
Why Is Israel's Presence in the Territories Still Called "Occupation"?

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EXECUTIVE SUMMARY

When an armed force holds territory beyond its own national borders, the term "occupation" readily comes to mind. However, not all the factual situations that we commonly think of as "occupation" fall within the limited scope of the term "occupation" as defined in international law. Not every situation we refer to as "occupation" is subject to the international legal regime that regulates occupation and imposes obligations upon the occupier.

The term "occupation" is often employed politically, without regard for its general or legal meaning. The use of the term "occupation" in political rhetoric reduces complex situations of competing claims and rights to predefined categories of right and wrong. The term "occupation" is also employed in the context of the Israeli-Palestinian conflict to advance the argument that Israel bears ultimate responsibility for the welfare of the Palestinians, while limiting or denying Israel's right to defend itself against Palestinian terror, and relieving the Palestinian

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side of responsibility for its own actions and their consequences. The term is also employed as part of a general assault upon Israel's legitimacy, in the context of a geopolitical narrative that has little to do with Israel's status as an occupier under international law.

Iraq was occupied by the Coalition forces from the spring of 2003 until June 28, 2004, at which time authority was handed over to the Iraqi Interim Government. At that point, Coalition forces remained in Iraq, but Iraq was no longer deemed occupied. If handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true for the establishment of the Palestinian Authority and Israel?

Under the Interim Agreement between Israel and the Palestine Liberation Organization of September 28, 1995, it would seem that at least those areas placed under the effective control of the Palestinian Authority, and from which Israel had actually withdrawn its military forces, could no longer be termed "occupied" by Israel. Moreover, since the continued presence of Israeli troops in the area was agreed to and regulated by the Agreement, that presence should no longer be viewed as an occupation.

The withdrawal of all Israeli military personnel and any Israeli civilian presence in the Gaza Strip, and the subsequent ouster of the Palestinian Authority and the takeover of the area by a Hamas government, surely would constitute a clear end of the Israeli occupation of Gaza. Nevertheless, even though Gaza is no longer under the authority of a hostile army, and despite an absence of the effective control necessary for providing the governmental services required of an occupying power, it is nevertheless argued that Israel remains the occupying power in Gaza.

INTRODUCTION

"For false words are not only evil in themselves, but they infect the soul with evil."

Plato, *Phaedo*

There is a joke that is currently making the rounds about an Israeli going through passport control at JFK. The immigration officer asks: "Occupation?" The Israeli says: "No. I'm just visiting." The joke is premised upon a general perception of Israel as an occupier. That perception is so pervasive in regard to Israel and Israel alone, that the joke will not work if you substitute any other nationality.² But does that perception accurately portray Israel, even after all the regional developments brought by the peace process? And if it is not accurate, why does it persist so tenaciously? In order to address those questions, we must first examine the meaning of the term "occupation."

When an armed force holds territory beyond the borders of its own nation, “occupation” is the term that most readily comes to mind. It may be difficult to think of a more felicitous term to describe the factual situation.³ But not all the broad spectrum of factual situations that we commonly think of as “occupation” fall within the limited scope of the term “occupation” as defined in international law. Not every situation we refer to as “occupation” is subject to the international legal regime that regulates occupation and imposes obligations upon the occupier.

A striking example of this dual usage of the term “occupation” is provided by the Army of Occupation Medal. In 1946, the United States War Department issued a medal bearing the words “Army of Occupation” to recognize soldiers who had served in post-war Germany and Japan. Yet, neither Germany nor Japan was deemed to be occupied territory subject to the international law of occupation.⁴ Indeed, when Iraqi President Jalal Talibani stated: “Iraq is not occupied, but there are foreign forces on its soil, which is different,”⁵ he correctly expressed an often-misunderstood distinction.

The distinction was also made by the International Committee of the Red Cross (ICRC) in regard to Iraq. As Swiss jurist Daniel Thürer has explained, Iraq was occupied by the Coalition forces from the spring of 2003 until June 28, 2004, at which time authority was handed over to the Iraqi Interim Government.⁶ At that point, Coalition forces remained in Iraq, but Iraq was no longer occupied. While this maintains the distinction between our casual use of the term “occupation” and its strict legal sense, it raises an interesting question. The Coalition occupation of Iraq would not seem substantively different from the Allied occupation of Germany or the American occupation of Japan, which are generally not deemed to have constituted occupation under international law. On its face, the same reasoning that supports the prevailing opinion that neither Germany nor Japan was occupied should support the view that Iraq was not occupied in the legal sense of the term.⁷ Even if that were not the case, if handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true in regard to the establishment of the Palestinian Authority and, *a fortiori*, following the Palestinian general election in 1996? Why would the same distinction not apply to Israel?

THE FOUNDATIONS OF THE LAW OF OCCUPATION

Historically, occupation was conquest. “In former times, enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants.”⁸ But the concept of occupation underwent fundamental change in the nineteenth century.⁹ With the growing acceptance of the idea that occupiers were subject to legal limitations came the need

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both to define those limitations and to define the situations to which they applied. The initial internationally accepted legal framework defining and regulating occupation is found in the Hague Regulations (Hague II), 1899.¹⁰ Articles 42 and 43 of those Regulations, which are identical to Articles 42 and 43 of the Hague Regulations (Hague IV), 1907,¹¹ set out the conditions that constitute "occupation":

Article 42

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43

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, while respecting, unless absolutely prevented, the laws in force in the country.

These articles clearly recognize three preconditions for deeming an area to be occupied in the sense of being subject to rules of international law. First, the area is under the actual control of the hostile army. Second, the area was previously the sovereign territory of another state. Third, the occupier holds the area with the purpose of returning it to the prior sovereign. This third precondition would seem to be the underlying idea for respecting the laws in force, and for the other articles of the Convention that require maintenance of the status quo ante bellum. Thus, Oppenheim states: "As the occupant actually exercises authority, and the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the territory and its inhabitants; and all legitimate steps he takes in the exercise of this right must be recognised by the legitimate Government after the occupation has ceased."¹²

The idea that occupation is a temporary state during which foreign control suspends the sovereignty of the legitimate government may be said to express the essential difference between the conception of occupation as it was understood prior to the nineteenth century, and the conception of occupation that grounded its treatment in international law. Acceptance of the principle that sovereignty cannot be alienated by force distinguishes occupation from conquest, and stands at the basis of the Hague Regulations. "The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force....From the principle of inalienable sovereignty over a territory spring the constraints that international law imposes upon the occupant. The power exercising effective control within another sovereign's territory has only temporary managerial powers, for the period until a peaceful solution is

reached. During that limited period, the occupant administers the territory on behalf of the sovereign.”¹³

In light of the fundamental premises of the law of occupation, the problem in defining the Allied presence in post-war Germany and the American presence in post-war Japan becomes clear. As Kelsen explains:

The principle that enemy territory occupied by a belligerent in the course of war remains the territory of the state against which the war was directed, can apply only as long as this community still exists as a state within the meaning of international law. This is hardly the case if, after occupation of the whole territory of an enemy state, its armed forces are completely defeated so that no further resistance is possible and its national government is abolished by the victorious state. Then the vanquished community is deprived of one of the essential elements of a state in the sense of international law: an effective and independent government, and hence has lost its character as a state. If the territory is not to be considered a stateless territory, it must be considered to be under the sovereignty of the occupant belligerent, which—in such a case—ceases to be restricted by the rules concerning belligerent occupation. This was the case with the territory of the German Reich occupied in the Second World War after the complete defeat and surrender of its armed forces.¹⁴

Gerhard von Glahn has explained that belligerent occupation “as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government, of the occupied territory, is at war with the government of the occupying forces.”¹⁵ And as Yehuda Blum has explained:

This assumption of the concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognising and sanctioning the occupant’s rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign.¹⁶

The law of occupation as envisaged by the Hague Regulations was widely disregarded in the course of World War I, and the need for reconsideration and adjustment was already clear before the onset of World War II. By the end of World War II, the situation was even worse. This led Benvenisti to conclude, “[t]he poor record of adherence to this law compromised the status of the Hague Regulations as customary law. Indeed, there is sufficient ground to claim that in light of the recur-

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ring disregard of the law of occupation, the Hague Regulations had lost their legal authority by the end of the war."¹⁷ This provided the background for the drafting of the Fourth Geneva Convention to supplement the Hague Regulations.

It is important to note that while the Fourth Geneva Convention marks a significant change in focus, it does not purport to change the definition of occupation. Rather, it would appear that the Convention employs the term "occupation" in accordance with its definition under customary law, as declared in the Hague Regulations. But whereas international law had traditionally focused upon the obligations of states toward other states, the Geneva Convention appears to shift the emphasis to the obligations of belligerent states toward the population of the occupied territory rather than toward the sovereign of that territory. Nevertheless, it should be borne in mind that Part I, Article 2 of the Fourth Geneva Convention specifically states:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The references to High Contracting Parties would appear to reinforce the conclusion that, although the Convention was drafted with a clear recognition of the changing perceptions of the role of states, and with a view toward shifting emphasis from preserving the rights of sovereigns to protecting populations,¹⁸ nevertheless, the underlying political nature of the conflict giving rise to the situation of occupation remains unchanged. This should not come entirely as a surprise given that, unlike the Hague Regulations, which declared in the Preamble the purpose "to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible,"¹⁹ and is thus primarily a declaratory restatement of customary law, the Geneva Convention was drafted as conventional law in order to address the deficiencies in customary law made apparent as a result of the two World Wars. Indeed, as the Introduction to the ICRC commentary to the Fourth Geneva Convention states: "The Convention does not invalidate the provisions of the Hague Regulations of 1907 on the same subjects but is supplementary to them (see Article 154 of the Convention)."

As far as the Convention is concerned, occupation remains occupation in its customary sense. The Convention addresses the treatment of civilians in occupied

territory as made necessary in light of the deficiencies of international law made apparent in the course of the World Wars, deficiencies that were, at least in large measure, the result of the fact that international law, as it evolved in the nineteenth century, was primarily concerned with the rights of states and their obligations towards one another. The issue of the treatment of civilians that was ancillary to that purpose is primary to the purpose of the Geneva Convention.

In sum, as Glahn points out: “Conventional international law recognizes only one form of military occupation: belligerent occupation, that is, the occupation of part or all of an enemy’s territory in time of war; this is the type of occupation covered by the Hague Regulations and the Fourth Geneva Convention of 1949.”²⁰ And as earlier noted, according to Glahn: “Belligerent occupation, as discussed up to this point and as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government, of the occupied territory, is at war with the government of the occupying forces.”²¹

It is against this background that we may proceed to examine the usage of and ensuing developments in the definition of “occupation.”

THE ISRAELI OCCUPATION—1967²²

Occupation in the Absence of Prior Sovereignty

In June 1967, in the aftermath of the Six-Day War, Israeli military forces held territories beyond its pre-war borders.²³ These territories comprised the Sinai Peninsula, Gaza Strip, Golan Heights, and the West Bank. Under customary law, the Israeli military presence in the Sinai Peninsula and the Golan Heights clearly constituted occupation in the legal sense.²⁴ The Sinai Peninsula had been under Egyptian sovereignty and the Golan Heights had been under Syrian sovereignty.²⁵ The situation was not as clear in regard to the Gaza Strip, over which Egypt did not claim sovereignty and which it held under a military government,²⁶ and the West Bank, over which the Jordanian assertion of sovereignty did not gain international recognition.²⁷ The status of these two areas has been the source of much debate both in Israel and in the international community.

Upon the assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel’s control of the West Bank and Gaza did not fall within the definition of “occupation” inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.²⁸

Israel’s argument concerning the *de jure* application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with

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customary international law and the humanitarian provisions of the Fourth Geneva Convention, or from adhering to those rules in practice.²⁹ This intention seems consistent with the view of Blum:

The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.³⁰

Under the circumstances, one might reasonably ask why Israel insisted upon making the distinction between the *de jure* force of the Fourth Geneva Convention and its *de facto* application. There would appear to have been a number of political considerations that argued in favor of making the distinction, and arguing against the automatic application of the Fourth Geneva Convention. First, as Shamgar points out:

[A]utomatic application of the Fourth Convention would create unintentionally a change in the political status quo by according to Egypt and Jordan, which had occupied the Gaza Strip and the West Bank respectively in consequence of the invasion of 1948, the standing of an ousted sovereign whose reversionary rights have to be respected and safeguarded. Since the whole idea of the restriction of powers of the military government by the Convention is based upon the assumption that there is a sovereign who was ousted and that he has been a legitimate sovereign, the automatic and unqualified application of the Convention could have enhanced the legal rights of Egypt and Jordan, and this, paradoxically, from the date of the *termination* of their military government.³¹

Second, saying that the territories were occupied by Israel "could conceivably be interpreted as a renunciation of sovereign rights by Israel to the areas. After all, one does not 'occupy' one's own territory, and one most certainly is not bound therein by the International Law of Belligerent Occupation."³² Third, in light of the above, saying the territories were occupied by Israel could be construed as acceptance of the 1949 ceasefire lines as international borders.

Thus, the primary difference of opinion between Israel and the International Committee of the Red Cross (ICRC) concerning the Fourth Geneva Convention centered on the question of formal applicability. Interestingly, the ICRC's argument for the applicability of the Fourth Geneva Convention did not rely upon a rejection of Israel's legal interpretation of the definition of "occupation" in cus-

tomary law. Rather, the position of the ICRC focused entirely on the interpretation of Article 2, which reads:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

As Shamgar explains:

The Article apparently refers to three alternative situations: (a) Peacetime; (b) Cases of armed conflict; (c) Cases of occupation. The first question is whether the first and second paragraphs of Article 2 are concurrent and complimentary or disjunctive, namely, whether the first paragraph lays down the *lex generalis* in relation to the extent of the application, which impliedly refers not only to all possible forms of an armed conflict but also to all secondary results and developments and *inter alia* to military occupation, comprising *ex abundante cautela* the one described *expressis verbis* in the second paragraph; or whether, alternatively, there is no linkage between the two paragraphs and each has to be read and interpreted separately and independently, the first paragraph dealing with armed conflicts, except military occupation, and only the second paragraph referring to the occupation of territory.

If the paragraphs are independent and not of a cumulative effect, and only the second paragraph defines the extent of the application to occupied territory, the one and only conclusion arising is that the Convention applies merely to the occupation of the territory of a High Contracting Party and not generally to territories held under military occupation. It seems, as a *prima facie* corollary, that not each and every occupation of territory turns it into territory to which the Convention applies.³³

In other words, it was and remains the view of the ICRC that the Fourth Geneva Convention applies to all forms of armed conflict, and the question of

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whether or not a particular territory is "occupied" in the legal sense is irrelevant to the question of the application of the Convention's provisions.³⁴

Indeed, there is much to be said in favor of the interpretation advanced by the ICRC. Primarily, the view that the Fourth Geneva Convention applies to all conflicts is consistent with the shift in focus from states to people. If the purpose of the Convention is to protect people, the legal status of the source of the threat to their safety and well-being should not make any difference.

Of course, that statement is far too broad, and it is unlikely that the community of nations would accept a statement of obligation that threatens so severe an infringement of sovereignty. While limiting that broad protection only to persons threatened by a conflict of an international character may appear to resolve the issue of a threat to sovereignty, Israel's concerns in regard to the question of sovereignty over the West Bank and Gaza demonstrate that the issue is not so easily resolved. It is not, I think, easy to maintain the argument that a state will agree to the automatic assumption of the political obligations imposed under international law toward a belligerent party in a conflict over territory that the state claims as its sovereign territory.

Moreover, we must bear in mind that to the extent that we are not concerned with the application of customary law, but rather with the construction of a provision of conventional law, care must be taken to respect the intention of the parties. In regard to the second paragraph, the ICRC itself admits: "The wording of the paragraph is not very clear, the text adopted by the Government Experts being more explicit."³⁵ But more explicit language was not adopted. While the ICRC's opinion may be persuasive, it is neither definitive nor constitutive. Ultimately, the parties to a convention cannot be expected to assume obligations beyond those originally contemplated by them.

In ratifying a convention, a state does not relinquish its sovereign power to the ICRC. Moreover, in the absence of any example of a state actually acting in accordance with the interpretation of the ICRC in this regard, the ICRC's view, however laudable in theory, is not the view accepted by the community of nations in practice.

A similar view to that of the ICRC is expressed by Bothe: "The unclear status of an occupied territory does not prevent the applicability of the rules of belligerent occupation. The application of humanitarian law cannot be made to depend on such legal niceties as the recognition of legal titles to territory."³⁶ As high sounding and convincing as these statements may appear at first glance, it is worrisome that anyone might think that a source of conflict, wars and bloodshed can be swept away as "legal niceties." But even if we ignore the unfortunate choice of words, the statement remains problematic. Its acceptability is largely dependant upon what is meant by the notoriously slippery term "humanitarian law." If the author's intention is to say that the humanitarian provisions of the Fourth Ge-

neva Convention should be applied to all conflicts, then the Israeli case provides a supporting precedent for this view. However, if by humanitarian law we mean something broader, e.g., the rules of international law deriving from the Hague and Geneva Conventions, or the international law of armed conflicts, or even the Fourth Geneva Convention in its entirety, then arguably, the “legal niceties” may present a serious stumbling block to the acceptance of a view that might impose international standards and political obligations upon what a state may deem as a purely internal matter.

As opposed to the approach that seeks to broaden the application of the Fourth Geneva Convention by extending it to all *de facto* situations of occupation, and on that basis argues for the *de jure* application of the Convention to the territories administered by Israel, others have challenged Israel’s *de jure* position that it is not an occupier. The basis of this approach is similar to that of the ICRC in that it focuses upon the issue of hostilities and deems the question of sovereignty to be irrelevant, but it differs in a fundamental way. While the view of the ICRC is that the question of sovereignty is irrelevant inasmuch as humanitarian concerns should not be contingent upon whether a situation constitutes an occupation, this approach argues that the question of sovereignty is not relevant to the definition of occupation. The problem with this approach is twofold: First, it seeks to define occupation without regard for its underlying premise. Second, it seeks to redefine a concept of customary law without regard for the actual customs and usages of nations. Thus, although the commonly accepted view would seem to be that Israel became the belligerent occupant of the West Bank and Gaza in June 1967, maintaining that view seems to require redefining the customary concept of occupation without regard for custom.

As opposed to this, some authors refer to Israel’s presence in the territories as conferring upon Israel a status “no more than,” “no better than,” or “at the very least,”³⁷ that of a belligerent occupant, or not conferring “any status beyond”³⁸ that of a belligerent occupant. This approach is employed in the context of the question whether or not Israel is obligated to apply the Fourth Geneva Convention, and in refutation of a potential Israeli claim to sovereignty. In the former case, it is, in essence, a moral argument that the issue of prior sovereignty should not be relevant to the granting of humanitarian protection to the civilians affected by hostilities or under military rule, and is not unlike the ICRC’s argument. The latter case concerns the premise that sovereignty over territory cannot be acquired by force of arms, and concerns the issue of whether the non-existence of a prior lawful sovereign bestows upon a belligerent party any greater claim to sovereignty vis-à-vis the territory by virtue of the lack of a competing claim. Neither of these approaches concerns the question of whether or not Israel is an “occupier.”

When examined solely in terms of the meaning of the term “occupation” in international law, it would appear that Israel never occupied the West Bank or Gaza.

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It is another question entirely whether this means that the Fourth Geneva Convention does not automatically apply, or whether this consideration is irrelevant to the application of the Convention. Regardless of the answer to that question, it would appear that the West Bank and the Gaza Strip are erroneously referred to as "occupied territory" as a result of their capture in the Six-Day War, and their subsequent administration by Israel.

OCCUPATION AND THE PEACE PROCESS

Occupation in the Absence of Prior Authority

If we were to assume, nevertheless, that Israel had occupied the West Bank and Gaza in June 1967, the question would then arise as to what would bring about the end of that occupation. That question is of particular interest in light of the peace process that began with the signing of a peace treaty between Israel and Egypt in 1979, and the continuing claim that the West Bank and Gaza are under Israeli occupation.

Inasmuch as Egypt never asserted any claim of sovereignty over Gaza, that treaty would not appear to be of any consequence in regard to Israel's status as an occupier. The same cannot immediately be said in regard to the 1994 Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan.

Article 3 of the Israeli-Jordanian Peace Treaty established the international boundary between the two states. In so doing, it would seem—at the very least—that two issues relevant to the occupation of the West Bank were affected.

Article 3(2) of the Treaty states:

The boundary, as set out in Annex I (a), is the permanent, secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.

On the face of it, the "without prejudice" statement would seem to make the statement irrelevant to our discussion. However, the Article does bear at least two unavoidable implications for Israel's presence in the West Bank. First, it settles the question of any Jordanian claim of sovereignty. Second, regardless of the "status of the territories," it deprives the 1949 ceasefire line—the Green Line—of any but historical significance. With the permanent international boundary established, the pre-existing ceasefire line is of no further importance to the former belligerents. If occupation is a temporary state of affairs meant to protect and preserve the *status quo ante bellum*, then even if one were to argue that the legal status of the former government is not decisive but rather only its factual presence is

important (i.e., “where territory under the authority of one of the parties passes under the authority of an opposing party”),³⁹ then arguably, even under such a broad conception of occupation, an occupation would cease to exist following the withdrawal of all claims by the previous government, due to the lack of any further interest in protecting or preserving its prior status or interests. As for the Palestinian residents of the area, the historical significance of the Green Line appears to be assumed, although its legal significance is far from clear. Nevertheless, the legal literature appears to attach no significance whatsoever to the Treaty in all that concerns Israel’s alleged status as occupier.

Occupation in the Absence of Effective Control

Although one might imagine that the Interim Agreement⁴⁰ between Israel and the Palestine Liberation Organization would mark an important development in terms of Israel’s status in the territories, this would not appear to be the generally accepted view. Inter alia, the Agreement provided for the transfer of authority from the Israeli military government to a Palestinian self-governance body—the Palestinian Authority—and for the withdrawal of Israeli forces from designated areas. On the face of it, it would seem that at least those areas placed under the effective control of the Palestinian Authority, and from which Israel had actually withdrawn its military forces, could no longer be termed “occupied” by Israel. Although Israel retained certain overall authority even in regard to those areas, it no longer maintained a military presence there, and it no longer exercised day-to-day control over their governance. It might further be argued that having redeployed its forces in accordance with an international agreement with the Palestinian Authority, its troops no longer constituted an occupying force in any part of the West Bank or the Gaza Strip. Rather, since the continued presence of Israeli troops in the area was agreed to and regulated by the Agreement, that presence could no longer be viewed as an occupation.

Of course, this view can be countered with the argument that, unlike the Coalition presence in Iraq, for example, the Palestinian Authority continued to view Israel as an occupying power, and in the absence of its agreement, Israel’s status remains unchanged. But it is not clear that the declarations of the parties should govern their status. Indeed, if the status of the parties is to be decided on the basis of their subjective declarations rather than upon an assessment of the facts, then it might be argued that the Palestinian Authority’s repeated claim in U.S. courts that it constitutes a “foreign state” and that it is protected by sovereign immunity⁴¹ might be taken as an official Palestinian affirmation that Israel is no longer an occupier, unless it is the contention of the Palestinian Authority that it is a government in exile within its own territory, or that the agreements under which it was established are void.

In summing up Israel’s post-Agreement status in the territories, Yoram Dinstein has written:

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The quintessence of Article 6 [of the Fourth Geneva Convention] is that the continued (albeit partial) application of the Geneva Convention is contingent on the exercise of the functions of government in the occupied territories. Since, pursuant to the agreements with the PLO, Israel has relinquished most powers of government in the bulk of the Gaza Strip and in significant segments of the West Bank (in addition to some powers elsewhere in these territories), the provisions of the Convention can no longer be deemed automatically binding on Israel in the affected areas. Having transferred its authority, Israel (although it has retained responsibility for defence against external threats and is possessed with some other marginal powers) cannot possibly be held accountable under the Convention for what is happening beyond its control, where Palestinians wield their own powers. The transfer of authority to the Palestinian Council denotes also the transfer of responsibility over what transpires, once governmental functions have been handed over.⁴²

If Israel is to be deemed an occupier of those areas directly under Palestinian control, it could be deemed so only if the term "occupation" is extended so that it comprises an area under the control of another government, and in the absence of a military presence and effective control, and this by reason of the agreed presence of the occupier in other areas that are the subject of negotiations between the parties pursuant to the agreement.

While the facts on the ground would argue for a reassessment of Israel's position as an occupying power in Judea and Samaria, the International Court of Justice, for example, has held that the changing conditions and developments "have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of Occupying Power."⁴³ In contrast, Iraq is no longer deemed to be under occupation, even though the factual conditions of occupation have remained essentially unchanged, solely due to the political decision to recognize the sovereignty of the interim government in Security Council Resolution 1546.⁴⁴ It is troubling that people who—in terms of the objective facts—may be in a situation that justifies their protection under international humanitarian law might be deprived of that protection solely on the basis of political interests and declarations that effect no actual change in the situation on the ground, while changing conditions that may make such protection unnecessary or unjustified may be afforded no legal recognition.

Occupation in Absentia

The next stage in the Israeli situation that might have affected the issue of occupation was the withdrawal of all Israeli military personnel and any Israeli ci-

vilian presence in the Gaza Strip, and the subsequent ouster of the Palestinian Authority and the takeover of the area by a Hamas government. Surely this would constitute a clear end of the Israeli occupation of Gaza.⁴⁵ Indeed, even the International Court of Justice admits that “territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.”⁴⁶

Surprisingly, it is nevertheless argued that Israel remains the occupying power in Gaza. This argument is made on the basis of a variety of assertions, for example, that the bulk of “Palestinian territory” remains under Israeli control, and in the absence of a viable state in the West Bank, the residents of the Gaza Strip are deprived of fundamental political rights, that the Palestinian areas lack contiguity, and that Israel exercises absolute control over the borders.⁴⁷ A particularly interesting argument is presented by Bashi and Mann.⁴⁸ Their argument is that Israel continues to control Gaza by an “invisible hand,”⁴⁹ on the basis of their definition of the term “occupation” as exclusively measured in terms of control, without regard for questions of sovereignty, military presence, effective governance by the occupier, or the existence of an alternative effective and independent government in the territory. Thus, they put forward the proposition that even a total withdrawal from Gaza constitutes merely a change in degree rather than in substance.⁵⁰

The arguments advanced for viewing Israel as an occupier in Gaza present a number of difficulties. First among them is that they have no basis in the customary definition of occupation. Beyond that, if Israel’s control of Gaza’s borders constitutes an element of its effective control of Gaza, then arguably, that control is entirely contingent upon Egypt’s control of its border with Gaza. If Egypt were to open its border to the free flow of people and goods, Israel’s control would be rendered largely ineffective. Does this mean that Gaza is under Egyptian occupation, or under a joint Israeli-Egyptian occupation? Moreover, given that under the current situation, the establishment of an independent Palestinian state in the West Bank would not automatically place the Hamas-led Gaza Strip under the control of that state, does the end of Israeli occupation depend upon the outcome of a Palestinian resolution of the issue of the governance of Gaza?

Ultimately, it would seem that, under the definitions currently advanced for “occupation,” Israel lacks the power to end its occupation. Rather, having once attained the status of occupier, that status continues until such time as the occupied territory attains international recognition of sovereignty. As we have seen in the case of Iraq, such international recognition need not be dependant on any actual change in the factual circumstances that constitute an occupation or that justify the application of humanitarian law. Until such time as the community of nations shows itself willing to accept a sovereign Hamas-led Gaza into its midst, or Gaza

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reverts to the effective control of the Palestinian Authority, it would seem that the Israeli occupation that may never have begun, cannot ever be brought to an end.

CONCLUSION

In terms of the definition of "occupation" in customary law, as understood at least since the drafting of the Brussels Code of 1874, Israel has never occupied the West Bank and the Gaza Strip. Developments since 1967 raise questions that further undermine viewing Israel as an occupying power under the customary definition. Nevertheless, rather than re-examine the questionable use of the term "occupation" to define Israel's status vis-à-vis the territories, primary effort has been devoted to redefining the terms and parameters of occupation to fit the changing circumstances. At the same time, care has been taken to avoid or limit the use of the term "occupation" in regard to other conflicts.⁵¹

A number of explanations can be offered for this phenomenon in its various manifestations. The first, most obvious, is that the term is frequently employed loosely as a convenient description of a situation in which a military force controls territory beyond the sovereign borders of its own country. It is in this sense that we can understand the Medal of Occupation, or references to the Army of Occupation in Germany and Japan. While this casual description of a factual situation can explain much of the use of the term in regard to Israel's presence in the territories following the Six-Day War, it does not adequately explain its continued use in regard to areas that were handed over to Palestinian control, and is entirely inapplicable to Israel's relationship to Gaza. It also does not explain the studious avoidance of the term "occupation" in describing other situations of military control of foreign or disputed territory.

Unfortunately, it would appear that this casual use of the term "occupation" sometimes influences its use in circumstances where more caution is expected. On occasion, even legal scholars seem to assume that the existence of an Israeli occupation is self-evident and no longer requiring the rigorous examination that they would normally require in other cases. Indeed, in some cases, this commonly known "fact" of Israeli occupation is offered as a proof of the existence of some proposed principle or as proof of Israel's alleged status as occupier itself.⁵²

As opposed to the above, the evolving definition of the term "occupation" in scholarly literature often reflects what would seem to be an honest concern for the ineffectiveness of customary paradigms and conventional models in applying international humanitarian law to real situations, and the sense that legal lacunae should not translate into legal vacuums in the real world.⁵³ This desire to prevent legal vacuums is not primarily directed at preventing the possibility that a geographic area might be "lawless," nor is it related to the historical concern of inter-

national law for protecting sovereign rights. Rather, it is an expression of the growing trend toward extending the law of armed conflict to encompass areas of human rights law that has its origins in the shift in focus from state actors to individuals that began with the adoption of the Fourth Geneva Convention. This trend is also marked by the growing preference for the term “international humanitarian law” to refer to the law of war.

But broadening the term “occupation” in order to expand the incidence of international law in the fear of a legal vacuum is problematic. Redefining custom in the absence of real precedent in order to apply it to new or *sui generis* circumstances cannot be justified merely by a perceived moral imperative. Novel constructions of conventional law that do not reflect the contemplation of the contracting parties are not made legitimate by virtue of their internal consistency or perceived desirability. Broadening the scope of concepts like “occupation” and inventing subclasses of occupation to embrace every unforeseen development and every *sui generis* set of circumstances makes the scope of incidence vast beyond reason, and the ridiculous is easily ignored. Not surprisingly, the legal community’s attempts at redefining “occupation” have mainly succeeded in reinforcing and refining the customs and usages of non-compliance.

The scholarly world may well be disappointed that reality does not meet the standards of an idealized law. But rather than attempt to redefine without authority, it might be more fruitful to study that inadequate reality, and examine the many forms that “occupation” has taken in practice in order to arrive at a body of precedent—both positive and negative. The Israeli experience in this context can be of particular value inasmuch as it represents the only comprehensive attempt to apply international humanitarian law to a situation of military administration without regard for the question of whether or not that administration constitutes occupation or is *sui generis*.⁵⁴ It is of further interest because the attempt has been carried out with civilian review under the watchful eye of the Israeli Supreme Court, a court that has earned the esteem of the international legal community.

Particularly noteworthy in this regard is the approach developed by the Supreme Court that views the armed forces as a state agency subject to the state’s administrative law even when operating outside the state’s sovereign territory. This approach imposes standards of civilian review of military conduct not common in other jurisdictions, and grants standing to persons affected by the military regime, even though such persons (whether or not viewed as residents of an “occupied territory,” or as “protected persons,” or as “unlawful combatants”) would not enjoy such standing to challenge military decisions under international law. It has also enabled the Court to apply human rights standards to military conduct by virtue of the army’s obligation—as an agent of the state—to act reasonably and in accordance with Israeli domestic law.⁵⁵

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This approach has produced a large corpus of legal precedent that can be studied, appraised and mined for application to other instances of alleged occupation, and particularly to the more common cases of military administration that deem themselves *sui generis*, exceptional or otherwise unbound by international law. Inasmuch as no other state has systematically applied the Fourth Geneva Convention and the law of occupation to territory under its control to the extent that they have been applied by Israel,⁵⁶ or subjected its application of the law to the scrupulous review of its civilian courts,⁵⁷ Israel provides a valuable and unique precedent. It is regrettable that in the main, the scholarly literature seems to prefer measuring this legal corpus against the criteria of theoretical ideals applied to conceptual models of occupation that deviate from customary international law of armed conflicts, rather than evaluating its actual efficacy in providing workable responses to an increasingly complex political reality.

Another possible explanation is that the term "occupation" is employed politically, without regard for its general or legal meaning. The use of the term "occupation" in political rhetoric can be useful in simplifying debate. It reduces complex situations of competing claims and rights to clear-cut, predefined categories of right and wrong. The possibility of using the term "occupation" as a pejorative to vilify or delegitimize a party to a conflict rather than confront the legal, military and humanitarian issues is also not easily discounted.⁵⁸

The use of the terms "occupation" and "occupier" in the context of the Israeli-Palestinian conflict also serves to advance the argument that Israel bears ultimate responsibility for the welfare of the Palestinians, while limiting or denying Israel's right to defend itself against Palestinian terror,⁵⁹ and while relieving the Palestinian side of responsibility for its own actions and decisions and their consequences. This purposeful use of the term "occupation" would appear to be an important factor motivating the reinterpretation and expansion of the concept of occupation.

The use of the term "occupation" to maintain Israel's responsibility for the fate of the Palestinians also serves the agenda of those who question the legitimacy of the State of Israel or who view Israel as an American or Western proxy. This political abuse of the term "occupation" to demonize Israel as part of a general assault upon the West, or upon Israel's legitimacy, underlies the continued use of the term in regard to Israel as part of a geopolitical narrative that has little to do with Israel's status as an occupier under international law.

Unfortunately, political use and misuse of the term "occupation" has a detrimental effect upon the law and, potentially, upon the people deserving its protection. Making the definition of "occupation" subject to political interests and influence rather than to the formal requirements of international law erodes the power of the law to govern conflicts. While a criticism of "legalism" and "formalism" in the application of international law may serve the agendas of those seeking to broaden or contract the applicability of legal norms, it is legalism and formalism

that provide the necessary degree of certainty that actors in the international arena require no less than individuals. The fundamental principles of law and legality should not be sacrificed to a momentary purpose no matter how noble, particularly bearing in mind how often in history noble purpose has proven to be evil in disguise.

NOTES

1. A.B. (Columbia), LL.B. (Hebrew U.), M.A. (JTS), Lt. Colonel (IDF res.), former IDF Military Attorney for Judea, Samaria and Gaza. This paper expands upon and updates ideas presented by the author in his article *Keeping Occupied: The Evolving Law of Occupation*, 1 *Regent J.L. & Pub. Pol'y* 145 (2009). The views expressed here are the author's, and do not necessarily represent the opinions of the Jerusalem Center for Public Affairs, the IDF, the State of Israel, or any of its agencies.
2. The joke would not work as well if we would say, for example, "Chinese" instead of "Israeli," although the Chinese control of Tibet has been defined by the U.S. Congress as an occupation (see *Foreign Relations Authorization Act*, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 355, 105 Stat. 647, 713 (1991), and *Foreign Relations Authorization Act*, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 536, 108 Stat. 382, 481 (1994), stating, inter alia, "Because Congress has determined that Tibet is an occupied sovereign country under international law"). Indeed, it is likely that the average person would be hard pressed to name other instances of occupation, since so few territorial disputes are referred to by that term. On the avoidance of the term "occupation" in regard to other conflicts, see Dore Gold, *From "Occupied Territories" to "Disputed Territories"*, <<http://jcpa.org/jl/vp470.htm>>.
3. Thus, for example, in explaining that Germany was not subject to the law of occupation following the Second World War, Kelsen refers to the "un-occupied" territory administered by the Allies as: "The territory of the German Reich *occupied* in the Second World War after the complete defeat and surrender of its armed forces" [emphasis added—A.S.]. Hans Kelsen, *Principles of International Law* 76 (1952).
4. As Lauterpacht concluded, "the government of Germany by the Allied forces was not in the nature of belligerent occupation and was not subject to the customary and conventional rules of International Law relating to occupation of enemy territory." Oppenheim, *International Law*, vol. II, 436-37, H. Lauterpacht ed., 7th ed. (1952), 602; and see text *infra* at nn. 11-13.
5. "Talabani says time not ripe to seek US pullout from Iraq," *Agence France Presse* [Fr.] (May 9, 2005), <<http://ww2.epic-usa.org/Default.aspx?tabid=1006>>.
6. Daniel Thürer, *Current Challenges to the Law of Occupation*, speech delivered by Professor Daniel Thürer, Member, International Committee of the Red Cross, 6th Bruges Colloquium, 20-21 October 2005, <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/occupation-statement-211105?opendocument>>.
7. Indeed, as Robbie Sabel pointed out, "neither the US nor the UK has formally stated that they will be applying the IVth Geneva Convention to their administration of Iraq. In

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their joint letter to the UN Security Council of 8 May 2003, the two States affirmed that they 'will strictly abide by their obligations under international law including those relating to the essential humanitarian needs of the people of Iraq.' The Security Council, in the preamble to its subsequent Resolution of 22 May, designated the US and the UK as 'occupying powers,' but refrained from using the phrase 'occupying powers' in the operative part of the Resolution, which calls upon 'all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.' Explicit mention of the relevant IVth Convention was lacking." (Robbie Sabel, *The Problematic Fourth Geneva Convention: Rethinking the International Law of Occupation*, <<http://jurist.law.pitt.edu/forum/forumnew120.php>>.

8. Oppenheim, *International Law*, vol. II, 341–42, H Lauterpacht ed., 7th ed. (1952), 432.
9. For a review of the historical development of international law, and specifically the law of occupation, see Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863–1914* (1949).
10. Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (II) Respecting the Laws and Customs of War on Land, 1899. The definition of occupation adopted by the regulations is that of the Brussels Code of 1874, see Graber, *ibid.*, 59–61.
11. Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, 1907. Although the English versions of Articles 42 and 43 appear slightly different in the English translations of Hague 1899 and Hague 1907, the French versions are identical:

Article 42: Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

Article 43: L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

On the differences between Hague 1899 and Hague 1907, see Gerhard von Glahn, *The Occupation of Enemy Territory*, 296 (1957). For a comparison of the texts of Hague 1899, Hague 1907, and the Oxford, Brussels and Lieber Codes; see also the Appendix in Graber, *ibid.* 293ff.
12. Oppenheim, *International Law*, vol. II, H Lauterpacht ed., 6th ed. (1944), 341–42; Oppenheim, *International Law*, vol. II, H. Lauterpacht ed., 7th ed. (1952), 436–37. In this article, I refer to these editions of Oppenheim as they reflect the understanding of international law in the period leading up to and immediately following the adoption of the Fourth Geneva Convention.
13. Eyal Benvenisti, *The International Law of Occupation* 5–6, (1993).
14. Hans Kelsen, *Principles of International Law* 75–76 (1952).
15. Gerhard von Glahn, *The Occupation of Enemy Territory* 273 (1957).
16. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *Is.L.Rev.* 279, 293 (1968).
17. Benvenisti, *supra* note 13, 59.

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18. For a discussion of this shift in emphasis, see Benvenisti, *supra* note 13, chapter four.
19. Convention (IV) Respecting the Laws and Customs of War on Land, <<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>>.
20. Glahn (1957), *supra* note 15, 27.
21. *Op. cit.*, 273.
22. This jump from 1949 to 1967 reflects an apparent lack of developments in the area of occupation during this period. This lack of development does not mean that there were no situations that might have warranted being termed “occupation.” In the context of this study, it is interesting in light of the Egyptian presence in Gaza and the Jordanian presence in the West Bank during this entire period. Indeed, these situations tend to receive little notice, if mentioned at all, in discussions of the subject of occupation, even in the context of the Arab-Israeli conflict. Thus, for example, in his discussion of *Occupation after Armistice*, Michel Bothe states: “Examples are the German occupation of parts of France after the armistices of 1871 and 1940, the Allied occupation of Italy after the armistice of 1943 and the occupation of Syrian (Golan Heights), Egyptian (Sinai Peninsula) and Jordanian/Palestinian (West Bank) territories by Israel after the ceasefire in 1967 and after the disengagement agreements following the Yom Kippur War in 1973.” Michael Bothe, *Occupation after Armistice*, in III *Encyclopedia of Public International Law*, 761 (1992). Indeed, although the Egyptian occupation of Gaza and the Jordanian occupation of the West Bank and East Jerusalem are mentioned (e.g., at p. 1483 and 1489) in Peter Malanczuk’s comprehensive article *Israel: Status, Territory and Occupied Territories*, we find statements like “The Gaza Strip, which had been *administered* by Egypt from 1948 to 1967 without raising any claim to title to the territory, has since remained under Israeli *military occupation*” (p. 1484) (emphasis added), and that the Al-Hammeh region was “then under Syrian *administration* and now under Israeli *occupation*” (p. 1485) (emphasis added). Peter Malanczuk, *Israel: Status, Territory and Occupied Territories*, in II *Encyclopedia of Public International Law*, 1468 (1992). While it would not seem that the author intends any legal implication by this choice of words, it does appear to reflect the legal community’s lack of interest in examining the legal nature of those “administrations.” The then nine-year-old Egyptian occupation of Gaza and Jordanian occupation of the West Bank also receive no mention in Glahn (1957).
23. I refer to “pre-war borders” bearing in mind that the borders between Israel and the adjacent Arab states did not have the status of recognized international borders, but rather constituted ceasefire lines established between Israel and her neighbors under the 1949 Armistice Agreements between Israel and Egypt, Transjordan, Syria and Lebanon.
24. Farhy, *Current Trends in the Areas Administered by Israel*, 113 *Mil.L.Rev.* 47, 50 (1986).
25. The questions related to the legal status of the extension of Israeli law to the Golan under the Golan Heights Law, 1981, and to the transfer of sovereignty over the Golan to Syria as a result of the Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, 1920, go beyond the limited scope of this article. For a discussion of the historical background, see Y. Meron, *The Golan Heights*, in Meir Shamgar, ed., *Military Government in the Territories Administered by Israel 1967–1980* (1982) 85.
26. See Carol Farhi, *On the Legal Status of the Gaza Strip*, in Shamgar, *ibid.*, 61, 74 ff.

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27. See, Malanczuk, *supra* n. 22, 1490; Blum, *supra* n. 16, 289–290.
28. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in Shamgar, *supra* note 25, 13, 31 ff.; Blum, *supra* note 15, 289 ff.
29. Shamgar, *supra* note 25, 32; Farhy, *supra* n. 23, 50; Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in Kellerman, Siehr, Einhorn, eds., *Israel Among the Nations*, 137, 150–51 (1998). For a review of the official Israeli position on the application of the Hague Regulations and the Fourth Geneva Convention and the position of the Israeli Supreme Court, see Nissim Bar-Yaakov, *The Application of the Law of War to the Administered Territories*, 18 *Mishpatim* 831 (1990) (the article is in Hebrew, however the statements of Israel's official position are quoted in English).
30. Blum, *supra* n. 16, 294.
31. Shamgar, *supra* note 28, 37.
32. David Yahav, ed., *Israel, the Intifada and the Rule of Law* (1993) 21.
33. Shamgar, *supra* note 28, 38.
34. See ICRC Commentary to Geneva Convention IV, 21–22 <<http://www.icrc.org/ihl.nsf/COM/380-600005?OpenDocument>>; and see, Gerhad von Glahn, *Law Among Nations*, 7th ed. (1996) 667.
35. ICRC Commentary, 22.
36. Bothe, *supra* note 22, 764.
37. E.g., Blum, *supra* note 16, 294.
38. E.g., Malanczuk, *supra* note 22, 1493.
39. ICRC Note to the Government of Israel of May, 24, 1968, cited in Malanczuk, *supra* note 22, 1495.
40. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C., on September 28, 1995, 36 I.L.M. 551 (1997). For a brief summary of the Interim Agreement and the events leading up to it, see *Efiat Ungar v. Palestine Liberation Organization et al.*, 402 F.3d 274 (1st Cir. 2005).
41. See, e.g., Ungar, *ibid.*
42. Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in Kellerman, Siehr, Einhorn, eds., *Israel Among the Nations*, 137, 153 (1998).
43. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 78 (Int'l Ct. Justice, July 9, 2004), 43 ILM 1009 (2004) <<http://www.icj-cij.org/docket/files/131/1671.pdf>>.
44. See Daniel Thürer & Malcolm Maclaren, 'Ius Post Bellum' in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law, in *Festschrift für Jost Delbrück* (Berlin, 2005), <<http://www.ivr.uzh.ch/1stthuerer/forschung/FSDelbrueck.pdf>>.
45. See Yuval Shany, *Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement*, 8 *Yearbook of Int'l Human. L.* 369 (2005); Dore Gold, *Legal Acrobatics: The Palestinian Claim that Gaza is Still "Occupied" Even After Israel Withdraws*, <<http://www.jcpa.org/brief/brief005-3.htm>>.
46. *Supra*, n. 43.
47. See, e.g., Ariel Zeman, *Taking War Seriously: Applying the Law of War to Hostilities within an Occupied Territory*, 38 *Geo. Wash. Int'l L. Rev.* 645 (2006).
48. Sari Bashi and Kenneth Mann, *Disengaged Occupiers: The Legal Status of Gaza*, position paper by Gisha: Legal Center for Freedom of Movement, 2007, <http://www.gisha.org/>

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- UserFiles/File/Report%20for%20the%20website.pdf; and cf. Yuval Shany, *supra* n. 45, and Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 *Is.L.Rev.* 68, 71–72 (2008).
49. Bashi and Mann, *ibid.*, p. 18.
50. *Ibid.*, pp. 64 ff. It should be noted that in making its assertion, the authors restate the Israeli government's understanding of the term "occupation" as solely based upon the question of the presence of troops. In other words, the authors represent "effective control" as the Israeli government's definition and then argue against the government's narrow understanding of that definition. This studiously inaccurate presentation of the Israeli position makes it easier for the authors of the paper to advance their counter claim. Be that as it may, the theoretical claim of effective control by an "invisible hand" is not easily reconciled with a lack of the actual physical presence necessary for the performance of an occupier's obligations towards the civilian population (see Shany, *supra* n. 45 at 380), nor is it easily reconciled with a reality of uncontrolled rocket and mortar fire from the allegedly controlled area.
51. See Sabel, *supra* n. 7.
52. An example of such circularity is provided by Rotem Giladi: "The Israeli-Palestinian context demonstrates that occupation exists even in the event the territory is taken from a state having no (*recognized!*) sovereign title over the territory" [emphasis original]. Rotem Giladi, *The Jus ad Bellum/Jus in Bello Distinction and the Law*, 41 *Is.L.Rev.* 247, 287 (2008). Here, Giladi uses the mere assertion that Israel is an occupier in the absence of a prior sovereign as proof that occupation is possible in the absence of a prior sovereign. Another example is provided by Noemi Gal-Or: "Belligerent occupation is normally considered a situation where the direct occupant (of the occupied population's territory) is a state, e.g., Germany following World War II, or Israel's occupation of foreign territories following June 1967." Noemi Gal-Or, *Suspending Sovereignty: Lessons from Lebanon*, 41 *Is.L.Rev.* 247, 287 (2008), 302, 308 n. 25. Gal-Or replaces customary law's traditional requirement of a prior sovereign with the controversial concept of an "occupied population," apparently on the basis of an a priori belief that Israel is an occupier, and therefore, in the absence of a prior sovereign, occupation can only refer to the existence of an "occupied population." Her flawed reasoning also leads her to mistakenly present the Allied control of Germany following World War II as an example of a "normal" case of belligerent occupation (see text *supra* at nn. 11–13).
53. The ongoing debates on Guantanamo and Bagram are cases in point. Regardless of where one stands on the issues, it should be clear that the demands for *habeas corpus* and many of the allegations of human rights abuses represent attempts to judge international humanitarian law (IHL) by standards of human rights law. A finding that the Geneva Conventions are being observed, or that the claims and allegations are unsupported by the rules of IHL, does not address the questions raised, inasmuch as the questions are premised upon an assumption of the inadequacy of IHL. On the relationship between IHL and human rights law, see, e.g., Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 *Mil.L.Rev.* 1 (2007); Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 *Is.L.Rev.* 41 (2008); Grant T. Harris, *Human Rights, Israel, and the Political Realities of Occupation*, 41 *Is.L.Rev.* 87.

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54. Yuval Shany has described the Israeli presence in the territories as "the most conspicuous long-term occupation situation in which the occupier has accepted the applicability, at least *de facto*, of a significant part of the body of laws of occupation." Yuval Shany, *Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context*, 41 *Is.L.Rev.* 6, 7 (2008).
55. In a recent decision concerning military operations in the Gaza Strip, Israel Supreme Court President Beinisch wrote for the Court: "According to the aforesaid, the normative arrangements that govern the State of Israel when it conducts combat operations in the Gaza Strip derive from several legal sources. These legal sources include international humanitarian law, which is enshrined mainly in the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907, and the regulations annexed thereto, whose provisions have the status of customary international law; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, whose customary provisions constitute a part of the law of the State of Israel and have required interpretation by this court in several judgments...; and the first Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter—'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of Israeli law....In addition to international law, the fundamental rules of Israeli public law also apply.... According to the rules of Israeli public law, the army is liable to act, *inter alia*, fairly, reasonably and proportionately, while properly balancing the liberty of the individual against the needs of the public and while taking into account security considerations and the nature of the hostilities occurring in the area." H CJ 201/09 *Physicians for Human Rights et al. v. The Prime Minister of Israel et al.*, para. 15, available in English at <http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.htm>. In an earlier decision, former Supreme Court President Barak wrote: "In a long line of judgments, the Supreme Court has determined the standards for the scope of judicial review of decisions and acts of the military commander in territory held under belligerent occupation. This judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law." H CJ 7957/04 *Mara'abe et al. v. The Prime Minister et al.* (the "Security Barrier" case) available in English at: <http://elyon1.court.gov.il/Files_ENG/04/570/079/a14/04079570.a14.htm>. Note that in the course of the decision, the Court employs the term "belligerent occupation" in regard to Israel, noting that inasmuch as Israel has *de facto* agreed to act as a belligerent occupant in applying the law, the Court need not address the *de jure* status of Israel's presence in the territories. To date, the Israeli Supreme Court has not ruled on the *de jure* status of Israel's administration of the territories.
56. "With the exception of the Israeli occupation after the 1967 war, all other occupants after World War II refrained from resorting to the Hague Regulations or the Fourth Geneva Convention as the source of their authority or as a guide to their actions. The propensity to avoid the regime of occupation is particularly noticeable in the various occupations of the 1970s and early 1980s." Benvenisti, *supra* n. 17, 180.
57. Benvenisti, *supra* n. 17, 197–99; Tristan Ferraro, *Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities*, 41 *Is.L.Rev.* 331, 352–54 (2008).

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58. On the use of the term “occupation” as an accusation, *see* Dore Gold, *supra* n. 2.
59. The ICJ opinion on the security barrier represents just one example of politically motivated abuse of international law and the concept of occupation in this regard. On that decision, *see*, e.g., §23 of President Barak’s opinion in HCJ 7957/04 *Mara’abe*, *supra* n. 55.