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Kathleen A. Cavanaugh*

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Abstract

While the focus in transitional justice literature is most often on functional or quasi-functional processes, this Article turns to the rather less explored path of dysfunctional transitions through the lens of the Israeli/Palestinian case. The stop and start nature of the "transition" from a conflict to the post-conflict process has reverted to a situation that the Israeli government has recently described as an 'armed conflict short of war." Against this backdrop, this Article provides insight into the role of law or its absence in transitioning conflict. As there are conflicting Israeli and Palestinian arguments regarding the legitimacy of Israeli occupation (i.e., as a belligerent-occupant or administrator), Part I provides a brief historical overview to clarify and contextualize the current debate. Part II provides an overview of the administrative and legal frameworks that govern the Occupied Territories. I then turn to look specifically at the applicability of international law, with specific reference to the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention"), and evaluate some of the Israeli Supreme Court rulings with regard to the Occupied Territories. Part III provides a content analysis of the Oslo Accords and the accompanying agreements. Part IV addresses the question of where we go from here.

SELECTIVE JUSTICE: THE CASE OF ISRAEL AND THE OCCUPIED TERRITORIES

*Kathleen A. Cavanaugh**

INTRODUCTION

The concept of "transitional justice," which envelopes new normative conceptions of justice, is the movement by societies from overt, violent conflict to conflict management, and the interim legal arrangements that emerge from and facilitate this process. The movement from a repressive regime to a more "democratic" State structure is often accompanied by demands of retroactive justice by transitional societies. One aspect of facilitating this process is the establishment of transitional justice mechanisms or tools (judicial and non-judicial) that are available to transitional States, such as the establishment of truth commissions or commissions of inquiry, the implementation of different forms of amnesty and lustration mechanisms, and the initiation of criminal proceedings. At the core, the initiatives are underpinned by the idea that in facilitating the establishment of a new legal order founded firmly in the rule of law, it is possible to create a new political landscape that facilitates transition from conflict to conflict management. Law, therefore, has a profound role to play in this process. It signals an acceptance of the notion that there can be no lasting peace without due regard for justice.[1]

Mechanisms which can successfully transition conflict, and the role that the law plays in that process, are somewhat shaped and tested when unpacking the dynamics of ethno-political conflict in territories as disparate as Northern Ireland, South Africa, Bosnia-Herzegovina, and Israel/Palestine. In these cases, issues

* Kathleen A. Cavanaugh is a lecturer in intenational law at the Irish Centre for Human Rights, National University of Ireland, Galway. The author would like to thank Katherine Hurley for her research assistance in the preparation of this Article, and her colleagues, Joshua Castellino and Ray Murphy, for their review and comments.

1. This connection between peace and justice is not entirely uncontested. Counter-arguments suggest that political settlement can often be hampered by attempts to secure rights agendas, which are often rigid, idealistic, and unrealistic. In this view, securing an absence of violence and opening political dialogue can lead to political settlement with issues of justice — accountability, criminal sanctions, and indeed, a whole range of victims' rights requirements — pushed aside for political expediency.

of justice and political legitimacy *are* interdependent. Central to the narratives that frame each conflict are competing nationalist and territorial claims (with concomitant self-determination claims), as well as accompanying rights-based issues. These questions frame political debates and impact political settlements.

While the focus in transitional justice literature is most often on functional or quasi-functional processes, this Article turns to the rather less explored path of dysfunctional transitions through the lens of the Israeli/Palestinian case. The now largely aborted "peace process" and the accompanying public statements by Israeli officials indicating the demise of the Oslo Accords, leave the Israeli/Palestinian case best viewed as a dysfunctional process. The stop and start nature of the "transition" from a conflict to the post-conflict process, has reverted to a situation that the Israeli government has recently described as an "armed conflict short of war."[2] Against this backdrop, this Article provides insight into the role of law or its absence in transitioning conflict.

As there are conflicting Israeli and Palestinian arguments regarding the legitimacy of Israeli occupation (i.e., as a belligerent-occupant or administrator), Part I provides a brief historical overview to clarify and contextualize the current debate. Part II provides an overview of the administrative and legal frameworks that govern the Occupied Territories. I then turn to look specifically at the applicability of international law, with specific reference to the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention"),[3] and evaluate some of the Israeli Supreme Court rulings with regard to the Occupied Territories. While there is little credible debate regarding the non-applicability of the Geneva Convention, nonetheless, the lack of recognition and the failure of the Israeli legal system to redress this, have a significant impact on the language that is to emerge in the Oslo peace process. Part III provides a content analysis of the Oslo Accords and the accompanying agreements. The legal ambiguities that were cre-

2. *See* Letter dated 4 November 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, U.N. Relief and Works Agency for Palestine Refugees in the Near East, 57th Sess., Agenda Item 76, at 5, U.N. Doc. A/C.4/57/4 (2002).

3. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, U.N.T.S. No. 973, vol. 75, 287 [hereinafter Geneva Convention].

ated in the drafting of these documents and the sidelining of several key issues, have provided a legal lacuna, and a rewriting of international law, falling short of satisfying the legal norms of Geneva IV. It is this crucial failing, I argue, that has underpinned the dysfunction of the transitional process. Part IV addresses the question of where we go from here.

I. *HISTORICAL NARRATIVES*

As in the case of Northern Ireland, the conflict in Israel/Palestine is a metaconflict — a protracted conflict between two peoples and a conflict about the nature of the conflict itself. Such is often the case in deeply divided societies, where people hold fundamentally opposing opinions on the nature and causes of conflict. Every historical event and every mark in history are accompanied by varying interpretations of causes, perceptions as to why events happened, and even precisely what has happened. History becomes a living instrument creating different narratives often used to justify actions by both State and non-State actors. In the Israeli/Palestinian conflict, arguments surrounding the confiscation of territory, and therefore, the applicability of international law, most prominently the Geneva Convention, apply a technical reading of the law and combine this with a rather limited reading of the historical context within which the territories were occupied. The following sub-sections endeavor to provide the historical context of the conflict. It is by no means a definitive account.

A. *Early History: 1917-1948*

A review of the historical record marks 1994 as the first date in modern history that Palestinians, under the direction of the Palestinian Authority ("PA"), assumed legal control over a territory. From the sixteenth century onward, Palestinians were subject to Ottoman rule. With the defeat of the Ottoman Empire, and the subsequent division of territories under the League of Nations, Great Britain assumed control of the territory we now know as Israel, the West Bank, Gaza and Jordan under a quasi-colonial Mandate.[4] Promises made to Arab leaders in the McMa-

4. *See* Mandate for Palestine, League of Nations Doc. C.529.M.314.1922.VI (1922); *see also* Sykes-Picot Agreement, May 16, 1916, Br.-Fr. Britain and France agreed to British initial control of Palestine under the Sykes-Picot Agreement. The League of Na-

hon correspondence to establish an independent Arab State, which would include Palestine in exchange for support in World War I,[5] were in conflict with the British promises to Zionists to establish a Jewish homeland in Palestine.[6] In 1922, Britain established the Emirate of Transjordan; although still part of the Mandate, it was administratively separate from Palestine.

The demographics of the territory during this time period are important to note. When Britain took control of Palestine in 1917, over 90% of the population were Arab Muslims. The Jewish population was quite small, comprised of indigenous peoples as well as a more politicized Jewish community (linked to the Zionist movement), who had begun to immigrate to Palestine in the 1880s.[7] Hitler's rise to power in 1933 triggered further Jewish immigration to Palestine and, with it, increased land purchases and settlements. The Arab revolt from 1936-1939 was a culmination of Palestinian resistance to the British rule, and reflected the unease connected with the increasing Zionist settlements. With the support of Zionist militias, Britain successfully repressed the uprising.

Increased tensions between the Arabs and the Jews following the end of World War II, precipitated Britain's departure from Palestine. A 1947 United Nations ("U.N.") General Assembly plan to divide the territory into two States was proffered, but never took effect. On May 15, 1948, Zionist leaders declared the State of Israel. Arab States intervened militarily in the first ever Arab-Israeli war.[8]

B. *Post World War II: 1948-1967*

In the wake of the 1948-1949 Arab-Israeli conflict, Palestine was divided into three parts. Israel assumed control over 77% of the territory; Jordan annexed East Jerusalem and the area that is now referred to as "the West Bank"; and Egypt took control over

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tions subsequently gave Britain Mandate (and, Britain would argue, legal authority) to control the territory of Palestine.

5. McMahon Letter, Oct. 24, 1925, *available at* http://domino.un.org/unispal.nsf.

6. Balfour Declaration, Nov. 2, 1917, *available at* http://domino.un.org/unispal.nsf. The Balfour Declaration also allowed for Jewish immigration to Palestine.

7. *See* Martha Wenger, *Jerusalem*, 182 MIDDLE EAST REP. 9 (1993).

8. THE WAR FOR PALESTINE: REWRITING THE HISTORY OF 1948 (Eugene L. Rogan & Avi Shlaim eds., 2001). This text provides a fresh look at the events surrounding the establishment of the Israeli State.

the Gaza Strip. While the U.N. plan had proposed that Jerusalem become an independent zone, free from both Arab and Jewish control, the 1949 Armistice divided the city into two halves — one controlled by Jordan and the other by Israel. The divided control did not quell, but only exacerbated tensions in the area. The 1948 war that led to the creation of the State of Israel also created a Diaspora of Palestinians, as over 1 million Palestinians fled or were expelled, most of them settling in Jordan.[9]

In 1964, the Palestinian Liberation Organization ("PLO") was founded as an umbrella organization for both, political and military Palestinian groups struggling to regain Palestinian control over pre-1948 Palestine.[10] A few years later, the decisive victory in 1967 of Israel over its neighbouring Arab States of Egypt, Syria, and Jordan, secured Israel's control over all of Palestinian territory, including the West Bank, Gaza, and East Jerusalem.[11] Israel also captured the Golan Heights from Syria and the Sinai Peninsula from Egypt. The defeat had two primary effects. First, the ignominious Arab defeat served to ebb the growth of pan-Arab nationalism (underpinned by the political ideologies of Nasirism and Ba'thism). Second, the PLO emerged as a key player in the region.

C. *The Peace Process: Since 1977*

A November 1977 visit to Jerusalem marked the beginning of the Camp David peace process. U.S. President, Jimmy Carter's, mediating efforts between Israeli Prime Minister, Menachem Begin, and Anwar Sadat, resulted in the Camp David Accords. The first provided a framework for peace between Egypt and Israel; the second was a broader framework intended to resolve the Palestinian question. Only the Egyptian-Israeli agreement took effect.

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9. The number of Palestinians living in Jordan is estimated at 1.3 million. Other Palestinians settled in Lebanon, Kuwait, and Syria. Only Jordan has granted Palestinians citizenship.

10. Yasir Arafat, leader of Fatah, the largest of the groups within the Palestinian Liberation Organization ("PLO"), emerged as its Chairperson in 1968.

11. On June 28, 1967, the Israeli Interior Minister extended Israeli law to East Jerusalem and extended Jerusalem's municipal boundaries by twenty-eight miles. While Israel maintains that this did not constitute an annexation, the international community has regarded the administrative and legal extension of Israeli rule to East Jerusalem as constituting a *de facto* annexation. *See* Wenger, *supra* n.7, at 11. It later reaffirmed this annexation in 1981.

The Palestinian movement found renewed impetus with the popular uprising against the occupation, or *Intifada*, which began in the West Bank and Gaza in December 1987. During a speech to the U.N. in Geneva in 1988, Yasir Arafat endorsed the "two State" solution proffered by the U.N. Security Council Resolution 242, and proclaimed the State of Palestine, while accepting Israel's own right to exist.[12] Meanwhile, the *Intifada* was met by repressive Israeli measures, resulting in renewed support for Palestinian paramilitary groups. By 1990, Israel had confiscated over 52% of the West Bank and 30% of the Gaza Strip for military use or for Jewish settlements.

The Palestinian question was the focus of negotiations undertaken in Oslo, Norway, culminating in the 1993 Declaration of Principles on Interim Self-Government Arrangements for Palestinians ("DOP").[13] The Agreement negotiated by the PLO with Israel was signed on September 13, 1993 in Washington, D.C. Under the terms of the DOP, a settlement based on U.N. Security Council Resolutions 242 and 338 would be established.[14] The DOP established a Palestinian Interim Self-Governing Authority ("PNA") for a period of five years.[15] The seventeen articles of the DOP delineated the means by which authority would be transferred to the PNA; the substance and scope of PNA authority;[16] the nature of relations between the PNA and Israel, and Jordan and Egypt;[17] and the withdrawal of Israeli forces from some areas, with their redeployment to other areas.[18] The DOP was not binding upon final negotiations and did

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12. U.N. GAOR, 43rd Sess., 78th mtg. at 37, U.N. Doc. A/43/PV.78 (1989).

13. Declaration of Principles on Interim Self-Goverment Arrangements for Palestinians, Sept. 13, 1993, Isr.-PLO [hereinafter DOP].

14. *See id.* art. I; *see also* S.C. Res. 242, U.N. SCOR, 22nd Sess., 1382nd mtg., U.N. Doc. S/RES/242 (1967); S.C. Res. 338, U.N. SCOR, 28th Sess., 1747th mtg., U.N. Doc. S/RES/338 (1973).

15. DOP, art. VI. Under Article VI, "Preparatory Transfer of Powers and Responsibilities":

> Upon the entry into force of the Declaration of Principles and the withdrawal from Gaza Strip and the Jericho Area, a transfer of authority from the Israeli military government and its Civil Administration to the authorized Palestinians for this task, as detailed herein, will commence. This transfer of authority will be of preparatory nature until the inauguration of the Council.

Id.

16. *Id.*

17. *Id.* art. XII.

18. *Id.* arts. XIII, XIV.

not address several thorny, but critical issues, including existing Israeli settlements, the status of territory gained during the 1967 war, Jerusalem, and refugees.

Two further agreements between the PLO and Israel were reached to facilitate the implementation of the DOP.[19] On May 4, 1994, there was a limited withdrawal of Israeli security forces from the Gaza Strip and Jericho in the West Bank, with a concomitant, albeit limited, transfer of powers to the PNA. On August 29, 1994, the PLO and Israel agreed to a further transfer of civil administrative powers to the PNA in the West Bank.[20]

The Interim Agreement ("Oslo II Accords") was signed by the PLO and Israel on September 28, 1995.[21] In the West Bank, only Zone A, comprising approximately 3% of the total surface area, was placed under PNA control. However, as the Zones making up the total area are not contiguous, Palestinians entering or leaving the zones must pass through Israeli-controlled road networks, which are often closed at Israeli discretion. Zone B, approximately 27% of the West Bank, was to be jointly supervised by the PNA, which held civil and policing powers, and Israel, which retained the right to "internal security," the definition of which is vague. The largest chunk of the West Bank, 70%, was classified as "Zone C," and placed under complete Israeli control. This area consists of Jewish settlements in the West Bank; some Palestinian villages, as well as lands outside of Palestinian municipal and village boundaries; and main arteries and bypass roads. Zone C also holds some of the region's primary aquifers, over which Israel seeks to maintain control. In Gaza, approximately 60% of the land was listed as Zone A, with the remaining territory classified as "Zone C."[22] As noted, these were interim arrangements and, as such, not determinative in the final negotiations. Like the DOP, the Oslo II Accords left critical issues, such as the status of Jerusalem, existing Jewish set-

19. Protocol on Economic Relations Between Israel and the PLO, Representing the Palestinian People, Apr. 29, 1994, Isr.-PLO. This was the third agreement reached between Israel and the PLO.

20. Agreement on Preparatory Transfer of Powers and Responsibilities, Aug. 29, 1994, Isr.-PLO.

21. Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO.

22. *See* Mouin Rabbani, *Palestinian Authority, Israeli Rule: From Transitional to Permanent Arrangement*, 201 MIDDLE EAST REP., 26 (1996).

tlements, land and water rights, and refugees, to be dealt with during the final negotiations.

In the wake of the signing of the Oslo II Accords, Israeli Prime Minister, Yitzhak Rabin, was assassinated. In 1996, Palestinian elections to the Palestinian National Council took place, and redeployment from a number of West Bank towns began. In May 1996, the first in a planned series of final status talks took place in Taba. However, just three weeks later, Israeli elections placed the Conservative, Benjamin Netanyahu of the Likud party, in power. Netanyahu was a vocal opponent of the Oslo Accords, and his election effectively aborted the peace process. New elections in 1999 returned Labour to power with the election of Ehud Barak, and revived the peace process. Negotiations were resumed with the Palestinians and in early September 1999, the Sharm el-Sheikh Memorandum was signed, agreeing upon a timetable for the final status negotiations.[23] Multilateral negotiations were also jump-started and working committee timetables were set. While Israeli/Palestinian talks took place beginning in March 2000 in the United States, with subsequent meetings convening at various locations, the next major summit, labeled "Camp David II," took place in July 2000. At the invitation of the then President, Bill Clinton, Arafat and Barak engaged in final status negotiations. The meetings ended without agreement on July 25, 2000.[24]

September 29, 2000 marked the beginning of the current Al-Aqsa *Intifada*, triggered by the killing of four Palestinians by an Israeli policeman on the Temple Mount. Following this incident, Palestinians began violent demonstrations against the Israeli Defence Forces ("IDF") throughout the Occupied Territories.

II. *THE ADMINISTRATIVE AND LEGAL FRAMEWORK*

A. *Administration of Occupied Territories*

Since 1967, the West Bank and Gaza have been subject to military government, with military commanders in each area em-

23. Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999 [hereinafter Sharm el-Sheikh Memorandum].

24. For a comprehensive review of the various peace accords, *see* CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000).

powered with "governmental, legislative, appointative, and administrative power."[25] Following the Camp David accords, all legal and administrative powers were transferred to the newly-established Civil Administration.[26] These administrators were given wide powers in relation to all civilian matters, with military commanders retaining responsibility for security and military issues. The DOP and the accompanying agreements provided for a transfer of civil powers and responsibilities from the Israeli Civilian Authority to the Palestinian Legislative Council in Zones A and B, and in Zone C for those powers and responsibilities not relating to territory.

The rather intricate nature of the administration of the Occupied Territories is reflected in the complexity of the applicable laws. Before 1967, the law in the West Bank combined remnants of laws from the Ottoman, British Mandate, and Jordanian periods, as well as the Islamic *Shari'a*. With the promulgation of Military Order Number 2 of 1967, any pre-existing laws that did not coincide with the orders issued by the Civil Administration were repealed. There have been over 2,500 published military orders issued in the West Bank and the Gaza Strip since 1967.[27] With the signing of the Oslo II Accords, the PNA was conferred with jurisdiction over the legal affairs of the West Bank and the Gaza Strip, with some notable exceptions. Annex IV, the Protocol Concerning Legal Affairs, provides the PNA with jurisdiction over all offences committed inside Gaza, except those offences committed inside Jewish settlements, Israeli military installations, and offences committed by or against Israelis. In the West Bank, the PNA has jurisdiction over all offences committed by Palestinians and/or non-Israelis in the areas of the West Bank under Palestinian control. Israel retains jurisdiction over offences committed inside the West Bank by Israelis, regardless of location, as well as over offences against Israelis, and offences affecting security and terrorism in Zone B of limited Palestinian control.[28]

For civil matters, authority inside Gaza and the West Bank

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25. Israeli Defense Force Military Proclamation 2(3) (on file with author).

26. Israeli Defense Force Military Order Number 947 (on file with author).

27. A number of these orders, especially those related to settlements, remain unpublished.

28. There is a separate protocol for the cooperation between Israeli and Palestinian authorities regarding criminal matters, including investigations, restraining orders,

has been fully transferred to the Palestinian courts and judicial authorities, except for cases against Israelis (or for ongoing Israeli business inside Gaza, real property inside Gaza, or where there is consent to Palestinian jurisdiction), and against the State of Israel or its agents. Cooperation between Israeli and Palestinian authorities regarding the service of documents, taking of evidence, and enforcement of orders and judgments, was provided for in an additional protocol.

Pending a satisfactory conclusion in the final status negotiations, provisional internal administrative and legal frameworks that operate in the Occupied Territories cannot be divorced from the principles of international law. Examining the administrative and legal obligations of an occupant is beyond the scope of this Article, and has been undertaken elsewhere.[29] Of particular interest for this examination, are the positions of the Israeli government and the PA with respect to international law, and the impact these positions have had on the transitional process.

B. *The Applicability of International Law in the Occupied Territories*

Notwithstanding Israeli arguments that Israel is an "administrator," not "occupier," in the Occupied Territories, a point to which I will return shortly, the principal international law instruments pertinent to this examination are the 1907 Hague Convention Respecting the Laws and Customs of War on Land ("Hague Regulations")[30] and the Geneva Convention. Also relevant to this discussion is the U.N. Charter, international human rights treaties to which Israel is signatory, and the Oslo II Accords and the related agreements.

Since 1967, Israel has occupied the West Bank (including East Jerusalem) and the Gaza Strip. Rules governing the conduct of an occupying power are laid down in the Geneva Convention to which Israel is signatory, as well as in the Hague Regulations.

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summons and questioning of witnesses, transfer of suspects, and execution of court orders, including search warrants.

29. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF THE OCCUPIED TERRITORIES 241 (Emma Playfair ed., 1992).

30. Hague Convention Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

Under the laws of war, as expressed in the Hague Regulations and the Geneva Convention, there are four legal principles customarily held to govern belligerent occupation.[31] First, the occupier exercises *de facto*, not *de jure* authority over the territory. Second, in exercising its authority, the occupier does have the power to take measures to maintain security; however, it must act in a manner that proportionately weighs its military objectives and requirements with the needs of the local peoples. Third, as the occupation of the territory is temporary, whatever rights exercised by the occupier in relation to the territory during this period, are ephemeral. Therefore, the occupier must preserve and respect existing laws and administration. Finally, the occupier must not exercise its rights to further its own needs or interests or those of its own peoples.

Israel is not a signatory to the Hague Regulations. However, Israel has considered the Hague Regulations to be customary international law and, therefore, has accepted their application. Israel's position with regard to the Geneva Convention is that although Israel is party to the Convention, it is not binding on Israeli actions within the Occupied Territories.

Israel has adopted the argument of the "missing reversioner," first advanced in 1968 by a lecturer of law at the Hebrew University.[32] This theory proffers that underpinning the law of belligerent occupation, as expressed in the Geneva Convention, lies the presumption of displacement of a "High Contracting Party" within the meaning of Common Article 2 of the Geneva Convention. Lawful control of a contested territory, then, would "revert" to this party upon cessation of hostilities.[33] Israel's argument is that neither Jordan nor Egypt[34] has lawful territorial entitlement in either the West Bank or the Gaza Strip, as this territory was seized in an act of aggression against Israel in the 1948-

31. *See generally id.* Annex, Sec. III, "Military Authority over the Territory of the Hostile State".

32. *See* Y. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

33. An excellent discussion on these points can be found in Richard Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza: In Legal Defence of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

34. Egypt administered the Gaza Strip from 1948-1967, but never claimed sovereignty over this area. Jordan did establish territorial rule over the West Bank during its tenure.

1949 War of Independence.[35] Under these circumstances, Israel claims that it is not bound by the rules governing belligerent occupation, as expressed in the Geneva Convention.[36]

This formulistic reading of the text has left Israel's position regarding applicability of the Geneva Convention exposed. Common Article 2 reads:

> 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 drafters of the Geneva Convention included the second paragraph to extend the applicability of the Article's provisions to those territories in which occupation was *not* the result of armed conflict. However, a case in which occupation was the result of armed conflict is governed by the first paragraph of the Article. It follows, then, that the Article would apply to the territory that was acquired in the 1967 war between Israel, Jordan, and Egypt, all parties to the Geneva Convention. It is also worth noting that the International Committee of the Red Cross has argued that the Geneva Convention applies to a territory that was acquired during armed conflict, and that its application is not limited by the status of the territory.[37]

The decision by the Israeli High Court to review acts in the Occupied Territories is unique. Its willingness to do so left open the possibility that it would fill a legal gap created by the Israeli position regarding the applicability of the laws of war in the Oc-

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35. H.C. 61/80, Ha'etzni v. State of Israel, (3) P.D. 595 (on file with author). Indeed, until this case in 1980, the Israeli High Court had been content to ignore this question.

36. The Israeli position on the applicability of international law in the Occupied Territories is articulated in a paper presented by former Attorney General. *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B.H.R. 262 (1971). Israel has agreed to apply what it has termed "humanitarian provisions" of the Geneva Convention to the Occupied Territories, although the definition of what constitutes "humanitarian provisions" is unclear.

37. DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 34 (2002).

cupied Territories. As the following Part details, however, it is a task that the Court only partially fulfilled.

III. *DOMESTIC ENFORCEMENT*

Until the landmark case of *Hilu v. Government of Israel*,[38] the Israeli High Court's position on the relevance of the Hague Regulations in the Occupied Territories was unclear.[39] Following the *Hilu* decision, the Israeli position has been to regard the Geneva Convention as customary international law,[40] and to "bind the military administration in Judea and Samaria."[41] This view was delineated in the landmark *Teachers' Housing Cooperative Society v. Military Commander of Judea and Samaria* decision, where the Court held:

> The rights of a resident of the area under military government vis-à-vis the military commander — rights subject to judicial review in a Court of law of the occupying [S]tate — stem from the rules governing belligerent occupation in customary international law and contractual international law, insofar as they have been assimilated into the internal law of the occupying [S]tate by a valid internal act of legislation. In respect to Israel's belligerent occupation, and in the absence of legislation which internalises the principle norms of the laws of war relating to belligerent occupation, [the rules in force] are those included in the Regulations . . . Even though the Hague Regulations serve as an authority in this respect, the accepted attitude — which has also been accepted by this Court — is that the Hague Regulations are declarative in nature and reflect customary international law, applicable in Israel without an act of Israeli legislation.[42]

This distinction between what the Court viewed as "customary" and what it viewed as "contractual" international law was

38. H.C. 302/72, Sheik Suleiman Hussein Odeh Abu Hilu et al. v. Government of Israel et. al., 27(2) P.D. 169 (on file with author).

39. For a detailed look at Supreme Court rulings and the Occupied Territories, *see* Falk & Burns, *supra* n.33.

40. Israel notes correctly that the Geneva Convention has been generally accepted among most States as declaratory of customary international law and is, therefore, binding as such.

41. *See* H.C. 390/79, Dweikat v. State of Israel, 34(1) P.D. 1 (on file with author); *see also* H.C. 393/82, Teachers' Housing Cooperative Society v. Military Commander of Judea and Samaria Region, 37(4) P.D. 785/802 (on file with author) [hereinafter *Teachers' Housing Cooperative Society*].

42. *Teachers' Housing Cooperative Society*, *supra* n.41.

crystallized in the 1978 case of the Beit El settlement.[43] While the Court implicitly recognized the applicability of the Geneva Convention to the Occupied Territories, stating "enforcement [of the Geneva Convention] is a matter for the States parties to the Convention," it held that the Geneva Convention was contractual, not customary law.[44] As such, the Convention could not be considered part of internal Israel law and was, therefore, outside of the Court's authority. In the *Jaber* case, where the internal law in question was the Defence (Emergency) Regulations 1945, the Court went on to argue that when it can be established that an internal law exists, that internal law supersedes both the provisions of the Geneva Convention and the Hague Regulations.[45] In *Teachers' Housing Cooperative Society*, the Court confirmed the relevance of the Hague Regulations noting that "an Occupying State in an occupied territory must observe and apply the rules of customary international law [e.g. Hague Regulations] and the rules embodied in international conventions to which it is a party."[46] However, the Court further argued that:

> The same does not apply to the Geneva Convention . . . which, even if applicable to Israel's belligerent occupation of Judea and Samaria — a question which is extremely controversial and which we will not address — constitutes above all else a constitutive Convention which does not adopt existing international customs, but generates new norms whose application in Israel demands an act of legislation.[47]

The non-recognition of the Geneva Convention places a restriction on individuals' rights to petition under it, thereby limiting its application. Such restrictions have had particular relevance when turning to the questions of land acquisition under Article 49(6), deportations, and the holding of detainees outside of the territories.[48] In addition, the Israeli High Court has re-

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43. H.C. 606/78, 610/78, Ayyoub v. Minister of Defence et al., 33(2) P.D. 113 (on file with author).

44. *Id.* at 389. In this same case, the Court held that under the provisions accorded by the Hague Regulations as being part of international customary law and therefore internal Israel law, it had the authority to examine the actions of military commanders with respect to the Occupied Territories.

45. HC 897/86, Jaber (Ramzi Hana) v. OC Central Command, 41(2) P.D. 522.

46. *Teachers' Housing Cooperative Society*, *supra* n.41.

47. *Id.* at 793.

48. Geneva Convention, *supra* n.3, art. 49. Article 49 states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory

fused to engage in the legality of settlements under Article 49 of the Geneva Convention, "leaving the Court's jurisprudence on settlements and related issues [resting] on a dubious assumption of legality."[49]

The acknowledgement by the Israeli High Court of a theoretical obligation to respect the laws of belligerent occupation is coupled with a view that it cannot enforce the Geneva Convention domestically without an act of legislation. This argument suggests that by enforcing the State's international treaty obligations, the Court would in some way, undermine the legislative supremacy of the Israeli Parliament. However, this argument lacks merit. First, the authority to enter and the responsibility to undertake international legal obligations are vested in the Executive. To ensure that the State meets these obligations would in no way undermine the legislative authority of the Knesset. Second, the administration of law in the Occupied Territories is undertaken by the military, which is a part of the Executive. The law-making power, therefore, is also in the hands of the Executive. These realities suggest that by not addressing the question of the application of the Geneva Convention, the Court circumvented its responsibility, thus leaving a huge legal loophole through which countless Israeli policies in contravention of international legal norms have slipped.

The requirement that an occupying power must respect the laws in force in an occupied territory, is a principle of international law articulated in Article 43 of the Hague Regulations.[50] However, a second position, which has found support among some academics and has been advocated by the Israel High Court, is that the laws of belligerent occupation apply to occupations of short duration. The Hague Regulations were not conceived for, and therefore do not accurately reflect, situations of prolonged "occupation," such as is the case with the Occupied Territories. In such circumstances, the rules governing conduct and administration must adopt what has been termed an "evolutive" approach. That is, the rules envisioned by the Hague Regulations must be developed to accurately reflect the prolonged

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to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." *Id.*

49. *See* KRETZMER, *supra* n.37, at 99.

50. *See* Geneva Convention, *supra* n.3, art. 43.

nature of Israeli occupation and administration in the West Bank and the Gaza Strip. This interpretation can be found in a number of Israeli High Court decisions.

In the 1971 case of *Christian Society for the Holy Places,* petitioners objected to the establishment of a new arbitration body by the Israeli government to settle labor disputes.[51] They argued that despite the fact that Jordanian labor laws governing the settlement of labor disputes had never been implemented and no arbitration body had been established, there was nothing which "absolutely prevented," as noted under Article 43 of the Hague Regulations, Israel, as the occupying force, from respecting this law. In this case, the Court ruled against the petitioners and held that the prolonged nature of the occupation warranted that the laws must adapt to meet the "changing needs" of the situation.[52] In the 1981 *Tabib* case, the Court continued to push the envelope on the interpretation of Article 43.[53] This case involved the expropriation of private Palestinian land by Israel for the purpose of building a bypass road. The petitioners argued that such State action contravened international laws applicable to the Occupied Territories. In finding against the petitioners, the Court held that altering the laws for the purposes of insuring the "public good or the military interests" was entirely within the duties imposed by Article 43. Moreover, the Court introduced a rather questionable interpretation of the meaning contained within Article 43:

> The question [of whether it is absolutely necessary] is one of the preferable and convenient means for achieving the purpose as stated in the beginning of Article 43, that is "ensuring public order" — a term which I propose to interpret as meaning the existence of an administration safeguarding civil rights and concerned about the maximum welfare of the population. If the achievement of this purpose requires a deviation from the existing laws, there is not only a right, but indeed a duty to deviate from them.[54]

In the *Abu Aita* case involving taxation in the Occupied Ter-

51. H.C. 337/71, Christian Society for the Holy Places v. Minister of Defence, 26(1) P.D. 574 (on file with author).

52. *Id.*

53. H.C. 202/81, Tabib et al. v. The Minister of Defence, 36(2) P.D. 622 (on file with author).

54. *Id.*

ritories, the Court held that the rules conceived to govern a short-term duration of occupation could not be applied in full to a prolonged occupation. The amount of authority given to an occupant is relative to the time of occupation, and is determined by striking a balance between the needs of the local population and the military needs and interests. The case reveals the Court's view on legislative changes and what, if any, are the limitations imposed by international law:

> The need of which we are speaking may be a military need, on the one hand, and humanitarian considerations on the other hand, and the absolute prevention may derive from legitimate interests of the military government in maintaining public order or from concern for the local population and ensuring its civil life. Of course, in all cases there must be a fair balance between the considerations so that a military interest or military need of themselves do not permit severe violation of humanitarian rights.[55]

The result, as Kretzmer has accurately noted, is that "in certain circumstances the authorities are not only permitted to introduce legislative changes, but that they may have a positive obligation to do so."[56]

In *Teachers' Housing Cooperative Society*, the Court revisited this question:

> [N]othing prevents the development — within their framework — of rules defining the scope of a military government's authority in cases of prolonged occupation . . . Long-term fundamental investments in an occupied area bring about permanent changes that may last beyond the period of military administration. [They] are permitted if required for the benefit of the local population — provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.[57]

In addition, the Court stated that in evaluating the "occupant's duty," as delineated under Hague Regulations, consideration must be given to the fact that civil society had developed since the inception of the Regulations:

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55. *See* Abu Aita et al. v. the Military Commander of Judea and Samaria Region (on file with author); H.C. 69/81, 493/81, Kandil et al. v. Military Commander of the Gaza Strip Region, 37(2) P.D. 197 (on file with author).

56. *See* KRETZMER, *supra* n.37, at 63.

57. *Teachers' Housing Cooperative Society*, *supra* n.41, at 310.

> The concrete content that we shall give to Article 43 of the Hague Regulations in regard to the occupant's duty to ensure public life and order will not be that of public life and order in the nineteenth century, but that of a modern and civilized State at the end of the twentieth century.[58]

The prolonged nature of occupation raises interesting questions regarding the international legal requirements or restrictions on the State. It is true that the Hague Regulations and the Geneva Convention do not address conditions likely to evolve in prolonged occupations. It follows, then, that Israel is correct to proffer a less restrictive reading and interpretation of the regulations. However, as Kretzmer has argued, the prolonged duration of the occupation necessitates that

> Some flexibility must be allowed in the exercise of governmental functions in the occupied territory . . . Nevertheless, the Court's interpretation has stripped the restriction on legislative changes of any significant meaning. Article 43 might just as well have stated that the military commander must act in the best interests of the local population except where prevented from doing so by military necessity.[59]

With regard to international human rights law, Israel is required to respect and protect human rights under its obligations enumerated in a number of U.N. treaties, which it has ratified. These treaties include the following: the International Covenant on Civil and Political Rights ("ICCPR");[60] the International Covenant on Social, Economic and Cultural Rights ("ICESCR");[61]

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58. *Id.* at 307.

59. *See* KRETZMER, *supra* n.37, at 63. It is worth noting that in the case of the South African occupation of Namibia, a 1971 advisory opinion of the International Court of Justice determined that certain conventions, "such as those of a humanitarian character," were binding. While there are clear distinctions to be drawn between the Namibian and the Palestinian cases, what is relevant to this argument is that the Court confirmed the applicability of international legal norms, while recognizing that the occupation had "exceptional" features. *See* INTERNATIONAL COURT OF JUSTICE REPORT, LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA (SOUTH WEST AFRICA) NOTWITHSTANDING SECURITY COUNCIL RESOLUTION 276 (1970) 16 (June 21, 1971).

60. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

61. International Covenant on Social, Economic and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[62] the Convention on the Rights of a Child;[63] and the Convention on the Elimination of all Forms of Racial Discrimination.[64] These treaties are accompanied by other international human rights standards, which are binding on members of the U.N., and include guidelines and guiding principles that regulate the code of conduct of law enforcement officials; the preventative and investigative requirements in disputed killings; the use of force and firearms, detention and imprisonment; and victims' rights.

However, Israel has argued that unlike international humanitarian law, human rights law does not apply in the Occupied Territories. It has argued that these conventions bind the High Contracting Parties to respect the rights of individuals in their territories *and* subject to their jurisdictions. Israel has raised the question, in the post-Oslo period, of its "effective" control, and therefore, responsibility, over Palestinians living within Zone A transferred to the PA. Yet, it is clear from a review of the rulings of the European Court of Human Rights ("ECtHR") and the Human Rights Committee ("HRC") that a State remains responsible for the acts of its agents performed outside of its borders. Further guidance regarding Israel's obligations in the Occupied Territories can be found in the 1975 ECtHR decision, *Cyprus v. Turkey*, in which the Court held that Turkey was bound to "secure the said rights and freedoms to all persons under [its] actual authority and responsibility, not only when that authority is exercised within [its] own territory but also when it is exercised abroad."[65] In light of the situation to date, it is impossible to argue that Israel is not currently exercising effective control over Zone A.

The questions related to the application of international legal norms, as well as the Court's interpretation of these obligations, are critical. The refusal by Israel to acknowledge the appli-

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62. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

63. Convention on the Rights of a Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.

64. Convention on the Elimination of all Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

65. Cyprus v. Turkey, App. No. 6780/74, 4 EUR. H.R. REP. 482 (1976) (Commission report).

cability of the Geneva Convention and its position vis-à-vis human rights law in the post-Oslo period, has left a legal lacuna. The Court's decision to exercise judicial review in the Occupied Territories may well have had a "restraining influence on the authorities," but it did not fill the gaps left by Israeli non-compliance.[66] Instead, "in the actual decisions themselves, especially those dealing with the substantive questions of principle or policy, the legitimising function of the Court has been dominant."[67] Against this backdrop, it is unsurprising that the interim agreements left significant questions unanswered. The deft crafting and ambiguities of certain provisions necessary for securing agreement, have allowed for claim and counterclaim as to whether ongoing Israeli practices constitute violations of the Oslo Accords, and obscured the pinpricking question of compliance with other international legal obligations.

IV. *THE PEACE PROCESS: THE INTERIM AGREEMENTS AND INTERNATIONAL LAW*

There has been significant debate raised regarding the relationship between international law and the DOP and the accompanying agreements in the post-Oslo II Accords period. Did the DOP end the Israeli occupation? Or, phrased differently, did the Geneva Convention cease to apply with the implementation of the DOP? In a series of articles which address the question of Israel's status in the Occupied Territories during the post-Oslo II Accords period, Benvenisti raises several points worth revisiting. He argues that that "the important factor in determining responsibility is effective control, rather than sovereignty."[68] As Israel's status as "occupier" is derived from its "effective control" of the Territories, the transfer of this control to the PNA ends its status as "occupant," and "Israel is not internationally responsible for ensuring human rights and humanitarian norms in the areas under the jurisdiction of the PNA."[69] Benvenisti concludes that having relinquished this territory, Israel would have no right to reoccupy.

66. *See* KRETZMER, *supra* n.37, at 196.

67. *Id.*

68. Eyal Benenisti, *Responsibility for the Protection of Human Rights under the Interim Israeli-Palestinian Agreements*, 28 ISR. LAW REV. 308 (1994).

69. *Id.* at 312.

This argument and its conclusions have been questioned by a number of scholars. Peter Malanczuk points out, rather ominously, that should the peace process falter and Israel reoccupy the Territories, the laws of armed conflict would once again apply, regardless of the legality of the occupation.[70] Malanczuk also raises a second point: the transfer of powers from Israel to the PA under the DOP and indeed, in subsequent agreements, still allows Israel, vis-à-vis the settlements, security, and external affairs, to retain "residual power."[71]

These theoretical debates have largely been unpacked by events on the ground. The second *Intifada* signaled the demise of the Oslo peace process. In the wake of Operation Defensive Shield,[72] the Israeli government reoccupied seven of the eight major West Bank towns. The reoccupation, combined with the significant damage to the infrastructure of the PA, rendered the arguments regarding the question of who exercises authority and "effective control" essentially moot. There is little question that since March 2002, the PNA has been reduced to a mere spectator. In the name of State security, the Israeli government has made it quite clear through its actions that the process is indeed reversible.

In unpacking the failure in the conflict to the post-conflict process, two key and interrelated issues emerge. The first, as discussed above, is the Israeli government's policy of rejecting the relevance of the Geneva Convention and, as expressed in High Court decisions, of increasingly evaluating the lawfulness of its

70. Peter Malanczuk, *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485 (1996).

71. *Id.* at 487.

72. Operation Defensive Shield was a new offensive launch by the Israeli Defence Forces ("IDF") on March 29, 2002, in Palestinian residential areas. The purpose of the offensive was outlined by Ariel Sharon, Israel's Prime Minister, in a speech before the Knesset, on April 8, 2002:

> IDF soldiers and officers have been given clear orders: to enter cities and villages which have become havens for terrorists; to catch and arrest terrorists and, primarily, their dispatchers and those who finance and support them; to confiscate weapons intended to be used against Israeli citizens; to expose and destroy terrorist facilities and explosives, laboratories, weapons production factories and secret installations. The orders are clear: target and paralyse anyone who takes up weapons and tries to oppose our troops, resists them or endangers them — and to avoid harming the civilian population.

Prime Minister Sharon's Address to Knesset (Communicated by the Prime Minister's Office), Apr. 8, 2002, *available at* http://www.israelmb.org/articles/2002/2002040801UD.html.

policies in the Occupied Territories, based on compliance with Israeli internal law, at the expense of customary international law. This position has left the two parties to negotiate from different starting points. Without an acknowledgement of the applicability of the Geneva Convention, Israel could dismiss the claims to the right of self-determination and concomitant territorial claims, as well as sideline the question of settlements and land confiscation.[73] The question of accountability for the past abuses, an essential component of any transitional process, was conspicuously absent from the Oslo II Accords.[74] In fact, the very focus of the Oslo Accords and the related agreements on the transfer of powers, left institutional human rights provisions conspicuously absent, preserving the "status quo wherein Israeli human rights abuses take place."[75] The questions of the right to return, settlements, natural resources, the status of Jerusalem, and the legal principles that guided these issues framed the Palestinian discourse. This discussion was in contradistinction with the Israeli terms of reference, their differing historical narratives and accompanying legal positions. The contradiction, in turn, raises a second issue: the inability of the Palestinians to use political leverage to fill this critical gap reveals the asymmetrical power relationship that characterized the negotiations.

From this rather tenuous starting point, it is unsurprising that the texts of the DOP and the Oslo II Accords are riddled with limitations imposed by the impossible task of reconciling Palestinian and Israeli national interests. The language is left deliberately vague or conflicting. For example, Article 1 of the

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73. It can be argued that the acknowledgement of the Palestinians as a distinct "peoples" was implicit in the DOP. It is worth noting that whereas before 1967, Israel denied the "right" of self-determination by claiming that no distinct Palestinian national identity existed (that is, by denying that Palestinians constituted a "peoples"), after 1967, arguments rejecting self-determination claims were rooted in the missing reversioner thesis. If there was no legitimate sovereign, then Israel could not be considered an occupying power. As Bell has noted: "This connects to a denial that Palestinian constitute a 'peoples' within the terms of international law, on the grounds that Palestinians cannot be separated ethnically from the larger category of 'Arab' and that territorially their ties are with the land of Jordan rather than the Occupied Territories." BELL, *supra* n.24, at 75-76.

74. The 1994 Gaza-Jericho Agreement did provide for the release of prisoners. Some 4,500 prisoners were released by July of that year. This issue was again raised in the Interim Agreement under "Confidence-Building Measures," and again, in the Sharm el-Sheikh Memorandum.

75. *See* BELL, *supra* n.24, at 203.

DOP indicates that "negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338."[76] This would, ostensibly, comply with customary international law, which prohibits the acquisition of territory by force and withdrawal of forces from occupied territories. However, subsection 3 of Article 1 defers consideration of most of the main pricking points of negotiations — the status of Jerusalem settlements, refugees, borders, and security — to the final negotiations.[77] Article 4 of the DOP allows for jurisdiction of the PNA over the West Bank and Gaza territory, "except for issues that will be negotiated in the permanent status negotiations."[78] These "issues" are later defined in Article 5(3) to include settlements.[79] Those matters that are not transferred to the PNA remain under the control of Israel. Therefore, while the DOP calls for the implementation of Resolutions 242 and 338, advocating withdrawal from the Occupied Territories on the one hand, it concomitantly allows Israel to maintain control over settlements in the West Bank, Gaza City, and East Jerusalem.[80] The limited legislative powers conferred to the PNA do not allow it to review matters outside of those accorded to it in the interim arrangements, leaving the PNA unable to review such critical issues as land acquisition and settlement practices. In short, both the DOP and the Oslo II Accords make permanent what, under international law, was meant to be temporary.

The deliberately ambiguous nature of the language and the deferral of main pinpricking issues to the final negotiations, allow Israel to breach some aspects of the interim agreements, while maintaining compliance, citing other provisions. The ambiguity of the language makes it difficult to accurately assess when a breach has occurred. Under Article 31(7) of the Oslo II Accords, "neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending

76. DOP, *supra* n.13, art. 1.

77. *Id.* art. 1(3).

78. *Id.* art. 4.

79. *Id.* art. 5.

80. The exact wording of the Resolution 242, "Withdrawal of Israeli armed forces from territories occupied in the recent conflict," has led to some debate as to the omission in the English text of a definitive article before "territories," which was present in the French text. The omission gives rise to debate as to whether the U.N. was calling for withdrawal from *all* the territories, or merely *some* of the Occupied Territories.

the outcome of the permanent status negotiations."[81] This suggests that construction of settlements and the confiscation of land for bypass roads in the Occupied Territories are not permissible. However, this provision is set in contradistinction to another, which posits settlement construction and administration of settlements as outside of the remit of the Accords. Israelis are, therefore, able to claim:

> In fact, neither of the agreements in force between Israel and the PLO — the [DOP] and the [Oslo II Accords] — contains any provision prohibiting or restricting the establishment or expansion of Israeli settlements. Similarly, none of the other agreements between the two sides, now superseded by the [Oslo II Accords], contained such a provision. At various stages during the negotiations over these agreements, requests were made by the Palestinian side to include such a provision. Israel, however, opposed the inclusion of such a provision, pointing out that the Israeli Government in this regard had already established Israeli policy in a number of decisions, and explaining that it was not prepared to undertake any commitment beyond these unilateral Government decisions.
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> The [DOP] does provide, in Article V, that the issues of settlements and Israelis are among a number of issues to be negotiated in the permanent status negotiations. Article IV provides that the jurisdiction of the Palestinian Council covers "West Bank and Gaza Strip territory, except for those issues that will be negotiated in the permanent status negotiations." Accordingly, not only is there no restriction on settlement activity during the interim period, but also the Council has no jurisdiction over settlements or Israelis. Settlements and Israelis remain under exclusive Israeli authority throughout the interim period.[82]

In response to Palestinian claims that settlements violate Article 31(7) of the Oslo II Accords, Israel argues:

> The suggestion that this provision prohibits settlement activity is disingenuous. The building of homes has no effect on the status of the area. The prohibition on changing the status of the areas is intended to ensure that neither side takes any unilateral measures to change the legal status of these areas

81. DOP, *supra* n.13, art. 31(7).

82. *See* Israel Foreign Ministry, *Israel's Settlements: Their Confomrity with International Law* (last modified Dec. 1996), pt. 3, *available at* http://www.israel-mfa.gov.il.

> (such as by annexation or a declaration of [S]tatehood) pending the final status talks. Moreover, since the provision applies to [both sides], were it to prohibit building, it would prohibit the construction of homes for Israelis and Arabs alike. This is not only impractical but also clearly not what was envisaged by the [Oslo II Accords], which contains provisions dealing with planning and zoning, on the assumption that building is to continue throughout the interim period.[83]

The deft crafting of ambiguity in the Oslo II Accords may have facilitated securing Israeli and Palestinian agreement but has, concomitantly, provided a window for Israel to claim compliance with the Accords, while violating international law. As Bell has quite accurately noted:

> The very difficulties of applying international law to interim agreement arrangements have indeed furthered a process of *de facto* "legalization" of the *status quo*, including Israeli settlements. This was a process begun by the international inaction in enforcing the Geneva Convention, and by the sheer length of the Israeli occupation. However, the creation of the Palestinian autonomy and the existence of a "peace process" has further contributed to undermining international legal consensus that withdrawal of Israel from all of the Occupied Territories is called for, as apparently contemplated by U.N. Resolution 242, and that building of settlements is an impermissible violation of the Geneva Convention.[84]

V. *THE "TRANSITION TO JUSTICE"?*

Conservative estimates indicate that 1,900 Palestinian and 700 Israeli deaths have occurred since the beginning of the second *Intifada*. An outflanking by political elites within the ruling Likud Party, and the virtual disintegration of Labour as a viable alternative, have left the resumption of negotiations at a crossroads.[85] Indeed, as the proscribed dates for the implementation of interim measures pass without completion, and a renegoti-

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83. BELL, *supra* n.24, at 203.

84. *Id.* at 194.

85. This is best demonstrated by the likely re-election of Ariel Sharon on January 28, 2003, despite his campaign being dogged by allegations of "bribe taking, fraud and breach of trust". *See Inside Track/Still Rotting, This Apple*, HA'ARETZ, Jan. 17, 2003, *available at* http://www.haaretzdaily.com. The Labour Party voter turn out is expected to be quite disappointing. It is worth noting that the Labour Party leader, Amram Mitzna, pledged that, if elected, negotiations with Palestinians would be resumed.

ation of the agreements unfolds in the political arena, the possibility of movement out of conflict seems rather distant, keeping the questions of accountability and justice current.

So the question may now be asked: where do we go from here? A logical starting point is to begin to unpack what the "deal" requires. This question subsumes several issues. What are the international legal norms required of the transitional process? What does the transition itself require? And lastly, what exactly is the transition from and to?[86]

As the South African case demonstrates, the transitional process need not adhere to rigid legal frameworks. Therefore, the questions of what is required and what is necessary may not coincide. It is likely that compromise will have to be met with regard to the question of the right of return, and the control of Jerusalem, even if the agreed arrangements fall short of what the legal norms of the Geneva Convention compel. Where the legal requirements and practical necessities converge, however, is on the question of territory and settlements.

Unlike the peace process in either Northern Ireland or South Africa, the Oslo process was about separation, rather than accommodation — a transition *from* the Israeli occupation of the territories *to* some form of Palestinian Statehood carved roughly along 1967 borders. While the end game (partition) seemed to be accepted by both sides, the Agreements were left to provide the interim measures necessary to achieve the divorce. At best, the necessary imprecision of the drafting of the Oslo agreements left open for interpretation the question of application of the Geneva Convention, and the language that, albeit indirectly, addressed Palestinian self-determination claims. However, that ambiguity also allowed for continued settlement construction and land expropriation, which, although arguably not explicitly violating the terms of the principles laid down in the agreements, was in clear violation of Articles 47 and 49 of the Geneva Convention.[87]

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86. This last question, Bell has suggested, must be raised when we talk about transitional processes. *See* BELL, *supra* n.24, at 312.

87. Geneva Convention, *supra* n.3, art. 47. Article 47 of the Geneva Convention states:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into

The deal-breaker here is the question of territorial *sovereignty*, which is not only a necessary legal requirement of Article 47 of the Geneva Convention, but also a necessary requirement for transition. However, the question of Palestinian territorial sovereignty of the West Bank and Gaza intersects with the thorny political issue of settlements. It is here that international law must serve as the benchmark for the deal. The Israeli position on its international legal obligations, coupled with the weak political and power positioning of the Palestinians, have been an obstacle to ensuring that international legal norms required by the Geneva Convention play a role in the transitional process, and ensured that the *status quo* was likely to be preserved. As the current situation reveals, transitional mechanisms that fail to address the underpinnings of conflict and so detach the concepts of peace and justice, will most certainly fail. Yet, the ambiguity that riddles the Oslo Accords (which, despite political rhetoric, remain in effect), provides an opportunity to constructively re-engage the "necessary" legal norms in the transitional process. The questions of settlements and land confiscation must be addressed, and compliance with Articles 47 and 49 of the Geneva Convention must be required.

In the current political climate, it is unlikely that this undertaking can be possible without the international community. As Contracting Parties to the Geneva Convention, members of the international community are not only morally compelled to assume this role but are, in fact, obligated.[88] While the political realities of these agreements mark "an almost complete divorce between the concept of peace and the concept of justice,"[89] the situation dictates that the territorial key to unlocking the current impasse cannot be bargained.

> the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Id.

88. Geneva Convention, *supra* n.3, art. 146.

89. *See* BELL, *supra* n.24, at 205.