HC 698/80, 649. This opinion later gained the approval of Dinstein, who said that, had the military governor sent the petitioners in the *Qawassmeh* case to the Kingdom of Jordan, there would be no grounds for speaking about a violation of Art. 49(1) of the Geneva Convention. In Dinstein's opinion, this article prohibits the deportation of protected persons from the occupied territory to the territory of the occupying power or to that of another state. However, the word 'another' should be defined as a state which is not the state of citizenship of the deportee. (Dinstein, 'The Deportation of the Mayors from Judea' (in Hebrew), *Eyunai Mishpat* (Tel Aviv University Law Review) 8(1981), 158 and 170.

<sup>96</sup> HC 256/85, 513,514/85, *Nazal et al v The Military Commander of the Judea and Samaria Region*, PD 39 (3) 645, 654, and HC 454, 456/85 *Kasrawi et al. v. The Minister of defence*, PD 39 [3] 401, 410.

<sup>97</sup> HC 454/85, 410.

<sup>98</sup> HC 97/79, 316. Dinstein criticized this position in 'Settlement and Deportation in the Administered Territories' 188 and 193.

<sup>99</sup> J. Pictet, *Commentary on Geneva Convention IV of 1949*, trans. R. Griffin and C. W. Dumbleton (Geneva, 1958), 9.

Two other scholars, Yingling and Ginnane, reached an identical conclusion:

The new civilian convention is an extension and codification of earlier rules and practices governing the treatment of alien enemies in a belligerent country and in the treatment of the inhabitants of territory under military occupation.<sup>100</sup>

Other scholars state that, if not all the provisions of the Convention are part of customary international law, at least some specific provisions of the Convention do actually constitute norms of customary international law of which the Geneva Convention was declaratory. According to Georg Schwarzenberger:

The question of whether the Geneva Red Cross Convention IV is declaratory or constitutive is not settled conclusively in the Convention. *It* is merely stated that the Convention is 'supplementary' to the corresponding sections of the Regulations of 1899 and 1907. Some of its provisions are no more than attempts to clarify existing rules of international customary law ... To the extent, however, to which existing legal duties of occupying powers are not merely elaborated, but enlarged, the Convention must be treated as constitutive and applied only between the parties.<sup>101</sup>

Likewise, the American Jewish legal scholar Theodor Meron argues that the Geneva Convention should not be considered a constitutive convention. In his opinion:

As regards the Geneva Convention, I would not question the opinion which regards it as conventional rather than customary. However, account must be taken of the fact that some provisions of the Geneva Convention are indeed declaratory of customary international law ... Rather than view all the provisions of the Geneva Convention as reflecting conventional international law and therefore as non-invokable in domestic courts, it is suggested that the High Court of Justice should, in the future, examine each relevant provision of that convention in order to determine whether it is declaratory of customary international law or not.<sup>102</sup>

The Supreme Court was ready to accept the above suggestion and did actually examine-in the minority opinion of Judge Haim Cohn-whether the beginning of Article 49 prohibiting deportation constitutes part of customary international law. He concluded that 'in the beginning of Article 49 of the Geneva Convention there exist the seeds of customary international law which has always been followed throughout the world' .<sup>103</sup>

In the opinion of this author, Judge H. Cohn's ruling, in spite of his being in the minority, constitutes at present the 'only possible means for deportees to try to prevent their deportation, especially if they are neither West Bank residents nor being deported to Jordan'.<sup>104</sup>

Another possibility, which we believe to be less practical, is to try to show that a certain provision of the Geneva Convention, or the Convention as a whole, has over the time that has passed since 1949 until now, become part of customary international law. Customary international law is defined in Article 38 of the constitution of the International Court of Justice to be 'international custom, as evidence of general practice applied by law'. That is to say, so long as the international standard of behaviour upheld by states is considered to have the status of an obligation, or is considered legally

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<sup>100</sup> R. T. Yingling and R. W. Ginnane, 'The Geneva Conventions of 1949', *AJIL* 46 (3) (1952), 393, 411.

<sup>101</sup> G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, 2: The Law of Armed Conflict* (London, 1968), 165. This passage was cited in HC 606/78, the *Beit El* case, 121.

<sup>102</sup> Meron, 'West Bank and Gaza: Human Rights and Humanitarian Law', 111-12.

<sup>103</sup> In HC 698/80, the *Qawassmeh* case, 636. Dinstein, agreeing with the judge's approach, notes that, '[I]n theory this approach is correct and we do not wish to dispute it. However, in practice, there are not many effects of this approach: Dinstein, 'The Deportation of the Mayors', 167n.

<sup>104</sup> The President of the Supreme Court avoided discussion of the argument that Art. 49 is part of customary law in the *Nazal* deportation case (n. 96 above). He did so on the grounds that, in his opinion, the deportation of a West Bank resident to Jordan is not prohibited by a literal reading of Art. 49 of the Geneva Convention. HC 256185, 654.

just, the general rule that arises from this behaviour is usually considered to be a rule of the customary law of nations.<sup>105</sup> In the opinion of Professor Dinstein, which appears to be correct:

The State of Israel is the first to be asked (as a party) to implement the Geneva Convention in law and practice. Granted, hopefully and perhaps likely, the Convention will indeed be implemented in the future, perhaps when an international custom is established. However, in the meantime, this is no more than a wish or an expectation.

In Dinstein's opinion,

*It is not impossible that some of the provisions scattered through the Convention already were of a declaratory nature, without relation to the constitutive status of the entire document. However, this must be proven by state practice. And I am not referring to practice in time of peace, but to practice during times of war.*<sup>106</sup>

### *The Geneva Convention as a Legislative Convention rather than a Contractual Convention*

Binyamin Rubin, an employee of the Ministry of Justice in Israel, published an illuminating article in 1983 in which he argues that there is no practice in Israel according to which only customary international law constitutes part of internal law.<sup>107</sup> This would be in keeping with English practice, which Rubin considers to be correct, but to have been misinterpreted in Israel.

In Rubin's opinion, the distinction made by the Israeli court between the Geneva Convention and the Hague Regulations—both laws relating to war, one pertaining to contractual international law and the other to customary international law—whereby the latter constitutes part of the law of the country and the former does not, is an incorrect distinction. In Rubin's opinion:

In England itself, from where this distinction between contractual law and customary law ostensibly stemmed, laws of war are the exception to this distinction. English laws of war are part of the country's laws, whether they fall under customary law or contractual law. This is only one of the reasons why the Geneva Convention, more than other legislative conventions, should be viewed as being part of the law of the land.<sup>108</sup>

According to Rubin,

Beginning with the claim that waging a war is part of the 'royal prerogative', in England they arrived at the conclusion that the crown is entitled to bind its own hands in the conduct of war, and the conventions to which it is a signatory become a part of internal law without the need of legislation for this purpose.<sup>109</sup>

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<sup>105</sup> See L. Oppenheim, *International Law*, i, 8th edn. (London, 1955), 27. Also see HC 256/85, the *Nazal* case, 638, and the *Shahin* case (HC 13/86, 209-10) in which Judge Shamgar examines the question of whether there is a generally accepted legal practice obliging an occupying state to allow entry and residence in occupied territory to a resident of an enemy country. In the opinion of the judge: 'In no case have general principles crystallized creating an obligatory customary norm which is generally to be applied to the area under belligerent occupation. Nor have there been any precedents in this area which could serve as a kind of evidence of generally accepted practice in law.'

<sup>106</sup> Dinstein, 'The Deportation of the Mayors', 168.

<sup>107</sup> Rubin, 'The Adoption of International Conventions', 211.

<sup>108</sup> *Ibid.* 211

<sup>109</sup> *Ibid.* 214. Also see n. 14 on same page, in which Rubin turns to A. D. McNair, *The Law of Treaties* (Oxford, 1961), 89-91, and F. A. Mann, 'The Enforcement of Treaties by English Courts', *Trans. of the Grotius Society* 44 (1958-9), 29, 37-9.

In dealing with the Israeli practice established in judgments in the two cases of *The Custodian of Absentee Property v. Samara*<sup>110</sup> and *KLM v. The Minister of Transportation*,<sup>111</sup> Rubin attempts to show that actually these two judgments dealt with an international convention of a contractual nature which therefore did not constitute part of internal Israeli law, in contrast to legislative conventions which are part of general international law.

In Rubin's opinion:

When discussing legislative conventions, there is no point whatsoever in making a distinction between them and customary international law. Now that it has been established that the rules of customary international law which bind Israel are part of the laws of the land, it would appear that the same must now be established in respect to the rules in legislative conventions to which Israel is party.<sup>112</sup>

Rubin concludes by saying:

In order for part of a convention to be considered law in this country, it is not enough for it to be of a legislative nature. It must also be a 'self-executing treaty', that is, one whose provisions can be implemented as they are without requiring other measures arising from the convention<sup>113</sup>

On the basis of the above reasoning and the argument that follows, Rubin arrives at the conclusion that no distinction should be drawn between the Geneva Convention and customary international law and that, for all intents and purposes, the Fourth Geneva Convention should be considered to be part of internal Israeli law and that the Supreme Court must rule in accordance with it. In Rubin's opinion, this conclusion follows from, *inter alia*, the fact that the role of the military commander in occupied territory was established by international law, particularly by the laws of war. Laws of war place the area commander under certain obligations, as these laws both establish the role he is required to fulfil and the limits of his power and his obligations.

This feature of the role of an area commander makes it obligatory for his actions to be examined in accordance with the laws of war which he is required to uphold, and in this respect there is no difference between customary law and contractual law.<sup>114</sup>

In order to pressure the Israeli Supreme Court into adopting the Fourth Geneva Convention as part of internal Israeli law, any means available should be employed, including the path proposed by Rubin. However, in our opinion, the likelihood of Rubin's arguments being accepted is slight, not least because the practice of applying only customary international law as part of Israeli law has become so rooted that it is realistically impossible to believe that it will ever be changed.

#### *The Application of the Geneva Convention as Part of the Orders of the General Staff*

The inception of the idea that the Geneva Convention was within the context of Israeli law, on account of being included among the orders issued -by the general staff, actually came from a remark made by Judge Barak -in the judgment in the *Teachers' Housing Cooperative* case. Judge Barak said:

There is a question here as to whether the humanitarian sections of the Fourth Geneva Convention, in accordance with which the government of Israel has decided' to act, do not on their own account constitute

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<sup>110</sup> HC 25/55, PO 10 (3)1825.

<sup>111</sup> HC 380/81, *KLM v. The Minister of Transportation* (unreported). See Rubin's treatment of this judgment, 'The Adoption of International Conventions', 224.

<sup>112</sup> Ibid. 226.

<sup>113</sup> Ibid. 227.

<sup>114</sup> Ibid. 237.

obligatory norms, and not only in part, by dint of their being part of the internal guidelines of the government .to military commanders and by dint of their being independent guidelines of the general staff itself. <sup>115</sup>

The 'above idea serves to introduce an article written by Hillel Sommer,<sup>116</sup> who advocates the application of the Geneva Convention provisions under Israeli law, by reason, he argues, of a general staff order instructing IDF soldiers, including the military commander of the administered territory, to behave *in* accordance with those provisions.

General Staff Order No. 33.0133 of 20 July 1982 states the following:

Discipline-behaviour in accordance with the conventions to which Israel is a party.

*The Geneva Convention*

(1) From 12 August 1949, Israel has been party to the four Geneva Conventions for the protection of the victims of war ...

(2) These Conventions have been published in official gazettes, under Convention Records No. 30, on 30 September 1951, and also in the 'Library of Military Law-17-24'.

(3) All IDF soldiers are required to act in accordance with the provisions included in the above Conventions ... <sup>117</sup>

The Conventions themselves form Appendix 61 to the order of the general staff and the army sees them as an integral part of the orders issued to the army. Such is the official opinion of the chief military advocate of the IDF: 'The Geneva Convention is one of the orders of the army and its provisions have been adopted *in* the wording given in Appendix 61 of the general staff orders.<sup>118</sup> The question is, however, whether the orders of the general staff, among which can be found the Geneva Conventions, constitute part of internal Israeli law.

The definition given to 'law' in Article 3 of the Law of Interpretation of 1981 includes 'legislation'; legislation is defined in the same article as a 'law or regulation', 'regulation' being defined as an instruction issued by force of law enacted by legislation. In regard to the second characteristic-'enacted by legislation'-the orders of the general staff clearly fall into this category as they meet the criteria established by the Supreme Court.<sup>119</sup>

Hence, we must pose the question of whether military orders are issued by force of law. Article 5 of The Basic Law: Army stipulates: 'The authority to issue instructions and orders in the army will be established by law or by force of law'. In 1978, the Military Jurisdiction Law 1955 was amended (Amendment No. 12) by Article 2A, which states:

2A(a) The orders of the Supreme Command are the general orders issued by the Chief of Staff with the approval of the Defence Minister, and they will lay down principles related to the organization of the army, administration, and discipline, for safeguarding its well-ordered operation.

(b) The orders issued by the general staff are general orders and they will establish the details of the issues mentioned in subsection(a).

(c) Under the instructions of the supreme command, other types of general orders can be issued by those authorized to do so which are binding on the army ...

2B In respect to the instructions and orders mentioned in Article 2A, they do not require official publication and will be brought to the attention of the concerned parties as the chief of staff sees fit to order.

In light of the above, it is clear that these orders of the general staff constitute part of Israeli law and that, therefore, the Geneva Convention is actually part of obligatory Israeli law. However, this conclusion must contend with the provision of Article 3(a) of the Military Jurisdiction Law, according to which: 'In respect to this law, military orders and other general orders are to be considered law'. This provision was important prior to the amendment and the addition of subsection A to Article 2, which to

<sup>115</sup> He 393/82, 793-4.

<sup>116</sup> H. Sommer, 'In Spite of This, the Provisions [Should] be Applied', *Eyunei Mishpat* (Tel Aviv University Law Review) 11 (1986), 263.

<sup>117</sup> Ibid. 268.

<sup>118</sup> Ibid. 268. See also n . 31 on the same page.

<sup>119</sup> Ibid. 271.

all intents and purposes strips it of all meaning, since Article 2A actually establishes that the orders of the general staff constitute part of the law. However, practically all the substance is removed from this idea by the interpretation of the above-mentioned Article 3(a) in an incidental observation given by Judge S. Levine in the judgment of *Hiram v. Minister of Defence*:

Legally speaking, the respondents argued that the provisions of the Supreme Command under discussion have the status of law, yet this claim is doubtful, as by dint 'of Article 3(a) of the Military Jurisdiction Law 1955, the orders of the Supreme Command are to be seen as law only in regard to this specific law and no to other matters

<sup>120</sup>

And indeed, *if* the position of Judge Levine is correct, the orders issued by the general staff, including Order No. 33.0133, constitute law solely under the Military Jurisdiction Law, but not for any other purpose, including the obligation of the Supreme Court to examine the actions of military commanders in accordance with these orders.

In Sommer's opinion, Judge Levine's interpretation should be rejected, *if not*, the amendment of 1979 is meaningless and such an interpretation would actually conflict with Article 133 of the Military Jurisdiction Law and Article 12 of the Penal Code 1977.<sup>121</sup> So it is that he reaches the conclusion that:

[I]n so far as the Geneva Convention constitutes part of the orders of the army, and in so far as these orders are part of the law applied to IDF soldiers (including those who hold positions in the Israeli military government in the administered territories), the military government is obliged to abide by its provisions, and a deviation from them may bring about the annulment of their decisions.<sup>122</sup>

The path proposed by Sommer does not appear to be realistic, for two reasons. One, it demands a further ruling of the Supreme Court about everything concerned with Article 3(a) of the Military Jurisdiction Law,<sup>123</sup> and not in the framework of a discussion about the application of the Geneva Convention. In our opinion, *if* such a hearing takes place before the court has established its position in regard to Article 3(a), it would seem likely that the Supreme Court would reject the idea proposed above on the grounds that the orders of the general staff constitute 'law' only for the sake of the Military Jurisdiction Law itself. The second reason for our reservations is that Sommer proposes to apply the Geneva Convention solely by dint of the orders of the general staff. But these orders can be changed very easily and it is not even necessary that the changes are published, as stated in Article 2 (b) of the Military Jurisdiction Law.<sup>124</sup>

## **The Geneva Convention as Part of Internal Law in the Occupied Territories**

*If* local law grants a certain kind of authority, and the military commander wishing to exercise it deviates from it, in keeping with what we understand by this term in our judgments, neither in respect to the exercise of his legislative authority nor in the implementation [of a decision], but rather erroneously or maliciously employing local law, or not acting in accordance with the standards incumbent on him in exercising his authority under local law, it is possible that his action will be declared to be null and void solely in light of the essence of the provisions of local law.

This is the law in respect to security legislation; a deviation by a military authority from the bounds set by the commander of IDF forces in the area can also provide grounds for the intervention of this court, even if the matter

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<sup>120</sup> HC 69/80, PO 35 [4] 505, 511 .

<sup>121</sup> Sommer, 'In Spite of This', 275-8.

<sup>122</sup> *Ibid.* 279.

<sup>123</sup> In HC 69/85 *Frumer v. The Military Appeals Court*, PO 40 [2] 617, 623, Judge Levine reiterated his position in the *Hiram* case, saying that 'By dint of Article 3 ,of the law, the orders of the general staff are considered to be legislation under the law. Judge Helima also supported this position.

<sup>124</sup> Sommer, 'In Spite of This', 279.

is not related to an action which contravenes the laws of war but rather to an action which contravenes local law, in force under Proclamation No. 2, i.e. the law in force on the eve of the establishment of IDF rule or the legislation passed by the commander of IDF forces in the area.<sup>125</sup>

Judge Shamgar's remarks in the *Abu Aita* case provoke the question of whether the local law in force on the eve of the military occupation of the territories in 1967, or the security legislation enacted in its wake, include any provisions for applying the Geneva Convention.

The answer to this question is affirmative. At the beginning of the occupation of the West Bank an order was published in regard to defence provisions which included, under Article 35, the following:

Observance of the Geneva Convention-35. The military court and the administrators of the military court must apply the provisions of the [Fourth] Geneva Convention ... with respect to judicial procedures. In case of a conflict between this Order and the said Convention, the Convention shall be preferred.<sup>126</sup>

*If anyone was surprised by the existence of this article, the surprise did not last longer than a few months. In October 1967, the above-mentioned Article 35 was changed in an enigmatic manner by Amendment No. 9 to the Security Provisions Order No. 144,<sup>127</sup> which replaced Article 35 with an entirely different article on calculation of prison sentences, having nothing whatsoever to do with the Geneva Convention.*

Once again, did the Fourth Geneva Convention constitute a part of local law in the West Bank prior to 1967? We will attempt to answer this question in part.<sup>128</sup>

Jordan acceded to the Geneva Conventions of 1949 on 29 May 1951. Article 33 of the Jordanian Constitution, which deals with the signature and authorization of international agreements, states:

(1) The King declares war, makes peace, and authorizes treaties.

(2) Peace treaties, alliances, commerce, shipping, and other conventions which involve alterations in the territory of the kingdom or the reduction of the right of sovereignty to it, or which involve expenditures by the Treasury, or a violation of Jordanian rights-whether they be public or private-will not be valid unless they have been approved by the national council. *It is strictly forbidden for the specific conditions of any contract to be in conflict with the standing conditions.*

Article 33(b) has been interpreted by the Supreme Council of Jordan, whose role as defined in Article 57 of the Jordanian Constitution includes interpretation of the articles of the Constitution. The Council's Decision No.2, published in the official Jordanian Gazette No. 1224 on 16 April 1955, states:

*It is clear that this formulation amending the constitution divides agreements into two categories in this section: (1) peace treaties, and trade and shipping agreements; and (2) other agreements which involve changes in regard to state land, sovereign rights, Treasury expenditure, or which involve violations of Jordanian rights, public or private. Agreements of the first type will not be valid under any condition save if they have been authorized by the parliament, without consideration of their essence or the obligations they impose. Agreements of this type by nature touch on the basic rights of the state, its sovereignty and its rule over land, sea and air. The execution of other agreements do not require the authorization of parliament, save if they involve a change in regard to state land, or its sovereignty, etc. In so far as this is not the case, these agreements will be valid after they have been reviewed and signed by the executive authority without any need for parliamentary approval in view of the unimportance of the obligations entailed therein.<sup>129</sup>*

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<sup>125</sup> HC 493/81, 69/81, PO 37 [2]197, 232.

<sup>126</sup> *Booklet No. 1* (1967), 5, at 12. *It would appear that the order was published in the month of June 1967 in a proclamation regarding orders and appointments issued by the IOF headquarters in the West Bank area.*

<sup>127</sup> *Booklet No.8* (1967), 303.

<sup>128</sup> As the author of this article is a Palestinian citizen of Israel, he has been unable to examine the relevant documents regarding Jordanian law, nor is there any possibility of his travelling to Jordan to do so. Thus, an answer to the above-mentioned question has only been posed in general terms and the author invites other.s\_ to develop this idea and examine its validity.

<sup>129</sup> *Official Jordanian Gazette*, No. 1224, 16 April 1955, 42.

Evidently, the Fourth Geneva Convention does not fall under the first category of agreements as delineated above. The question is whether the Convention falls under that part of the second category of agreements that also requires parliamentary approval, or does it constitute part of Jordanian law following the authorization or affirmation of the Jordanian government, without the need for special parliamentary approval?

*It is clear that Jordan's accession to the Geneva Conventions and the approval, if given, by the executive authority, that is the government, do not involve any amendment in regard to the territory of the state of Jordan or its sovereign rights. In the event of Jordan conquering territory, the Treasury would not be involved, as according to international law the occupier can finance the expenses of its armed forces deployed in the occupied territory by taxes and levies on the residents of the occupied territory itself.*

In our opinion, the most likely possibility is that the Fourth Geneva Convention falls under the category of agreements which do not require the approval of the Jordanian parliament, and, as such, it has constituted part of internal Jordanian law since Jordan became a party to the Convention. Hence, this Convention was actually part of the internal law which was in force on the eve of the occupation and the government of the occupying army is obliged, in accordance with Article 43 of the Hague Regulations of 1907, to respect the existing law and to operate in accordance with it.<sup>130</sup>

On the other hand, it can also be argued that, as in England, since the declaration and conduct of war fall under the prerogative of the crown according to Article 33(1) of the Jordanian Constitution, the King has the authority to bind his hands in the conduct of a war by the conventions to which he is signatory, which thus become part of internal law without the need for legislation or ratification.<sup>131</sup>

#### *Is There any Possibility of Applying the Fourth Geneva Convention to the Occupied Territories?*

In the opinion of this author, the Supreme Court will employ any legal means available for obstructing the application of the Fourth Geneva Convention to the Occupied Territories. The latest method employed by the court was established in the judgment on the *Jaber* case. *It may, in time, actually suppress any attempt to apply the Fourth Geneva Convention in the Occupied Territories.*

In spite of this, we retain hope and continue to seek ways and means to persuade the Supreme Court to apply the Convention and examine the actions of the occupying military authorities in accordance with the standards set by this Convention. The ideas put forward in this paper, and in other

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<sup>130</sup> The author tried to ascertain whether the Jordanian Parliament had ratified the convention, or whether the Government had affirmed the Convention, but without success of at any time prior to 7 June 1967 the Jordanian Parliament did ratify the Geneva Conventions, the argument made here would receive considerable reinforcement.

<sup>131</sup>

papers, may assist toward the achievement of this goal. And perhaps, in the end, they will prove effective.<sup>132</sup>

### III. The Universal Declaration of Human Rights of 1948

We will deal only briefly with the Universal Declaration of Human Rights, on account of the fact that the Supreme Court has never really delved into the matter in any depth.

While the major problem in regard to the Hague Regulations and the Fourth Geneva Convention was whether they apply to the territories occupied by Israel-without there being any controversy over their being<sup>1</sup> part of the laws of war which should be applied to occupied territory -the major problem in regard to the Universal Declaration of Human Rights of 1948 is whether this Declaration forms part of the laws of war.

*It would appear that there is some agreement that this Declaration constitutes part of customary international law.*<sup>133</sup> This has been established by a number of Supreme Court judgments, in some instances by a minority opinion. In the case concerning the *Beit El Mission* in Haifa, Judge Haim Cohn ruled that the Universal Declaration expresses customary international law, as it was formulated by legal experts from around the globe and approved by the United Nations General Assembly to which the great majority of nations in the world belong.<sup>134</sup>

Likewise, *In the Qawassmeh case*, Judge H. Cohn began with the premise that the Universal Declaration actually constitutes part of customary international law.<sup>135</sup> However, in the later judgments of the Supreme Court, the court refused to rule on whether the Universal Declaration does constitute part of customary international law, and the question of whether it applies to the Occupied Territories was

answered in the negative.<sup>136</sup> In the opinion of the court:

The Universal Declaration of Human Rights is not intended for dealing with factual Circumstances such as those before us, i.e. in a territory under military government which is being administered as such in the wake of a war, and so long as the situation of war continues.<sup>137</sup>

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<sup>132</sup> Prof. A. Rubinstein, the leading authority on constitutional law in Israel, has raised another view about the application of the Geneva Convention. While this idea has yet to be developed by Rubinstein, the gist of it can be garnered from the following:

In respect to parliamentary regimes of a type similar to that of England and Israel, only the legislator can alter the internal law of the state; however, when we come to deal with a convention which, by its very nature, is not at all intended to be applied within the jurisdiction of the state and thus is not intended to influence the essentials of internal law within it and which deals in its entirety with territories and relations which are outside the territory under jurisdiction, a doubt arises in regard to the need for this process of 'absorption' into internal law. One can argue that, in such cases, the need for such absorption vanishes, destroying the logical foundation which justifies it: no alteration of internal law is required by the adoption of the convention and there is no need to bring the matter before the Knesset. In the network of international obligations of the state, the approval of the convention suffices by itself. *It would be hard to comprehend how the Knesset could, even if it so desired, legislate a convention, as the Knesset employs its authority, by virtue of its nature, in regard to persons and territories under its rule. To the best of my knowledge, this is the reason why the Geneva Convention was not 'legislated' into the municipal legal systems of the states which are party to it.*

See A. Rubinstein, 'The Changing Status of the Occupied Territories' (in Hebrew), *Eyunei Mishpat* (Tel Aviv University Law Review) 11 (1986), 439, 446.

<sup>133</sup> On the applicability of international human rights law in occupied territories see chapters by Roberts, Quigley, and Dugard in this volume.

<sup>134</sup> HC 103/67, *The American European Beit El Mission v. the Minister of Welfare*, PD 21 [2], 333.

<sup>135</sup> HC 698/80, 644-5. In Dinstein's opinion, the Universal Declaration is today accepted as, by and large, reflecting customary international law ('The Deportation of the Mayors', 159).

<sup>136</sup> HC 13/86, the *Shahin* case, 210.

<sup>137</sup> HC 629/82, *Mustafa et al v. The Military Commander of the Judea and Samaria Region*, PD 37 [1] 158, 161, this position of the court was hinted at in former Supreme Court President Judge Landau's judgment in the *Qawassmeh* case, HC 698/80, 630

Perhaps we can end this section with a quotation from the work of Professor Meron, which reveals the problems involved in the application of the Universal Declaration of Human Rights in the territories occupied by Israel:

What about other provisions of customary international law of human rights which have not been expressly designed to apply, in whole or in part, to occupied territories? Take for instance the Universal Declaration of Human Rights, which many legal scholars tend to regard as having acquired, since its adoption in 1948, the characteristics of customary international law ...

A principle which appears in the preamble and in Article 2 of the Declaration states that no distinction shall be made on the basis of the political jurisdiction or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty<sup>138</sup>

## Conclusion

This paper attempts to examine the degree of application of international laws of warfare as reflected by the judgments of the Israeli Supreme Court related to the examination of the activities of the military government in the territories occupied by Israel. Unfortunately, in the great majority of cases one must reach the conclusion that the Supreme Court does not apply the laws of war to the Occupied Territories, and that when it does so, it interprets international law to condone the actions of the military government.

We also attempted to present and amplify a number of arguments whose acceptance by the Supreme Court would make the application of the Fourth Geneva Convention to the activities of the military government obligatory. Although in our hearts we have few hopes that these ideas will succeed in changing the position of the Supreme Court, we believe hopelessness is the worst enemy, and therefore urge the employment of these arguments in an effort to convince the Supreme Court to change its position on the issue.

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<sup>138</sup> Meron, West Bank and Gaza: Human Rights and Humanitarian Law', 112.