

Israel, Applicability of the Fourth Convention to Occupied Territories

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Shamgar, M. [At that time Attorney General (Israel), later member and President of the Israeli Supreme Court.], "The Observance of International Law in the Administered Territories", in *Israeli Yearbook on Human Rights*, vol. 1, 1971, pp. 262-77; footnotes omitted.]

I. APPLICATION OF CONVENTIONS

There is certainly a wide awareness of the great difficulty in approaching problems connected with the actual implementation of the rules of warfare without influence by innate prejudices or a deep-seated subjective outlook. The difficulty is actually twofold: the lack of that unanimity and clarity which is a comparatively frequent characteristic of municipal law, and, over and above that, the difficulty posed by political predilection. [...]

Before turning to the question of the observance of rules of international law, due consideration should be given to the difference between the questions connected with the observance of these rules and the prior question of the applicability of a certain set of rules to given circumstances. In other words, de facto observance of rules does not necessarily mean their applicability by force of law. [...]

Humanitarian law concerns itself essentially with human beings in distress and victims of war, not States or their special interests. As Max Huber said: "The fate of human beings is independent of the legal character which belligerents wish to give to their struggle." It is, therefore, always important to seek ways and means by which humanitarian relief can be extended to victims of war without waiting for the international law to develop further and without subjecting the fate of the civilians to the political and legal reality. While political

rights and the legal interpretation of a given set of factual circumstances are of far-reaching consequence for the fate of nations, and cannot be excluded from consideration, any possible separation between the decision on political issues and the pragmatic application of humanitarian rules should be considered positively. It must be borne in mind that this was also underlying idea of Article 3, common to all four Geneva Conventions.

In my opinion there is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties. Territory conquered does not always become occupied territory to which the rules of the Fourth Convention apply. It is apparently not so, for example, in cases of cessation of hostilities that lead to termination of war, nor is it so in cases of subjugation, although this question arose only before 1949.

The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign. Any other conception would lead to the conclusion that France, for example, should have acted in Alsace-Lorraine according to rules 42-56 of the Hague Rules of 1907, until the signing of a peace treaty.

As I mentioned before, I am aware of the theory of subjugation, which has been applied since World War II; if the Fourth Convention applies to every conflict, how do we adapt this theory to the Fourth Convention? In my view, *de lege lata*, the automatic applicability of the Fourth Convention to the territories administered by Israel is at least extremely doubtful, to use an understatement, and automatic application would raise complicated juridical and political problems. I shall mention some of them.

Israel never recognized the rights of Egypt and Jordan territories occupied by them till 1967. Judea and Samaria and the Gaza Strip were part of the territory of the British Mandate of Palestine which ended on May 14, 1948. The war which started on that date never led to recognized boundaries. On the contrary, the Armistice agreements of 1948 explicitly stated that the Armistice demarcation line is not to be construed in any sense as a political or territorial boundary and is delineated without prejudice to the rights, claims or position of either party.

From 1948 till 1956 and again from 1956 till 1967 the Gaza Strip was, according to express U.A.R. statements, under Egyptian military occupation, ruled by a U.A.R. Military Governor. The inhabitants of the Gaza Strip were not nationals of the Occupying Power. They even needed a special permit to enter the U.A.R. Military courts were set up, curfew was declared, and administrative detention was carried out according to the orders of the Military Governor. It is worth noting that notwithstanding these facts, the question of the application of the Fourth Convention to this territory was never brought up or considered before 1967.

The history of the legal status of Judea and Samaria is also relevant. On May 13, 1948, a law was enacted in Transjordan according to which the provisions of the Transjordan Defense law apply to any country or place

in which Jordan is responsible for the preservation of security and order. On May 18, 1948, General Ibrahim Pecha Hashem was appointed by King Abdullah as Military Governor of all territories which were held by the Transjordan Army. According to Proclamation No. 2 published by General Hashem:

All the laws and regulations which were in force in Palestine at the end of the Mandate on 15.5.48 shall remain in force in all areas in which the Arab Jordan Army stays or in which it is responsible for the preservation of security and order, except the laws and regulations which are contrary to the Defense Law of Transjordan of 1935 or the Regulations and Orders published under this law.

On September 16, 1950, the Law Regarding Laws and Regulations in Force in the Two Banks of the Hashemite Jordan Kingdom was published and entered into force. This law provided that the laws and regulations in each of the two banks should remain in force until unified laws for the two banks were promulgated with the consent of the national council and with the ratification of the King. The unification of the laws of the East and West banks went on from 1950 to 1967, although by June 5, 1967, some laws still remained different. The annexation by Jordan of the West Bank on April 24, 1950, was recognized only by two countries: Great Britain and Pakistan. [...]

There is no need to fully appraise the relative value and merit of the rights of the parties in this context. It should, however, be mentioned that in the interpretation most favorable to the Kingdom of Jordan her legal standing in the West Bank was at most that of a belligerent occupant following an unlawful invasion. In other words, following an armed invasion in violation of international law, the military forces of Jordan remained stationed in the West Bank and the Kingdom of Jordan then annexed the West Bank, after having agreed in the Armistice Agreement of 1949 that it had no intention of prejudicing the rights, claims, and positions of the parties to the Agreement. It is therefore not surprising to find the following conclusion as to the relative rights in the West Bank in Blum's article "Reflections on the Status of Judea and Samaria":

[...] [T]he traditional rules of international law governing belligerent occupation are based on a twofold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory. According to Glahn, "(b)elligerent occupation... as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government of the occupied territory of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognizing and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign's reversionary rights have no application." [*Israeli Law Review*, 1968, pp. 279]

The same conclusion would apply to the Gaza Strip which was regarded even by the U.A.R. government as

territory under military occupation, and that Government never even raised the claim that it had any legal rights to the territory.

The territorial position is thus *sui generis*, and the Israeli Government tried therefore to distinguish between theoretical juridical and political problems on the one hand, and the observance of the humanitarian provisions of the Fourth Geneva Convention on the other hand. Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to the territories under consideration which, as stated, does not in my opinion apply to these territories, and decided to act *de facto* in accordance with the humanitarian provisions of the Convention. [...]

V. CONCLUSION

[...] The significant achievements of the existing system, in my opinion, are the following: (a) the existence, since the first day of Military Government, of a military legal system based on the rule of law, a system in which even hostile critics abroad have detected no real flaws; (b) the speedy restoration of the normal functioning of the local courts, which exercise their powers without interference; (c) the fact that the right of defense is ensured in both military and civil trials; (d) the avenue for criticism of the army authorities which has been voluntarily provided for by recourse to the High Court of Justice, in contrast to what has been customary in all other countries during military rule in occupied territory; (e) the existence of Appeals Committees on compensation for damage and on decisions of the Custodian, presided over by lawyers; (f) the fact that the rights of the population are ensured by a long series of legislative acts relating to protection of property, safeguarding of rights to property, social benefit rights, and freedom of worship. [...]

Discussion

1.
 - a. Was there an international armed conflict between Israel, Jordan and Egypt in 1967? Is Convention IV applicable to the conflict? When does its application cease? (GC I-IV, Arts 2; GC IV, Art. 6)
 - b. Are Convention IV's provisions on occupied territories only applicable to occupation of a territory of a "High Contracting Party" (GC I-IV, Art. 2(2))? Or to all territory that comes under the control of a party to an international armed conflict? (GC I-IV, Art. 2(1)) According to Shamgar's interpretation, are the provisions on "aliens on the territory of a party to the conflict" applicable to the West Bank and Gaza? Or according to that interpretation, are neither these provisions nor those on occupied territories applicable? (GC I-IV, Arts 2; GC IV, 35-46 and 47-78)
 - c. When is a territory considered occupied according to IHL? (HR, Art. 42) Is it a question of fact, or of the legal status of the territory, or both, whether a territory is occupied? Is the concept of "occupied territory" the same under Convention IV and under the Hague Regulations?
 - d. Why does Shamgar claim that neither the West Bank nor Gaza is occupied territory as defined by IHL, and that therefore Convention IV is not applicable? Does IHL consider the status of the territory before occupation? According to IHL, can a territory only be occupied if it was previously under the control of a legitimate sovereign government, as claimed by Shamgar? Is the application of IHL conditional on recognition of the sovereignty of the previous government? What would the practical consequences for the applicability of Convention IV be if it depended on whether the

previous control of a conquered territory was legitimate or not? During a conflict, who could answer this question? What are the odds of the belligerents agreeing on this and therefore on the applicability of Convention IV?

- e. Does Convention IV address questions such as “who started the war?” “Who is fighting a just cause?” or “Who exercises legitimate control?” Isn’t it a confusion between *jus ad bellum* and *jus in bello*?
 - f. Is it the aim of IHL to protect sovereign rights, as seems to be suggested by the quotation from Blum’s article? Or is its main aim to protect individuals? Who or what is protected by Convention IV? (GC IV, Art. 4)
2. Is Shamgar’s interpretation of what constitutes an occupied territory in accordance with the “ordinary meaning to be given to the terms of the treaty”? (Vienna Convention on the Law of Treaties, Art. 31(1); available at <http://untreaty.un.org>)
3. Although Israel consented to “act *de facto* in accordance with the humanitarian provisions of the Convention”, did it say which provisions? Which are the “humanitarian provisions”? Can Convention IV be divided into humanitarian provisions and non-humanitarian provisions? Doesn’t IHL by definition consist entirely of humanitarian provisions? Are the provisions invoked against Israel in Israel, Ayub v. Minister of Defence; Israel, House Demolitions in the Occupied Palestinian Territory; and Israel, Cases Concerning Deportation Orders, accordingly non-humanitarian provisions? For example, are the prohibitions of torture and of deportations non-humanitarian?