

## SYMPOSIUM ON REVISITING ISRAEL'S SETTLEMENTS

### RESISTANCE TO MILITARY OCCUPATION: AN ENDURING PROBLEM IN INTERNATIONAL LAW

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#### *Introduction*

The fiftieth anniversary of Israel's occupation of certain Arab-inhabited territories following its victory in the June 1967 war is a good time to reflect on the question of how international law addresses resistance to military occupation. This issue—and its counterpart, the rights of an occupying power vis-à-vis resistance—has arisen repeatedly in connection with this occupation. It has been at the center of polemical debates involving Israel, neighboring states, and the Palestine Liberation Organization, in a wide range of international fora including the United Nations. It has also arisen in numerous other conflicts in the past half-century, including in Namibia before it achieved independence in 1990, and in Iraq following the 2003 U.S.-led intervention. The legal focus of this contribution is on the *jus in bello*. Certain *jus ad bellum* and human rights issues raised by occupation and resistance that inevitably intrude at certain points will be mentioned in passing.

The main geographical focus here is the Israeli-occupied territories. These have been subject to several changes of status, of which the most significant were the Israeli annexation of East Jerusalem in 1980, the application of Israeli law to the Golan Heights in 1981, the establishment of the Palestinian National Authority in Gaza and parts of the West Bank in 1994, Israel's unilateral disengagement from Gaza in 2005, and the de facto separation of Gaza (under Hamas) from the West Bank (under Fatah) in 2007. None of this adds up to a final peace agreement, and there are different views about whether some of these territories can still be considered as under Israeli occupation.

#### *The Relevant Law on Resistance as of 1967*

In his editorial comment for AJIL [Theodor Meron](#) elaborates legal advice that he had provided to the Israeli government in 1967–68.<sup>1</sup> He notes that, after he provided that advice, Israel adopted the position, advanced particularly by Yehuda Blum and Meir Shamgar in 1969–71, that the Fourth 1949 Geneva Convention was not de jure applicable to the West Bank, but that its “humanitarian provisions” would nevertheless be applied on a de facto basis. I share Meron's criticisms of two elements of Israel's position: firstly, its underlying argument about non-applicability of the Fourth Convention, which appears to be based on a misreading of its Article 2; and secondly, Israel's consistent reluctance to specify which humanitarian provisions it will apply.

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<sup>1</sup> Theodor Meron, [The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War](#), 111 AJIL (forthcoming 2017).

The problems that Meron had to address in his legal memoranda to the Israeli government—settlements and house demolitions—relate to resistance against occupation, and to how an occupying power responds to it. Settlements by citizens of an occupying state, and expulsions of indigenous populations, can have many motives, of which one may be the desire to discourage or punish acts of resistance. As for house demolitions in occupied territories, these are almost always defended in such terms. Such drastic measures sometimes achieve some of their objectives, but they can also exacerbate the immediate problem they were intended to solve, and may leave a legacy of resentment that may last for generations. When he gave his opinion that Israeli settlements and house demolitions in the occupied territories were illegal, Meron was reflecting accurately a body of law that had emerged out of hard experience, including in two world wars, and he was prescient in recognizing the extent and significance of criticism of Israel on these points.

Meron had not been asked about the legal status of resistance, and wisely did not stray into that territory. The intellectual and diplomatic difficulty of achieving anything approaching an agreed doctrine on the lawfulness or otherwise of resistance to occupation had been evident in all attempts at codification of the subject from the nineteenth century onwards. Article 52 of the [Lieber Code](#), issued in 1863 to the Union forces in the American Civil War, limited legitimate resistance to the extremely rare case of a *levée en masse* (i.e. armed resistance by the whole population against the process of invasion itself), and otherwise left no room for subsequent resistance:

No belligerent has the right to declare that he will treat every captured man in arms of a *levée en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.<sup>2</sup>

Lieber's assumption was that occupation law involved a bargain: the inhabitants had to be peaceable, and in return the occupant owed them protection and stability. Not all states shared this view. At the 1899 Hague Peace Conference a sharp and unresolvable disagreement between states on the specific issue of the legality of resistance led to the adoption of the most famous and majestic fudge words in international legal history—the Martens Clause, which was included in the Preamble to the [1899 Hague Convention II on land war](#):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>3</sup>

This wording is echoed in certain other treaties, including in the four 1949 Geneva Conventions. However, after the experience of the Second World War, in which resistance to occupation had been widely viewed as legitimate, it was generally accepted that the Martens Clause needed to be supplemented. One response to this problem, leading to a change in the first three [1949 Geneva Conventions](#) only, was enlargement of category of those entitled to prisoner of war status to include:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this

<sup>2</sup> U.S. War Department, General Orders No. 100, Apr. 24, 1863 [[Lieber Code](#)], reprinted in *THE LAWS OF ARMED CONFLICTS 3* (Dietrich Schindler & Jiri Toman eds., 4th rev. ed. 2004).

<sup>3</sup> [Hague Convention No. II with Respect to the Laws and Customs of War on Land, with annexed regulations](#), July 29, 1899, 1 Bevans 248.

territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.<sup>4</sup>

This is the first explicit mention of “resistance movements” in any international convention on the laws of war. However, this breakthrough was limited. Militias and volunteer corps had already been recognized in the Hague Regulations of 1899 and 1907, which had required them to fulfil the same four conditions. Now resistance movements were additionally required to belong “to a Party to the conflict” and to be “organized.” The most important innovation was the explicit recognition that such resistance movements could operate “in or outside their own territory, even if this territory is occupied.” (Article 1 of the Hague Regulations had not specified its applicability to occupied areas.)

An obvious limitation of this 1949 provision is that it does not cover certain movements and types of activity that have been recurring features of many occupations, including the Israeli occupations since 1967. For example, it omits movements that have an autonomous character, rather than belonging to a belligerent state; those where armed resistance takes different forms (e.g. acts of terrorism, and other completely clandestine activities, involving neither uniforms nor open carrying of arms); and civil resistance employing nonviolent forms of action (e.g. strikes, demonstrations, and disobedience of specific orders of the occupant). Persons engaging in at least some of these activities were not left entirely outside the scope of the 1949 Geneva Conventions, however. The Fourth Convention—on civilians—specified some important basic rules. These delineated the limited rights of, for example, spies and saboteurs in occupied territory (Article 5), addressed transfers of population (Article 49), and included penal provisions for protected persons acting against the occupant (Article 68). These provisions, along with others of a more general character, which balanced the rights of occupants and inhabitants, broke new ground in accepting that resistance of various kinds was a common consequence of occupations.

In the 1949 Geneva Conventions there was no single term to cover all those involved in resistance who do not meet the criteria for prisoner of war status. Writers sometimes used the old term “unlawful combatant” (which has seen a revival in this century because of the preoccupation with terrorist acts). After 1949 one distinguished legal writer referred to certain types of resistance fighters as “[unprivileged belligerents](#).”<sup>5</sup> This term is appropriate to persons whose offences are violations of the regulations of the occupant but not breaches of international law as such. In crude outline, this was where treaties on the laws of war stood on the matter of resistance as of the commencement of the occupation in 1967.

### *Complicating factors*

The Israeli occupation provoked opposition both within the territories and internationally. Four interrelated factors complicated the situation. First was Israel’s ambiguity about the applicability of occupation law. Second was the existence of expansionist tendencies in Israel, grounded in, among other things, ancient biblical ties

<sup>4</sup> [Geneva Convention relative to the Treatment of Prisoners of War](#) art. 4A(2), Aug. 12, 1949, 75 UNTS 135 [hereinafter Third Geneva Convention]. The same wording is in the First Geneva Convention, Article 13, and the Second Geneva Convention, Article 13.

<sup>5</sup> A term introduced by Richard R. Baxter in his examination of the 1949 Geneva Conventions in Richard R. Baxter, [So-called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs](#), BRIT. Y.B. INT’L L. 1951, 337.

and security concerns arising from the vulnerability of Israel's pre-1967 borders. A third complication was that, for many years after its foundation in 1964, the Palestine Liberation Organization was committed to the liberation of all of Palestine, a position it renounced decisively only in 1993. This posture meant that any resistance to occupation, even if it was in response to purely local issues within the occupied territories, could easily be perceived as (and might actually constitute) a threat to the existence of Israel itself. Fourthly, from 1970 onwards the resistance encompassed acts targeting civilians such as hijackings of passenger aircraft and killings of Israeli athletes and diplomats, often against targets geographically far removed from the occupied territories and thus posing a threat more widely.

Moreover, the international community was changing. By 1967 the United Nations had 122 member states—more than double its original number—and most of these states identified with a new postcolonial sensibility. UN resolutions were passed that not only supported self-determination in principle, but also—and increasingly—viewed resistance against outside domination as justified. As early as May 1968, a UN-organized International Conference on Human Rights passed a long and detailed [resolution on occupations](#), which was almost entirely about the Israeli-occupied territories.<sup>6</sup> The 1974 UN General Assembly [Definition of Aggression](#) explicitly supported the right of peoples to struggle for independence.<sup>7</sup> While the UN's record in passing such resolutions was by no means wholly one-sided, it strengthened perceptions that Israel could not always expect fair treatment from international bodies.

### *The 1977 Additional Protocol I*

[1977 Additional Protocol I](#), negotiated by states under the auspices of the International Committee of the Red Cross, included within the Geneva Conventions' scope of application “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”<sup>8</sup> This protocol requires both occupants and liberation movements to observe extensive provisions applicable to all combatants as regards methods and means of warfare, respect for civilians, and so on.

The impact of the 1977 Additional Protocol I on the Israeli-occupied territories has been limited. Israel, which has consistently been critical of it, is one of a number of states that are not parties. However, some of the Protocol's provisions, where considered part of customary law, have been taken seriously in Israel, including by its [High Court of Justice](#).<sup>9</sup> As for the [Palestinian Authority](#), on April 2, 2014 it acceded to the Protocol, and also to certain other agreements including the four 1949 Geneva Conventions.<sup>10</sup>

<sup>6</sup> [Resolution on “Respect for and implementation of human rights in occupied territories”](#), May 7, 1968, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, at 5 UN Doc. A/CONF.32/41.

<sup>7</sup> [Definition of Aggression](#) art. 7, Annex to GA Res. 3314 (XXIX) (Dec. 14, 1974). Of course, this was an annex to a General Assembly resolution, not a legally binding document as such; and it was not part of the laws of war.

<sup>8</sup> [Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts](#) art. 1(4) (Protocol I), 8 June 1977, 1125 UNTS 3.

<sup>9</sup> As in, for example, HJC 769/02 [Public Committee against Torture in Israel v. Government of Israel](#) paras. 4, 20, and 33–4 (Dec. 13, 2006) (Isr.). The case concerned the lawfulness of the Israeli use of targeted killings against terrorist operatives.

<sup>10</sup> Palestine's accession to these treaties is noted on the ICRC's IHL database at Treaties, States Parties and Commentaries, [Palestine](#), INTERNATIONAL COMMITTEE OF THE RED CROSS.

*The International Court of Justice's Advisory Opinion on the Wall, 2004*

Israel's unease about the stance of international bodies towards the occupation may have been reinforced by one part of the International Court of Justice (ICJ)'s argument in its [Advisory Opinion of 2004 on Israel's security wall/fence](#).<sup>11</sup> The ICJ concluded that the building of the wall "constitutes action not in conformity with various international legal obligations incumbent upon Israel." Although this conclusion was based primarily on the ICJ's interpretation of Israel's obligations under the law governing military occupations and also human rights law, it was, in addition, integrally related to a notably narrow interpretation of the right of self-defense. As is well known, the ICJ stated that when an attack emanates from an occupied territory, and takes place on the territory of the occupying power, it cannot constitute an "armed attack" within the meaning of Article 51 of the UN Charter. As [Sir Arthur Watts](#) wrote, in an otherwise generally favorable account of this Advisory Opinion, this "terse dismissal" is not supported by the text of Article 51 of the Charter and "sits ill alongside the ICJ's clearly correct emphasis on those territories being non-Israeli but only territories in respect of which Israel was the occupying Power."<sup>12</sup>

*Concluding Reflections*

In the words of the preamble of the 1907 Hague Convention, the laws of war have as one of their purposes "to diminish the evils of war, as far as military requirements permit." The fifty-year history of the Israeli-occupied territories points to some reflections on the effectiveness of the law in diminishing the evils of occupations.

- 1) The fact that Israel's role as an occupying power has not yet ended—despite several changes in the status of particular areas, and numerous efforts to reach an overall diplomatic settlement—is due primarily to the existence of bodies of opinion on both sides with incompatible goals. In some respects this problem has worsened in the present century. The conflict-ridden consequences of the Israeli disengagement from Gaza in 2005 have hardened opinion in Israel against any comparable disengagement from the West Bank; and Israel's apparent unwillingness to reach a negotiated general settlement reinforces Palestinian skepticism about diplomatic solutions.
- 2) The fact that the law of occupations contains reference to resistance and some guidelines about the permissible responses by occupants is a modest and sensible recognition of the reality that most military occupations encounter resistance of various types, and that it cannot be appropriate to declare in advance that all such resistance is a violation of the laws of war. This is an advance on Lieber's view that resistance against occupation is ipso facto a violation of the laws of war.
- 3) In the case of the Israeli occupations, it cannot be claimed that the provisions in occupation law regarding resistance and responses to it have had a manifestly ameliorative effect. The causes of several of the wars in which Israel has been involved since 1967 can be traced back to the problems arising from occupation and resistance. Egypt and Syria stated that the 1973 Middle East War was launched to recover territory under Israeli occupation. The Israeli intervention in Lebanon in 1982 and the operations in Gaza in 2008 and 2014 were justified by Israel in terms of suppressing terrorist actions. Acts denounced as terrorism had in turn been defended by their perpetrators as part of the antioccupation

<sup>11</sup> [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 2004 ICJ REP. 2004 (July 9). See also, David Kretzmer, [Settlements in the Supreme Court of Israel](#), 111 AJIL UNBOUND 41 (2017).

<sup>12</sup> Sir Arthur Watts, [Israeli Wall Advisory Opinion \(Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory\)](#), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 42 (Rüdiger Wolfrum ed., 2007). Judges Higgins, Kooijmans, and Owada drew attention to various aspects of these problems in their separate opinions, and criticized the position taken by the ICJ.

cause. Occupation law has at times been a basis for polemical debates both within the region and internationally.

- 4) It remains possible, however, that at times the framework of occupation law has helped to moderate Israeli and/or Palestinian aims and activities. Within the occupied territories, much resistance has taken a legal form, including for example in the establishment of Palestinian universities. The Israel Defense Forces have gone to some lengths to present their actions as consistent with the laws of war. While there have been many controversies about their actions, they have avoided the extremes witnessed since 2011 in the Syrian Civil War.
- 5) The post-1967 developments in the law—most notably 1977 Additional Protocol I—have had some, albeit limited, effects. Israel, although not a party to this agreement, accepts that some of its provisions reflect customary international law. The High Court of Justice has been emphatic on this point, citing the provisions on such key matters as targeting, civilian immunity, and conditions of detention.
- 6) Is there a need for further development of the law on occupations? Two issues that have repeatedly arisen, in the Israeli-occupied territories, Iraq, and many other cases, are (a) the applicability of human rights law in occupied territories; and (b) the lack of an agreement spelling out detailed rules regarding detention of all individuals, whether or not in occupied territory, who do not qualify for prisoner of war status. Both of these issues are complex, and have posed problems between allies as well as adversaries. Meanwhile, the existing body of law is not outdated. A main lesson of the U.S.-led invasion and occupation of Iraq in 2003 is that ignoring the duties and prohibitions spelt out in existing occupation law can contribute to disaster.
- 7) Is the law on occupations merely a device to preserve a conflict in stasis? A key principle of the law is that occupation, a temporary condition, should disrupt the inhabitants' lives as little as possible. After fifty years, this principle might appear shop-worn. However, notwithstanding the many changes in the status, economies, and social structures of the territories concerned, states are unwilling to recognize Israeli sovereignty over them, and still consider occupation law as applicable. This is a tribute of sorts to occupation law, and to its central idea that an occupant's control is provisional until there is a peace agreement.
- 8) Can observance of occupation law help to achieve a peace agreement? It is easy to argue that certain Israeli violations of the Fourth 1949 Geneva Convention, especially the construction of settlements, have been among the factors making a two-state solution less likely—a point made emphatically at the end of Meron's editorial comment. This suggests that if the goal is a negotiated peace, then observance of the rules, including the rule against settlements, has a sound basis. The questions, as they have been for fifty years, remain not only how to secure the law's implementation, but also how to address the deep security fears and incompatible territorial-cum-religious claims of the peoples concerned.