

# **THE LAW IN THESE PARTS**

Occupation is a legal concept.

# WHAT IS INTERNATIONAL HUMANITARIAN LAW (IHL)?

- Part of international law that was adopted to govern relations between states.
- IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It is also known as “the law of war” and “the law of armed conflict,” and specifically “the law of belligerent occupation.”
- It doesn’t regulate whether a state may use force (*jus ad bellum*) but comes into affect once inter-state hostilities have begun (*jus in bello*).
- Early examples: Lieber Code for the Union Army & Henry Dunant’s *A Memory of Solferino* lead to the formation of the ICRC.

# GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1949)

- Geneva Conventions of 1949 (signed by 194 countries).
- Rules: 1. **protection** of those who are not (civilians) or no longer take part in fighting (wounded & POWs).
- Principles of civilian protection: (a) Distinction, (b) Necessity, (c ) Proportionality.
- 2. Entitlement to ensure armed forces **security**.
- Even when states don't sign IHL it applies to them (customary international law) BUT there is no standing court that can enforce it (but there were ad hoc courts for Yugoslavia and Rwanda).

# THE ISSUE OF SOVEREIGNTY

- 3. The main pillar of the Geneva Convention is that occupation does not affect **sovereignty**. Displaced sovereign loses possession but not title, occupying power gains possession, but not title.
- Additional Protocol (AP) I, Article 4: “...Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.”
- Consequently, all occupations are **temporary**.

# FOURTH GENEVA CONVENTION ON OCCUPIED TERRITORIES I

- Article 4: “**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.

Nationals of a State which is not bound by the Convention are not protected by it.”

- Article 64: “The Occupying Power may...subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to **ensure the security** of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”

# FOURTH GENEVA CONVENTION ON OCCUPIED TERRITORIES II

- The occupied territory is usually administered through a military government which may legislate legally binding orders.
- Article 49: “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.”
- This article ends the practice of settler colonialism.

# ISRAELI POSITION ON FOURTH GENEVA CONVENTION: “SHAMGAR DOCTRINE”

- 1. There is no occupation since OPT were not under bona fide prior sovereignty.
  - (a) special pleading.
  - (b) anachronistic, since over the years the changing attitudes about entitlement to sovereignty also modified the law of occupation, as the principles of self-determination, democracy, and human rights came to restrict the purview of sovereignty itself.
- 2. The Geneva Convention, is not applicable
  - (a) GC Is not ‘customary’ but ‘conventional’ law
  - (b) though accepts its humanitarian provisions
  - (c) its Supreme Court accepts petitions from residents on OPT and uses, among other bodies of law, the Geneva Convention to adjudicate them.

# INTERNATIONAL CONSENSUS

- International community (ICRC) views WBG as under occupation & to be governed by Geneva Convention irrespective of the status of the territory.
- UNSC Resolution 2334 (December 23, 2016) (14 in favor, US abstaining):
- “*Reaffirming* the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.”



# IL/LEGALITY OF OCCUPATION

- Kofi Annan, UN Secretary General to UNSC (March 12, 2002) called on Israel “to end the illegal occupation.” Clarification: illegal refers not to occupation itself but to Israel’s refusal to accept the legal obligations thrust on her by her status as of an occupying power.”
- Occupation remains legal because it is part of law of armed conflict.

# IMPLICATIONS OF SHAMGAR DOCTRINE I

- Palestinians 'missed the train' (they are not a High Contracting Party to the GC). Interpreting IHL as pertaining exclusively to rights & duties of sovereign states leaves Palestinians, as stateless people who never had a state, in a legal limbo. They are not recognized as the rightful owners of WBG (entitled only to humanitarian care).
- Palestinians have individual but not collective rights.
- Legal maneuver to separate the land from the people residing there.
- Dual legal system (based not on territory but on ethno-national identity).

# IMPLICATIONS OF SHAMGAR DOCTRINE II

- Law enforcement v. war model (28), namely military occupation provides a legal basis for rule v. rule by brute force.
- Israel maintains importance legality but keeps to its own distinct interpretation (in contrast to both international legal trends & consensus).
- Military court system in OPT.
- Judicial review by High Court of Justice.

# HIGH COURT OF JUSTICE (KRETZMER)

- HJC accepted **jurisdiction** over OPT & adjudicated dozens of petitions by residents of the OPT, making this “the most legalized occupation in world history.”
- Inconsistent use of Geneva Convention: Israeli government did not challenge HCJ jurisdiction with “act of state” doctrine but court acted under “political question” doctrine.
- Notion (myth?) of ‘benevolent occupier.’
- HCJ serves as check in three areas: procedural, protection of private property, occasional balancing.
- “The Court provided legitimization for government actions that are highly questionable, not only on political grounds, but on legal grounds as well.” (99)

# WHEN DOES IHL MATTER?

- 1. Jim Ron's distinction between 'ghetto:' area under direct occupation where there is harsh policing but lower levels of violence because it is included in the state's legal sphere and benefits from modern states' sensitivity to the appearance of legality v. "frontiers:' areas unincorporated into a state's legal zone and therefore more prone to acts of lawless nationalist violence (including ethnic cleansing).
- 2. David Kretzmer's distinction between Supreme Court's actual decisions and the restraining influence of the "Court's shadow." (When government forgoes action that couldn't defend in court). (190)
- Would lack of judicial review have made the occupation less palatable? (198)