The Applicability of Human Rights Law to Occupied Territories:

The Case of the Occupied Palestinian Territories

Al-Haq, 2003

West Bank affiliate of the International Commission of Jurists - Geneva

In special consultative Status with ECOSOC of the UN

Funded by The British Government

AL-HAQ

Al-Haq, West Bank affiliate of the International Commission of Jurists - Geneva, is a Palestinian human rights organization located in Ramallah, West Bank, in special consultative Status with the Economic and Social Council of the United Nations. Al-Haq was established in 1979 with the goal of protecting and promoting human rights and respect for the rule of law in the Occupied Palestinian Territories. The organization is committed to the uniform application of universal principles of human rights regardless of the identity of the perpetrator or victim of abuse. Al-Haq conducts and disseminates legal and human rights research based on international and humanitarian law, as well as on human rights principles and standards. In addition, the organization, through an extensive database, documents and exposes human rights violations. Al-Haq also houses the only library specialized in human rights in the West Bank, and maintains a tradition of providing free legal services to the Palestinian community. By reinforcing the rule of law and promoting international human rights standards in the Occupied Palestinian Territories, Al-Haq contributes to the development of a transparent and democratic civil society in Palestine. At the same time, al-Haq expects to bring specific abuses to and end by targeting the human rights violations committed by the Israeli and Palestinian authorities.

Second Edition

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Acknowledgements

The author, Linda Bevis, is a lawyer and volunteer researcher with al-Haq. Each study published by al-Haq undergoes comments and revisions by other staff members, by outside consultants on occasion, and by al-Haq's Program Coordinator who gives final approval.

Special thanks for assistance and consultation in the preparation of this study are due to John Quigley, Kenneth Boyle, Francoise Hampson, and Tom Taylor.

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CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILO	International Labor Organization
PLO	Palestine Liberation Organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSG	United Nations Secretary General

Preface

As a Palestinian human rights organization concerned with protecting human rights and upholding the standards of international law, al-Haq has since its inception in 1979 called upon Israeli occupation authorities in the Occupied Palestinian Territories to adhere to the standards set for a belligerent occupant. These standards are found primarily in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 and the Regulations annexed to the 1907 Fourth Hague Convention Respecting the Laws and Customs of War on Land. These standards recognize that a certain degree of human rights protection must be afforded to persons in situations of war and occupation even though some human rights may be sacrificed to the exigencies of the situation. Israel has signed and artified the Fourth Geneva Convention and the international community has affirmed that the Convention applies to the Occupied Territories. Israel disagrees but claims that it applies the Convention's humanitarian provisions anyway. Israel's High Court has held that the Hague Regulations are declaratory of customary law and therefore applicable to the Occupied Territories. Thus, since al-Haq's inception in 1979, we have held Israel to the humanitarian standards found in these documents governing the conduct of belligerent occupation.

When Israel ratified several human rights conventions in 1991, the question arose whether these conventions applied not only to Israeli territory but to Palestinians in the territories occupied by Israel. When the Israeli military Civil Administration refused to allow families to reuinfy or critical medical cases to be referred to adequate medical facilities, was Israel violating the human rights standards of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, as well as the Fourth Geneva Convention and the Hague Regulations? In calling for urgent international action on behalf of detained Palestinians interrogated using torture, could al-Haq cite the Convention Against Torture, as well as provisions of humanitarian law, as instruments binding on Israel which prohibited torture? If these instruments were applicable to occupied territories in general, and in these Occupied Territories in particular, these human rights conventions could strengthen the theoretical protection already afforded to Palestinians by standards of humanitarian law.

Developments on the political scene also played a part in al-Haq's desire to broaden its understanding and knowledge of the protections afforded by the instruments of human rights law. In 1991, bilateral and multilateral talks began between Israel, the Palestinians (albeit not as yet formally recognized as an entity), and the neighboring Arab states, in the framework of what came to be called 'the

Madrid Process.' While the Madrid Process dragged on without yielding tangible results, the task was suddenly made more urgent by the mutual recognition of Israel and the Palestine Liberation Organization, and their signing on 13 September 1993 of the Declaration of Principles on Interim Self-Government Arrangements for the Palestinians of the West Bank and Gaza Strip. The possibility of fundamental transformations now loom on the horizon, directing our gaze more towards human rights law as an additional source of protection.

Research undertaken in the course of this study revealed that there is a wealth of state practice, judicial opinion, and scholarly writings in support of the view that human rights customary and conventional law does apply to belligerent occupations and related situations. Arguments in support of opposing views are weak by comparison. It was for this reason that al-Haq decided to publish this review of the relevant literature and positions on the subject in order to clarify what the arguments are and why the most reasoned view is that human rights law does apply to occupied territories.

After concluding that human rights law applies to situations of war and belligerent occupation, this paper considers several other questions. It discusses possible theories of the interaction between humanitarian and human rights law and deals specifically with several of the major human rights conventions that apply to the Occupied Palestinian Territories. The continued applicability of these conventions in the event that an occupying power such as Israel agrees to share some of its powers and responsibilities with representatives of the occupied population is also discussed, in light of the current changes taking place in the Occupied Territories.

In closing, it is important to note that al-Haq's interest is not in the theories of law for their own sake. This study constitutes part and parcel of our search for the legal standards and texts that can best obligate the authority in charge, be it Israeli or Palestinian, to implement internationally-recognized standards of human rights in the Occupied Palestinian Territories. The weakest link in that effort, however, remains that of enforcing international legal obligations. International efforts in this regard must be strengthened and made more effective if studies such as this one are to have practical and tangible value. It is our hope that the discussions and clarifications herein will contribute in a modest way to the encouragement of such efforts.

Fateh Azzam
Program Coordinator
Al-Haq

I
Introduction

In 1993, the Israeli occupation of the West Bank and the Gaza Strip entered its 26th year. While January 1993 found more than 400 Palestinian deportees sitting on a snowy hillside just north of Israeli-occupied South Lebanon, September found representatives of Israel and the Palestine Liberation Organization (PLO) signing an historic first Declaration of Principles to create a limited form of self-rule in parts of the Occupied Territories. Many political changes appear to be taking place. Some of these changes may introduce more confusion and violence into an already arbitrary and oppressive system, others might serve as blueprints for a nascent, self-determined, political entity. At such a time, it is more important than ever to safeguard and clarify collective and individual human rights.

At the time of writing, the majority of the deportees had not been allowed to return home; thousands of political prisoners and administrative detainees remain inside Israeli prisons and camps, many of them having been deprived of such basic human rights as the right not to be tortured; Israeli settlements built on confiscated or fraudulently obtained Palestinian land[1] are constantly expanding; and East Jerusalem remains illegally annexed. In short, nearly two million Palestinians still live under an alien authority subject to a variety of human rights abuses and unable to determine for themselves how they wish to construct and run their society.

The rules of international law governing such situations of belligerent occupation are commonly known as 'humanitarian law' and they form part of the laws of armed conflict. Humanitarian law is comprised principally of the Regulations annexed to the 1907 Fourth Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations)[2] and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949

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[1]An estimated 60 percent of the total area of the Occupied Territories has been expropriated by Israel using Israeli procedures which declare Palestinian land "state" land, or "abandoned," or "requisitioned for military purposes," or "closed military areas," or "expropriated for public purposes." Other land has been obtained by having landowners sign away their rights in a document written in Hebrew, a language they may not understand. Often the land is eventually used for the establishment of Jewish settlements. Al-Haq Fact Sheet, *Restrictions on Economic Development* (Ramallah: Al-Haq, June 1993); R. Shehadeh, *Occupier's Law: Israel and the West Bank*, rev. ed. (Washington, D.C.: Institute for Palestine Studies, 1985) pp. 15-49.

[2]18 Oct. 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

(Fourth Geneva Convention).[3]

For reasons related to Israel's refusal to recognize the legitimacy of the previous Jordanian (in the West Bank) and Egyptian (in the Gaza Strip) military governments, Israel has long refused to characterize itself as an occupier or accept the applicability of the Fourth Geneva Convention;[4] early Israeli military orders which recognized the Convention's applicability were quickly amended to exclude the Convention.[5] Israel has however volunteered to adhere to the 'humanitarian' provisions of the Convention, without ever specifically stating what they are.[6] The Supreme Court of Israel has accepted the applicability to the Occupied Territories of the customary law codified in the Hague Regulations.[7] In the view of al-Haq and the international community, both the Fourth Geneva Convention and the Hague Regulations are humanitarian in their entirety; therefore Israel is bound to apply them both in their entirety as a matter of binding obligation to the

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[3]12 Aug. 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287. Israel signed the Convention on 8 December 1949 and ratified it on 6 July 1951. It made a reservation regarding the use of the Red Shield of David as a distinctive sign of medical services.

[4]E. Cohen, *Human Rights in the Israeli-Occupied Territories, 1967-1982* (Manchester: Manchester University Press, 1985) pp. 35-64. For a discussion of the Israeli government's slightly vaccillating position on this point, and the Supreme Court's position that the Fourth Geneva Convention is not part of local law and therefore cannot be applied, see N. Bar-Yaacov, "The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip," *Israel Law Review*, Vol. 24, Nos. 3-4 (1990) p. 485.

[5]The Order Concerning Security Regulations annexed to Proclamation No. 3 of 7 June 1967, POA (Judaea and Samaria) No. 1, p. 51. Deleted in autumn 1967 and replaced by an unrelated section. Order No. 144, 22 Oct. 1967, POA (Judaea and Samaria) No. 8, p. 303. For discussion, see Shehadeh, *supra* note 1, and Cohen, *supra* note 4, p. 79.

[6]See 13 July 1987 letter from Colonel Yoel Singer, then head of the International Law Section, Military Advocate General's Corps, Israel Defense Forces, to M. Michael Arniguet, Delegate General of the International Committee of the Red Cross (ICRC) in the Middle East and North Africa. See also ICRC, *Bulletin* No. 163 (Aug. 1989).

[7]See, e.g., *Sylvester v. Attorney General*, 1 Pesakim 513; *Aa'reib v. Appeals Tribunal,* 40(ii) P.D. 57 (1986); *Al Nawar v. Minister of Defence et al.*, 39(iii) P.D. 449 (1985).

Occupied Palestinian Territories.[8]

Humanitarian law was developed over the course of several centuries, striving to balance the security needs of military forces on the one hand with the humanitarian needs of civilian populations on the other. Thus, it has long been universally accepted that even during times of war and occupation, civilians retain some human rights.

Beginning with the formation of the United Nations (UN) after World War II, however, another branch of law began to develop. In the main, when compared with humanitarian law, human rights law is more protective of rights and grants much less flexibility to a state and its security needs. In 1989, Professor John Quigley wrote:

> Human rights law assumes universality. The law of belligerent occupation gives considerable flexibility to the occupant. The two bodies of law appear to be on a collision course....
>
> When the law of belligerent occupation was formulated, human rights law did not exist. Even in 1949, when the most important treaty in belligerent occupation [the Fourth Geneva Convention] was adopted, human rights law had not advanced beyond a United Nations Charter obligation to observe human rights and the United Nations General Assembly's Universal Declaration of Human Rights in 1948. By the 1980s, however, many states had accepted human rights law via treaty, and many important rights entered into customary international law.

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[8]See, e.g., UN General Assembly (UNGA) Res. 47/64 E (22 March 1993):

> Reaffirming that the [Fourth Geneva Convention] is applicable to the Palestinian territory occupied by Israel since 1967, including Jerusalem, and to the other occupied Arab territories.

And see UN Security Council Res. 681 (1990) para. 4 urging

> the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention, of 1949, to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the said Convention;...

(Footnotes omitted)[9]

Disagreements now arise in considering exactly which human rights remain guaranteed to civilians during periods of armed conflict and belligerent occupation and what are the sources of these rights. Can civilians still only benefit from the rights conferred on them by humanitarian law, which in most cases confers only a minimal level of rights on certain groups of people? Or can civilians now also benefit from the newer provisions of human rights law, developed during the latter half of this century, which in most cases grants a higher degree of protection and freedom and grants it to all human beings? How do the sets of rights interact? If human rights standards are applicable during times of war and belligerent occupation, do they replace or complement humanitarian laws? If the two sets of laws are regarded as complementary, how are their sometimes conflicting provisions to be reconciled?

This paper addresses these questions and discusses the answers in the context of the Occupied Palestinian Territories. It concludes that both humanitarian and human rights laws can be applicable in situations of war and belligerent occupation. Conventional laws are applicable provided that relevant parties have ratified them and that the wording in a particular document allows application. In all circumstances, customary human rights and humanitarian laws provide protection to all persons. Both sets of laws have provisions that, for the most part, complement each other. In cases where the provisions conflict, the higher degree of human rights protection should be granted in order to be more in keeping with the humanitarian spirit of the instruments.

These human rights and humanitarian provisions remain in force and applicable for as long as the occupying power retains jurisdiction over the occupied territories, regardless of any special agreements made with the occupied population. However, there may be spheres of authority over which the occupier has relinquished all control in fact, as well as in appearance. In such cases, responsibility and accountability for implementation of certain human rights standards may devolve on the occupied population's authority. This reveals a vacuum at the level of international law because the representatives of the occupied population are not recognized as representing a state and cannot become signatories to international conventions. Under such circumstances, it becomes

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[9]J. Quigley, "The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does An Occupied Population Have a Right to Freedom of Assembly and Expression?" *Boston College International and Comparative Law Review*, Vol. XII, No. 1 (Winter 1989) p. 1, pp. 1-2.

imperative for the representatives of the occupied population to unilaterally implement and declare their adherence to human rights instruments and to establish independent judicial machinery accessible to the occupied population for redress of human rights violations. Otherwise, the occupied population is left completely vulnerable, without any protection.

II
Theories of Applicability of Human Rights Law to Occupied Territories

There are several positions taken by states, jurists, and scholars on the question of the applicability of human rights law, whether customary or conventional,[10] to belligerent occupation.[11] As can be seen from the list below, not all positions are mutually exclusive in theory or result:

1) **Universal Applicability:** The first position is that human rights law is universally applicable; it has now been developed and elaborated to the extent that it adds substantially to, and is concurrently applicable with, humanitarian law during times of war and belligerent occupation. This is the position that al-Haq believes to be the best reasoned one.

2) **Exclusive Applicability:** In contrast to universal applicability is the second view which posits that each body of law operates exclusively: human rights law applies during times of peace and humanitarian law applies during times of war. The two bodies of law do not overlap.

3) **Temporary Displacement:** The third position differs from the second in theory but not in result. Although the temporary displacement theory views human rights law as universally applicable, humanitarian law temporarily displaces it during times of occupation and war.

4) **Local Law:** The fourth position is based on the premise that humanitarian law and not human rights law applies to belligerent occupation. However, humanitarian law requires the occupier to apply the laws in force in the occupied territories on the eve of the occupation, with certain exceptions. Insofar as human rights law might have been part of that local law, it still applies.

5) **Construing Humanitarian Law in Accordance With Human Rights Provisions:** This position argues that, while humanitarian law applies exclusively to times of war or belligerent occupation and human rights law does not, human

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[10]A conventional human right is one found in a treaty or convention. States which have ratified or acceded to the convention are obligated to uphold the right. A customary law norm is found in the general practice, or custom, of states which states accept as law. If a norm is customary then it is binding on states at all times even if they are not a party to a convention which describes that norm.

[11]The first four positions are set forth cogently in Quigley, *supra* note 9, p. 2.

rights instruments can be used to construe humanitarian provisions.

6) Creeping Applicability: Finally, proponents of the sixth position argue that although humanitarian law is applicable in times of war and during the initial stages of a belligerent occupation, when an occupation becomes prolonged and resembles peacetime in many ways, human rights instruments better suit conditions and should be applied.

The first task of this paper then is to examine the merits of these different positions and explain which position represents the rule of law accepted today.

To determine a rule of law, several kinds of sources can be consulted. According to Article 38 of the Statute of the International Court of Justice (ICJ), the Court, which determines and applies rules of law, shall apply:

> (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognised by civilised nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Thus, in discussing international law, the law-determining agencies are principally states. In the case of treaties, the state-parties themselves determine the rules of law. In the case of rules of customary law, all states and their practice accepted as law should be analyzed. With regard to general principles of law, some or all of the "civilized" nations determine the law. Subsidiary law-determining agencies are international and domestic courts, and highly respected legal scholars.[12] It is to each of these sources, states, courts, and scholars, that this paper turns now to shed light on which rule of law pertains to the application of human rights law in occupied territory. The argument for universal applicability is presented first as the best reasoned rule so that the remaining arguments can be contrasted with it.

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[12]G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. I, 3rd ed. (London: Stevens & Sons, Ltd., 1987) pp. 25-28.

A. Universal Applicability

Support for the view that human rights law is applicable universally, even during periods of armed conflict and belligerent occupation, can be found in many law-determining sources including state practice, judicial decisions, and the opinions of scholars.

1. State Practice

Resolutions and reports by the UN reflect state practice. State practice has generally followed the rule that human rights law is universally applicable, even during situations of armed conflict and belligerent occupation. Most recently, on 25 June 1993, representatives of 171 states adopted by consensus the Vienna Declaration and Programme of Action (Vienna Declaration) of the World Conference on Human Rights which affirmed the universal nature of "all human rights and fundamental freedoms"[13] and concern of state participants

> about violations of human rights during armed conflicts .... [The Conference called] upon States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions ... and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions.[14]

In 1970, the UN General Assembly (UNGA) adopted Resolution 2675 (XXV) which affirmed certain basic principles for the protection of civilian populations in armed conflicts.[15] The Resolution acknowledged the necessity of

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[13]Vienna Declaration and Programme of Action (Vienna Declaration) of the World Conference on Human Rights of June 1993 (New York: UN Department of Public Information, 1993) Art. I(1).

[14]*Ibid.*, Art. I(29).

[15]UNGA Res. 2675 (XXV) Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 25th session, 1922nd plenary meeting, 9 Dec. 1970. 25 UNGAOR Supp. No. 28 (A/8028), N.Y. UN, 1971, p. 76. The vote was 109 to 0, with 8 abstentions. J. Quigley, "The Right to Form Trade Unions under Military Occupation," in E. Playfair, ed., *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press, Oxford: 1992) p. 295, p. 301.

the Geneva Conventions but advocated "the need for measures to ensure the better protection of human rights in armed conflicts of all types". It affirmed the General Assembly's view that

> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

Two years previously, at the urging of the first International Conference on Human Rights, held in Teheran, Iran in 1968, the General Assembly had invited the UN Secretary General to study ways to ensure better protection for civilians during armed conflicts.[16] In his report entitled "Respect for Human Rights in Armed Conflicts"[17] (UNSG Human Rights Report), Secretary General U Thant affirmed

> the applicability, in time of armed conflict as well as in time of peace,... of the instruments concluded under the auspices of the United Nations during the first twenty-five years of the Organization's existence, e.g., the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide on [sic] the International Covenants on Human Rights, ... United Nations instruments already in force and those which still require ratifications in order to become fully operative may be invoked to protect human rights at all times and everywhere and thus complete in certain respects and lend support to the international instruments especially applicable in conditions of war or armed conflict.[18]

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[16]UNGA Res. 2444 (XXIII), unanimously adopted.

[17]UNGA, Official Records, 24th Session, "Respect for Human Rights in Armed Conflict: Report of the Secretary-General," 20 Nov. 1969, UN Doc. A/7720; UNGA, Official Records, 25th Session, "Respect for Human Rights in Armed Conflict: Report of the Secretary-General," 18 Sept. 1970, UN Doc. A/8052.

[18]UNGA, Official Records, 25th Session, "Respect for Human Rights in Armed Conflict: Report of the Secretary-General," 18 Sept. 1970, UN Doc. A/8052, Annex I: "General Norms Concerning Respect for Human Rights in Their Applicability to Armed Conflicts," para. 16.

In preparing his Report, the Secretary General consulted and cooperated closely with the International Committee of the Red Cross (ICRC), considered the guardian of the Geneva Conventions, as well as with other esteemed international experts.[19] UNGA Resolution 2675 (XXV), mentioned above, adopted the Secretary General's positions.

The General Assembly has also called on belligerent occupants, and specifically Israel, to respect the customary human rights law codified in the Universal Declaration of Human Rights (UDHR).[20] In 1968, the Assembly established a committee to monitor human rights in the Occupied Territories, stating that it was "guided by ... the Universal Declaration of Human Rights" and echoing the Human Rights Conference's call for Israel to respect and implement both the UDHR and the Geneva Conventions in the Occupied Territories.[21] Two years later, the Assembly asked Israel to comply with the committee's recommendations and "comply with its obligations under ... the Universal Declaration of Human Rights."[22]

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[19]*Ibid.*, paras. 7-8.

[20]Quigley, *supra* note 15, p. 301. It is now widely accepted that the UDHR embodies customary law. See Section IV. According to the Proclamation of Teheran issued by the first International Conference on Human Rights at Teheran, the UDHR "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;..." 13 May 1968, Final Act of the International Conference on Human Rights (UN publication, Sales No.: E.68.XIV.2), chapter II, Proclamation of Teheran, operative para. 2. The UNSG Human Rights Report cited this statement with favor and continued:

> It appears to follow that respect for the rights set forth in the Universal Declaration of Human Rights in times of peace, as well as in times of armed conflict, constitutes now an important commitment of States, including States involved in an armed conflict.

UNSG Human Rights Report, *supra* note 18, paras. 4-5.

The Vienna Declaration noted that the UDHR "constitutes a common standard of achievement for all peoples and all nations," *supra* note 13, para. 8.

[21]UNGA Res. 2443 (XXIII) 1748th plenary meeting, 19 Dec. 1968. The vote was 60 in favor, 22 against, and 37 abstaining.

[22]UNGA Res. 2727 (XXV) 1931st plenary meeting, 15 Dec. 1970, para. 2. The vote was 52 for, 20 against, 42 abstaining.

The UN Security Council has also resolved, with specific reference to the Arab-Israeli war of 1967, that "essential and inalienable human rights should be respected even during the vicissitudes of war."[23]

The Human Rights Commission established by the UN has referred to the UN Charter, the UDHR, and the Fourth Geneva Convention as standards applicable to the Occupied Palestinian Territories.[24] Very recently, the UN Working Group on Arbitrary Detention which operates under the auspices of the Human Rights Commission, declared that the detention of a Palestinian prisoner in the Occupied Territories was arbitrary according to provisions of the UDHR and the International Covenant on Civil and Political Rights (ICCPR).[25]

Besides state practice evident in the statements and acts of various UN bodies, evidence of a rule of international law is found in the "Martens clause." This clause is contained in the preamble to the 1907 Hague Convention and is evidence of the drafters' intent to fill any gap left by the Hague instruments during armed conflict and belligerent occupation with humanitarian provisions from other sources in order to safeguard human rights. The Martens clause reads:

> Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

The same principle of filling gaps in humanitarian law with other human rights

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[23]Security Council Res. No. 237 (1967) of 14 June 1967 (calling on Israel to respect human rights in areas affected by the 1967 Middle East conflict). The General Assembly welcomed this resolution in UNGA Res. 2252 (ES-V) of 4 July 1967.

[24]*Question of the Violation of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East*, UN Doc. E/CN.4/L.1195, preambular para. 4 (1972); Edited version in Quigley, *supra* note 9, p. 12.

[25]UN Working Group on Arbitrary Detention, Decision No. 26/1993 (Israel), adopted 30 Apr. 1993 (excerpt of decision transmitted to al-Haq after al-Haq provided information on the detention of Ahmad Qatamesh to the Working Group; full text of decision can be found in the report which the Working Group will present to the Commission on Human Rights at its 50th session in Feb./Mar. 1994).

provisions is repeated in Article 158 of the Fourth Geneva Convention. It is widely accepted that the Martens clause has become a customary rule of international law. This is in accordance with the view that human rights and humanitarian law are

> gradually fusing together, the law of human rights setting the normal standard for peacetime as well as for wartime .... the law of human rights ... [exerting] a positive influence on the law of armed conflicts, filling in gaps and helping to revise it.[26]

The body of human rights law which would fill the gaps in humanitarian law consists of the UN Charter, the UDHR, the international covenants on civil, political, and economic, social and cultural rights, the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the convention to prevent genocide, and many other instruments. In addition, the "principles of the law of nations" referred to in the Martens clause have also been developed and expanded through state practice and judicial opinions. These principles find voice particularly in the judgments of the international military tribunals at Nuremberg and Tokyo after World War II, and in a number "of national and occupational statutes and court decisions, and their follow-up in the work of the United Nations."[27]

State practice can also be found in the acts of individual states. The United States Department of State holds conditions in territories under military occupation

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[26]Cohen, *supra* note 4, p. xvi. The Secretary General has noted with regard to the Martens clause that "the relevant principles of the law of nations have been elaborated and expanded in breadth as well as in depth" so that there is now "a comprehensive body of international law ... [applicable] in time of peace as well as, with certain permissible derogations, in time of armed conflicts ...." UNSG Human Rights Report, *supra* note 18, para. 74. See also, M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government -- The Initial State" in Shamgar, ed., *Military Government in the Territories Administered by Israel, 1967-1980, 1: The Legal Aspects* (Jerusalem: Hebrew University, 1982) p. 31, which mentions the Martens clause and notes that although the governing law in situations of belligerent occupation is primarily that of the laws of armed conflict, the situations are also subject to customary rules and usages not included in any code.

[27]UNSG Human Rights Report, *supra* note 18 , para. 75.

to the same standards as states during times of peace.[28]

After World War II, the state practice of the Allied Powers occupying Germany affirmed the applicability of human rights law to belligerent occupation. According to humanitarian law, local law is to be applied by the occupier with certain "absolutely necessary" exceptions. However, the occupying Powers in Germany applied a human rights standard to the local law and refused to implement laws that fell below that standard. Thus, the Powers did not apply certain Nazi criminal laws that discriminated on the basis of race and religion. The Powers suspended any local legislation found to fall below a certain international minimum human rights standard.[29]

2. Judicial Opinion

In an advisory opinion, the International Court of Justice stated that an occupying power, even if occupying illegally, remains responsible for fulfilling its obligations stemming from human rights conventions in the occupied territory. The ICJ described these multilateral human rights conventions as "general conventions ... with a humanitarian character, the nonperformance of which might adversely affect the people of [the occupied territory]...."[30] The Court was considering South Africa's occupation of Namibia and, in this case, the use of the phrase "humanitarian character" can be considered to have the general connotation of "human rights." Professor Meron has commented that

> The case for the application of general multilateral conventions of a humanitarian character to which the power in control is a party is even stronger in the case of belligerent occupation, which has not been declared illegal by the UN Security Council or the

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[28]See, e.g., U.S. Dept. of State, *Country Reports on Human Rights Practices for 1992* (Washington: U.S. Printing Office, 1993) pp. 1013-1030 (referring to Israel and the Occupied Palestinian Territories); U.S. Dept. of State, *Country Reports on Human Rights Practices for 1979* (Washington: U.S. Printing Office, 1980) pp. 760-68.

[29]Quigley, *supra* note 9, p. 13.

[30]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (summary of Advisory Opinion of 21 June), *ICJ Yearbook 1970-71*, No. 25 (1971) pp. 105-106.

International Court of Justice.[31]

The European Commission of Human Rights agrees that human rights law applies during belligerent occupation. In *Cyprus v. Turkey*,[32] Cyprus claimed that Turkey had violated several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms[33] arising from Turkey's invasion of Cyprus in 1974. The Commission found that Turkey was a military occupant and that human rights norms in the European Convention were applicable to the situation. It then found that Turkey had violated some of the provisions of the Convention.

Thus, international courts and commissions agree that human rights instruments remain applicable to situations of armed conflict and belligerent occupation.

3. Scholarly Opinion

Besides state practice and judicial opinion as discussed above, the opinions of legal scholars are also evidence of a rule of international law. The majority of scholars find human rights law applicable during armed conflict and military occupation.[34] The ICRC has also indicated that human rights law may apply to

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[31]T. Meron, "Applicability of Multilateral Conventions to Occupied Territories" in Shamgar, ed., *supra* note 26, p. 221 n. 15.

[32]*Cyprus v. Turkey*, *European Commission of Human Rights*, Vol. 13 (1979) p. 85 (decision on admissibility) reprinted in *International Law Report*, Vol. 62, (1982) p. 75. See also *European Human Rights Reports*, Vol. 4 p. 482.

[33]4 Nov. 1950, entered into force 1953. 213 UNTS 222, ETS No. 5, UKTS 70 (1950) Cmd 8969.

[34]Quigley, *supra* note 9, pp. 7-8, citing Robertson, Draper, Calogeropoulos-Stratis, Partsch, and Espiell as examples. Cohen, *supra* note 4, pp. xx, 8, adding S. MacBride and F. Przetacznik. See also F.J. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts," *Review of Military Law and the Law of War* (forthcoming) pp. 7-8; E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories," *Israel Law Review*, Vol. 26, No.1 (1992) p. 24, p. 30; S. Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts," in K. Vasak and P. Alston, eds., *The International Dimensions of Human Rights*, Vol. I (Paris: UNESCO and Westport: Greenwood Press, 1982) pp. 175-212; L. Green, "Human Rights and the Law of Armed Conflicts," *Israel Yearbook on Human Rights*, Vol. 10 (1980) p. 9, p. 30; Greenspan, "The Protection

armed conflicts and military occupation.[35]

Many of the arguments that scholars rely on for this premise have been noted above, in the discussion regarding state practice and court rulings. Other reasons are presented below, beginning with the fact that most human rights conventions expressly envisage their applicability during war and belligerent occupation.

a. Derogation and Limitation Provisions: The Scope of Application of Most Human Rights Accords Does Not Exclude Their Applicability During Wartime

The applicability of human rights law in times of armed conflict and belligerent occupation is supported by the fact that the human rights conventions themselves envisage that during emergency situations, such as war, the conventions will continue to apply. Evidence of this is found in conventions containing provisions allowing or expressly disallowing derogation measures in such emergency situations and in conventions with provisions limiting individual rights for purposes of national security or public order.[36]

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of Human Rights in Time of Warfare," *Israel Yearbook on Human Rights*, Vol. 1 (1971) p. 228, p. 229; Partsch, "Experiences Regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights," *Israel Yearbook on Human Rights*, Vol. I (1971) p. 327; J. Pictet, *The Principles of International Humanitarian Law* (Geneva: ICRC, 1966) pp. 10-12. Theodor Meron writes:

> Although human rights apply primarily in times of peace and humanitarian norms primarily in times of armed conflict, there is a growing overlap in their applicability *ratione materiae* [because of their subject matter]. There is also a very large convergence and parallelism between norms originating in human rights instruments and those originating in humanitarian instruments.

T. Meron, *Human rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) pp. 10-11, n. 14.

[35]*The Red Cross and Human Rights*, ICRC Doc. CD/7/1/1 (1983) pp. 113, 116 (1983) (working document submitted to the Council of Delegates, Provisional Agenda Item 7, Geneva, Sept. 1983).

[36]A third way of evading application of part of a convention is to make a reservation, thereby opting out of a provision in whole or in part from the start. Reservations are not permitted if they are incompatible with the object and purpose of the convention. At the June 1993 World Conference on Human Rights, states were encouraged

i. Derogation Provisions

Although some rights are considered so fundamental that they are non-derogable, some human rights instruments have a derogation provision applicable to the remaining rights, specifically designed for emergency situations. In the ICCPR, for example, derogation is allowed according to Article 4:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[37]

A reference to war or armed conflict was originally included but then intentionally deleted from the ICCPR because it was felt that such a UN document should not even mention the possibility of war. Nonetheless, war was clearly one of the emergency situations the drafters had in mind according to the *travaux preparatoires*.[38] The UN Rapporteur on derogations confirms that

> The inclusion of Article 4 in the [ICCPR] ... constitutes an attempt to regulate departures from the usual standards during times of acute crisis, that is, to extend the Rule of Law to this domain rather

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> to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.

Vienna Declaration, *supra* note 13, Art. II(5).

[37]ICCPR, Art. 4. However, no derogation may be made from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16, and 18. See Section IV A 2 for a further discussion of the ICCPR's derogation article.

[38]UNSG Human Rights Report, *supra* note 18, para. 10.

than create an exception to it.[39]

Thus, the derogation provision in the ICCPR was included because it was agreed by the drafters that human rights principles applied to emergency situations such as war and belligerent occupation.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) expressly provides that no derogation from any of its provisions is possible; even during war

> no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[40]

This clause is also evidence that this human rights convention continues to apply during war and belligerent occupation.

ii. Limitation Provisions

In addition to the possibility of derogation, several rights in the major human rights conventions may be limited by law if necessary for national security or public order, or for the rights and freedoms of others.[41] Public health and morals are two other reasons mentioned for limiting certain rights.

Article 29 para. 2 of the UDHR, for example, limits the exercise of rights in the following manner:

> (2) In the exercise of his [sic] rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements

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[39]D. O'Donnell, "Commentary by the Rapporteur on Derogations," *Human Rights Quarterly*, Vol. 7, No. 1 (1985) p. 30.

[40]Art. 2(2).

[41]See, e.g., ICCPR Arts. 12 (freedom of movement), 13 (limiting expulsion of aliens), 14 (due process guarantees), 19 (freedom of expression), 21 (freedom of assembly), 22 (freedom of association and the right to form trade unions).

> of morality, public order and the general welfare in a democratic society.

The basis of "public order" could be used during situations of armed conflict or belligerent occupation, if the circumstances warranted it, to constrict certain rights.

Similar limitations appear in several human rights instruments including the African Charter on Human and Peoples' Rights[42] and the Convention on the Rights of the Child.[43] The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the possibility of limitation of its rights for the general welfare in Article 4. Thus, the UDHR and other human rights instruments with limitation provisions have the flexibility to continue to apply in situations of armed conflict and belligerent occupation.

b. Other Rationales for Applicability

Besides the existence of derogation and limitation provisions in human rights instruments, other reasons proposed by legal scholars in support of the universal applicability of human rights law include the following.

First, the history of the development of human rights law points to its applicability during war and belligerent occupation. Adam Roberts notes that

> the main impetus for UN action after 1945 to develop human rights law was the near-universal reaction against Nazi oppression in Germany and in German-occupied territories in World War II....[44]

Second, there are issues and procedures which are not addressed in humanitarian law which have now come to be recognized as important for all

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[42]Adopted by the 18th Conference of Heads of State and Government of the Organization of African Unity (June 1981) Nairobi, Kenya. Articles 11 (free assembly and association), 12 (freedom to live and return to own country), and 14 (right to property) contain limitation provisions.

[43]Adopted by the UNGA, opened for signature 26 Jan. 1990, ratified by Israel on 3 Oct. 1991. Articles 10, 13, 14, 15 contain limitation provisions with regard to the rights to leave a country, free speech, free manifestation of religion, and assembly and association.

[44]A. Roberts, "Prolonged Military Occupation: The Israeli-Occuped Territores, 1967-1988," in Playfair ed., *supra* note 15, p. 25, p. 53.

human beings in whatever conditions they live.[45] Such issues include educational materials, and discrimination in employment, while the procedures include automatic reporting requirements and the possibility of individuals raising a matter directly with a foreign institution. It is widely believed that such issues and procedures continue to be important during armed conflict and belligerent occupation and the only way for them to be applied is through human rights law.

Third, the application of a human rights treaty to an occupied territory by an occupier does not imply sovereignty over the land; that it does imply sovereignty has been an objection previously raised in specific cases. However, according to the ICJ, in such human rights conventions

> the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'etre* of the convention.[46]

The Court was deciding whether to permit reservations to the Genocide Convention. Thus, in applying a human rights convention to occupied territory, the occupier does so solely for the humanitarian benefit of the occupied population and is not understood to be making any legitimate claim on the territory itself.[47]

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[45]*Ibid.*, p. 57.

[46]The *Genocide* case. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion of 28 May) *ICJ Rep.* (1951) p. 23. See also the discussion in Quigley, *supra* note 15, p. 308.

[47]Benvenisti adds:

> It would seem that the occupant who has undertaken to respect treaty-based human rights norms, can and must also furnish reports as required by the relevant conventions with respect to the occupied territories. There is little fear that acceptance of such reports by the competent committees would amount to international recognition of the legal title of the occupant over whole or part of the occupied territory. The acceptance of such reports would only acknowledge the occupant's duty to present these reports and to implement the treaty provisions in the area under its control.

Benvenisti, *supra* note 34, p. 32. For a contrary but less persuasive view, see the discussion regarding the International Labor Organization (ILO) in Section IV below.

The position that human rights law is universally applicable is well supported by state practice, judicial opinion, and legal experts. The position reflects both a theoretical belief that human rights should continue to exist during wartime and a practical belief that they can.

B. Exclusive Applicability

Professor Dinstein sets forth the opposing theory of exclusive applicability:

> Most peace-time human rights are suspended for the duration of the hostilities. Yet, some human rights cannot be suspended at any time -- not even in war or emergency -- and remain unaffected by the crisis. Furthermore, war produces new human rights; which are applicable in war-time in lieu of those suspended in peace-time....[48]

Gerhard von Glahn, writing in 1957 before most human rights instruments had been drafted, also makes a clear distinction between the laws of war and those of peace.[49] Jean Pictet, author of the authoritative *Commentary*[50] on the Fourth

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[48]Y. Dinstein, "The International Law of Inter-State Wars and Human Rights," *Israel Yearbook on Human Rights*, Vol. 7 (1977) p. 139, pp. 148-149. Dinstein elaborates on the rights safeguarded to persons during times of war and belligerent occupation according to the theory of exclusive applicability

> The human rights of civilians in time of war.... can be telescoped into a single quintessential corresponding obligation, imposed on belligerents, namely, to uphold a minimum standard of due process of law insofar as the protection of the life, liberty and property of civilians (particularly in occupied territories) is concerned. The upshot is that civilians in time of war – even in occupied territories - - may lawfully lose their lives, their liberty and their property, but only after a modicum of due process of law has been observed.

See also Y. Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law," in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) pp. 345-368.

[49]G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) pp. 5-6.

[50]J. Pictet, ed., *Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons In Time of War* (Geneva: ICRC, 1958).

Geneva Convention argues that human rights law does not apply to armed conflicts or military occupation.[51] However, Pictet's argument rests not on theory,[52] but on the recognition that implementation and enforcement are different for the two sets of laws. Cohen grasps the problem also as one of implementation rather than theory. She argues that because human rights enforcement is politicized (often through the involvement of UN bodies) it cannot ensure protection during armed conflict in the same way that a neutral body such as the ICRC, ensuring protection through humanitarian law, can.[53]

> These arguments, based on expediency, are not a reason to deny the applicability of human rights norms in wartime or during military occupation, a situation which is neither fully wartime nor peacetime either. To the extent that Pictet's arguments have validity, their validity is less for military occupation than for periods of hostilities."[54]

These are arguments, at most, for continuing to enforce humanitarian law while also applying human rights law to situations of armed conflict and belligerent occupation so that the most effective implementation and enforcement measures of both sets of laws can be utilized in support of human rights. Moreover, humanitarian law also contains many of the same flaws noted above regarding human rights law. The Fourth Geneva Convention's enforcement mechanisms are also subject to shortcomings. Its systems of Protecting Powers and universal prosecution are rarely used and, in the case of Israel and the Occupied Territories, while the ICRC affords some relief to political prisoners, it has been powerless to halt the torture and mistreatment that occurs in the first 14 days before Israeli military regulations allow the ICRC to see new prisoners.[55] Implementation of

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[51]J. Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva: Sijthott-Henry Dunant Institute, 1975) p. 15.

[52]In theory, Pictet has described the field of human rights as finding "its application in time of peace as well as in time of war." Pictet, *supra* note 34, p. 12.

[53]Cohen, *supra* note 4, pp. 8-9.

[54]Quigley, *supra* note 9, p. 6.

[55]Al-Haq, *A Nation Under Siege: Al-Haq 1989 Annual Report on Human Rights in the Occupied Palestinian Territories* (Ramallah: Al-Haq, 1990) p. 169.

the Fourth Geneva Convention has become politicized, as illustrated by the numerous UN resolutions urging its application to the situation and Israel's ongoing refusal to recognize its applicability. Finally, human rights conventions now have, if anything, more mechanisms for enforcement than do humanitarian laws. Thus, arguments for exclusive applicability based on procedural issues appear weak when scrutinized closely.[56]

Some scholars argue that human rights law is inapplicable to military occupations because the relationship between ruler and ruled is fundamentally different under occupation between the occupier and the occupied population than in peacetime between a government and its people.[57] Dinstein writes that

> a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population.[58]

The Israeli Foreign Ministry's Legal Advisor used a similar argument to justify the non-application of the UDHR, the ICCPR, and the ICESCR to Israel's conduct in the Occupied Territories. The Legal Advisor noted that there was

> clearly not a classical situation in which the normal components of 'human rights law' may be applied, as are applied in any standard, democratic system in the relationship between the 'citizen' and his government. Hence the criteria applied in the areas administered by Israel, in view of the *sui generis* situation, are those of 'humanitarian law', which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety, and security.[59]

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[56]See Section IV where the reporting mechanisms of several of the major human rights instruments are noted.

[57]Meyrowitz, "Le droit de la guerre et les droits de l'homme," *Revue de Droit Public et de la Science Politique en France et a l'Etranger*, Vol. 88 (1972) p. 1059, pp. 1098-99.

[58]Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights," *Israel Yearbook on Human Rights*, Vol. 8 (1978) p. 116.

[59]Office of the Legal Advisor, Ministry of Foreign Affairs, State of Israel, Memorandum (12 Sept. 1984) cited in A. Roberts, B. Joergensen, and F. Newman, *Academic Freedom under Israeli Military Occupation* (London: World University Service, 1984) pp. 80, 81, and quoted in Quigley, *supra* note

If one carried this argument to its logical extreme, human rights law would only be applied where a democratic system with its many human rights safeguards already existed and it would not be applied where relations between ruler and ruled were less than completely democratic. In other words, human rights law would not be applied where such safeguards were needed the most. In fact, as Quigley points out, human rights law as well as humanitarian law, presuppose "a difference in interest between a government and the population it controls.... Thus the difference ... [between humanitarian and human rights law that is seen] as fundamental is in reality one of degree."[60]

Other major reasons for advancing the exclusive applicability of humanitarian and human rights laws include 1) the fact that international instruments on human rights only protect nationals from their own state and do not protect populations of occupied territories or even, perhaps, prisoners of war; 2) with or without derogation clauses, human rights instruments do not protect persons as well as humanitarian instruments do; and 3) the voluntary system of implementing human rights instruments can and will be withdrawn by a state during an armed conflict.[61]

Discussions in other sections of this paper clarify, however, that 1) many international human rights instruments do, by extending their scope of applicability to every person within a signatory's "jurisdiction", protect populations of occupied territories and not just nationals from their own state.[62] 2) The protection afforded by human rights instruments sometimes does exceed that of the humanitarian instruments and application of one body of law need not exclude the other; thus the highest degree of protection offered by either body of law could

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15, p. 55. This quotation is a surprising statement in light of the fact that Israel has consistently refused to acknowledge the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territories. See Shamgar, "The Observance of International Law in the Administered Territories," *Israel Yearbook on Human Rights*, Vol. 1 (1971) pp. 262, 263. But according to the Israeli Attorney-General, speaking at a 1971 Symposium on Human Rights held at Tel Aviv University, the Israeli government decided "to act *de facto* in accordance with the humanitarian provisions of the Convention." *Ibid.*, p. 266.

[60]Quigley, *supra* note 9, p. 7.

[61]Meyrowitz, *supra* note 57, pp. 1079-89.

[62]See Section IV below.

always be available.[63] 3) Finally, mechanisms of implementation and enforcement can be changed and do not affect the theory of applicability. Moreover, states are as likely to eschew the mechanisms of humanitarian law as those of human rights law in some cases.

Another argument advanced for the exclusive application of humanitarian law during wartime is that most humanitarian law texts themselves do not mention human rights law.

Several points may be mentioned in response. First, humanitarian law permits local laws in effect on the eve of an occupation to remain in effect, subject to the occupier's need to change the laws if "absolutely prevented" from respecting them. As discussed below, these local laws could include human rights provisions, which might then remain in effect during the imposition of humanitarian law. Second, it is universally agreed that customary human rights law, by definition, is and remains applicable during times of war and belligerent occupation and the Martens clause in the Hague Regulations alludes to this. Third, although the major texts of humanitarian law do not mention human rights law, they do not exclude them either. Thus, arguments based on the texts of humanitarian law cannot be used to exclude the possible application of human rights law. Fourth, in the most recently drafted humanitarian law texts, the failure to mention human rights law more specifically than the Martens clause has been remedied. The 1977 Protocol I to the Geneva Conventions states that:

> No provision of this Article [enumerating protected human rights] may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law....[64]

According to Professor Quigley, "[t]his reference apparently includes human rights law because that is the body of law that provides protection to individuals."[65]

The arguments in support of exclusive applicability are weak. They grow more so over time with the further development of human rights law. All other

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[63]See Section III below.

[64]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977, Art. 75.

[65]Quigley, *supra* note 9, p. 5.

arguments discussed below are variations on either the universal or exclusive applicability theories. Their relative merits will be compared in the following sections.

C. Temporary Displacement

In essence, the theory of temporary displacement is based on the argument that the entire "law of war is a derogation from the normal regime of human rights...."[66] In Colonel Draper's words:

> We have ... got ourselves into the position that the law of war may take its place within the general system of international law not as an alternative to the law of peace, the old and classic positioning, but seen as an exceptional and derogating regime from that of human rights, contained, controlled and fashioned by the latter at every point possible.[67]

Proponents of this theory, such as Colonel Draper, wish to see "the establishment of more and better human rights, more securely enforced, within the content of our modern law of armed conflicts."[68]

With the admission that human rights law is universally applicable but allows derogation to a lower standard during times of war, this theory is similar to that of universal applicability where some human rights provisions may be derogated from in times of war. The difference lies in whether the derogation during times of war leaves human rights instruments or humanitarian instruments in place. With no theoretical objection to continued applicability of human rights instruments, this temporary displacement theory can be reconciled easily in practice with that of universal applicability, by allowing both humanitarian instruments and human rights instruments to act as sources of human rights in times of armed conflict and belligerent occupation.

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[66]Draper, "The Relationship Between the Human Rights Regime and the Law of Armed Conflicts," *Israel Yearbook on Human Rights*, Vol. 1 (1971) p. 191, p. 206.

[67]*Ibid.*, p. 198.

[68] *Ibid.*; see also Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation," *Stanford Law Review*, Vol. 37 (1985) p. 1539, p. 1600.

D. Local Law

According to humanitarian law, "the laws in force in the country" at the time that the authority of the legitimate power has passed to the occupier shall be respected, unless the occupier is absolutely prevented from doing so.[69] This local law which remains in force could include human rights instruments if they have been ratified or acceded to and incorporated into domestic law by whatever process the legitimate power required. Human rights law is thus applicable through incorporation in situations of war and belligerent occupation.

Jordanian law, for example, was in force in the West Bank on the eve of the Israeli occupation in 1967. Article 33 of the Jordanian Constitution provides:

> (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.

The Supreme Council of Jordan has interpreted this to mean that for an agreement to form part of local law, the Jordanian Parliament must authorize all peace treaties and shipping and trade agreements; however, other agreements do not need the authorization of Parliament unless they involve changes in state land, sovereignty, expenditures, or violation of rights. Therefore, this latter type of agreement, including human rights instruments, becomes part of local law immediately after it has been signed by the executive.[70]

Jordan had ratified or acceded to the following human rights conventions

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[69]Art. 43, Hague Regulations.

[70]*Official Jordanian Gazette*, No. 1224, 16 Apr. 1955, 42 (Decision No. 2 of the Supreme Council of Jordan whose role is defined in the Jordanian Constitution to include interpretation of its articles) cited in M. Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel," in Playfair ed., *supra* note 15, p 120.

prior to the 1967 occupation of the West Bank by Israel:[71] the Convention on the Prevention and Punishment of Genocide[72] (acceded to on 3 April 1950); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[73] (acceded to on 27 September 1957); the Slavery Convention with the Protocol Amending the Slavery Convention signed at Geneva on 25 September 1926[74] (acceded to on 5 May 1959); and several International Labor Organization (ILO) conventions.[75] These then became part of the local law applicable, according to humanitarian law, in the Occupied Palestinian Territories.[76]

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[71]See generally Centre for Human Rights, *Status of International Instruments* (United Nations, New York: 1987).

[72]Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A(III) of 9 Dec. 1948. Entered into force 12 Jan. 1951.

[73]Adopted by a Conference of Plenipotentiaries convened by Economic and Social Res. 608 (XXI) of 30 Apr. 1956 and done at Geneva on 7 Sept. 1956. Entered into force 30 Apr. 1957.

[74]Approved by General Assembly Res. 794 (VIII) of 23 Oct. 1953. Entered into force 7 Dec. 1953. The amended Convention entered into force on 7 July 1955.

[75]By June 1967, Jordan had registered its ratification of the following ILO conventions: No. 29 on forced labor (ratified on 6 June 1966); No. 100 on equal remuneration (22 Sept. 1966); No. 105 on forced labor (31 March 1958); No. 111 on discrimination in employment and occupation (4 July 1963); No. 116 on rèvision of final articles (4 July 1963); No. 117 on basic aims and standards of social policy (7 Mar. 1963); No. 118 on equal treatment in social security (branches c,d,f,g) (7 Mar. 1963); No. 119 on guarding of machinery (4 May 1964); No. 120 on hygiene in commerce and offices (11 Mar. 1965); No. 122 on employment policy (10 March 1966); No. 123 on minimum age in underground work (6 June 1966); and No. 124 on medical examinations of young persons in underground work (6 June 1966). See discussion of ILO convention applicability and reporting requirements for Israel in Section IV below.

[76]Whether or not Jordan can accurately report on implementation of these conventions is another question, discussed in Section IV below.

Egyptian law was never implemented in the Gaza Strip and Gaza was never annexed by Egypt. In June 1948, the *Gaza Official Gazette* ordered that the courts should continue to operate according to the British Mandate Laws of Palestine and orders issued by the Egyptian Governor General who was the Military Governor of the region, (Volume I, p. 17). Thus, the fact that Egypt had ratified or acceded to the following conventions prior to the 1967 occupation by Israel does not provide a basis to argue that these instruments formed part of local Gaza law, although it could have served as a basis to argue that Egypt had an obligation to implement these instruments in Gaza: International Convention on the Elimination of All Forms of Racial Discrimination (signed by Egypt on 28 Sept. 1966 and

Israel has always accepted the fact that local law remains in force in the Occupied Territories, subject to Israeli amendment under certain conditions. The Supreme Court of Israel has not found the Israeli argument that Jordan was not the legitimate power prior to occupation to be a barrier to applying local law:

> 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 [Israel Defense Force] to be valid.[77]

The local law rule found in humanitarian texts is unquestioned and shows that humanitarian law envisages the concurrent application of at least some provisions of human rights law with humanitarian law.

E. Construing Humanitarian Provisions In Accordance With Human Rights Conventions

Humanitarian law may also encourage concurrent application of human rights law in its requirement to preserve "*la vie publics*", or civil life of the community, found in Article 43 of the Hague Regulations:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [*l'ordre et la vie publics*], while respecting, unless absolutely

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ratified on 1 May 1967 with reservations to Article 22); Convention on the Prevention and Punishment of the Crime of Genocide (signed on 12 Dec. 1948 and ratified on 8 Feb. 1952); the Slavery Convention (acceded to on 25 Jan. 1928); Protocol Amending the Slavery Convention (signed on 15 June 1954 and ratified on 29 Sept. 1954); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (acceded to on 17 Apr. 1958); and Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (acceded to on 12 June 1959).

[77] *Elyakim Ha'etzni v. The State of Israel*, HC 61/80, PD 34 [3] p. 595, p 597.

prevented, the laws in force in the country.[78]

Professor Cohen summarizes the opinions of most legal scholars in her analysis of the meaning of Article 43:

> The institutional, administrative and legal structure in occupied territory is to be preserved. Nevertheless, the occupant may make such changes as are necessitated by his interest in the maintenance of the safety of his armed forces, the maintenance of public order, the protection of public life and property, and the public benefit of the inhabitants.[79]

Allowing changes for the benefit of the occupied population and preserving civil life could be interpreted as allowing the application of human rights law. According to Benvenisti, "the law of occupation would seem to sanction, in most cases, the implementation of human rights conventions by occupants in occupied territories."[80] Cohen urges the borrowing "from the list of human rights in the Universal Declaration and the Covenants, especially when the occupation is prolonged, as a nonbinding guide to administration."[81]

The Israeli High Court of Justice has held that this humanitarian law requirement to ensure the civil life of the occupied population should be construed

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[78]The English translation of the official French text rendered the phrase "*l'ordre et la vie publics*" as "public order and safety" although the term *la vie publics* includes the entire social and commercial life of the community. A better translation would be "public order and civil life." Cohen, *supra* note 4, pp. 18-19. See also von Glahn, *supra* note 49, p. 34.

Article 64 of the Fourth Geneva Convention echoes the terms of Article 43 of the Hague Regulations, (*Commentary*, *supra* note 50, p. 335). According to Jean Pictet:

> the powers which the Occupying Power is recognized to have are very extensive and complex, but these varied measures must not under any circumstance serve as a means of oppressing the population.

Ibid., p. 337.

[79]Cohen, *supra* note 4, p. 19.

[80]Benvenisti, *supra* note 34, p. 32.

[81]Cohen, *supra* note 4, p. 71.

applying the standards of a late 20th century democratic state to occupied territory.[82] According to the Siracusa Principles:

> While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.[83]

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[82]Quigley, *Israel's 45-Year Emergency: Are There Time Limits to Derogations From Human Rights Obligations?* (Draft Copy, 1993) p. 25, citing, *Bahij Tamimi et al., v. Minister of Defence et al.* (Case of Arab Lawyers Union), HC 507/85, Ruling of Sept. 16, 1987, PD 41 (4) p. 57, and summarized in *Israel Yearbook on Human Rights*, Vol. 18 (1988) p. 248. The Israeli Supreme Court sitting as the High Court of Justice has accepted the right of Palestinians in the Occupied Palestinian Territories to present claims against the State of Israel, the military government and its authorities, deciding not to question whether it has jurisdiction over the military government in the Occupied Territories. See Cohen, *supra* note 4, pp. 80-85. The Court considers claims regarding "matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal." Section 7(a) Courts Law 1957, 11, *Laws of the State of Israel* (1956/7) pp. 157-58. It reviews the acts of public officials according to whether they have abused or exceeded their authority. It also reviews the validity of orders upon which the acts are based. However,

> practically speaking, the dominant tendency in Israeli Supreme Court rulings is one of non-application of international law in the Occupied Territories, ... 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,... 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.

Qupty, *supra* note 70, p. 88.

[83]Siracusa Principles, B.ii. 21., reprinted in "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," *Human Rights Quarterly*, Vol. 7, No. 1 (1985) p. 5. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights were drafted in 1984 by a group of 31 distinguished experts in international law who were convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences. The experts hailed from many countries, as well as the UN Centre for Human Rights, the ILO, and the sponsoring organizations. The Siracusa Principles "are considered by the participants to reflect the present state of international law" except where noted. "Introduction," *Human Rights Quarterly*, Vol. 7, No. 1 (1985) pp. 1-2.

The European Court has found that a democratic society is "one characterized by pluralism, tolerance and broadmindedness."[84] Professor Quigley contends that the Israeli High Court's holding therefore implicitly includes application of international human rights norms such as those found in the ICCPR and ICESCR.[85]

Thus, both the local law rule and construction of humanitarian law theory discussed here support the applicability of human rights law to situations of belligerent occupation.

F. Creeping Applicability

Some scholarship and state practice support the view that the longer a belligerent occupation exists, the more compelling become the arguments for legislative changes including application of human rights standards to such a situation.

Although "the existing body of law proceeds from the assumption that belligerent occupation is, or should be, of short duration",[86] Meir Shamgar pointed out that:

> According to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, ... and ... could, from a legal point of view, continue indefinitely.[87]

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[84]Lockwood, Finn, Jubinsky, "Working Paper for the Committee of Experts on Limitations," *Human Rights Quarterly*, Vol. 7, No. 1 (1985) p. 54, citing *Handyside Case*, Judgment of 7 Dec. 1976, ser. A. no. 24, 1976 *Yearbook of the European Convention on Human Rights*, p. 506 (Eur. Ct. of Human Rights); *Young, James, and Webster v. U.K.*, Judgment of 13 Aug. 1981, ser. A, no. 44, para. 63, 1981 *Yearbook of the European Convention. on Human Rights* p. 440 (Eur. Ct. of Human Rights); *Dudgeon Case*, Judgment of 22 Oct. 1981, ser. A, no. 45, para. 53, 1981 *Yearbook of the European Convention on Human Rights*, p. 444 (Eur. Ct. of Human Rights).

[85]Quigley, *supra* note 82, p. 26.

[86]A. Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources," in Playfair ed., *supra* note 15, p. 419.

[87]M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government -- the Initial Stage" in Shamgar, ed., *supra* note 26, p. 43.

Scholars and jurists have opined that a prolonged occupation, such as the one in the Occupied Palestinian Territories which has lasted for over a quarter of a century, cannot be constrained to the same extent that a short military occupation is:

> During a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the *status quo ante*: decisions may have to be taken about such matters as road construction, higher education, water use, electricity generation, and integration into changing international markets. Such decisions, although they involve radical and lasting change, cannot be postponed indefinitely without ... leaving a whole population in legal and political limbo.... If there is any risk at all that the law on occupations might provide, paradoxically, the basis for a kind of discrimination that might bear comparison with *apartheid*, the causes of that risk need to be identified, and possible solutions explored.[88]

Thus, according to the creeping applicability theory, human rights law should increasingly provide the standard for belligerent occupation over time:

> The needs of the local population, ... 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.[89]

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[88]Roberts, *supra* note 44, pp. 33-34.

[89]Y. Dinstein, "Legislative Authority in the Administered Territories" (in Hebrew) *Eyunai Mishpat (Tel Aviv University Law Review)*, Vol. 2 (1972) p. 505, pp. 509-511 quoted in Qupty, *supra* note 70, p. 94. See also Cohen, *supra* note 4, pp. 9, 20-21:

> Only a minimum of human rights can be protected in time of war. Nevertheless, there are situations governed by the law of armed conflicts in which military necessity is diminished, and in which the law of human rights can serve to limit the more brutal requirements of military necessity contained in the law of armed conflicts. Such a situation is that of a prolonged occupation after the cessation of general hostilities.

According to Dr. Cohen:

> While the [Fourth Geneva] Convention remains applicable to a large extent during the prolonged belligerent occupation phase, it is insufficient to ensure adequate protection for the needs of the civilian population during that phase.[90]

She suggests the use of the UDHR and the two international covenants "to guide the belligerent occupant in the administration of the territory occupied, just as civilian governments may be guided by these laws in the administration of their own territories."[91] Cohen specifically discusses economic rights as an area not covered in humanitarian law to which "the concept of human rights can serve to breathe new life into an otherwise stalemated situation."[92]

The Fourth Geneva Convention supports the notion of stages of occupation in its recognition of two stages of occupation in Article 6. Paragraph 3 states that "one year after the general close of military operations" the application of the Convention shall cease, except for certain key provisions to which the occupier is bound "for the duration of the occupation, to the extent that such Power exercises the functions of government...." The *Commentary* confirms that although an occupation may last more than a year, "as hostilities have ceased, stringent measures against the civilian population will no longer be justified."[93] The

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Ibid. p. xvi. See also Benvenisti, *supra* note 34, p. 30.

[90]Cohen, *supra* note 4, p. 29.

[91]*Ibid.*

[92]*Ibid.*

[93]*Commentary,* supra note 50, pp. 62-3. According to Roberts, however, this provision, while representing "one attempt to address the issue of prolonged occupation ... [is] of little importance, ..." because it

> was based on the assumption, confounded in the Israeli-occupied territories, that as time went by indigenous institutions would take over more and more responsibilities. The provision has never been formally implemented, was in effect rescinded by Protocol I, and must be regarded as a failure.

Roberts, *supra* note 44, p. 76.

UNSG Human Rights Report also divided military conflicts into two phases: when hostilities and military operations occur, and when they have essentially ceased "at least for a time, and enemy armed forces remain in military control or occupation of territories in which civilians live or work."[94]

The Supreme Court of Israel has discussed the issue of prolonged occupation and the conceptual changes to occupation that it brings. In 1972, the Court noted:

> A prolonged military occupation brings in its wake social, economic and commercial changes which oblige [the occupier] ... to adapt the law to the changing needs of the population.[95]

In 1982 the Court elaborated on the actions taken for the occupied population's benefit:

> [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.[96]

The Court concluded that Article 43 of the Hague Regulations, with its admonition to "restore, and ensure" public order and civil life (or "safety"), provides a broad and flexible framework within which the duration of the occupation should be considered. The military government should take "all measures necessary to ensure growth, change, and development" and is

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[94]UNGA, Official Records, 24th Session, "Respect for Human Rights in Armed Conflict: Report of the Secretary-General," 20 Nov. 1969, UN Doc. A/7720, para. 135.

[95]*The Christian Association for the Holy Places v. The Minister of Defence, et al.*, HC 337/71, 26(1) PD., p. 355.

[96]*A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region, et al.*, HC 393/82, PD 37 (4) p. 785, pp. 800-801, summarized in *Israel Yearbook on Human Rights*, Vol. 14 (1984) p. 301. pp. 800-801.

> entitled to develop industry, commerce, agriculture, education, health, welfare, and like matters which usually concern a regular government, and which are required to ensure the changing needs of a population in a territory under belligerent occupation.[97]

Thus, humanitarian instruments and legal scholarship support the views that there are stages of military occupation and that certain legal changes may be more acceptable during the latter stages than the former. Professor Dinstein and Justice Shamgar have both suggested that the criterion for when a change is consistent with international law be when the occupier would enact or has enacted a similar law in its own country.[98]

Adam Roberts has noted, however, that while the argument regarding the increasing permissibility of legislative change during a prolonged belligerent occupation is attractive, "it raises the question of exactly what individual or institution is able to assess and respond to the changing needs of the population, and by what means those needs or wishes should be determined."[99] Judge Cohn, in the minority opinion of *The Christian Society for the Holy Places* discussed above, suggested a much narrower reading of Article 43 of the Hague Regulations:

> 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.[100]

Thus, "[o]nly if 'absolutely prevented' from restoring order without changing

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[97]*Ibid.*, p. 804.

[98]Dinstein, *supra* note 58, p. 113; *Abu Aita* case, HC 69/81 and 493/81 and summarized in *Israel Yearbook on Human Rights*, Vol. 13 (1983) p. 348, as discussed in Roberts, *supra* note 44, p. 73.

[99]Roberts, *supra* note 44, p. 76.

[100]*The Christian Society* case, *supra* note 95, p. 588, as quoted in Qupty, *supra* note 70, p. 93.

these laws can they be altered, and then only to the extent absolutely necessary."[101] Cassese also objects to the idea that prolonged occupation entails increased freedom to legislate; Cassese objects because the argument "fails to specify which of the customary and conventional rules on belligerent occupation should be set aside, and which should continue to apply...."[102] State practice has consistently held even long-term occupants to the old set of belligerent occupation rules, undermining the argument that a new set of customary or treaty rules should replace the old ones.[103]

While arguing for the continued applicability of traditional humanitarian rules, however, Cassese supports the interpretation of "the body of traditional customary rules on occupation in the light of the present circumstances...."[104] He argues for an 'evolutive' approach of increased emphasis on the restrictions of the occupied power that appear in the Hague Regulations which would not contradict the underlying objectives of humanitarian rules:

> Indeed, as a result of a drawn-out occupation, the provisional nature of the administration by a military authority tends to fade away, and the occupying force tends to turn into a fully-fledged administrative entity, without there being any of the safeguards of ordinary government (political representation, etc.). Consequently, to avoid frustrating the purpose and the spirit of the Hague Regulations, one should give pride of place to those limitations upon the powers of the occupant that are explicitly or implicitly set out in the Hague Regulations. The strengthening of these limitations is the only safeguard against the turning of the occupant (a transitory military administration) into a political and administrative government in disguise.[105]

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[101] *The Christian Society* case, *supra* note 95, p. 586, as quoted in Qupty, *supra* note 70, p. 93.

[102] Cassese, *supra* note 86, p. 419.

[103] *Ibid.*, pp. 419-420.

[104] *Ibid.*, p. 423.

[105] *Ibid.*, pp. 426-27. While Roberts tends to agree with Cassese that the rights of the occupier should become more restricted over time, he would not apply this rule to every situation automatically; "extensive and violent opposition to the occupation" or a "general terrorist threat to the nationals of the

Thus, the existence of stages in a military conflict and occupation is widely accepted. Both major humanitarian instruments foresee possible changes in the applicable law based either on duration of the occupation, when the major functions of government are supposed to have become the responsibility of the indigenous population, or due to the occupier being 'absolutely prevented' from respecting the laws in force. Some scholars argue that in the latter stages of armed conflict and belligerent occupation human rights law becomes increasingly applicable and should form part of the legislative changes that occur.

The main objection to the creeping applicability theory of human rights law is that the questions of when to implement new laws and which laws to apply remain unanswered. This would unacceptably leave every occupying power deciding for itself what is "beneficial" to the civil life of the occupied population. Instead of creeping applicability, the application of the full body of human rights law from the commencement of occupation would solve this problem, with derogations allowed according to the procedures set forth in the human rights instruments. Derogations for emergency situations might be justified during the more combative stage of belligerent occupation and no longer justified when the major hostilities have ceased. Thus, while discussion of the creeping applicability theory sheds useful light on the problem of only applying humanitarian law to situations of armed conflict and belligerent occupation, the adoption of the universal applicability model instead would solve the problems inherent in the other model.

G. Discussion

The applicability of human rights law to situations of war and belligerent occupation has been addressed through examining theories of universal applicability, exclusive applicability, temporary displacement of human rights law, application of local law during occupation, construing humanitarian provisions according to human rights principles, and the creeping applicability of human rights law to prolonged occupations.

It should be noted that only the second and fifth positions, arguing for exclusivity or construction of humanitarian principles, hold that human rights law is never applicable to occupied territories in theory, and only the theories of

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occupying power" might justify the extension or application of emergency measures. Roberts, *supra* note 44, p. 34.

exclusivity and temporary displacement state that human rights law should never be applied to occupied territories in practice. All of the other positions would apply human rights law to occupied territories at least in some cases, although the theories of applicability are distinct. Thus, these theories overlap and sometimes complement each other.

The universal applicability of human rights law has been strongly affirmed in the last few decades by state practice, judicial decisions, and scholarly opinion. Human rights laws themselves envisage their application to emergency situations such as war and belligerent occupation and provide for such situations through derogation and limitation provisions. Humanitarian law does not expressly exclude the possibility of concurrent application with human rights law and in fact provides for the protection of "the principles of the law of nations", which could include human rights principles, in the Martens clause. More specifically, Articles 43 of the Hague Regulations and 64 of the Fourth Geneva Convention allow human rights law to apply if it constituted local law prior to the occupation or, according to some interpretations, if it is necessary in order to restore a democratic civil life to the occupied population.

There is some support for the creeping applicability of human rights standards to prolonged occupation. But this theory does not propose a clear standard for deciding when to implement the new standards; nor does it provide a guide for exactly what new standards to apply. The universal applicability of human rights law with derogations and limitations on certain human rights allowed, but strictly controlled, during periods of emergency or for national security is better suited to situations of both short and prolonged occupation.

The idea that human rights law is universally applicable, but temporarily displaced by humanitarian law in times of war or belligerent occupation, is not undermined in theory by the continued application of human rights law to the situation, subject to derogations and limitations.

Arguments that humanitarian law is exclusively applicable to situations of war and belligerent occupation are based mainly on the notion that the relation between ruler and ruled is fundamentally different during such times, as compared to times of peace and the relation between a state and its citizens in democratic societies. However, this argument ignores the obvious existence of differences in interest between the governed and the governing at all times and in all kinds of societies. Where the human rights of a people are concerned, there is no qualitative difference between their relationship with a ruler who represents a legitimate state and one who represents an occupying power. Other arguments for exclusive applicability rely on judgments that one set of implementation or

enforcement mechanisms is more effective than the other. The solution in this case is to improve the less effective mechanisms or use each mechanism when it is most effective. Universal application would allow the application of the two sets of laws and their mechanisms concurrently, while exclusive applicability would deny occupied populations the second, or alternative, layer of protection.

The position that human rights law is universally applicable with humanitarian law to situations of war and belligerent occupation is strongly supported and best represents the rule of law accepted today. The interaction between the two bodies of law is the subject of the next section.

III
The Interaction Between Humanitarian and Human Rights Law

Both human rights and humanitarian laws apply to situations of armed conflict and belligerent occupation. The way in which the two sets of laws work together must be examined and their differing provisions reconciled.

A. Differences of Scope and Rights

The first major difference between the two sets of law is that of scope. Human rights law protection is more broadly applicable than humanitarian law. For instance, non-derogable provisions in the ICCPR apply to all persons and all situations, whether or not the persons have a certain national or combat status and whether or not an armed conflict is international.[106] According to the UNSG Human Rights Report, the provisions concerning emergency situations in the ICCPR, as well as in the European and American regional human rights conventions

> provide a basic and substantial minimum of guarantees of the respect for human rights in emergency situations including situations of armed conflict and war. These guarantees differ from those set forth in the Geneva Conventions ... by the fact that they apply always and everywhere and that they can be invoked irrespective of whether there exists a war, declared or undeclared, or any other armed conflict, again irrespective of whether this armed conflict meets or does not meet certain qualifications of general international law.[107]

The second difference is that of rights. Certain human rights are protected

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[106]UNSG Human Rights Report, *supra* note 18, paras. 25-26.

[107]*Ibid.*, para. 32.

by both humanitarian and human rights law.[108] In some cases, however, humanitarian law offers substantive rights not offered by human rights law. In other cases, human rights law protection contains more substantive rights than provided by humanitarian law.[109]

Professor Cohen finds the Fourth Geneva Convention adequate in protecting "humane treatment and ... juridical rights" while silent in large areas of social, economic, and cultural rights and certain civil and political rights.[110] For instance, under the Geneva Conventions the wounded and sick must be collected and cared for and an impartial humanitarian body may offer its services to the Parties to the conflict.[111] Human rights law does not contain such specific provisions on these points. Thus, the Secretary General worried that

> any efforts at obtaining a better observance of humanitarian principles in armed conflicts should not be such as would cast doubts on the binding character of these provisions [of the 1949 Geneva Conventions], at least until the 1949 provisions which have retained their usefulness have been reaffirmed and others have been amended by international instruments of equal validity.[112]

In the following examples, by contrast, the rights are non-derogable in the ICCPR

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[108]Article 27 of the Fourth Geneva Convention protects certain fundamental rights also found in the UDHR and ICCPR, such as the right to humane treatment and non-discrimination with regard to race, religion or political opinions. Other rights contained in both types of instruments include the rights to life, property ownership, food, medical care, education, a nationality, protection of the family, protection of women and mothers, recognition as a person before the law, an effective remedy by competent tribunals, fair trial, appeal, proper conditions of detention and internment; and protection from torture, slavery, forced labor, arbitrary arrest and detention, retroactive punishment, arbitrary exile or expulsion. Cohen, *supra* note 4, pp. 68-69. While the rights do not differ significantly between the two sets of laws in the above regard, the scope differs; the Fourth Geneva Convention only protects "protected persons" in occupied territory. It would not, for instance, protect nationals of the occupying state who were in the occupied territory.

[109]UNSG Human Rights Report, *supra* note 18, para. 27.

[110]Cohen, *supra* note 4, p. 71.

[111]UNSG Human Rights Report, *supra* note 18, para. 44.

[112]UNSG Human Rights Report, *supra* note 94, para. 113.

but in humanitarian law they are either absent or unavailable to persons who are not "protected" or prisoners of war or otherwise subject to the Geneva Conventions: prohibitions on imposing the death sentence on persons under 18 and carrying the sentence out on pregnant women; prohibition of slavery, the slave trade and servitude; prohibitions on the enactment and application of retroactive criminal legislation; and the right to recognition as a person before the law.

B. Reconciliation

Several scholars have dealt at length with issues of reconciliation.[113] The UNSG Human Rights Report reconciled many provisions of the ICCPR and the Geneva Conventions. The Report views human rights law as completing and lending support to humanitarian instruments, rather than supplanting them:[114]

> ... [T]he humanitarian conventions in their turn complement the body of law consisting of the United Nations, and for that matter, the regional, human rights instruments as far as their application in times of conflict is concerned.[115]

In some cases, the Report found the two bodies of law either to be covering the same or different ground and in other cases it found that their scope of protection overlapped but that one provided more human rights protection than the other. In all cases, the Report deemed that persons in armed conflicts could benefit from the greatest degree of protection possible for the individual. The Report therefore applied whichever set of laws granted the individual more protection as being most commensurate with the humanitarian spirit of these bodies of law to provide maximum protection.[116]

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[113]See, e.g., F. Przetacznik, "Protection of Human Rights in Time of Armed Conflict," *Revue de Droit Penal International et de Droit de la Guerre*, Vol. 13, Pt. 2 (1974) p. 316.

[114]UNSG Human Rights Report, *supra* note 18, para. 16.

[115]*Ibid.*, para. 75.

[116] Applicability of human rights law does not negate the law of military occupation.... It provides an additional enforcement mechanism for those rights that overlap in the two bodies of law. For the rights found only in human rights law, but not in occupation law, human rights law provides the sole protection, apart from the

1. Apparent Contradictions

Apparent contradictions can most often be resolved through careful inspection of the history of the drafting of these instruments. For instance, the apparent contradictions between some provisions of human rights law, such as protection of the right to life on the one hand, and situations of armed conflict, where persons inevitably lose their lives on the other hand, do not preclude the applicability of this right to these situations. According to the UN Secretary General, in the drafting of both the UDHR and the ICCPR, the relationship between the right to life and armed conflicts was considered. In drafting the UDHR's Article 3 which safeguards the right to life, liberty, and security, the preparatory work

> indicates that delegations proceeded from the following two basic assumptions: (1) that the provision of what eventually became article 3 is meant to be respected -- albeit with some modifications -- in time of armed conflict as well as in time of peace and (2) that the right to life as understood by the authors of the Universal Declaration of Human Rights is not absolute.
>
> The proceedings show that the taking of life pursuant to the sentence of a competent court arrived at after due process of law was, at least by the majority, considered at that time as not inconsistent with the principle of the protection of the right to life. The conclusion appears, therefore, to be justified that loss of life due to what in pre-United Nations days were considered "lawful acts of war" is also not to be considered as infringing the provisions of article 3 of the Declaration.[117]

Like the UDHR, the ICCPR's guarantee of the right to life "applies also in time

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domestic law of the displaced sovereign.

Quigley, *supra* note 9, p. 27. Professor Przetacznik urges amendment to bring instruments with a lower degree of protection into line with the greater degree of protection. Przetacznik, *supra* note 113, p. 320.

[117]UNSG Human Rights Report, *supra* note 18, paras. 22, 24.

of armed conflict, and the Covenant does not permit derogations from it."[118] Early drafts of the ICCPR included "killing by a member of the military in time of war" as a possible limitation on the right to life.[119] However,

> the view that the circumstances permitting the deprivation of life should be listed and defined was rejected by the Commission by ten votes to five with three abstentions and a joint amendment was adopted reading 'No one shall be arbitrarily deprived of his life'.[120]

In later debates it was noted that arbitrary killing did not include "the case of a judge, a soldier or a citizen carrying out his duty as provided by law since in none of those cases did the ultimate responsibility rest with the individuals concerned."[121] Thus, the right to life found in the Covenant is not an absolute right but has an exception for lawful acts of war and is therefore not inconsistent with situations of war and belligerent occupation.[122]

Both the ICCPR and the Geneva Conventions provide a number of protections of the right to life although, as discussed above, neither one recognizes an absolute right to life. All of these protections should be applied.[123] Thus, while the Geneva Conventions do not mention pregnant women in connection with the death sentence, the Covenant does. A legitimate position therefore is that international law prohibits the carrying out of the death sentence on pregnant women, even during times of armed conflict. Similarly, while the ICCPR grants the right to seek pardon or commutation from a death sentence, the Third Geneva Convention Article 101 provides that a death sentence pronounced on a prisoner of war shall not be executed for at least six months from the date when the Protecting Power receives notification of the sentence. "To the extent the

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[118] *Ibid.*,.para. 46.

[119] *Ibid.*, para. 25, citing E/CN.4/95, annex B.

[120] *Ibid.*, para. 29

[121] *Ibid.*, para. 30, citing A/C.3/SR.813, para. 42.

[122] *Ibid.*, para. 46.

[123] *Ibid.*, paras. 45-53.

institution of a protecting Power is operative, a prisoner of war sentenced to death has this additional chance that his life will be spared."[124]

Similarly, prohibitions on slavery and servitude mentioned in the ICCPR (Article 8) can be viewed as strengthening the limitations placed on labor by prisoners and protected persons mentioned in the Third and Fourth Geneva Conventions.[125] Although there is no provision in the Geneva Conventions similar to the ICCPR's prohibition on coercion impairing freedom to have or adopt a religion or belief (Article 18, para. 2), some provisions of the Third and Fourth Geneva Conventions reflect the basic principle.[126] The ICCPR's prohibition of imprisonment for inability to fulfill a contractual obligation (Article 11) is not found in the Geneva Conventions and should be added to the protections available during armed conflicts and belligerent occupations.[127]

Professor Przetacznik also notes that certain economic, social and cultural rights found both in human rights and humanitarian instruments complement and refine each other. These include the rights to health, freedom from hunger, work in safe conditions and freely choose work, own property, and protection for the family.[128] The difference between the two sets of laws is mainly that the human rights documents contain more detail concerning the rights of all persons under the jurisdiction of the state party, while the humanitarian laws often contain less detail and only apply to certain persons in a specific geographical territory, but may contain more detail regarding the circumstances of armed conflict and belligerent occupation.

2. Actual Conflicts

In some cases, there are genuine conflicts between the laws of armed

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[124]*Ibid.*, para. 49. However, the six months can be reduced "in circumstances of grave emergency involving an organized threat to the security of the Occupying Power." Fourth Geneva Convention, Art. 75.

[125]*Ibid.*, paras 60-61. See also Przetacznik, *supra* note 113, pp. 323-25.

[126]Przetacznik, *supra* note 113, p. 330. See, e.g., Arts. 27 and 31, Fourth Geneva Convention. UNSG Human Rights Report, *supra* note 18, para. 68.

[127]UNSG Human Rights Report, *supra* note 18, para. 62.

[128]Przetacznik, *supra* note 113, pp. 331-337.

conflict and human rights. Professor Quigley notes that "[i]n the areas of freedom of assembly and expression, reliance on human rights law or occupation law produces sharply different approaches to the rights of individuals."[129] Many writers on military occupation, as well as the United States Army manual on land warfare and the Supreme Court of Israel have found strict censorship, banning of publications, and prohibition of some or all political activity to be permissible; for the most part, however, they have relied on evidence of law and practice that predates the development of human rights law.[130] Human rights law grants everyone the right to peacefully assemble and associate, to freely hold opinions and express them, and to seek, receive, and impart information and ideas. These rights may only be limited where they threaten national security or public order, where they negate other protected rights, and in time of declared public emergency.[131] Adam Roberts notes another conflict between human rights and humanitarian law with the UDHR's grant of the "right to freedom of movement and residence within the borders of each state" (Article 13(1)) and the restrictions on movement, including assigned residence and internment, allowed by Article 78 of the Fourth Geneva Convention.[132]

There are several approaches to conflicts between human rights and humanitarian instruments which cannot be reconciled through careful reading of the specific provisions in the context of the entire instrument and its *travaux preparatoires*. It should be pointed out that problems of conflicting or differing provisions may also be found among human rights instruments; insofar as no two documents contain exactly the same language or focus, these conflicts are bound to arise. In cases of irreconcilable conflicts, there is strong support for applying the greatest degree of human rights protection available to every situation. In 1968 the Commission to Study the Organization of Peace wrote:

> It is generally agreed that the many instruments adopted by various international organizations should have a cumulative effect, the newer documents being designed to supplement the older ones and

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[129]Quigley, *supra* note 9, p. 14.

[130]*Ibid.*, pp. 14-15 citing Fauchille, Von Glahn, and Greenspan.

[131]*Ibid.*, pp. 17-23.

[132]Roberts, *supra* note 44, p. 57.

> to add strength to, and enlarge the scope of, the obligations previously contracted....
>
> In each case the individual should have the benefit of the instrument which gives him greater protection against governmental interference with his rights.[133]

Quigley follows this approach in arguing that in the case of freedom of assembly and speech the newer human rights law has superceded humanitarian law. Permissible limitations and derogations in human rights law, along with state practice, have shown that the rights to freely assemble and express opinions are now applicable in situations of military conflict and occupation and have arguably developed into a customary norm:

> The position that existed prior to development of human rights law -- that an occupant may suppress all hostile speech and assembly -- has given way to a norm calling for protection of freedom of assembly and speech.[134]

Benvenisti would take into account the duration of the occupation, arguing that "as hostilities subsided, and as long as security considerations may permit, the occupant can be expected to respect a wider array of human rights, including political rights."[135] However, the problems with determining when a greater degree of human rights protection should be allowed, and which human rights should be protected, make this an unworkable suggestion.

Professor Shraga takes a different approach. She would apply the instrument most specifically designed for either the situation or the location, regardless of whether the instrument granted more or less protection than another applicable one. Thus the European Convention for the Protection of Human Rights and Fundamental Freedoms would take precedence in Europe over more universal instruments "unless there exists a compelling reason -- such as a *jus*

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[133]The Commission to Study the Organization of Peace, *The United Nations and Human Rights* (New York: Oceana Publications, Inc., 1968) pp. 174-175.

[134]Quigley, *supra* note 9, p. 23.

[135]Benvenisti, *supra* note 34, p. 30.

cogens provision inserted in the universal convention `-- that dictates otherwise."[136] And in a situation of armed conflict or belligerent occupation, Shraga suggests subordinating the European Convention to humanitarian law.[137] This approach seems, however, to moot much of the point of considering human rights protections universally applicable. Nor does it take into account the development of law that may be embodied in some more recent and general human rights instruments which could usefully inform or complement older, and sometimes more specific, instruments. It does not satisfy the need for human rights protections during war and belligerent occupation as well as does the position taken by those who would apply the greatest degree of human rights protection in all cases.

C. Enforcement Mechanisms

A practical advantage of the dual application of human rights and humanitarian law during periods of armed conflict and military occupation is that this allows both enforcement mechanisms to be used.[138] Enforcement of human rights law is public, via regional or United Nations reporting systems, commissions, and courts; the focus is on past violations. Enforcement of humanitarian law is usually confidential, cooperative, preventative, and relies on Protecting Powers or the ICRC. Use of all of these measures simultaneously or serially results in a better chance of affording persons the most human rights protection possible in all situations. This is, of course, provided there is the political will and good faith effort to initiate enforcement efforts by Contracting Parties to these instruments.

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[136]D. Shraga, "Human Rights in Emergency Situations Under the European Convention on Human Rights," *Israel Yearbook on Human Rights*, Vol. 16 (1986) p. 217, p. 222.

[137]*Ibid.*, p. 223.

[138]Quigley, *supra* note 9, pp. 27-28.

IV
Which Human Rights Laws Apply to the Occupied Palestinian Territories?

There are compelling arguments for the universal applicability of human rights law and therefore its potential applicability to situations of belligerent occupation. The interaction between the continued application of humanitarian law and the application of human rights law should provide the individual with the greatest degree of human rights protection possible. This paper now examines particular international instruments and discusses whether each can be applied to occupied territories. Even more specifically, the question whether each can be applied to the Occupied Palestinian Territories is addressed. Customary human rights norms, applicable to all situations even in the absence of a binding treaty, are also reviewed.

A. Human Rights Instruments

With regard to human rights instruments, it is necessary to examine each one individually, first asking whether each, by its own language, can apply to occupied territories and next questioning whether those that can apply have been ratified or acceded to by the occupying power, in this case the state of Israel.

In most cases, instruments state their scope of applicability in terms of "territory" or "jurisdiction." If an instrument is applicable to the "jurisdiction" of the signatory, it is widely agreed that it is applicable wherever the signatory exercises its authority, including occupied territories, and not just within the signatory's own national territory.[139] The UN Secretary General has written that a convention applicable "'within their [the signatories'] jurisdiction would apply also in occupied territories *vis-a-vis* the occupying authorities."[140] The European Commission of Human Rights has ruled that because Article One of the European Convention for the Protection of Human Rights and Fundamental Freedoms holds

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[139]See, e.g., E. Benvenisti, "Ratification: What It Implies For Human Rights in Israel," *Israel Children's Rights Monitor*, Vol. III (Nov. 1992) p. 26; and Benvenisti, *supra* note 34, pp. 33-35, submitting that Israel is bound to apply the conventions regarding the prevention of discrimination (CERD), the prevention of torture (CAT), the rights of the child, and the covenant protecting civil and political rights (ICCPR) in the Occupied Palestinian Territories.

[140]UNSG Human Rights Report, *supra* note 18, para. 72.

state parties responsible for human rights "to everyone within their jurisdiction" this means that the parties are obligated to "secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad."[141]

The European Commission has expressed the opinion that "jurisdiction" can be wider in its scope than "territory" both with regard to Turkey's military occupation of northern Cyprus and the United Kingdom's military occupation of Berlin. In the latter case, the Commission decided, however, that the United Kingdom's exercise of authority in Berlin did not constitute the exercise of "jurisdiction" because the authority was jointly exercised with the United States, France, and the Soviet Union.[142] This raises the question whether joint Israeli-Palestinian authority in some spheres under the new self-governing arrangements currently being worked out between Israeli and PLO negotiators may undermine the international human rights accountability which Israel previously faced when it exercised sole *de facto* jurisdiction over the Occupied Palestinian Territories. The case of post-World War II Germany on the one hand, and Occupied Palestine on the other, is not analagous however; in the former case, for example, the joint authority was shared by four occupying powers, while in the latter case the joint authority will be shared between the occupying power and representatives of the occupied population. It is unlikely that the occupied population will exercise the necessary degree of authority so as to equal or supercede that of Israel and free Israel of its international responsibility.[143]

In contrast to the above opinions, in construing the ILO Director-General's Standing Orders authorizing the Governing Body of the ILO to hear complaints

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[141] *Cyprus v. Turkey* case, *supra* note 32, p. 85.

Interestingly, an Israeli court has defined the usually more restrictive term "territory" so broadly as to encompass what has by most definitions been considered "jurisdiction". The Jerusalem District Court in *The Attorney-General v. J. Davis* held that where a bilateral extradition treaty obligated parties to "deliver up persons found in its territory," this "must mean an area effectively under the control of the state, and not necessarily an area where the state has sovereignty." (iii) P.M. 336 (1989) cited in *Israel Law Review* Vol. 26, No. 4 (1992) p. 564, p. 567.

[142] *Hess v. U.K., European Commission of Human Rights* Vol. 2 (1975) p. 72, pp. 73-74 (decision on admissibility).

[143] For a further discussion of this point see Section V.

regarding matters arising within a member state's "jurisdiction," the ILO has decided that member states are not bound to submit to the jurisdiction of the Governing Body concerning freedom of association violations pertaining to territories they have militarily occupied.[144] Professor Quigley has criticized this view as inconsistent with other interpretations of 'jurisdiction' by such respected bodies as the European Commission whose interpretation he considers "more in keeping with the humanitarian character of human rights law."[145] However, the ILO has also suggested that if the previous power in control of the territory had been a party to an ILO convention when occupation began, then the occupier is bound to apply the convention.[146] With regard to certain basic and customary rights, such as freedom of trade union association, the ILO has held all state members bound to allow these rights in all territories which they control, including militarily occupied territories.[147]

Some conventions may be silent as regards applicability. In this case, there is a growing consensus that they are applicable to all persons in a state signatory's jurisdiction. The Inter-American Court of Human Rights declared that:

> modern human rights treaties in general ... are not multilateral treaties of the traditional type .... Their object and purpose is the protection of the basic rights of individual human beings .... In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they ... assume various obligations, not in relation to other States, but towards all

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[144]Governing Body, International Labour Office, *Report of the Director-General: Sixth Supplementary Report: Second Report of the Officers of the Governing Body: Representation Submitted by the Union of Building and Construction Workers of Nablus and Thirteen Other Trade Unions under Art. 24 of the Constitution of the ILO alleging Non-observance by Israel of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)* para. 7, 23 June 1986, 233rd sess., ILO Doc. No. GB.233/16/30 (1986). See also Quigley, *supra* note 15, p. 308.

In a letter to al-Haq, dated 2 July 1986, the ILO explained its position which appeared to be based on the apprehension that this might be seen as legitimizing Israel's sovereignty over the Occupied Territories. See discussion in Section IV 7.

[145]Quigley, *supra* note 15, p. 308.

[146]*Ibid.*, p. 306 n. 60, discussing the ILO's views on the applicability of the Freedom of Association Convention (No. 87).

[147]See 2 July 1986 letter from ILO to al-Haq, ILO Ref: ACD 19-025, *supra* note 144.

individuals within their jurisdiction.[148]

The Vienna Convention on the Law of Treaties,[149] Article 29, states that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." The preparatory work to the Vienna Convention shows that its drafters envisaged that "entire territory" includes territory for which the state party is internationally responsible, including that outside its metropolitan territory.[150] However, the Convention's drafters did not consider the specific case of belligerent occupation.[151]

Although a treaty may be applicable to all persons under a state's control, this applicability may only have effect on an international plane. Under most states' laws, including Israel's law, an international treaty is not automatically incorporated into domestic law although it binds the state in the international sphere. International law embodied in a treaty ratified by Israel, for example,

> does not constitute a law to which ... [Israeli] courts will have recourse or which they will enforce. The rights it confers and the duties it imposes are those of the states which concluded the

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[148]Inter-American Court of Human Rights, Advisory Opinion No. OC-2/82 (24 Sept. 1982) p. 12 para. 29.

[149]Entered into force on 27 Jan. 1980. See United Kingdom *Treaty Series* No. 58 (1980); I. Brownlie, 3rd ed., *Basic Documents in International Law* (Oxford: Clarendon Press, 1983) p. 349. Israel is not a party to the treaty, however, "a good number of [the Convention's] articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law." I. Brownlie, *Principles of Public International Law*, 3rd. ed. (Oxford: Clarendon Press, 1982) p. 601.

[150]Benvenisti disagrees, claiming that the presumption under Article 29 "would be that [conventions silent as to territorial reach] are binding on each party only within its national territory." Benvenisti, *supra* note 34, p. 33, n. 36. However, this does not explain why several other categories of land besides metropolitan territory were included in the discussions regarding Article 29.

[151]T. Meron, "Applicability of Multilateral Conventions to Occupied Territories, "*American Journal of International Law*, Vol. 72 (1978) p. 543 n. 7 "Article 29 of the [Vienna Convention] ... was not intended to deal with the question of extraterritorial application of treaties and is not helpful as regards territories under belligerent occupation." See also Linda Bevis and Zuhair Sabbagh *An Ailing System: Israeli Military Government Health Insurance in the Occupied Palestinian Territories* (Ramallah: Al-Haq, 1993) pp. 86-87.

> agreement, and only those states can realize these rights and duties through the special means available for the implementation of international treaties.[152]

According to Rubin, however, international treaties ought to be applied to occupied territories even though they have not been transformed into domestic law because the powers of the military government flow directly from international law.[153]

For reasons of space, it is not possible in the following pages to consider every human rights instrument and its applicability to belligerent occupation and the Occupied Palestinian Territories. The following list of applicable instruments should in no way be considered exhaustive.

1. United Nations Charter[154] and Universal Declaration of Human Rights[155]

There can be little doubt that the UN Charter is universally applicable to all peoples and situations, including belligerent occupation. Most recently, the 171 nations participating in the 1993 World Conference on Human Rights recommended:

> that the United Nations assume a more active role in the promotion and protection of human rights in ensuring full respect for international humanitarain law in all situations of armed conflict, in accordance with the purposes and principles of the Charter of the United Nations.[156]

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[152]*Custodian of Absentee Property v. Samarah et al* HC 25/55, PD 10 (3) p. 1825. See generally R. Lapidoth, "International Law Within the Israeli Legal System," *Israel Law Review*, Vol. 24, Nos. 3-4 (1990) p. 450, p. 459.

[153]B. Rubin, "The Adoption of International Treaties into Israeli Law by the Courts," *Mishpatim*, Vol. 13 (1983) p. 230, pp. 237, 240-41, cited in Lapidoth, *supra* note 152, pp. 478-9.

[154]Adopted in 1945.

[155]The UDHR was adopted and proclaimed by General Assembly Res. 217 A (III) of 10 Dec. 1948.

[156]Vienna Declaration, *supra* note 13, Art. II (96).

The UN Secretary General has emphasized that:

> the human rights provisions of the Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other. Each of the relevant provisions refers to the promotion and encouragement of respect for human rights and fundamental freedoms for all.... [T]he Charter would ... encompass persons living under the jurisdiction of their own national authorities and persons living in territories under belligerent occupation.[157]

Professor Przetacznik recalls:

> that the inclusion in the Charter of the United Nations of provisions on the protection of human rights was due to the tragic events accompanying the Second World War and reflected the reaction of the international community to the horrors of war.[158]

UNGA Resolution No. 273 (III) of 11 May 1949 admitted Israel to membership in the UN following Israel's declaration that it "unreservedly accepts the obligations of the United Nations Charter and undertakes to honor them from the day when it becomes a Member...." The Charter has been applied as a standard of human rights to the Occupied Territories by the General Assembly.[159]

The UDHR likewise "does not refer in any of its provisions to a specific distinction between times of peace and times of armed conflict",[160] and seeks to secure its proclaimed rights and freedoms universally for "everyone." It limits the exercise of the rights and freedoms in certain circumstances, thus providing sufficient flexibility to deal with emergency situations that might occur during an

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[157]UNSG Human Rights Report, *supra* note 94, para. 23. See also Przetacznik, *supra* note 113, p. 316.

[158]Przetacznik, *supra* note 113, p. 316. See also UNSG Human Rights Report, *supra* note 94, para. 16.

[159]See, e.g., UNGA Res. 45/83A (13 Dec. 1990).

[160]UNSG Human Rights Report, *supra* note 94, para. 24.

armed conflict or belligerent occupation. The Preamble to the UDHR proclaims that it contains a common standard of achievement whose recognition and observance are to be secured "both among the peoples of Member States themselves and among peoples of territories under their jurisdiction."

Although Israel has taken the position that the UDHR does not apply,[161] the UDHR's applicability to the Occupied Territories has been alluded to in General Assembly resolutions.[162] It is in fact considered by many scholars to embody customary law (see discussion below on customary law) and be universally applicable.

2. International Covenant on Civil and Political Rights[163]

Article 2, paragraph 1 of the ICCPR obligates:

> ... Each State Party to the present Covenant ... to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, ...

Professor Quigley explains that "subject to its jurisdiction" "has little meaning unless it applies to protect persons located elsewhere than in sovereign-held territory."[164]

The early drafts of the ICCPR expressly allowed certain derogations "in time of war or other public emergency."[165] The final version omitted any direct

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[161]Roberts, *supra* note 44, p. 55. However, as the following discussion of the ICCPR indicates, the Israeli High Court has considered the UDHR in its decisions and arguably suggested that it constituted customary international law because its principles are "the heritage of all enlightened nations." *The American-European Beth-El Mission,* HC 103/67, PD 10 (3) p. 325. See Lapidoth, *supra* note 152, pp. 472-74.

[162]See, e.g., UNGA Res. 45/73 H (11 Dec. 1990); UNGA Res. 45/74 A (11 Dec. 1990).

[163]Adopted and opened for signature, ratification and accession by General Assembly Res. 2200 A (XXI) of 16 Dec. 1966, entered into force 23 Mar. 1976.

[164]Quigley, *supra* note 82, p. 23.

[165]UNSG Human Rights Report, *supra* note 94, para. 26, citing *Official Records of the Economic and Social Council, Sixth Session, Supplement No. 1* (E/6000) Annex B, Article 4; *Id., Seventh Session, Supplement No. 2* (E/8000) Annex B, Article 4; *Id., Ninth Session, Supplement No. 10* (1371)

reference to war because "[i]t was felt ... that the Covenant should not envisage, even by implication, the possibility of war. For this reason the express reference to war was omitted from the text...."[166] According to the UNSG Human Rights Report:

> It is clear, in any event, that the provisions set forth in the International Covenant on Civil and Political Rights apply in time of public emergency, which term includes the state of an armed conflict.[167]

The drafters of the Siracusa Principles concur, expressly acknowledging the interaction between human rights and humanitarian law during times of emergency such as war. The Principles affirm that no derogation measures taken under the ICCPR can be inconsistent with other international law obligations:

> In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and ILO Conventions.[168]

Israel took the position in 1984 that the ICCPR does not apply to the Occupied Territories.[169] Israel's Legal Advisor to the Foreign Ministry argued then that the UDHR and the two International Covenants did not apply to the Occupied Palestinian Territories because of the unique relationship between an occupant and the occupied population which took it out of the sphere of human

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Annex I, Article 4.

[166] para. 26, citing *Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5* (E/1681) Annex I, Article 2.

[167]UNSG Human Rights Report, *supra* note 94, para. 29. See also Przetacznik, *supra* note 113, p. 316 for the opinion that the UDHR and the international covenants "apply equally in times of peace and in times of war and to the full range of conceivable armed conflicts, irrespective of whether or not they are of an international character."

[168]Siracusa Principles, *supra* note 83, E. 66, p. 11.

[169]Roberts, *supra* note 44, p. 55.

rights law.[170] This was the Israeli position after Israel had signed the Covenant on 19 December 1966 but before Israel had ratified it on 3 October 1991.

However, on at least two occasions, Israeli bodies have relied on the ICCPR and other human rights instruments in ways suggesting their applicability to the Occupied Territories. The Israeli High Court cited the ICCPR, before it had come into force in 1976, in a case regarding freedom of religion. In that case, Justice H. Cohn seemed to suggest that the ICCPR embodied customary law:

> The principle of freedom of religion, like other human rights, as determined in the Universal Declaration of Human Rights, 1948, and in the Covenant on Political and Civil Rights, 1966, are today the heritage of all enlightened nations, whether or not they are members of the United Nations Organization, and whether they have already ratified the 1966 Covenant or have not yet done so; for these provisions have been drafted by legal scholars from all over the world, and have been established by the General Assembly of the United Nations in which the majority of the nations of the world participate.[171]

When the government of Israel established a commission to inquire into General Security Service (GSS) interrogation methods in the Occupied Territories, the Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (the Landau Commission) also relied on the UDHR, the ICCPR, and the European Convention on Human Rights because:

> provisions of [these] international treaties ... touch upon the question of methods of interrogation of persons suspected of terrorist activity. We do so even though these treaties do not, from a formal point of view, bind Israel; nevertheless, in this chapter of the Report in which we present our conclusions and recommendations, we will take heed of what they say, with a view

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[170]Office of the Legal Adviser, memorandum (12 Sept. 1984) written for, and contained in Roberts et al, *supra* note 59, pp. 80, 81 and quoted in Roberts, *supra* note 44, p. 55 n. 89. See discussion above on exclusive applicability of human rights law.

[171]*Beth-El Mission* case, *supra* note 161.

to abiding by the general prohibitions they contain.[172]

The Landau Commission Report was officially endorsed by the Israeli Knesset which adopted the Report findings and recommendations and asked the government to act accordingly.[173]

a. The Derogation Provision in the Covenant

In-depth discussion of the derogation provision in the ICCPR will clarify the importance of such a provision in a human rights instrument, both as a provision providing flexibility in times of emergency and as a provision maintaining human rights protection during such times. Although the ICCPR permits derogation from some, but not all,[174] of its provisions, it does so only if all of the following conditions are met: 1) there is a public emergency which threatens the life of the nation; 2) the emergency is officially proclaimed and communicated to the UN Secretary General and justified to the Human Rights Committee; 3) the measures taken in response to the emergency are strictly required by the exigencies of the situation; 4) the measures are not inconsistent with other international legal obligations; and 5) the measures are not discriminatory solely on the basis of race, color, sex, language, religion, or social origin.[175] Some of these requirements are discussed in depth below.

While recognizing the significance of an emergency situation, the derogation provision strictly safeguards human rights through a number of constraints on the state. According to the Siracusa Principles, the derogation is strictly limited to

a situation of exceptional and actual or imminent danger which

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[172]Landau Commission Report, para 3.21, quoted in Lapidoth, *supra* note 152, pp. 473-74.

[173]Asher Wallfish, "Cabinet to Set Up Watchdog Group Over Shin Bet," *Jerusalem Post* (9 November 1987).

[174]Article 4, para. 2 does not permit derogation from articles concerning the rights to life, recognition as a person before the law, and freedom of thought, conscience and religion. Nor does it permit derogation from articles concerning the prohibitions of torture, slavery, imprisonment for contractual obligations, and retroactive penal legislation.

[175]ICCPR, Art. 4.

threatens the life of the nation. A threat to the life of the nation is one that:
(a) affects the whole of the population and either the whole or part of the territory of the State, and
(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.[176]

The interpretation of a similar derogation provision in the European Convention for the Protection of Human Rights highlights the great threat that a state must face before it can declare a situation justifying derogation from any human rights provision. The European Convention, which has a similar scope to the ICCPR, is explicit. Article 15(1) begins "[i]n time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention...." The article proceeds to limit this right to the extent strictly necessary and to measures which are not inconsistent with other international law obligations, just as the ICCPR does. The European Court defined "public emergency" under this Convention as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed."[177] In the *Greek Case*, the European Commission found that street demonstrations and labor strikes were not evidence of an imminent takeover by insurgents against the ruling military junta and therefore no public emergency existed. "[P]olitical instability and tension", public disorder, and an expansion of opposition activity did not amount to an imminent threat.[178]

Derogation in the ICCPR and most other conventions is also strictly constrained by proclamation and notification requirements.[179] Moreover, any

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[176]Siracusa Principles, *supra* note 83, Art. 39, p. 7.

[177]*Lawless v. Ireland Case (Merits)*, judgment of 1 July 1961, ser. A, no. 3, 1961.

[178]*Greek Case*, 1969 *YearBook of the European Convention On Human Rights* p. 72. For other discussion of this case, see Section IA.

[179]Siracusa Principles, *supra* note 83, Arts. 42-50, pp. 8-9. For discussion of these limitations, see J. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision," *Human Rights Quarterly*, Vol. 7, No. 1 (1985) pp. 99-105.

derogation measure taken shall be in severity, duration, and geographic scope only as "strictly necessary to deal with the threat to the life of the nation and ... proportionate to its nature and extent."[180] Furthermore, "[e]ffective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation."[181] Derogations are also limited by the principles of non-discrimination, good faith, continuation of the rule of law, and minimum guarantees of due process.[182] In addition, the Human Rights Committee, not the State, passes final judgment on whether or not the derogation measures are necessary.[183]

The derogation "shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state."[184] According to the Rapporteur on limitation provisions, "the aim of the authors of the Covenant has not been to lower the existing degree of protection recognized for rights recognized by other treaties" and this is supported by the international law rule

> according to which a treaty cannot restrict the scope and the exercise of international legal obligations resulting from other international treaties, unless all the contracting parties of the latter

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[180]Siracusa Principles, *supra* note 83, Art. 51, p. 9.

[181]*Ibid.*, Art. 56, p. 9.

[182]Hartman, *supra* note 179, pp. 89, 118.

[183]Siracusa Principles, *supra* note 83, Art. 57, p. 9. The Rapporteur on derogations commented:

> It was decided not to recognize in the Siracusa Principles the well-known doctrine of the "margin of appreciation" [given to states] developed in the European human rights system because of its dangerous potential for weakening international supervision precisely in an area where the need for close supervison of the protection given to human rights is greatest. Although some deference to the state's evaluation of the severity of the threat to the nation and the appropriateness of alternate responses to it may be inevitable or even desirable, this is not incompatible with strict scrutiny of the state's actions and it was considered preferable to stress the need to interpret the right to derogate restrictively.

O'Donnell, *supra* note 39, pp. 29-30.

[184]Siracusa Principles, *supra* note 83, Art. 14, p. 5.

are also parties of the former.[185]

The most important of these other obligations are the 1949 Geneva Conventions and their 1977 Protocols, and the provisions of the ILO's "basic human rights conventions" which specify nonderogable rights.[186]

b. Israel's Derogation

When it ratified the ICCPR in October 1991, Israel formally declared a public emergency under the ICCPR and communicated it to the UN Secretary General:

> 1. Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.
> These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.
> In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of Article 4(1) of the Covenant.
> The Government of Israel has therefore found it necessary, in accordance with the said Article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.
> In so far as any of these measures are inconsistent with Article 9 of the Covenant, Israel derogates from its obligations under that

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[185]A. Kiss, "Commentary by the Rapporteur on the Limitation Provisions," in *Human Rights Quarterly*, Vol. 7, No. 1 (1985) p. 17. According to Professor Quigley, one of the outcomes of the prohibition on contradicting other international law obligations in the ICCPR is that "[a]n emergency cannot be claimed by an occupant that has come into occupation by aggression." Quigley, *supra* note 9, p. 26, citing the ICCPR, Article 4, and M. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) p. 89.

[186]Hartman, *supra* note 179, p. 119. See the discussion in this section on the ILO.

provision.[187]

Article 9 of the ICCPR prohibits arbitrary arrest and detention and provides that anyone arrested has the right to certain enumerated due process protections.

Since 1967, Israel has administratively detained without charge or trial tens of thousands of Palestinians. Over 16,000 Palestinians endured this detention from 1988 through 1993 alone.[188] Through the use of this measure, Israel has deprived Palestinians of the normal protective procedures surrounding arrests, as called for in the ICCPR, such as the right of a detainee to prompt notification of the reasons for detention and the right to judicial review of the detention in a proceeding where the lawfulness of the detention can be effectively challenged.[189] Thus, Israel appears to have violated Article 9 of the Covenant, unless its derogation is proper.

Professor Quigley challenges the legitimacy of Israel's derogation on the following grounds.[190] First, Israel has failed to show that an "emergency" exists. The Human Rights Committee places the burden on the derogating state to show with detail the existence of an "emergency". As discussed above, other international bodies administering human rights treaties and interpreting similar derogation provisions have interpreted an "emergency" to be one that affects the whole population or threatens the organized life of the community of the state; Israel's declaration of emergency provides little factual detail and refers to a broad time period without detailing the frequency, intensity, or nature of the attacks. In

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[187]Inscribed in the Fifth Book of Protocol under No. 1750, 4 Sept. 1991, declaration that the Government of Israel has ratified the ICCPR with certain declarations and reservations. Israel also reserved the right to apply religious law in matters of personal status:

> With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned.
> To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.

[188]Al-Haq Press Release No. 64, "Arbitrary Detention of Another Palestinian Confirmed: Qatamesh Gets Administrative Detention Despite Grant of Bail," (22 October 1993). See also Emma Playfair *Administrative Detention in the Occupied West Bank*, (Ramallah: Al-Haq, 1988).

[189]Quigley, *supra* note 82, p. 6.

[190]*Ibid.*, pp. 8-18.

reality, there is insufficient factual basis for Israel's claims that it has been the victim of armed attacks i.e., unlawful force.[191] Moreover, with regard to Israel's claim that it has been the victim of "campaigns of terrorism", while Israel has been subject to attacks on its civilians by armed Palestinians, those that have occurred in the Occupied Territories would not seem to threaten the life of the nation and those that have occurred within Israel with civilians as targets have not occurred with enough frequency to justify a state of emergency, especially one that it claims has lasted since 1948.[192] It can be added that the population of Israel has not been placed under emergency regulations and no civil, political or other rights of Israeli citizens have been suspended due to such emergency.

The second ground on which Quigley challenges Israel's derogation is that of time. The acceptable time period for such a declaration of emergency has typically been short and temporary, whereas Israel has declared a long and seemingly permanent emergency that has lasted from 1948 until the present.

Third, with particular regard to detaining persons without trial, even during an emergency, the Human Rights Committee requires that there be a specific need to detain a particular person without trial due to the exigencies of the situation, and that the specific person present a clear and serious threat to society. Israel's wholesale use of the practice on thousands of Palestinians does not fit this criteria and is not legitimate.

Fourth, in its declaration of derogation, Israel never establishes the connection between its alleged emergency situation and its need to impose arbitrary detention on certain persons.

Professor Quigley also finds it "questionable whether the 'public emergency' exception [in the ICCPR] can apply in military occupation" because

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[191] *Ibid.*, pp. 15-16. According to well-documented sources, Israel initiated three of the military conflicts (in 1956, 1967, and 1982) and cannot therefore be considered the victim of unlawful force in these conflicts. See, e.g., F. Khouri, *The Arab Israeli Dilemma*, 3rd ed. (Syracuse: Syracuse University Press, 1985). Furthermore, in 1948, the situation was complex but involved minimal military activity in territory that Israel was claiming and most of the movement of Arab state forces towards Israeli-claimed land occurred only after thousands of Palestinian Arabs had been forced from their homes and the expulsions seemed likely to continue. The UN Security Council made no finding of who initiated hostilities. In 1973 only land that Israel itself had occupied came under attack, not Israel itself.

[192] *Ibid.*, pp. 16-18. Interestingly, in 1993, the Israeli Prime Minister and Defense Minister Rabin stated that terrorist organizations "are a threat to individuals, but not to the country's existence." Liat Collins, "Rabin: We must make peace with our enemies," *The Jerusalem Post* (2 Sept. 1993) p. 2.

an imminent threat to the entire territory of the nation, not just the occupied territory, cannot be shown. A threat to the continued control of the occupied territory does not suffice.[193] Should a threat be found to exist in the occupied territory, the threat must be imminent and specific measures taken by the state must be based on actual necessity.[194]

As Professor Hartman noted,

> The most severe problems of abuse in the declaration of an emergency arise where ... a particular regime seeks to perpetuate itself against popular opposition,... Emergency measures by definition must be read in context with the Covenant's fundamental commitment to democratic governance, particularly Articles 1, 2, 5, and 25.[195]

c. Limitations Provisions in the Covenant

Limitations provisions in the ICCPR as in other human rights instruments can also be used by states to reduce human rights protections. In the ICCPR, several rights may be restricted by law, but only if consistent with other rights in the Covenant, and if "necessary to protect national security, public order (*ordre*

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[193]Quigley, *supra* note 9, p. 25. *Ireland v. United Kingdom*,judgment of 18 January 1978, ser. A, No. 25, 1978, which found a public emergency even when problems only threatened a portion of the state's territory, seems wrongly decided based on the preparatory work of the drafters of the ICCPR which referred to threats to the "life of the nation as a whole." Quigley, *supra* note 9, p. 26.

Israeli Deputy Defense Minister Mordechai Gur, after the killing of two Israeli settlers by armed Palestinians, responded "The people of Israel is not lost. Haven't we had casualties in Jerusalem and in Lod? Why when it happens in the territories is there always such hysteria?" S. Honig, "Tsur, Gur Cause Uproar by Criticizing Settlers," *Jerusalem Post* (2 Dec. 1993) p. 2.

[194]Quigley, *supra* note 9, pp. 26-27.

[195]Hartman, *supra* note 179, p. 91. She also stressed that the *travaux preparatoires* to the ICCPR emphasize that "the privilege of derogation must be strictly limited and precisely defined so that abuses can be easily identified. The drafters of the derogation article clearly anticipated international supervision of its terms." *Ibid.*, p. 96.

public), public health or morals or the rights and freedoms of others, ..."[196]

A Committee of Experts on limitations provisions in the ICCPR has commented about "public order" that:

> The interpretation of 'ordre public' as a broad police power exercised in a legal framework respecting human rights is most analogous to the use of 'public order (ordre public)' in the limitation clauses of the Covenant.[197]

With regard to the limitation for reasons of national security, the Committee remarked:

> A government which engages in the systematic abuse of human rights has no [basis] ... for justifying the measures taken for its self-preservation on the grounds of national security. A state may be said to be secure only when all of its constituent elements, its territory, its inhabitants, and its government, are secure. Security in regard to the inhabitants consists of the inviolability of their human rights. In a state where security to inhabitants is completely lacking, state security cannot be said to exist. Such a government cannot justify limitations on rights to protect national security when, in fact, there is no state security to protect, but only the government's interest in self-preservation.[198]

The ICCPR is a broad yet detailed human rights convention which safeguards many human rights to those under its protection with only strictly limited derogations and limitations allowed. Its protection mechanisms include a

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[196]Article 12(3). This article concerns liberty of movement. Other articles allowing limitations include freedom to manifest one's beliefs (18(3)), freedom of expression (19(3)), right to peaceful assembly (21), and freedom of association (22(2)).

[197]Lockwood, Finn, Jubinsky, *supra* note 84, p. 59.

[198]*Ibid.*, p. 72.

Human Rights Committee to whom each state party must report,[199] and complaint procedures. An optional protocol allows individuals who have exhausted domestic remedies to complain to the Committee provided that the state complained about has accepted the protocol. Optimally, cases and human rights violations trends can be highlighted through these procedures and the responsible state pressured into changing its practices. The ICCPR's applicability to the Occupied Territories is certain and Israel's current derogation from it is of questionable legitimacy.

3. International Covenant on Economic, Social and Cultural Rights[200]

The ICESCR is applicable in times of peace and of war, although some of its provisions may be limited during the

> involvement of a State in an armed conflict [which] may make it necessary and permissible to provide by law for the limitation of certain economic, social or cultural rights if the general welfare requires it.[201]

This limitation is possible through Article 4 but "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

Although the ICESCR does not mention its scope of applicability, it does expressly place responsibility on state parties

> including those having responsibility for the administration of Non-Self-Governing and Trust Territories, ...[to] promote the realization

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[199]Israel's first report to the Human Rights Committee was due on 2 January 1993 but has not yet been received. Letter from Alessio Bruni, International Instruments Section, UN Centre for Human Rights, Geneva, to al-Haq (8 Jan. 1993). Reports are due after the first year of ratification and every fifth year thereafter.

[200]Adopted and opened for signature, ratification and accession by General Assembly Res. 2200 A (XXI) of 16 Dec. 1966, entered into force 3 Jan. 1976. See 21 GAOR, Supp. 16, U.N. Doc. A/6316 (1966).

[201]UNSG Human Rights Report, *supra* note 94, para. 25

of the right to self-determination ....[202]

The overarching right of self-determination in the ICESCR, which encompasses many other individual and collective rights, has thus been safeguarded to persons under the control, but outside the metropolitan territory, of a state party. The applicability of the ICESCR to occupied territories can therefore be strongly argued.

Despite the relatively strong arguments for applicability, Israel's position is that the ICESCR does not apply in the Occupied Territories.[203] Israel signed this Convention on 19 January 1966 and ratified it on 3 October 1991. It made no reservations.

While the progressive implementation[204] of the ICESCR makes it a weaker covenant than the ICCPR, the idea of the indivisibility of all human rights has gained credence in the last decades and was most recently affirmed at the 1993 World Conference on Human Rights which stated that "All human rights are universal, indivisible and interdependent and interrelated."[205] There can be no implementation of civil and political rights in an atmosphere of poverty and cultural or social repression.[206] Moreover, the ICESCR is to be implemented "to the *maximum* of [the member state's] ... available resources" (emphasis

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[202]Art. 1; para. 3.

[203]Roberts, *supra* note 44, p. 55.

[204]Each party "undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures." ICESCR, Art. 2(1).

[205]Vienna Declaration, *supra* note 13, Art. I(5). The African Charter on Human and Peoples' Rights affirms the universality and indivisibility of civil, political, economic, social, and cultural rights in its preamble.

[206]In affirmation of this principle, the Human Rights Committee responsible for the implementation of the ICCPR has declared that the obligation to protect the inherent right to life found in Article 6 of the ICCPR requires affirmative action by states to reduce infant mortality and eliminate malnutrition and epidemics. F. Jhabvala, "The International Covenant on Civil and Political Rights as a Vehicle for the Global Promotion and Protection of Human Rights," *Israel Yearbook on Human Rights*, Vol. 15 (1985) p. 184, p. 199.

added)[207] which, in Israel's case as an industrialized nation, would be a large amount of its resources. However, this implementation has certainly not occurred in the Occupied Territories where many economic indicators show that conditions have in fact deteriorated since the occupation began.[208]

The Economic and Social Council supervises the ICESCR, aided by the Committee on Economic, Social and Cultural Rights. State parties must report regularly on their implementation of the Covenant.

4. International Convention on the Elimination of All Forms of Racial Discrimination[209]

CERD is the oldest and most widely ratified UN human rights convention.[210] It

> is, like the other human rights instruments established under United Nations auspices, applicable in time of peace as well as in times of armed conflict.[211]

CERD is applicable to occupied territories by virtue of its applicability to "everyone within their jurisdiction" (Article 6) of the signatory party:

> This obligation (arg. "within their jurisdiction") would apply also in occupied territories *vis-a-vis* the occupying authorities.[212]

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[207]ICESCR, Art. 2(1).

[208]See, e.g., Bevis and Sabbagh, *supra* note 151, detailing the deterioration of health services in the Occupied Territories since 1967, including a drop in the proportional number of hospital beds available to the population. See also other al-Haq studies on economic conditions in the Occupied Territories, such as taxation.

[209]Adopted and opened for signature and ratification by General Assembly Res. 2106 A (XX) of 21 Dec. 1965, entered into force 4 Jan. 1969, 660 UNTS 195.

[210]United Nations, *Human Rights: The Committee on the Elimination of Racial Discrimination Fact Sheet No. 12* (Geneva: United Nations, 1991) p. 2.

[211]UNSG Human Rights Report, *supra* note 18, para. 72.

[212]*Ibid.* CERD also mentions "territories under their jurisdiction" (Art. 3).

CERD in its entirety is non-derogable even in emergency situations, thus illustrating the high degree of importance placed on non-discrimination at all times. However, CERD does contain certain limitation provisions which, while not undermining the central proscription against racial discrimination, permit a signatory to give more positive treatment to citizens than non-citizens, exercise discretion in questions of naturalization, provide temporary preferential measures for certain groups if necessary to attain non-discrimination, consider alternative means to end discrimination, and ensure that the right to freedom from discrimination will not exclude other fundamental rights.[213]

Israel signed CERD on 7 March 1966 and ratified it on 3 January 1979 with a reservation to Article 22 regarding acquiescence to the jurisdiction of the ICJ in disputes between parties.[214] In 1984, Israel stated that its policy in the Occupied Territories was in conformance with CERD,[215] along with the provisions of the 1950 Agreement on the Importation of Educational, Scientific, and Cultural Materials and the 1960 Convention against Discrimination in Education. It included the Occupied Territories in its first CERD report;[216] however, it has apparently not done so since. The Committee charged with monitoring and reviewing actions by states to fulfill their CERD obligations has repeatedly questioned Israel with regard to the occupation and called on Israel to implement CERD in the Occupied Palestinian Territories.[217]

State parties to CERD must report every two years and whenever requested on their implementation of the Convention. The Committee on the Elimination of Racial Discrimination considers the reports, makes suggestions and recommendations based on these reports and other information, and may hear

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[213]Drew Mahalic and Joan Gambee Mahalic, "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination," *Human Rights Quarterly*, Vol. 9 (1) (1987) pp. 74-101.

[214]The reservation reads: "The State of Israel does not consider itself bound by the provision of article 22 of the said Convention."

[215]Roberts, *supra* note 44, p. 55.

[216]Quigley, *supra* note 82, n. 108.

[217]Bevis and Sabbagh, *supra* note 151, pp. 89-90, citing records of the fortieth session of the Committee on the Elimination of Racial Discrimination: CERD/C/192/Add.2; CERD/C/SR. 929-932, 936 held in 1991.

complaints from individuals if the state complained against has recognized that the Committee is competent to do so.

5. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[218]

Article 2 of CAT obligates signatories to "prevent acts of torture in any territory under its jurisdiction." Thus, it is commonly understood that CAT applies to occupied territories.

Israel signed CAT on 22 October 1986 and ratified it on 3 October 1991.[219] The Legal Advisor to the Foreign Ministry of Israel has argued that this Convention is not applicable in the Occupied Territories because applicability would undermine the Israeli government's position that the status of the territories is still to be determined. In this case, the Israeli government argued that if it applied the Convention to the Territories it would be making a claim of sovereignty over the territories.[220] As previously discussed, however, application of human rights conventions to a territory does not entail a claim of sovereignty.[221]

The Committee Against Torture oversees compliance with the Convention

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[218]Res. 39/46 adopted by the General Assembly on 10 Dec. 1984, Official Documents of the General Assembly, Thirty-ninth session, Supplement No. 51 (A/39/15) pp. 197-201.

[219]Israel made the following reservations:

> 1. In accordance with article 28(1) of the Convention, the state of Israel hereby declares that it does not recognize the competence of the committee provided for in article 20 [this article authorizes the Committee Against Torture to investigate reliable information which appears to contain a well-founded indication that torture is being systematically practiced and authorizes the Committee to report on its inquiry. It seeks the cooperation of the state in its efforts].
> 2. In accordance with paragraph 2 of Article 30, the state of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article [Article 30 para. 1 establishes dispute resolution mechanisms between state parties, including arbitration and referral to the ICJ].

[220]"Israeli Interrogation Methods Under Fire After Death of Detained Palestinian," *Middle East Watch Reports*, Vol. 4 (19 March 1992) p. 3, quoting letter from Legal Advisor to Foreign Ministry, forwarded by Foreign Ministry to Middle East Watch.

[221]See discussion in Section I A.

and state parties are supposed to report every four years and upon request. Individuals may complain to the Committee provided that the state complained against has recognized the competence of the committee to hear such complaints. The Committee has various ways, including confidential inquiries and public summaries of reports, of dealing with situations where a well-founded basis to believe that torture is being systematically practiced exists.

6. Convention on the Elimination of All Forms of Discrimination Against Women[222]

The state participants at the 1993 World Conference on Human Rights agreed that

> Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law.[223]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not address the scope of applicability. Arguably, it can be applied to all territories under the jurisdiction of the state party, including occupied territories, as discussed in Section IV A.

Israel signed CEDAW on 17 July 1980 and ratified it on 3 October 1991, with the following reservations and declarations:

> 1. The state of Israel hereby expresses its reservation with regard to article 7(b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel. Otherwise, the said article is fully implemented in Israel, in view of the fact that women take a prominent part in all aspects of public life.
> 2. The state of Israel hereby expresses its reservation with regard to article 16 of the Convention, to the extent that the laws on

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[222]Adopted and opened for signature, ratification and accession by General Assembly Res. 34/180 of 18 Dec. 1979, entered into force 3 Sept. 1981.

[223]Vienna Declaration, *supra* note 13, Art. II(38).

personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article.

Declaration:

3. In accordance with paragraph 2 of article 29 of the Convention, the state of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article [Article 29 refers to dispute resolution mechanisms, including arbitration and referral of disputes to the ICJ] .

7. International Labor Organization Conventions

The basic human rights conventions of the ILO concern freedom of association (Convention Nos. 11, 87, 98, 136, 141, and 151), forced labor (Nos. 29 and 105), and equality of opportunity and treatment (Nos. 100, 111, 156).[224] Of these, only No. 29 contains a provision concerning exceptions in case of war or emergency.[225] The rest of these rights are considered so important as not to admit of derogation in any circumstance.

It should be noted that ILO conventions rarely allow invocation of limiting circumstances; normal trade union activity, particularly the political opinions or actions of any trade union member, are not a reason to limit trade union rights.[226] The ILO has taken the position that international labor standards apply during wartime and belligerent occupation, and that while warring parties may agree to suspend these labor obligations among themselves during actual hostilities, they may not do so during occupation.[227]

The basic human rights conventions of the ILO do not preclude applicability to occupied territories. The ILO Constitution deals with the application of conventions to non-metropolitan territories, but does not specifically

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[224]Hartman, *supra* note 179, p. 119; O'Donnell, *supra* note 39, p. 31.

[225]At least seven other ILO conventions contain such provisions: Nos. 1, 6, 30, 46, 90, 94, and 106. Marks, *supra* note 34, p. 186 n. 50.

[226]Quigley, *supra* note 15, p. 310.

[227]*Ibid.*, p. 312.

mention belligerent occupation.[228] Article 35 provides that members who have ratified ILO conventions must apply them to non-self-governing non-metropolitan territories, except where inapplicable because of local conditions. Several conventions also specifically mention application to non-self-governing non-metropolitan territories, usually providing that the signatory declare whether it is applying the convention to the territory without modification; applying it with modifications to adapt it to local conditions; or not applying the convention at all and the grounds why not.[229] Each convention must be read separately in order to analyze whether its language allows or precludes its applicability.

For instance, in Articles 1, 2, and 11 of Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise,[230] each member undertakes to ensure for all workers and employers without any distinction whatsoever the rights in the Convention. The Convention contains the standard options regarding non-metropolitan territory, which could be interpreted to include occupied territories.

Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation[231] obligates its members to "pursue a national policy" to eliminate discrimination under Article 2. This can be interpreted as either referring only to "national territory" or to a national policy in all controlled territories with regard to its scope of application.[232]

Both Israel and Jordan are members of the ILO and have ratified numerous conventions.[233] In 1974, the ILO implicitly held Israel responsible for applying Conventions No. 87 and No. 111 in the Occupied Territories. Both Jordan (prior

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[228]Meron, *supra* note 151, p. 544.

[229]International Labour Organization, *International Labour Conventions and Recommendations, 1919-1981* (Geneva: International Labour Office, 1982) pp. 1165-67.

[230]Entered into force 4 July 1950. For text, see *ibid.*, pp. 4-6.

[231]Entered into force 15 June 1960. For text, see *ibid.*, pp. 47-48.

[232]Meron, *supra* note 151, p. 545.

[233]By 1993, Israel had ratified the following ILO conventions with certain limitations: 1, 5, 9, 10, 14, 19, 20, 29, 30, 48, 52, 53, 77, 78, 79, 81, 87, 88, 90-92, 94-98, 100-102, 105, 106, 111, 112, 116-118, 122, 133, 134, 136, 138, 141, 142, 150. Jordan had ratified the following ILO conventions with certain limitations: 29, 81, 98, 100, 105, 106, 111, 116-120, 122-124, 135, 142. Letter from ILO to al-Haq, Ref: DE 4-0-4-72 (29 October 1993).

to the Six Day War in 1967) and Israel had ratified Convention No. 111, but only Israel had ratified No. 87. In its "Resolution Concerning the Policy of Discrimination, Racism and Violation of Trade Union Freedoms and Rights Practised by the Israeli Authorities in Palestine and in the Other Occupied Arab Territories" during the 59th session of the International Labor Conference, the ILO condemned the alleged Israeli "policy of racial discrimination and violation of trade union freedoms" and mentioned the two conventions in its preamble.[234]

However, in 1977, the ILO assumption that Israel was responsible for the application of ILO conventions in the Occupied Territories appears to have changed.[235] That year, the Committee of Experts on the Application of Conventions and Recommendations requested information regarding the situation of workers in the Occupied Territories in response to which Israel submitted a report concluding that its policy and practice accorded with Convention No. 111. In the discussions of this report in the Committee, several members objected to the assumption that an occupying power should apply a convention, on the basis that this might imply sovereignty over the territory. Delegates to a plenary session also objected to consideration of the report submitted by Israel. The supervision of the application of Convention No. 111 was entrusted to the Director-General of the ILO and the Governing Body. Israel's report was not approved for lack of a quorum.

Professor Meron points out that in this case the Convention could be considered to have already been in effect in the West Bank, having been ratified by Jordan prior to occupation. The discussions in the ILO did not distinguish between Israel's duty to apply the convention on the basis that it had ratified it, and Israel's duty to report on the application of a convention already in effect.[236]

In 1986, when al-Haq attempted to make a formal representation under article 24 of the ILO Constitution alleging non-observance by Israel of Convention No. 87 in the Occupied Territories, the ILO characterized these non-observances as "outside the territory of Israel" and stated that the Governing Body had:

> concluded that the occupation by Israel of Arab territories in 1967 cannot be considered as having extended to the occupied territories

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[234]Meron, *supra* note 151, p. 544.

[235]*Ibid.*, p. 546.

[236]*Ibid.*, p. 547.

> Israel's obligations under Conventions it has ratified, and secondly, that actions taken by Israel in the occupied territories cannot be considered as having taken place "within its jurisdiction" for the purposes of the procedure for the examination of representations under article 24 of the Constitution and the Standing Orders relating thereto. In these circumstances the Governing Body decided that the representation was not receivable under article 24 of the Constitution.[237]

The Governing Body instead urged that the information in the representation be submitted as a complaint to the Committee on Freedom of Association, which had developed procedures "applicable even in the absence of obligations arising under a ratified Convention." The ILO regards Convention No. 87 as embodying customary law.

In a recent letter, the ILO confirmed that its position remains essentially the same. In a letter from the Director of the International Labor Standards Department to al-Haq, in response to our query regarding the applicability of ILO conventions ratified by Israel in the Occupied Territories, the Director responded:

> I can only refer to the position taken by the Conference in 1977 which did not agree to examine the situation in the occupied territories on the basis of reports submitted by Israel in connection with ratified Conventions in the framework of Article 22 [annual reporting requirement] of the ILO Constitution. As you may know, the Conference has in recent years held annual discussions on the situation of Arab workers of the occupied territories on the basis of a special report of the Director-General. Recent developments between Israel and the PLO may, of course, modify the position but it would be premature for the Office to anticipate exactly in what manner.[238]

In fact, the ILO does receive reports regarding Palestinian workers in the Occupied Territories, submitted by Israel at the ILO's request and by Arab

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[237]Letter from ILO to al-Haq, Ref: ACD 19-025 (2 July 1986).

[238]Letter from Dr. Hector G. Bartolomei de la Cruz, Director of the International Labor Standards Department to al-Haq, Ref: DE 4-0-4-72 (29 Oct. 1993).

governments and trade unions on their own initiative.[239] It also sends missions to the Occupied Territories.

In Professor Meron's opinion, the issue of the applicability of labor conventions to occupied territory is a complex one. He finds conventions ratified and implemented by the legitimate government prior to occupation clearly applicable as part of local law. However, in the case of other conventions, the fact that they are designed to benefit the occupied population must be balanced against the fact that the legitimate government may have chosen not to ratify the convention and that the convention may not be suitable for local social and economic conditions. Meron would find a presumption for applicability if the legitimate government had ratified the convention prior to occupation but had not yet implemented it, and a presumption against applicability when the legitimate government had not yet ratified the convention. Thus, he would urge the applicability of Convention No. 111 to the Occupied Territories.[240]

Meron did not consider the case of a prolonged occupation where the legitimate sovereign may not have had the opportunity prior to occupation to ratify a convention that has been drafted since the occupation occurred or where the local conditions had changed dramatically in the intervening years. These, and cases where a legitimate sovereign had ratified and implemented conventions during occupation, would also appear to warrant a presumption of applicability. However, in all cases:

> The answer must ... be given in each case in light of the specific convention, the social and economic conditions of the occupied territory, the needs of the population, and the character of the changes in the local laws and institutions that would be required.[241]

In analyzing the applicability of ILO conventions to the Occupied Territories, it is important to keep in mind the following points. The customary

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[239]Meron, *supra* note 151, p. 545. See, e.g., *Report on the Situation of Workers of the Occupied Arab Territories*, Report of the Director-General of the ILO to the International Labor Conference 79th Session (Geneva: International Labor Office, 1992) Appendices, Vol. 2.

[240]Meron, *supra* note 151, p. 557.

[241]*Ibid.*, p. 551.

law character of several ILO conventions, including No. 87, renders them binding on the Occupied Territories regardless of whether any state has ratified them. As for the other conventions, the ILO's narrow interpretation of "jurisdiction," in which it would not hold an occupying power responsible for implementing conventions in the occupied territories, is at odds with the interpretation of the term expressed by most other international bodies and would appear to be at odds with the humanitarian spirit of the conventions themselves. Apparently, this interpretation was developed under the impression that requiring Israel to apply and/or report on convention implementation might imply recognition of Israeli sovereignty over the territory it was occupying.[242] As discussed above, the application of such human rights conventions to any territory does not imply sovereignty. The more reasonable approach would be to consider that the ILO's conventions ratified by Israel are applicable to the Occupied Territories and that those conventions ratified by Jordan prior to the June 1967 war apply in the West Bank as part of local law.[243] Despite the ILO's narrow interpretation of the applicability of its conventions, however, it must be borne in mind that, practically, it is possible to report on the actual labor conditions in the Occupied Territories directly to the Director-General.

B. Customary Law

Human rights law includes customary as well as conventional law. Customary law is "evidence of a general practice [of states] accepted as law."[244] According to the ICJ

> not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[245]

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[242]See discussion in Section I A above and 31, p. 32.

[243]By June 1967, Jordan had ratified ILO Conventions Nos. 29, 100, 105, 111, 116, 117, 118, 119, 120, 122, 123, 124. See Section II D for more more details.

[244]Art. 38(1)(b), Statute of the ICJ.

[245]*North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth)*, 1969 *ICJ Rep.* (Judgment of 20 Feb.) p. 3, p. 44 and quoted in Meron, *supra* note 34, p. 107.

In other words, the states must not only generally act according to a rule of law, but they must also believe it is a law, for a customary norm to develop. If a norm is customary then it is binding on states at all times even if they are not a party to a treaty or convention which describes that norm.[246] Similarly, a customary norm binds a state even if it has ratified a treaty stating that norm but has not yet enacted legislation to transform the treaty into internal law,[247] or if it has withdrawn from a treaty,[248] or if it has made reservations to certain provisions of a treaty.[249] Customary norms may also be subject to different interpretation than the same norms expressed in treaties.[250]

According to the well-accepted theory of universal applicability, customary human rights norms are applicable in times of peace and war. Customary law includes norms allowing exceptions to generally applicable norms. These exceptions parallel permissible derogations found in some human rights treaties and counter the argument that human rights norms might be inapplicable in times of war and belligerent occupation because they do not provide for such emergency situations. The customary exceptions include those for *force majeure*, necessity, and self-defence.[251] These exceptions, however, should be strictly limited and actual situations closely investigated due to the ease with which states could invoke them to dodge their customary obligations.[252]

There are no exceptions permitted to the obligation to protect certain

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[246]Meron, *supra* note 34, p. 3.

[247]*Ibid.*, p. 4-5.

[248]Vienna Convention on the Law of Treaties, *supra* note 149, Art. 43 states that denunciation "shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

[249]Meron, *supra* note 34, p. 7.

[250]*Ibid.*, p. 8.

[251]*Ibid.*, p. 215.

[252]Because humanitarian instruments embodying customary norms, such as the Hague Regulations, already balance military necessity with the human rights of civilians, the invocation of necessity with regard to these instruments would not be permissible. *Ibid.*, p. 217.

customary human rights that are very compelling.[253] These overriding principles of international law, called *jus cogens*, are:

> rules of customary law which cannot be set aside by treaty or acquiescence but only by formation of a subsequent customary rule of contrary effect.[254]

The level of protection of human rights and humanitarian law "never descends below respect for norms having the character of *jus cogens*."[255] Examples of *jus cogens* include certain basic judicial guarantees and the prohibitions against aggressive war, genocide, racial discrimination, crimes against humanity, arbitrary deprivation of life, torture, and slavery.[256] Recognized as *jus cogens*[257] and so fundamental that they are commonly contained[258] in the ICCPR,[259] the European Convention (Art. 15(2)) and the American Convention (Art. 27(2)) are the following rights: the right to life; freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation; the right not to be held in slavery or involuntary

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[253]*Ibid.*, pp. 220-222.

[254]Brownlie, *supra* note 149, p. 513.

[255]Marks, *supra* note 34, p. 200.

[256]*Ibid.*, p. 202.

[257]Hartman, *supra* note 179, p. 114.

[258]According to Professor Meron,

> [t]he repetition of certain norms in many human rights instruments is in itself an important articulation of state practice and may serve as evidence of customary international law.

Meron, *supra* note 34, p. 92.

[259]The ICCPR offers a nonexhaustive list of fundamental rights. Articles 6, 7, 8, 11, 15, 16, and 18 list non-derogable rights which have been defined as customary in the Siracusa Principles. Siracusa Principles, *supra* note 83, E. 69, pp. 11-12.

servitude; and the right not to be subjected to retroactive criminal penalties. Other rights that may be *jus cogens* include the right to recognition everywhere as a person before the law; the right to freedom of thought, conscience, and religion; and the right not to be imprisoned merely on the grounds of inability to fulfill a contractual obligation.

Although not all customary rights have achieved the status of *jus cogens*, the remaining customary rights are binding on all nations unless there is a relevant customary exception. A recent authoritative list of customary human rights was published in the *Restatement of the Foreign Relations Law of the United States*:

> A state violates international law if, as a matter of state policy, it practices, encourages or condones
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> (a) genocide,
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> (b) slavery or slave trade,
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> (c) the murder or causing the disappearance of individuals,
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> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights.[260]

Most scholars agree that the following declarations of rights embody customary law: the UDHR,[261] the Convention on the Prevention and Punishment of the Crime of Genocide;[262] the Hague Regulations;[263] the principal provisions

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[260]American Law Institute, Restatement, Third - the Foreign Relations Law of the United States, 3rd ed. (St. Paul: American Law Institute, 1987) Section 702.

[261]T. Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition," *Israel Yearbook on Human Rights*, Vol. 9 (1979) p. 112; Meron, *supra* note 34, p. 82. The Supreme Court of Israel has agreed with this statement on occasion (in *The Beit El* case, *supra* note 161, p. 333, and in *Qawassmeh*, HC 320/80, PD 35 (1) 617, pp. 644-45) but in later cases refused to rule on whether it constituted customary law and held that in any event it did not apply to military occupation.

[262]Meron, *supra* note 34, p. 11, citing *Restatement*, *supra* note 261, Section 702(a) and comment d and Reporters' note 3.

of CERD;[264] and some provisions of the Convention relating to the Status of Refugees.[265]

The rights to self-determination,[266] certain basic due process guarantees,[267] and to humane treatment of detainees are also widely recognized as customary norms.[268] The rights to equality before the law, to non-discrimination, and to leave any country and return to one's own country are considered by most scholars to be customary law norms.[269]

Some scholars would also add to the list of customary norms certain rights in the Geneva Conventions, such as those in Article 3(1)(a)-(c) (prohibiting murder, torture, taking of hostages, and humiliating or degrading treatment) and the due process rights in (d)[270] and possibly many or all of the other provisions.[271] The Rapporteur on derogations to the ICCPR has suggested that

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[263]See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, Vol. XXII, IMT Secretariat, Nuremberg (1948) p. 497.

[264]Meron, *supra* note 34, p. 21.

[265]Done at Geneva 28 July 1951, 189 UNTS 137. *Ibid.*, p. 23.

[266]See *Western Sahara*, 1975 *ICJ Rep.* 12 (Advisory Opinion of 16 Oct.) where the Court construed self-determination as a right based on UNGA resolutions and on its 1971 advisory opinion on South West Africa. See Meron, *supra* note 34, p. 113.

[267]These include the rights: to be tried by a competent, independent, and impartial tribunal established by law; to presumption of innocence; not to incriminate oneself by testimony or confession; to be present at the trial; to have an opportunity to defend oneself in person or with legal counsel of one's own choosing; to examine witnesses; to have a conviction and sentence reviewed by a higher tribunal according to law. *Ibid*, pp. 96-97.

[268]*Ibid.*, pp. 95-96.

[269]*Ibid.*, p. 97.

[270]*Ibid.*, pp. 34-35.

[271]*Ibid.*, p. 35 citing E. Lauterpacht, ed., *H. Lauterpacht, International Law· Collected Papers*, Vol. 1 (1970) p. 115. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US)* Merits, 1986 *ICJ Rep.* 14 (Judgment of 27 June), which held that the Geneva Conventions were declaratory of customary law, and Qupty, *supra* note 70, pp. 111-114, citing Pictet's *Commentary* and Yingling and Ginnane, "The Geneva Conventions of 1949," *American Journal of International Law* 46(3) (1952) p. 393, p. 411 for the proposition that the entire Convention embodies customary law.

the prohibitions of racism and punishment without trial, and the principle of *nonrefoulement* (not returning persons to a country where they might be persecuted) might also be added to its list of non-derogable rights.[272] The ILO is of the belief that the right to freedom of association has become a customary norm.[273] Professor Sohn suggests that the ICCPR and ICESCR, as authoritatively interpreting the rights in the UDHR and the UN Charter "are of some importance, at the same time, with respect to the interpretation of the Charter obligations of the nonratifying states",[274] which would make them customary law obligations. Professor Meron notes that "some economic, social and cultural or 'second generation' rights, and possibly even some solidarity or 'third generation' rights" have been accepted by some scholars as customary norms.[275]

> Given the rapid, continued development of international human rights, the list as now constituted should be regarded as essentially open-ended.... Many other rights will be added in the course of time.[276]

Customary law norms protect both citizens and aliens of the state.[277] The state is responsible internationally for acts or omissions by state organs, even if they exceed their scope of authority, and by "agents." The actions of an official

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Qupty, *supra* note 70, pp. 11-114 cites Schwarzenberger and Meron for the view that some of the provisions may be declaratory of customary law. See Meron, *supra* note 34, p. 37, however, for Meron's opinion that "As in the past, the determination to which category -- customary or conventional -- a particular provision belongs must be made *in concreto*."

[272]O'Donnell, *supra* note 39, p. 32. See also Section IV A 7.

[273]1b, p. 296 quoting the ILO, *The Trade Union Situation in Chile: Report of the Fact-Finding and Conciliation Commission on Freedom of Association* (Geneva: ILO, 1975) p. 108, para. 466.

[274]Sohn, "The Human Rights Law of the Charter," *Tex. Int'l Law Journal*, Vol. 12 p. 129, p. 136 (1977) and quoted in Meron, *supra* note 34, pp. 82-83 n. 7.

[275]Meron, *supra* note 34, p. 97.

[276]*Ibid.*, p. 99.

[277]*Ibid.*, p. 125.

of a state may be as an agent or as a private individual, "the capacity in which they have acted in the specific case where their activity is impugned must be determined."[278] Notwithstanding the rule just stated, a state is responsible for *all* acts committed by members of the state's armed forces, at least in international conflicts.[279] Under customary law norms, violations of human rights by private persons are increasingly regulated by international law and where they are not, there is an evolving obligation of states to take responsibility for preventing and prosecuting such violations, and providing victims with civil remedies against the perpetrators.[280]

The Supreme Court of Israel has accepted the applicability of customary law to Israel and the Occupied Territories.[281] In *Hilu v. The Government of Israel*,[282] the Court held that international customary law is absorbed into Israeli law without any special legislation, unless there is a contradictory provision in internal law.[283] A decade later, it repeated this view:

> 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

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[278]*Ibid.*, p. 157. For a discussion of whether single or minor infringements of these laws by a state organ or its agents would constitute a matter of international concern, see pp. 101-106.

[279]*Ibid.*, pp. 161-162.

[280]*Ibid.*, pp. 164-165.

[281]See generally Lapidoth, *supra* note 152, p. 451, 456. Lapidoth notes, however, that where a clear contradiction between the international norm and an Israeli statute cannot be resolved through a presumption of agreement, Israeli law takes priority.

[282]*Hilu v. The Government of Israel* HC 302/72, PD 27 (2) 169, p. 179. See also *Dvikat v. The Government of Israel* HC 390/79, PD 34 (1)1.

[283]Qupty, *supra* note 70, p. 89.

> the laws of the [Hague] Regulations .... the accepted attitude -- which has also been accepted by this court -- is that the Hague Regulations are declarative in nature and reflect customary international law, applicable in Israel without an act of Israeli legislation.[284]

It may be strongly argued that the Court's opinion that customary law applies to the Occupied Territories includes both human rights and humanitarian customary law.

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[284] *A Teachers' Housing Cooperative* case, *supra* note 96, p. 793. Advocate Mazen Qupty, *supra* note 70, p. 91, reports that "when it comes to their practical application, the court interprets them [the Hague Regulations] in a narrow sense, in order to legalize the action in question from the standpoint of international law."

V

Effects on Human Rights Law Applicability of Transferring Some Authority from the Occupier to the Occupied: The Case of a Palestinian Self-Governing Authority in the Occupied Territories

Customary and conventional human rights laws, provided the latter meets certain language and ratification requirements, apply to situations of armed conflict and belligerent occupation, as well as to times of peace. The state exercising control over occupied territories is responsible for violations of these laws, on the international plane. However, difficulties can arise when the state responsible for controlling the territories apparently agrees to share some of its control with the occupied population. Issues of responsibility and accountability for the protection of human rights become confused in such cases and the occupied population is in danger of losing all human rights and humanitarian protection.

Occupations come in many forms. Some occupiers prefer to rule directly, through a military government, as Israel did formally until 1981. Others prefer to create administrative bodies staffed mostly by the occupied population but headed by members of the occupier's regime. In 1981, by Military Order 947 in the West Bank and 725 in the Gaza Strip, Israel transferred much of the administrative responsibility for the Occupied Territories to the "Civil Administration," a subordinate branch of the Israeli Ministry of Defense which retained overall responsibility for the occupation.[285] Many of the employees of the Civil Administration were Palestinian teachers, doctors, police, technicians and bureaucrats. Notwithstanding these organizational changes, the structure that these employees worked within and the laws with which they were compelled to comply remained completely controlled by the Israeli occupation regime which had transferred to itself full legislative, executive, and judicial authority at the very beginning of occupation. This case illustrates why different forms of occupation do not affect the occupier's full responsibility and accountability for its actions during a belligerent occupation according to international humanitarian and human rights law.

The *Commentary* to the Fourth Geneva Convention specifically addresses this issue:

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[285]"Order Concerning Establishment of a Civil Administration", Military Order No. 947 (West Bank) 8 November 1981, and No. 725 (Gaza Strip) 1 December 1981, established the Civil Administration to be headed by an appointee of the Area Commander.

> During the Second World War Occupying Powers intervened in the occupied countries on numerous occasions and in a great variety of ways, depending on the political aim pursued; examples are changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities.
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> ....
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> .... Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power.[286]

The Fourth Geneva Convention explicitly protects the occupied population from such cosmetic changes by declaring in Article 47 the inviolability of the rights safeguarded by the Convention: The Fourth Geneva Convention explicitly protects the occupied population from such cosmetic changes by declaring in Article 47 the inviolability of the rights safeguarded by the Convention:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Additionally, Article 8 states that persons protected by the Fourth Geneva Convention

> ... may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the

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[286] *Commentary*, *supra* note 50, p. 273.

special agreements referred to in [Article 7 which is similar to Article 47 quoted above]....

The historic signing of a Declaration of Principles (Declaration)[287] by Israel and representatives of the PLO on 13 September 1993 has confused the issues of responsibility and accountability for human rights protection in the Occupied Territories. The Declaration itself does not mention human rights protection and a careful reading of the Declaration raises some major issues as discussed below.

A. Israel's Responsibility and Accountability Until the Occupation Ends

Professor Cohen discusses how an occupation terminates

> through the permanent and voluntary withdrawal of the occupying forces; through forceful and lasting ejection of the occupant by a *levee en masse* [popular uprising] or by the regular armed forces of the invaded State, its allies, or third parties; or through the provision of an armistice or peace treaty at the end of the conflict.[288]

According to the Declaration of Principles, a final agreement is to be reached by the parties within five years; therefore, the Declaration is an interim agreement that does not itself purport to end the occupation. Thus, according to the Declaration, the Israeli occupation will continue for at least another five years. During this period, the Israeli occupation authorities will continue to exercise some legislative, executive, and judicial functions in the Occupied Territories. According to the Declaration of Principles, Israel will have complete jurisdiction over East Jerusalem, settlements, and border areas and may continue to control much of the rest of the Palestinian land and water resources as well. Occupation legislation and military courts will continue to function, although legislation in certain spheres may be "reviewed" by joint Palestinian-Israeli teams and the role

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[287] *Declaration of Principles on Interim Self-Government Arrangements* (13 Sept. 1993). Copy from Palestinian Team to the Peace Conference, Office of the Advisory & Technical Committees, Jerusalem, on file at al-Haq.

[288] Cohen, *supra* note 4, p. 17.

of the Palestinian civil courts in criminal cases may expand.

To the extent that Palestinians will in fact remain "subservient to the will of the Occupying Power," and as long as the occupation continues, Israel will continue to be held accountable by the humanitarian law obligations of the Fourth Geneva Convention. According to Article 6 of the Fourth Geneva Convention, to the extent that Israel "exercises the functions of government" it continues to be bound by the most important provisions of the Fourth Geneva Convention, (specifically, Articles 1-12, 27, 29-34, 47, 49, 51-53, 59, 61-77, and 143) until the end of occupation. Clearly the Declaration is one of the kinds of agreements to which Article 47 of the Fourth Geneva Convention applies and according to this Article no agreement between the parties can undermine the protections granted in the Convention.

Israel must also continue to be held responsible under its human rights conventional and customary obligations in the Occupied Territories to the extent that it continues to exercise jurisdiction in the Occupied Territories. Application of this principle to specific rights may be difficult. If for instance, Israel agrees to grant control of health matters to Palestinians, this arguably releases Israel from its responsibility on the international plane for health conditions in the Occupied Territories. However, if Israel retains a veto over review of health legislation and other relevant military orders, and retains control over health-related matters such as planning territory-wide infrastructure and water sanitation and supplies, it can hardly be said that Israel no longer exercises jurisdiction over health in the Occupied Territories. The difficulties of establishing what exactly is the scope of Israel's jurisdiction in the Occupied Territories, if in certain spheres it has handed a certain amount of control to Palestinians, and holding those responsible accountable for their actions may be enormous in practice.

B. Responsibility and Accountability of the Palestinian Governing Entity Until the Occupation Ends

On 14 June 1989, the Ambassador of the State of Palestine and Observer and Permanent Representative of Palestine to the United Nations and the other International Organizations in Geneva filed instruments of accession with the Swiss Federal Council, as depository of the Geneva Conventions and Protocols. In his letter of the same date, he informed the Swiss government of the desire of the Executive Committee of the PLO,

> entrusted with the functions of the Government of the State of

> Palestine ... to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto, ... and to respect ... and to ensure their respect in all circumstances.[289]

The Ambassador also conveyed to the Swiss government

> the will of the State of Palestine to be bound by the said Conventions and Protocols by acceding thereto, and to affirm the application and observance of their provisions in all circumstances, out of the firm belief of the State of Palestine in the lofty humanitarian principles and objectives for which these Conventions have been laid down.[290]

Although the Swiss government refused to decide whether the communication could be considered an instrument of accession "[d]ue to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine," the Permanent Mission of Switzerland noted that "[t]he unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982, by the Palestine Liberation Organization, remains valid."[291]

This exchange indicated a moral willingness, though not a legal obligation, on the part of the PLO to adhere to certain very important humanitarian norms. Other statements made in the wake of the September 1993 signing of the Declaration of Principles signal a willingness on the part of the PLO to protect human rights. These statements include the proposed establishment of a human rights commission.

All of these expressions of goodwill, however, will not adequately protect human rights unless the governing authority is also legally bound to apply human rights protections even when state agents or organs are unwilling to do so. This obligation cannot stem from signed and ratified international instruments unless the

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[289]Letter from Ambassador Nabil Ramlawi to the Swiss Federal Council (14 June 1989) reprinted in *The Palestine Yearbook of International Law*, Vol. V (1989) pp. 319-321.

[290]*Ibid.*

[291]Letter from the Charge d'Affaires of the Permanent Swiss Mission to Palestine Ambassador Nabil Ramlawi (13 Sept. 1989), reprinted in *ibid.* p. 321.

governing authority is a state or is otherwise granted the legal personality necessary to sign international documents, a possibility for the Palestinian authority which may not occur for a long time. The obligation to protect all the human rights set forth in major human rights conventions can, however, be written and incorporated into new domestic legislation and adopted as law in whatever spheres of authority it is agreed that the Palestinians have the right to propound new law. Such an adoption of human rights standards into local Palestinian law will provide initial protection from abuse in these areas. Adequate protection must also include the implementation of proper supervisory and enforcement mechanisms, including an impartial and independent judicial system.

In spheres where Palestinians cannot implement new legislation and adequate protective mechanisms, it must be assumed that Israel remains internationally responsible for the human rights violations which might occur in these areas, absent convincing evidence to the contrary. In spheres where Palestinians continue to be constricted by Israeli military orders and the Israeli military judicial system and a civil courts system which has deteriorated and shrunk as a direct result of occupation policies, Israel should remain internationally responsible and accountable.

The Palestinian governing entity will be bound to apply customary human rights and humanitarian norms when governing the Occupied Territories.

C. Discussion

The Israeli-PLO Declaration of Principles does not sufficiently protect the Palestinian right to self-determination or other human rights, and it does not clarify important issues of accountability and responsibility.[292] It is a specific example of the general difficulty encountered when trying to determine for a given violation of human rights the identity of the responsible and accountable governing authority in occupied territories when two authorities have agreed to share power.[293] The fact that one of these authorities is the occupier and one

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[292]See al-Haq, *An Assessment of the Declaration of Principles from a Human Rights Perspective* (Ramallah: al-Haq, 1993).

[293]It may help, in an investigation into the degree of authority an occupier continues to exercise in an occupied territory, to compare this situation with situations where a non-occupied territory exercises a certain degree of autonomy. According to a survey by Lillich and Hurst of various autonomous regions throughout the world, the minimum governmental powers that a territory must possess to be

represents the occupied population should not be overlooked. Humanitarian law views such agreements with suspicion and safeguards the human rights of the occupied population under such agreements. The fact that one of the authorities sharing power cannot legally commit itself to international human rights standards because it lacks the legal personality to do so is another factor to be weighed in attempting to apportion responsibility for human rights abuses. These concerns should inform the inquiry into responsibility and accountability under human rights conventional and customary law as well as humanitarian law.

The United Nations, ILO, and the ICRC -- as the guardians of UN conventions, labor conventions, and the Geneva Conventions respectively -- could contribute to the protection of human rights during periods such as the one currently being implemented in the Occupied Palestinian Territories by establishing an investigative body to whom Palestinians could appeal to determine when violations of human rights have occurred and the identity of the responsible governing authority.

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considered "fully autonomous and self-governing" are: a locally-elected body with some independent legislative power, a locally chosen chief executive, and an independent local judiciary. These characteristics are not inconsistent with specific limitations on local power in areas of special concern to the sovereign government or with specific power-sharing arrangements between the central and autonomous governments. However, a grant of "only cultural and religious autonomy, even if coupled with certain administrative responsibilities, would *not* seem to constitute 'full' autonomy or self-government." Hannum and Lillich, "The Concept of Autonomy in International Law," in Y. Dinstein, ed., *Models of Autonomy* (London: Transaction Books, 1981) p. 215, pp. 250-51. Furthermore, a "regime with purely personal jurisdiction in certain respects over its members" would not be considered fully autonomous. *Ibid.* p. 253. Lillich and Hurst also point out that transitional autonomy regimes usually attain much more limited forms of autonomy than do permanent regimes and are established in the context of a future arrangement or set of options. *Ibid.* Generally, the more limited the autonomy, the more responsibility the central government continues to bear for the autonomous region. It should be kept in mind, however, that the questions and concerns related to the autonomy of non-occupied regions are not identical to those related to the degree of authority, and hence accountability and responsibility, exercised by various entities in occupied territories.

VI
Concluding Remarks

Human rights conventional and customary law is universally applicable and can therefore be used to protect human rights in situations of war and belligerent occupation. Traditionally applicable humanitarian law can be complemented and expanded by the more newly developed human rights law. Together, the two bodies of law reinforce many human rights and create a variety of enforcement mechanisms for the protection of human rights in occupied territories. This protection is especially necessary during uncertain phases such as the one currently being implemented in the Palestinian Territories occupied by Israel since 1967, in which areas of jurisdiction and functions of government will allegedly be shared between the occupying and occupied authorities. In such cases, responsibility and accountability for human rights protection of the occupied population may become obscured by areas of overlapping or unclear jurisdiction. It is highly desirable in such a situation to enlist the full force of international human rights protection, including customary and conventional humanitarian and human rights law, in the fight to protect human rights.