Current Israeli Practices and Policies in the West Bank and the Gaza Strip: A Historical and Legal Analysis

Richard Ober
CURRENT ISRAELI PRACTICES AND POLICIES IN THE WEST BANK AND THE GAZA STRIP: A HISTORICAL AND LEGAL ANALYSIS

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I. INTRODUCTION

The Arab-Israeli conflict over the status of Palestine has captured international attention for most of this century. This attention waned somewhat in the middle of this decade with increased international focus upon the Iran-Iraq War. However, the Palestinian question has once again assumed great international importance because of the current Palestinian uprising against both the twenty-year Israeli occupation of the West Bank and Gaza Strip and the security practices Israel has employed to quell this most recent unrest. These practices include deportations, curfews, house arrests, demolition of homes, Israeli settlement of the occupied ter-

1 See Pressburg, The Uprising: Causes and Consequences, 17 J. PALESTINE STUD. 38, 42 (Spring 1988).
2 See id. The Palestinians essentially felt that international focus, especially by Arab states, on other issues such as the Iran-Iraq War had rendered international conferences meaningless and necessitated the uprising (intifadah) to raise the Palestinian question to world view once again.
ritories, and the most recent policy of "force, might and beatings." Palestinians have claimed that these policies violate their civil and human rights and studies by many international human rights groups confirm their view.

This Note will first discuss, on an historical and a legal basis, whether the Palestinians are a "people" who have the right to self-determination. The Note will then analyze under international law the Israeli rule of law in the occupied territories and the "security" practices Israel employs in these territories. While some of these practices comply with international law, others do not.

II. THE PALESTINIANS AS A PEOPLE ENTITLED TO SELF-DETERMINATION

The discussion of the history of the Palestinian conflict continually raises the issue of the Palestinian right to self-determination. The concept of self-determination has evolved throughout history. It is defined as the right of a "people," defined by its common history, traditions, language and ethnic background, to constitute an independent state and determine its own government. The Greeks and the Romans were among the first peoples to demand self-determination, though both frequently denied it to other groups whom they conquered. John Locke wrote that political societies cannot exist unless they have the consent of the people included within them. Thomas Jefferson advocated the right of all peoples to defend their liberty against outside, belligerent states. It was not until after World War I, however, when Woodrow Wilson asserted that all peoples and nations have the right to self-determination, that the concept received worldwide attention.

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7See generally U. Umozurike, SELF-DETERMINATION IN INTERNATIONAL LAW (1972).
8Comment, Israeli Settlements, supra note 4, at 560.
10See U. Umozurike, supra note 7, at 4-5.
11Id. at 6.
12Id. at 8-9.
13A. COBBAN, supra note 9, at 62-64.
Wilson insisted that any resolution of pre-World War I colonial claims must consider the indigenous populations. The League of Nations essentially followed the Wilson plan when it established the Mandate system to administer former colonies. Under the Mandate system, a foreign power, assigned by the League, would oversee a former colony until that territory was able to assert its own rights and maintain its political independence.

The United Nations Charter, though not specifically mentioning the concept of self-determination as a legal right, provided for "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." The United Nations has since issued many declarations and resolutions which have emphasized the importance of self-determination.

Both the Palestinians and the Jews have frequently asserted their right to self-determination within Palestine. According to

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14 See U. Umozurike, supra note 7, at 14.
15 Id. at 29–30.
16 League of Nations Covenant art. 22. Article 22 states that the people in former colonial areas who are "not yet able to stand by themselves under the strenuous conditions of the modern world . . . " should be given tutelage by "advanced nations who by reason of their resources, their experience, or their geographical position can best undertake this responsibility . . . . The character of the mandate must differ according to the stage of development of the people, the geographical situation of the people, its economic conditions and other similar circumstances." Article 22 further declared that some areas, primarily those formerly under Turkish control, had developed to a point where their existence as independent nations could be recognized subject to administrative assistance by the power entrusted with the Mandate until they could stand alone as nations.
17 U.N. Charter art. 1, para. 2.
19 See generally F. Khoury, The Arab-Israeli Dilemma (2d ed. 1976). For the purposes of this Note the area identified as Palestine includes Israel, the West Bank and the Gaza Strip. Others have argued that at various points throughout history the area of Palestine included what is now the State of Jordan. This Note limits the definition of Palestine to the areas listed above based upon the League of Nations Mandate for Palestine. Mandate for Palestine League of Nations Doc. C.529 M.314 1922 VI (C.P.M. 466).
one Palestinian scholar, the Palestinian right of self-determination is based on the fact that they are a people with a common language, a common historical experience, and a common attachment to that particular geographical area.\(^{20}\) The people now known as the Palestinians inhabited Palestine as the overwhelming majority from the sixth century A.D. up to the end of World War I.\(^{21}\) They have endured many foreign occupations, including those of the Seljuk Turks, the European Crusaders, the Tartars, the Ottoman Turks,\(^{22}\) and now the Israelis.\(^{23}\)

In ancient times Abraham led the Jews to Palestine, though they soon moved on to inhabit Egypt.\(^{24}\) The Jews returned to Palestine in the twelfth century B.C. and remained as the majority group there for slightly less than two hundred years.\(^{25}\) Jewish rule ended when first the Assyrians, then the Babylonians, the Persians, the Greeks and the Romans consecutively conquered the area and during the Roman occupation the vast majority of the Jewish inhabitants were driven out of Palestine.\(^{26}\)

Modern Jewish claims to a national home in Palestine began in 1897 at the First Zionist Congress in Basel, Switzerland, at which Theodor Herzl founded the World Zionist Organization (WZO).\(^{27}\) The WZO encouraged Jewish immigration to Palestine, and by the beginning of World War I 85,000 Jews had immigrated to Palestine.\(^{28}\) The WZO also lobbied the government of Great Britain to gain support for a Jewish homeland in Palestine. In 1917 Britain adopted, at the insistence of Foreign Secretary Arthur Balfour, the now famous Balfour Declaration as national policy.\(^{29}\) The Balfour Declaration designated Palestine as a future national home for the Jewish people and provided that the rights of the non-Jewish inhabitants of Palestine were not to be violated in pursuit of this goal.\(^{30}\)


\(^{21}\) See F. Khouri, supra note 19, at 2.

\(^{22}\) Id.

\(^{23}\) Shehadeh, supra note 5, at 24.

\(^{24}\) See F. Khouri supra note 19, at 1.

\(^{25}\) Id.

\(^{26}\) Id. at 1–2.

\(^{27}\) C. Smith, Palestine and the Arab-Israeli Conflict 30 (1988).

\(^{28}\) Id. at 32.

\(^{29}\) Balfour Declaration, Letter from Lord Arthur J. Balfour to Lord Rothschild (Nov. 2, 1917), reprinted in C. Smith, supra note 27, at 55; see also id. at 53–55.

\(^{30}\) Balfour Declaration, supra note 29.
Modern recognition of the Palestinians as a people inhabiting the area of Palestine began in the early part of this century when Great Britain formally sought Palestinian aid against the Ottoman Turks during World War I in exchange for a promise of Arab independence after the war.\(^{31}\)

After World War I, the League of Nations established a Mandate for Palestine which recognized both the Jews and the Palestinians as peoples entitled to Palestine.\(^{32}\) During the Mandate, the problems of two peoples vying for the same area of land became apparent. Jewish immigration increased substantially during this period and these immigrants used various means to confiscate Palestinian-held land.\(^{33}\) The Palestinians lacked the unity, education, leadership or international influence to sufficiently defend themselves and they lost much of their property to the Jewish settlers.\(^{34}\) The Palestinians eventually rose in rebellion several times during

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\(^{31}\) F. KHOURI, supra note 19, at 6-10. In the 1915 discussions between Sir Henry McMahon, the British High Commissioner of Egypt, and Sharif Hussein, the spokesman for Arab interests in the areas under Turkish control (including Palestine), the Sharif requested British recognition of Arab independence in an area bounded on the north by Turkey and extending eastward to Persia (Iran) and the Persian Gulf and westward to the Mediterranean and Red Seas. In exchange, the Arabs agreed to revolt against Turkish rule. McMahon agreed “to recognize and uphold the independence of the Arabs in all the regions lying within the frontiers proposed by the Sharif” with some exceptions. Palestine was not among the exceptions. Id. at 7.

Sir Reginald Wingate, the subsequently appointed British High Commissioner of Egypt, sent two messages to the Sharif in 1918 reiterating McMahon’s previous pledges. Id. at 8.

\(^{32}\) Mandate for Palestine, supra note 19. Palestine was established as a Mandate with Great Britain as the power entrusted with the Mandate. The Mandate provided for the establishment of a Jewish national home, id. at art. 2, for the facilitation of Jewish immigration to and settlement in Palestine, id. at art. 6, for the means by which Jewish immigrants could acquire Palestinian citizenship, id. at art. 7, and for the recognition of the WZO as the representative of the Jewish people in Palestine. Id. at art. 4.

The Mandate, however, was set up as an A-Mandate, which under Article 22 of the League Covenant meant that Palestine was an area already at a point where it could be recognized as an independent nation subject to the administrative assistance of the power entrusted with the Mandate. U. UMORIJE, supra note 7, at 34, 39. It also specifically provided for the protection of Palestine’s indigenous inhabitants, Mandate for Palestine, at art. 2, for the protection of local autonomy, id. at art. 3, for the freedom of conscience and worship, id. at art. 15, and prohibited discrimination based upon race, religion or language. Id. There was thus a recognition of the Palestinians and the Jews as “peoples” entitled to self-determination within Palestine.

\(^{33}\) F. KHOURI, supra note 19, at 18. Jews purchased much of this land from what the British considered state owned land and from absentee landowners in Syria and Lebanon separated from their land by the League-imposed mandate boundary. After each Jewish purchase, the Palestinian tenants and workers were evicted from the land and provisions were inserted into the deeds stating that the land could never be resold to Palestinians, nor could a Palestinian be employed on the land.

\(^{34}\) Id. at 20.
the Mandate period to protest the perceived Zionist dominance of their home.\textsuperscript{35} In response, Great Britain, the power the League entrusted with the Mandate, sent several commissions to study the Palestine situation. Each one concluded that Britain should provide the indigenous Palestinian population with greater protection for their rights as a “people.”\textsuperscript{36} In 1939 the British issued a “White Paper” which provided for 1) Palestinian independence in ten years if the Jews and the Palestinians were able to work out their differences in that period; 2) 75,000 more Jewish immigrants with further immigration contingent upon Palestinian approval; and 3) stringent restrictions on land sales to Jews.\textsuperscript{37}

Great Britain, however, was unable to reconcile Palestinian and Zionist claims. During World War II Jews residing in Palestine generally backed Britain and the Allied war effort, believing that this would strengthen their cause.\textsuperscript{38} Many more Jews emigrated to Palestine to escape Nazi persecution in Europe. This gave even more impetus to the aspirations of Zionists for a Jewish state in

\textsuperscript{35} C. Smith, supra note 27, at 94–102; F. Khouri, supra note 19, at 21–25.

\textsuperscript{36} C. Smith, supra note 27, at 98; F. Khouri, supra note 19, at 22–23. The Shaw and Hope-Simpson Royal Commissions of 1929 and 1930, dispatched by Great Britain to study outbreaks of Palestinian violence, reported that 1) Palestinians feared that continued Jewish immigration and land purchases would make them a minority in their own country; 2) Palestinians resented Jewish immigrants who showed little or no concern for Palestinian interests; and 3) Palestinians were gravely concerned that the newly-settled Jews would eventually dominate them both economically and politically and that large-scale Palestinian unemployment would result. Id.

In 1936 Britain sent the Peel Commission which reported that Palestinian unrest originated from a desire for their own national home and their hatred and fear of the proposed Jewish national home. It recommended partition as the only possible answer which would provide an opportunity for peace in the area. The Commission awarded the northern region of Palestine extending to just south of Nazareth with the coastal plain from Lebanon to below the city of Jaffa to a proposed Zionist state. The Palestinian state would include the remainder of the area including central Palestine (essentially the West Bank) and the entire region south of Jerusalem including the Gaza Strip, the Negev region (which extends south and west to the Sinai Peninsula and the Gulf of Aqaba), and the city of Jaffa. A thin strip extending from the coastal city of Jaffa to Jerusalem was to remain under a British mandate. C. Smith, supra note 27, at 98.

\textsuperscript{37} F. Khouri, supra note 19, at 26–27. The White Paper of 1939 was issued after the conclusion of a failed meeting in London of the British government, representatives of the Palestinian people (the Arab Higher Committee and other groups), representatives of various Arab nations, and the Jewish Agency in Palestine. Reactions to the White Paper varied. The Arab Higher Committee rejected it because it continued to allow Jewish immigration, though other Palestinian leaders saw that it made some concessions to their interests. The Jewish Agency also rejected it outright, claiming that it violated the terms of the Mandate for Palestine. Id. at 27.

\textsuperscript{38} Id. at 27–28.
Palestine.\textsuperscript{39} As time passed, extremist Zionist groups which were angered by apparent British indecision regarding Palestine began to employ terrorist tactics against both the British and the Palestinians.\textsuperscript{40} The Arab states responded to this growing Zionist threat and to British inaction regarding Palestine by forming the Arab League in 1945.\textsuperscript{41} One of the purposes of the Arab League was to apply, both jointly and separately, diplomatic pressure on Britain and other nations to consider Palestinian interests.\textsuperscript{42} Neither side was able to fully assert its cause until after 1947, when Britain decided it could not resolve the claims of both groups and requested the newly formed United Nations to assume responsibility for the Palestinian problem.\textsuperscript{43}

In 1947, the United Nations recognized both Palestinian and Zionist interests in Palestine when it passed General Assembly Resolution 181, the Partition Resolution, which provided for two independent states in Palestine, a Zionist one and a Palestinian one.\textsuperscript{44} Soon thereafter, in May 1948, the Zionist state declared its independence as the state of Israel.\textsuperscript{45} The Palestinians, however, were unorganized and unable to assert their rights as a people. Consequently, they did not proclaim their own state.\textsuperscript{46}

The neighboring Arab nations then massed their armies outside the newly-declared state of Israel in order to, among other reasons, protect the Palestinian claims to their homeland.\textsuperscript{47} The ensuing battles between Israel and the Arab forces resulted in an

\textsuperscript{39} See id. at 28.
\textsuperscript{40} F. Khouri, supra note 19, at 28; C. Smith, supra note 27, at 120–21. The leading Zionist terrorist gangs were the Irgun (led by Menachem Begin) and the Stern Gang. The Irgun sought help from Fascist Italy and exploded Jerusalem’s principal hotel, the King David Hotel, in 1946, killing almost one hundred Palestinians, British and Jews. F. Khouri, supra note 19, at 35.
\textsuperscript{41} C. Smith supra note 27, at 125; F. Khouri supra note 19, at 31.
\textsuperscript{42} Id.
\textsuperscript{44} G.A. Res. 181, 2 U.N. GAOR — Resolutions at 131 (1947) (the U.N. Partition Resolution). This partition provided for two independent states, a Jewish state and a Palestinian state. The Palestinian state was to include what is now known as the West Bank and Gaza Strip areas plus the majority of Jerusalem, Western Galilee, the fertile plains of central Palestine, a strip around the Mediterranean port of Jaffa, and an area surrounding the Gaza Strip which extended north along the Mediterranean and south approximately half the distance to the Gulf of Aqaba.
\textsuperscript{45} C. Smith, supra note 27, at 145–46.
\textsuperscript{46} See F. Khouri, supra note 19, at 68. One of the reasons the Palestinians were unable to declare their own state was that the Arab League rejected the declaration of such a state in only these areas. Id.
\textsuperscript{47} H. Nuseibeh, supra note 43, at 26.
overwhelming Israeli victory.\textsuperscript{48} By the end of 1948 Israel had captured much of the area reserved for the Palestinian state.\textsuperscript{49} This caused over 470,000 Palestinians to flee their homes and settle in refugee camps in the West Bank and Gaza Strip, the only areas which Israel did not conquer.\textsuperscript{50} This is where the majority of the Palestinians remain today.

The Palestinians, as vulnerable refugees, required outside Arab assistance to protect and provide for them. Jordan and Egypt responded by administering the West Bank and Gaza Strip, respectively.\textsuperscript{51} The Palestinians, however, continued to remain a recognizable people without a state in their own homeland.

In 1964, the First Palestine National Council, a meeting of Palestinian leaders representing their respective communities, was held in Jerusalem. There, the Palestine Liberation Organization (PLO) emerged as the representative group of the Palestinian people.\textsuperscript{52} The PLO declared that its avowed purpose was to achieve "the liberation of Palestine" through "the elimination of Zionism in Palestine," the perceived obstacle to the Palestinian state.\textsuperscript{53}

The Palestinians, however, have been unable to realize this state. In 1967 the "Six Day War" erupted between Israel, on one side, and Jordan, Egypt and other neighboring Arab states on the other side.\textsuperscript{54} Israel conquered the West Bank and Gaza Strip during this war and has militarily occupied these areas to the present.\textsuperscript{55}

The United Nations has continued to recognize the Palestinians' right to self-determination.\textsuperscript{56} It has repeatedly recognized that the Palestinians are entitled to the inalienable right of self-determination and that full respect for this Palestinian inalienable right is an indispensable element of a just and lasting peace in the Middle East.\textsuperscript{57} It has established the Committee on the Inalienable Rights

\begin{footnotes}
\item[48] C. Smith, \textit{supra} note 27, at 147.
\item[49] Id.
\item[50] Id.
\item[51] Id.
\item[54] See generally F. Khouri, \textit{supra} note 19, at 257–60.
\item[55] Id. at 260.
\item[56] See Talhami, \textit{supra} note 20, at 476.
\end{footnotes}
of the Palestinian People and a Special Unit of the Secretariat for Palestinian Rights. The United Nations General Assembly has further recognized the Palestinian people as "a principal party to the question of Palestine." The United Nations Security Council has also condemned the Israeli occupation of Palestinian land on the West Bank and Gaza Strip, called for Israeli withdrawal from these areas, and for all parties involved to recognize every state in the region.

Furthermore, the United Nations has affirmed the status of the PLO as the sole, legitimate representative of the Palestinian people. It has additionally recognized that the PLO is a party to resolving the question of Palestine and has invited the PLO to participate in United Nations meetings regarding Palestine. By the early 1980s over eighty nations had granted diplomatic recognition to the PLO and the PLO had representatives in virtually all of these nations. Finally, the United States, historically almost as fierce an opponent of the PLO and the Palestinian people as Israel, has recently declared that the PLO is a party to the question of Palestine and has agreed to meet with it in peace negotiations regarding the future of Palestine.

There is thus both an historical basis for, and an international recognition of, the Palestinians as a people. As a people the Palestinians have the right to self-determination and the right to defend their liberty against any foreign occupier of their land. In addition, the Palestinians as a people are protected under international law from any foreign infringement upon their inalienable rights.

Yet despite this Palestinian right to self-determination, Israel continues its occupation of the West Bank and Gaza Strip. To main-
tain this occupation, Israel employs a variety of security measures. The next section discusses whether these measures comply with international law vis-à-vis the Palestinians' inalienable right to self-determination.

III. Israeli Security Measures in the West Bank and Gaza Strip Under International Law

Israel has occupied the West Bank and the Gaza Strip since 1967.70 During this time it has employed many policies and practices in the occupied territories for "security reasons."71 These practices include preventive detentions, curfews, demolition of homes, deportations,72 settlement of the West Bank and Gaza Strip by Israeli citizens,73 and the latest practice of "force, might and beatings."74 The Palestinians, as well as many international groups that have examined the Palestinian situation, claim that these practices significantly violate the inalienable rights of the Palestinian people.75 An analysis of these practices under international law indicates that this contention is correct.

A. International Law of Military Occupation

The 1907 Hague Convention Respecting the Laws and Customs of Wars on Land (Hague Convention)76 and the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)77 provide many of the international legal standards for "security measures" taken by a state over areas it occupies militarily. Israel maintains that its practices in

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70 Cohen, Justice for Occupied Territory? The Israeli High Court of Justice Paradigm, 24 COLUM. J. OF TRANSNAT'L L. 471, 471 (1986).
71 See generally Pressburg, supra note 1, at 39–42.
72 See Reicin, supra note 3, at 516.
73 See Comment, Israeli Settlements, supra note 4, at 581–91.
74 See Shehadeh, supra note 5, at 29.
75 See generally, Punamaki, supra note 6. The International Red Cross reports that there were 500,000 detentions of Palestinians in the occupied areas in the first twenty years of the Israeli occupation, nearly one-third of the Palestinian population. Amnesty International reports the extensive torture of Palestinian prisoners by Israel. Id. at 82.
the occupied territories of the West Bank and the Gaza Strip comply with both of these conventions.\(^{78}\)

There are several provisions in the Fourth Geneva Convention which govern the military occupations to which the Convention applies. Article 2, paragraph 1, provides that the Convention is to apply to "all cases" of war or armed conflict "which may arise between two or more High Contracting Parties."\(^{79}\) The Convention, under Article 2, paragraph 2, also applies 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."\(^{80}\) Finally, Article 4 provides that "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or an Occupying Power of which they are not nationals."\(^{81}\)

Israel argues that it is only obligated to comply with the Hague Convention and that it is not obligated to comply with the Fourth Geneva Convention.\(^{82}\) Israel justifies this position on two grounds. First, Israeli law automatically incorporates the rules of customary international law, but not those of conventional international law.\(^{83}\) Customary international law expresses maxims which bind all nations, while conventional international law only binds those nations which were parties to the agreement expressing the law.\(^{84}\) The provisions of the Hague Convention were declared by the International Military Tribunal at Nuremberg of 1945 to be indicative of customary international law.\(^{85}\) The rules of the Fourth Geneva

\(^{78}\) See Reicin, supra note 3, at 518–19.

\(^{79}\) Fourth Geneva Convention, supra note 77, art. 2, ¶ 1.

\(^{80}\) Id. art. 2, ¶ 2. A High Contracting Party is one which ratified the Fourth Geneva Convention.

\(^{81}\) Id. art. 4.

\(^{82}\) Cohen, supra note 70, at 482–83.

\(^{83}\) Id. at 484.

\(^{84}\) Conventional law, or the law of treaties as it is also known, is that law created by agreement between two or more nations. It is much like the law or obligations created by contracts which binds only those nations who are parties to the convention or treaty. It is listed first by the International Court of Justice as sources of international law which it applies. This is because most treaties and conventions clearly show their legal terms and thus can be readily applied. M. Janis, An Introduction to International Law 10–12 (1988).

Customary international law has been defined as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law."\(^{Id.}\) at 35–36. It replaces the gaps that conventional law does not cover. It is fundamentally based upon the international custom and practice of nations which have evolved into international legal rules. \(^{Id.}\)

\(^{85}\) Cohen, supra note 70, at 484.
Convention, however, have never been declared as indicative of customary international law and thus are merely conventional law.\textsuperscript{86} Israeli law only incorporates the rules of conventional international law if the Israeli parliament, the Knesset, formally enacts the rules into law.\textsuperscript{87} This is true whether or not Israel is a contracting nation to the international convention in question. Even though Israel was a contracting party to the Convention, the Knesset has not yet enacted the rules of the Fourth Geneva Convention into Israeli law. This has led Israel to claim that these rules do not apply to its occupation of the West Bank and the Gaza Strip.\textsuperscript{88}

Israel further maintains that the Fourth Geneva Convention does not apply to its practices in the occupied areas because Israel is not an occupying power as defined in Article 2, paragraph 2, of the Fourth Geneva Convention.\textsuperscript{89} Article 2, paragraph 2, provides that “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.”\textsuperscript{90} Jordan and Egypt, which administered the West Bank and Gaza Strip from 1948 to 1967, are both contracting parties to this Convention, as is Israel.\textsuperscript{91} Israel, however, claims that neither Jordan nor Egypt were the legitimate sovereigns over the West Bank or the Gaza Strip, respectively, and that to accept the applicability of the Fourth Geneva Convention to its occupation of these areas would implicitly recognize that Jordan and Egypt were the legitimate sovereigns over these areas from 1948 to 1967.\textsuperscript{92} Thus, argues Israel, it did not occupy the territory of a High Contracting Party.

There is a basis for this view because the United Nations Partition Resolution for Palestine did not provide for Jordanian or Egyptian sovereignty over these areas.\textsuperscript{93} Therefore, the argument

\begin{itemize}
\item \textsuperscript{86} See id.
\item \textsuperscript{87} Id. at 484.
\item \textsuperscript{88} Id. at 485.
\item \textsuperscript{89} See id. at 482–83.
\item \textsuperscript{90} Fourth Geneva Convention, supra note 77, art. 2, ¶ 2.
\item \textsuperscript{91} Note, Recent Israeli Security Measures Under the Fourth Geneva Convention, 3 CONN. J. INT’L L. 485, 485–86 n.3 (1988) [hereinafter, Note, Israeli Security].
\item \textsuperscript{92} Cohen, supra note 70, at 483.
\item \textsuperscript{93} G.A. Res. 181, supra note 44. This resolution did not provide for Jordan or Egypt to administer, annex or occupy any portion of the Palestinian state. The Palestinian state was to be independent. Jordan and Egypt moved into the West Bank and Gaza Strip, respectively, after the 1948 War in order to protect the Palestinians from further Israeli expansion. H. NUSEIBEH, supra note 43, at 26. The two countries then remained in these areas until Israel conquered the areas in the 1967 War. See C. SMITH, supra note 27, at 147.
\end{itemize}
continues, because Jordan and Egypt did not legitimately exercise sovereignty over these areas, the West Bank and Gaza Strip were not the territories of a High Contracting Party.

This view, however, fails to consider the interests or rights of the Palestinian people who inhabit these areas. The West Bank and Gaza Strip were part of the area allocated to the proposed Palestinian state in 1947 under the U.N. Partition Resolution for Palestine. Once the 1948 Arab-Israeli War ended, Jordan and Egypt moved in and administered the West Bank and Gaza Strip, respectively, in order to protect the Palestinian refugees displaced by the war. Jordan and Egypt thus arguably were the legitimate sovereigns over these areas from 1948 to 1967, and the Fourth Geneva Convention does apply to the Israeli occupation of these areas under Article 2, paragraph 2.

An examination of Article 2, paragraph 1 supports the application of the Fourth Geneva Convention to the Israeli occupation of the West Bank and Gaza Strip. Under Article 2, paragraph 1, the Convention is to apply generally to “all cases” of war or armed conflict “which may arise between two or more High Contracting Parties . . . .” It does not specifically require that any territory conquered or occupied by the victorious High Contracting Party be a legitimate territory of any other High Contracting Party or Parties. The Israeli occupation began during the 1967 War between Israel and several Arab states, including Jordan and Egypt. The Fourth Geneva Convention thus applies to the Israeli occupation of the West Bank and Gaza Strip whether or not Jordan or Egypt were the legitimate sovereigns over the West Bank and Gaza Strip.

The intent of the framers of the Fourth Geneva Convention buttresses such a conclusion. The drafters and signatories of the Fourth Geneva Convention intended “humanitarian considerations” to be the underlying purpose of the Convention. The Convention applies to any case of armed conflict or military occupation, regardless of territorial considerations. Article 1 provides

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94 G.A. Res. 181, supra note 44.
95 C. SMITH, supra note 27, at 147–48.
96 Fourth Geneva Convention, supra note 70, art. 2, ¶ 2.
97 Id. art. 2, ¶ 1.
98 Id.
99 Cohen, supra note 77, at 471.
101 Id.
that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The phrase "in all circumstances" was intended to include all instances of armed conflict or military occupation even when the people in the occupied area were not citizens of a High Contracting Party.

Furthermore, Article 4 provides that "persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Palestinians are living under Israeli military occupation and they are not nationals of Israel. Articles 2 and 4 thus are triggered, supporting the application of the Fourth Geneva Convention to the Israeli occupation of the West Bank and Gaza Strip.

Finally, the international community, through the United Nations, has recognized that the Fourth Geneva Convention applies to all cases of military occupation whether or not the High Contracting Party formerly exercising control of the area presently occupied was a legitimate sovereign over that area. Moreover, the United Nations Security Council has specifically decided that the Convention applies to the Israeli occupation of the West Bank and Gaza Strip.

Therefore, the provisions of the Fourth Geneva Convention clearly apply to Israeli administrative and security practices in the occupied areas. Israel, while proclaiming that the Convention does not apply to its occupation of these areas, nonetheless has asserted that it would comply with the Convention in its practices in the occupied areas. It has further maintained that its policies do comply with both the Hague Convention and the Fourth Geneva Convention. An analysis of these policies follows.

102 Fourth Geneva Convention, supra note 77, art. 1 (emphasis added).
103 U.N. Report, supra note 100, at 72-73.
104 Fourth Geneva Convention, supra note 77, art. 4.
105 U.N. Report, supra note 100, at 73.
108 See Reicin, supra note 3, at 518-20.
B. The Rule of Law in the Occupied Territories

An issue facing many occupying powers is what law they should apply to occupied areas. Article 43 of the Hague Convention provides for occupying powers to respect local law except when absolutely prevented from doing so.\(^\text{109}\) Article 64 of the Fourth Geneva Convention allows legislation by an occupying power to ensure the security of the occupying power and its forces, to maintain orderly government of the occupied areas, and to enable the occupying power to comply with the Fourth Geneva Convention.\(^\text{110}\) Occupying powers thus possess some discretion in enacting security and criminal law.

Israel officially recognizes the local law of the occupied territories as the governing law in these areas, except when such laws conflict with the proclamations and orders of the Military Commander.\(^\text{111}\) This “local law” includes old Ottoman law, Jordanian and Egyptian law,\(^\text{112}\) as well as the Defense (Emergency) Regulations of 1945.\(^\text{113}\) Many of the Israeli security practices in the occupied areas are based on provisions in these Regulations.\(^\text{114}\) These Regulations were enacted by Great Britain, while it was still entrusted with the Mandate for Palestine, in order to combat Jewish and Palestinian terrorism.\(^\text{115}\) These Regulations apply in conjunction with the proclamations of the Israeli Military Commander over all criminal and security matters.\(^\text{116}\) However, their viability as enforceable law is questionable. This is because Jordan did not recognize them as applicable law during their nineteen year administration of the West Bank.\(^\text{117}\)

Israel justifies its use of the Regulations by pointing to Proclamation No. 2 of the Jordanian government during its administra-

\(^{109}\) Hague Convention, supra note 76, art. 43. Article 43 states: “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.”

\(^{110}\) Fourth Geneva Convention, supra note 77, art. 64. The first sentence of Article 64 states: “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.”

\(^{111}\) Israeli & Ehrenfeld, supra note 107, at 424.

\(^{112}\) Reicin, supra note 3, at 530.

\(^{113}\) Cohen, supra note 70, at 490.

\(^{114}\) Reicin, supra note 3, at 534.

\(^{115}\) Talhami, supra note 20, at 480.

\(^{116}\) Cohen, supra note 70, at 489, 490.

\(^{117}\) Talhami, supra note 20, at 480–81.
tion of the West Bank. Proclamation No. 2 recognized all laws in force in Palestine after the British Mandate ended as the law of the West Bank. Palestinians have argued, however, that because Jordan never expressly recognized the Regulations as applicable law nor enforced the Regulations, Jordan had impliedly rescinded the Regulations. Assuming that Jordan did recognize the applicability of all previous laws in the West Bank, there is nonetheless evidence that the British themselves may have repealed these Regulations prior to the Jordanian administration of the West Bank. On May 12, 1948 Britain revoked the Palestine Order in Council of 1937 under which the Regulations were enacted. This essentially cancelled the Regulations. Israel, however, maintains that this revocation was not effective and the Regulations are indeed still valid because Britain did not provide notice of this revocation within Palestine itself. Consequently, the argument continues, attorneys within Palestine had no notice that the local law had changed.

Israel’s recognition of the Regulations may nonetheless comply with the Hague Convention and the Fourth Geneva Convention. The recognition and enforcement of the Regulations arguably is necessary to ensure the security of Israel and its military forces in the West Bank and Gaza Strip, and to maintain safe and orderly government in these areas. The Hague Convention does not prohibit the enactment or recognition of such law and the Fourth Geneva Convention expressly allows for it.

C. Palestinian Right of Access to the Israeli High Court of Justice

There is no basis for allowing the inhabitants of an occupied area access to the highest appeals court of the occupying power in Israeli law or the Hague Convention. Article 66 of the Fourth Geneva Convention, however, states that “. . . the Occupying Power may hand over the [criminally] accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the

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118 Reicin, supra note 3, at 535, 536.
119 Id. at 535.
120 Id. at 535–36.
121 Talhami, supra note 20, at 481.
122 Id.
123 Hague Convention, supra note 76, art. 43; Fourth Geneva Convention, supra note 77, art. 64.
124 Cohen, supra note 70, at 474.
occupied country.”

Article 71 provides that the occupying power must allow accused persons the right to a trial for their alleged offenses. Article 72 guarantees the accused the right to present evidence in his favor. Finally, Article 73 guarantees the accused the right to appeal any sentence imposed upon him.

Israel affords Palestinians inhabiting the West Bank and Gaza Strip the right to a trial for criminal charges brought in Israeli military courts. Furthermore, though no other contemporary occupying power allows inhabitants of occupied areas access to its highest court, the Israeli High Court of Justice can review the results of these trials and can review all legislative and security actions by the Military Commander for the occupied areas. This right of Palestinian access to the courts provides the opportunity for judicial review of any military actions or security measures undertaken in the West Bank or Gaza Strip and theoretically puts the Palestinians on the same level as Israeli citizens in the administration of justice.

Although the High Court of Justice sits in Israel proper this fact does not violate Article 66’s provision that appeals courts “preferably” sit in the occupied area.

The High Court asserts that there is no legal basis for its jurisdiction over the Palestinians other than agreement to such jurisdiction by the state itself. The Court’s jurisdiction is only on personal grounds, not on territorial grounds, so any Palestinian petition to the Court does not acknowledge an Israeli right to sovereignty over the West Bank or Gaza Strip. This access not only allows Palestinians to obtain judicial review of the acts of the Israeli Military Commander, it also acts as a nominal guarantee that the Military Commander’s actions will comply with international law and Israeli law, and he will thus exercise some self-restraint before acting. Palestinians, however, view this right of appeal to an Israeli court as a step toward Israeli annexation of the occupied areas.

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125 Fourth Geneva Convention, supra note 77, art. 66.
126 Id. art. 71.
127 Id. art. 72.
128 Id. art. 73.
129 Israeli & Ehrenfeld, supra note 107, at 427–28.
130 Reicin, supra note 3, at 532.
131 Israeli & Ehrenfeld, supra note 107, at 426.
132 Reicin, supra note 3, at 533 (citing Sheikh Suleiman Abu Hilu v. Israel, H.C. 302/72, 27(2) P.D. 169 (1975); Al Jamah v. Minister of Defense, H.C. 337/71, 26(1) P.D. 574 (1972)).
133 Cohen, supra note 70, at 475.
134 Israeli & Ehrenfeld, supra note 107, at 426–27.
135 Talhami, supra note 20, at 484–85.
Many Palestinians therefore do not exercise this right of access to Israeli courts.  

D. Preventive Detentions

In 1967 Israel authorized the use of preventive detentions in Security Instructions Order, Article 87. This Order allowed the Military Commander for the occupied areas, as well as district military commanders appointed by the Military Commander, to issue preventive detentions when “necessary and expedient” to ensure public order and safety. This Order essentially amended Regulations 108 and 111 of the Defense Regulations to comply with the Fourth Geneva Convention by allowing detainees a right to appeal all detentions.

Article 78 of the Fourth Geneva Convention allows for preventive detentions of persons in occupied areas for “imperative reasons of security,” as long as detainees have a right to judicial review. Article 78, as well as Article 41, also provides that an occupying power “may at the most, subject [detainees] to assigned residence or to internment.” This indicates that preventive detentions are permissible under the Fourth Geneva Convention but that they are the strongest security measures an occupying power can employ. An occupying power thus must demonstrate that any other security measure it uses is less severe than preventive detention. “Necessary and expedient” reasons to ensure public order are substantially similar to “imperative reasons of security.” The 1967 Order thus complies with Article 78.

Israel, however, modified this order in 1979 to provide that 1) district commanders can issue detention orders for a period of no more than four days; 2) the Military Commander can issue orders of up to six months which must be reviewed by a military court

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136 Israeli & Ehrenfeld, supra note 107, at 426.
138 Id. at 538.
139 Id. at 537 (citing Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 108, at 1082 and Reg. 111, at 1083 (Supp. II Sept. 27, 1945)).
140 Id.
141 Fourth Geneva Convention, supra note 77, art. 78.
142 Id. arts. 41, 78. Article 41, ¶ 1 states: “Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment . . . .”
within four days; and 3) that preventive detentions need no longer be based upon “necessary and expedient” reasons for public order but only upon “reasonable grounds” showing that the detainee may be a security risk. This modification loosened the controls on military authorities ordering detentions. The “reasonable grounds” standard expressed in this modification clearly imposes less controls on officials ordering detentions than issuing such orders for “imperative reasons of security.” It thus does not comply with Article 78.

Since the current uprising began, the Israeli army has issued new orders which allow the military to detain Palestinians without any specific charges or evidence and which have eliminated judicial review of detention orders. Officials issuing detention orders no longer even have to show “reasonable grounds” that the detainee is a security risk. These orders clearly violate Article 78.

The Fourth Geneva Convention also provides for the proper treatment of detainees. Article 76 guarantees detainees the right to be imprisoned in the occupied area and the right to proper observance of prisoners’ rights by the occupying power. These include provisions for the housing of detainees in “quarters which afford every possible safeguard as regards hygiene and health, and provide sufficient protection against the rigours of the climate . . . .” and for adequate medical treatment and facilities for all detainees. A University of Helsinki study, an Amnesty International study, and an International Committee of the Red Cross (ICRC) report of Israeli treatment of Palestinian detainees show that Israel continually violates these provisions. Amnesty International reports that the Israeli military extracts “confessions” from detained Palestinians through severe interrogation and that torture is a regular feature of the internment of Palestinians. The Helsinki study provides

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143 Reicin, supra note 3, at 539.
144 N.Y. Times, Mar. 23, 1988, at A1, col. 3.
145 Id.
146 Fourth Geneva Convention, supra note 77, art. 76.
147 Id. art. 85.
148 Id. arts. 91, 92.
149 Punamaki, supra note 6.
150 Id. at 82 (citing Amnesty International, Torture in the Eighties (1984) [hereinafter Torture in the Eighties]).
151 Id.
152 Torture in the Eighties 134. Amnesty International reports that Palestinian detainees are “hooded, handcuffed, and forced to stand without moving for many hours at a time for several days, and have been exposed while naked to cold showers or cold air ventilators.
specific detailed accounts by former Palestinian prisoners who recounted their experiences of severe torture while detained in Israeli prisons.153

E. Curfews

Since the beginning of the current uprising, Israel has used curfews to block Palestinian protests and demonstrations against the occupation.154 Curfews are necessary, Israeli army officials maintain, because the army is unable to control the occupied areas during these protests.155 These curfews sometimes restrict the movement of up to one-third of the total Palestinian population at a time156 and can last for days.157 The Security Instructions Order, Article 89, authorizes the use of curfews in the occupied areas.158 Article 89 was derived from Regulation 124 of the 1945 Defense Regulations159 and allows the Military Commander to order curfews without specifying any reason.160

Curfews present a problem under international law because there is no express provision for the use of them in either the Hague Convention or the Fourth Geneva Convention, and because the ends of curfews are subject to conflicting interpretations. One for long periods of time. Detainees have also been deprived of food, sleep and toilet and medical facilities, and have been subjected to abuse, insults, and threats against themselves and the female members of their families." Id.

153 Punamaki, supra note 6, at 88–89. Former Palestinian detainees have given the following accounts:

One of the (Israeli) interrogators was keen on beating my testicles time and again, as a result of which I fainted more than eight times.

Once, more than five interrogators showed me to a small room, my hands were tied and my eyes blindfolded. They rushed in and suddenly began beating me without asking any questions for five hours running. I was severely beaten with sticks and a hammer on the sensitive spots of my body till I lost consciousness.

A terrible experience was the attempt by the soldiers to rape the sister and wife of a fellow prisoner before his eyes.

I was left in solitary confinement for eighteen days; (the Israeli guards) sprayed cold water on me, but I was not allowed to bathe or clean myself.

I was hung naked from the ceiling, tied up by the hands and legs, or simultaneously by hands and legs, time and again.


156 N.Y. Times, Apr. 19, at A12, col. 1.


158 Reicin, supra note 3, at 543 (citing Security Instructions Order (Judea and Samaria), No. 815, art. 89 (amend. 18) (5740/1980), 46 K.M. Judea and Samaria 249).

159 Id. (citing Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 124, at 1090 (Supp. II Sept. 27, 1945)).

160 Id.
view sees curfews as a collective punishment against a large group of persons for the action of one or a few members of that group.\textsuperscript{161} Article 50 of the Hague Convention\textsuperscript{162} and Article 33 of the Fourth Geneva Convention\textsuperscript{163} both prohibit such collective punishments. The use of curfews thus is a violation of both conventions under this interpretation.

Another interpretation is that curfews are merely orders of assigned residence which maintain public order and security and prevent future violence.\textsuperscript{164} The Fourth Geneva Convention does not prohibit the use of curfews under this interpretation. Article 78 of the Fourth Geneva Convention allows for preventive detentions in the form of assigned residences for "imperative security reasons."\textsuperscript{165} Both of these interpretations, however, could apply to almost any situation which potentially calls for the imposition of a curfew. The lawfulness of curfews under the Fourth Geneva Convention thus depends upon which way one views the purposes of curfews.

The Israeli military has acknowledged that it uses curfews as a "collective punishment,"\textsuperscript{166} and this in fact occurs as curfews sometimes affect hundreds of thousands of persons.\textsuperscript{167} This admission suggests that Israel itself views curfews as collective punishments. Curfews, as Israel uses them, thus violate the Fourth Geneva Convention.

Israel does allow any person subjected to a curfew the right to appeal the imposition of the curfew to the Israeli High Court of Justice.\textsuperscript{168} This right of appeal, however, may offer little protection from arbitrary or exceedingly severe curfews because the Military Commander can cancel a curfew anytime before the High Court reviews the order imposing the curfew. This renders judicial review of the order moot even though the population is still forced to endure the curfew for at least a limited period of time.

\begin{footnotes}
\item[161] Id. at 544.
\item[162] Hague Convention, supra note 76, art. 50. Article 50 states: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."
\item[163] Fourth Geneva Convention, supra note 77, art. 33. Article 33 states: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."
\item[164] Reicin, supra note 3, at 544.
\item[165] Fourth Geneva Convention, supra note 77, art. 78.
\item[168] See Reicin, supra note 3, at 545.
\end{footnotes}
F. Demolition of Homes

Israel cites Defense Regulation 119(1) to justify the demolition of Palestinian homes when a resident of that home has allegedly committed a serious act of "terrorism" or some other significant security infraction. 169 The Israeli High Court of Justice has repeatedly upheld demolitions because of their deterrent effect. 170 It has ignored the principles of international law regarding the destruction of property and instead focused upon whether the military authorities abused their discretion in ordering the demolitions. 171

Article 46 of the Hague Convention provides that all persons' private property must be respected and cannot be confiscated, 172 and Article 47 forbids the pillage of property. 173 Article 53 of the Fourth Geneva Convention specifically prohibits any destruction of real or personal property except where "such destruction is rendered absolutely necessary by military operations." 174 International law thus prohibits the destruction of private homes by occupying armies absent extreme necessity.

Israel claims that the demolition of homes as practiced in the occupied areas complies with Article 53 because there is an "imperative military necessity" to punish and deter suspected Palestinian terrorists. 175 Israel, however, in destroying the homes of alleged terrorists, punishes everyone who resides in the home. As noted above, Article 33 of the Fourth Geneva Convention forbids such "collective penalties" against all the residents of a home. 176 More-

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169 Id. at 546 (citing Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 119(2), at 1089 (Supp. II Sept. 27, 1945)).
171 Id. at 549–50.
172 Hague Convention, supra note 76, art. 46. Article 46 states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."
173 Id. art. 47. Article 47 states: "Pillage is formally forbidden."
174 Fourth Geneva Convention, supra note 77, art. 53.
175 Reicin, supra note 3, at 546. This "imperative military necessity" may sometimes result in unnecessary, objectionable and illegal demolitions such as when the homes of fourteen Palestinian families were destroyed because of the alleged stoning of an Israeli teenage girl by members of those families. Investigations by the Israeli army revealed that an Israeli guard had mistakenly shot and killed the girl. The demolitions nonetheless proceeded. N.Y. Times, Apr. 9, 1988, at A1, col. 3.
176 Fourth Geneva Convention, supra note 77, art. 33.
over, one could interpret Article 53’s allowance of property destruction when absolutely necessary as a reference only to those times when the occupying power is involved in actual military engagements and it cannot avoid destroying property in order to defend itself or the occupied area’s inhabitants. This interpretation would not allow the demolition of homes as punishment against the inhabitants of the occupied area.

It is again important to note that Articles 78 and 41 of the Fourth Geneva Convention prohibit any punishments more severe than preventive detentions. Some would argue that the demolition of homes is more severe than the preventive detention of an alleged “terrorist” because it destroys all of the possessions of the home’s inhabitants. They are left with nothing, even though some of them may be guilty of nothing. Furthermore, a preventive detention only directly punishes one person and the detainee at least retains the hope of release and return to his home.

G. Deportations

Regulation 112(1) of the Defense Regulations of 1945 authorizes the use of deportations for “security reasons.” For the Israeli military, an allegation of being a supporter of the PLO or of Islamic fundamentalists is enough of a “security reason” to justify deportation. A deported person must remain outside of Israel and the occupied areas for as long as the order is in force. A deportee, however, may appeal an order of deportation to a military advisory committee and then to the Israeli High Court of Justice.

International law restricts the deportation of persons living in an occupied area. Article 49 of the Fourth Geneva Convention prohibits the deportation of individual persons or large numbers of persons from an occupied area to any other country except for evacuations or safety reasons. Article 147 declares that “unlawful

177 Id. arts. 41, 78. For the text of Article 41, see supra note 142.
178 Reicin, supra note 3, at 553 (citing Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 112, at 1085 (Supp. II Sept. 27, 1945)).
180 Note, Israeli Security, supra note 91, at 492.
181 Id.
182 Fourth Geneva Convention, supra note 77, art. 49. Article 49, ¶ 1 states: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”
deportation[s] or transfer[s]" of persons in occupied areas are "grave breaches" of the Convention. 183

Israel maintains that both of these articles allow for the deportations authorized in Regulation 112(1). Israel cites the Official Commentary to Article 49 which refers to the mass deportations and transfers of populations which occurred during World War II. 184 It argues that Article 49 was drafted to prohibit only these mass deportations and that the deportations from the West Bank and Gaza Strip are not this type of deportation. 185 Israel also argues that its deportations are not prohibited by Article 49 because Israel is not deporting Palestinians from occupied areas to "the territory of the Occupying Power or to that of any other country." 186 It asserts that the deportation of Palestinians to Jordan is merely a deportation to their own country because Palestinians hold Jordanian passports. 187

Israel further argues that Article 147 of the Fourth Geneva Convention does not prohibit deportations because this provision identifies unlawful deportations as a grave breach. 188 It argues that because the article mentions unlawful deportations there must be lawful deportations. 189 In addition, because the Article provides that deportations are only a "grave breach," it maintains that Article 147 does not absolutely prohibit deportations. 190

This logic is flawed. Article 49 expressly prohibits all deportations. 191 Moreover, the Official Commentary to Article 147 explains that the horror of World War II "made it necessary to prohibit deportation[s] completely." 192 Thus, there are no lawful deportations. Deportations are a grave breach of international law and are clearly prohibited.

Israel's claim that it is only transferring Palestinians to their actual home nation, Jordan, is also unfounded. The Palestinians

183 *Id.* art. 147.
186 *Fourth Geneva Convention*, supra note 77, art. 49.
188 Reicin, *supra* note 3, at 556.
189 *Id.*
190 *Note, Israeli Security*, supra note 91, at 493.
191 *Fourth Geneva Convention*, supra note 77, art. 49. For text of Article 49, paragraph 1, see *supra* note 182.
192 *Official Commentary, supra* note 184, at 599.
are a people who have lived in the area of Palestine, including the West Bank and Gaza Strip, for about two thousand years. These areas, not Jordan or any other area, comprise their home. Moreover, Jordan has declared that it will not accept Palestinians deported by Israel. Finally, Israel does not only deport Palestinians to Jordan. It also deports them to Lebanon and other neighboring nations.

Furthermore, deportations are a more severe punishment than preventive detentions, the most severe punishment an occupying power can employ under the Fourth Geneva Convention. This is because deportees are driven from their homes, their families and their country. Preventive detentions at least allow the detainee to remain in his homeland and the detainee is usually able to see his family periodically.

Finally, though Israel allows deportees a right to appeal the order of deportation, up to the High Court of Justice if necessary, this right is highly illusory. Deportees can be forced to appeal their deportation from abroad. This provides precedent which allows for the deportation of Palestinians before they can appeal, thus forcing them to appeal from outside the occupied areas. Moreover, the fact that the Israeli High Court of Justice has never overturned a deportation order shows the substantial procedural obstacles that a deported Palestinian faces in trying to appeal his deportation.

Israeli lawyers who represent deportees maintain that deportation procedures, including the appeal process, are merely a "charade." The Israeli authorities can withhold any specific charges and evidence against a deportee from the deportee and his lawyer, making it impossible to contest or appeal a deportation. In fact, several Israeli defense attorneys have attacked the inequitable treatment that Palestinians receive in deportation procedures. Felicia Langer, a prominent Israeli defense attorney, has observed that

193 See generally F. KHOURI, supra note 19, at 2.
194 Note, Israeli Security, supra note 91, at 494.
195 See Talhami, supra note 20, at 482.
196 Fourth Geneva Convention, supra note 77, arts. 41, 78. For the text of Article 41, see supra note 142.
197 Talhami, supra note 20, at 482.
198 Note, Israeli Security, supra note 91, at 495.
199 Reicin, supra note 3, at 554.
200 Id.
203 Id.
"[a]ppearance in front of a judge in a West Bank military court is like a battle with ghosts."204 Another Israeli defense attorney has also maintained that deportation is a punishment that does not fit the crimes of which most Palestinians are accused.205

H. Israeli Settlement of the Occupied Territories

Israel began its settlement policy in the West Bank and Gaza Strip under the "Allon Plan" of 1967 for "security purposes."206 This policy expanded in the late 1970s and 1980s in an Israeli effort to allow its citizens to settle in all areas of "Greater Israel" and thus create a situation which would preclude both any Palestinian action against the state of Israel and any creation of a Palestinian state.207 One commentator has concluded that this settlement policy has become irreversible,208 though other commentators have disagreed on both political and practical grounds.209

Article 47 of the Fourth Geneva Convention prohibits an occupying power from annexing an occupied area,210 and Article 49 prohibits any "transfer of parts of its own civilian population into the territory it occupies."211 Yet, Israel has allowed tens of thousands of its people to take up permanent residence in the West Bank and Gaza Strip.212 It has also extended Israeli law to those Israelis who live in these territories.213 This policy not only violates Article 49 but amounts to a de facto annexation and thus also violates Article 47. The United Nations has condemned the settlements on this

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204 Talhami, supra note 20, at 483.
205 See id. at 484–85.
206 Id. at 485.
207 Comment, Israeli Settlements, supra note 4, at 582–83.
208 Id. at 584. Meron Benvenisti, Mayor of Jerusalem, has argued that the Israeli government now has control of over fifty percent of the land on the West Bank and a sizable portion of the land in the Gaza Strip as well. He also predicts that the number of Jewish settlers will reach 100,000 by 1990. These are facts which Benvenisti argues dictate that the occupied areas will remain under direct Israeli control for the foreseeable future. Id. at 584–85.
209 Id. at 585 n. 247. Abba Eban, former Foreign Minister of Israel, has stated that all attempts to overcome the Palestinian character of the occupied areas through Israeli settlement have not succeeded and that Palestinian rule of the occupied areas is inevitable. Id. Yadin Kaufmann, an Israeli Supreme Court law clerk, maintains that the support for settlement and annexation of the West Bank and Gaza Strip is not as strong as many believe. Id. at 585.
210 Fourth Geneva Convention, supra note 77, art. 47.
211 Id. at art. 49.
212 Comment, Israeli Settlements, supra note 4, at 584–85.
213 Talhami, supra note 20, at 486.
basis. Security Council Resolution 237 demanded Israeli assurances for the safety, welfare, and security of all the inhabitants of Palestine and respect for the rights of these inhabitants. Security Council Resolution 242 called for Israel to withdraw completely from the West Bank and Gaza Strip. Security Council Resolution 252 denounced all Israeli expropriations of Palestinian land in Jerusalem and the occupied areas. General Assembly Resolution 2851 specifically called for Israel to desist from its settlement policies. Finally, even the United States, Israel's greatest ally, has repeatedly denounced the settlement policy as illegal under international law.

Israel has ignored all of these protests and continues to expand its settlements. The settlements have created a dual legal system in the occupied areas which resembles the universally condemned apartheid system of South Africa. The Israeli settlers are subject to Israeli law while the Palestinians are subject to a different system of law, the Defense Regulations of 1945 and the proclamations of the Israeli military commander. Israel has also attempted to separate the Israeli settlers from the Palestinian population by constructing a system of roads in the West Bank and Gaza Strip which connect Israeli settlements with each other and with Israel so that settlers need not pass through Palestinian-inhabited areas. Israeli settlers thus receive all the benefits of living in Israel while the Palestinians are denied any right to sovereignty over their own land, just as white South Africans receive all the benefits of South African law while blacks receive no such benefits. The West Bank and Gaza Strip are "virtually annexed to Israel but without the Arabs living in those areas."

I. "Force, Might and Beatings"

The current Palestinian uprising has also resulted in the latest Israeli security practice of "force, might and beatings," the new plan...
of Israeli Defense Minister Yitzhak Rabin. This policy involves the use of actual force by the Israelis to instill fear into the Palestinians through the use of beatings, rubber and plastic bullets, and an intensification of the already mentioned standard Israeli security practices. Beatings are the primary device. Israeli soldiers intentionally break the arm and leg bones and lacerate the muscle tissue of Palestinian youths. This prevents the youths from throwing rocks at Israeli soldiers. “Force, might and beatings,” however, has provoked an angry denunciation from the international community and from many of Israel’s own citizens.

This policy clearly violates both the Hague Convention and the Fourth Geneva Convention. Article 46 of the Hague Convention provides that an occupying power must respect the lives, honor and rights of persons in the occupied areas. Though Article 27 of the Fourth Geneva Convention provides that the occupying power can take those measures to maintain control and security “as may be necessary as a result of [a] war” it reiterates the provisions of Article 46 of the Hague Convention and adds that all persons are to be “humanely treated, and shall be protected . . . against insults and public curiosity.” Article 32 of the Fourth Geneva Convention also specifically forbids “. . . any measures of such a character as to cause the physical suffering or extermination of protected persons in [the occupying power’s] hands.” This Article applies to any “. . . measures of brutality whether applied by civilian or military agents.” These provisions show that “force, might and beatings” is an unlawful measure for an occupying power to take against the inhabitants of an occupied area. A power must always
respect the inalienable rights of the area's inhabitants until it is able to end the occupation and release the occupied area to its proper sovereign.

IV. Conclusion

The current uprising against the twenty-year old Israeli military occupation of the West Bank and Gaza Strip is unlikely to end until Israel withdraws from these areas and allows for Palestinian self-determination. It is unreasonable, however, to expect this result to occur in the near future. Israel has been firm in its proclamations that it will not give up any of the occupied areas, and the Palestinians are not yet capable of presenting a very great threat to the Israeli military. The international community can and should nonetheless continue to apply pressure on Israel to abide by the provisions of the Hague Convention and the Fourth Geneva Convention so long as it occupies the West Bank and Gaza Strip. It is clear that many of Israel's current "security practices" in these areas violate both of these conventions and thus, a change in these practices is necessary.

Richard Ober