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Deportation and Transfer of Civilians in Time of War

Jean-Marie Henckaerts

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ABSTRACT

In this Article, the Author discusses the international law prohibiting the deportation and transfer of civilians during times of war. The Author first focuses on Article 49 of the Fourth Geneva Convention, describing its genesis and its character as customary international law. The Author examines several specific instances of illegal deportations in Kuwait, the former Yugoslavia, and the Israeli-occupied territories, and discusses the application of Geneva IV to these situations. He concludes that more should be done to enforce international law prohibiting the transfer of civilians during times of war and to punish states for engaging in massive deportation.

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* This Article takes account only of developments up to May 31, 1993.

** Attaché, Cabinet of Minister of Interior, Brussels, Belgium; S.J.D. Candidate, George Washington University, National Law Center; LL.M. University of Georgia; LL.B. University of Brussels. The author wishes to thank Professor Louis B. Sohn and W. Hays Parks, Professorial Lecturer in Law, for reviewing earlier drafts of this Article.

I. INTRODUCTION

The protection of civilians, as nonparticipants in an armed conflict, is a cornerstone of existing international humanitarian law.[1] The prohibition of deportation of civilians during belligerent occupation forms an important part of this protection. An effective prohibition to this extent would have saved humanity from many of the horrible memories of both World Wars. During the Second World War especially, the German deportation practice reached an unheard-of level. These experiences must retain a place in our memory as a warning of mistakes not to be repeated.

In 1990, during its occupation of Kuwait, the Iraqi army resorted to a mass scale deportation and transfer exercise for civilians. This event, and the current developments in the former Yugoslavia, warrant a closer look, after forty years, at a provision that only recently might have been considered anachronistic, Article 49 of the Fourth Geneva Convention.

In Part II, the various provisions of this Article will be scrutinized. In Part III, its roots will be traced to the Hague Regulations and, on the basis thereof, its character as customary international law will be dis-

1. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 51-54, 63 (1985); *see also* K. Obradovic, *L'évolution de la protection juridique de la population civile dans les conflits armés internationaux, in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 134 (Antonio Cassese ed., 1971); K. Obradovic, *La protection de la population civile dans les conflits armés internationaux*, 12 REVUE BELGE DE DROIT INTERNATIONAL 116 (1976); Jean Mirimanoff-Chilikine, *Protection de la population et des personnes civiles contre les dangers résultant des opérations militaires*, 7 REVUE BELGE DE DROIT INTERNATIONAL 619 (1971); PAUL URNER, DIE MENSCHENRECHTE DER ZIVILPERSONEN IM GEMÄSS DER KRIEG GENFER ZIVILKONVENTION VON 1949 (1956); David G. Burwell, Note, *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123 (1973).

cussed in Part IV. In Part V, the criminal aspects of the deportation practice will be examined, from Nuremberg to Kuwait and the former Yugoslavia. This will also entail a brief discussion of the enforcement of the prohibition of deportation, both in theory and in practice. Part VI will deal with the special situation of the deportations from the Israeli-occupied territories. The controversies surrounding these deportations flared up after Israel deported some four hundred Palestinians in December 1992. Part VII will briefly address the legal situation of deportations and transfers during internal war.

II. GENEVA LAW

Existing international humanitarian law deals at some length with deportations and transfers of civilians. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva IV) is the cornerstone provision in this respect.[2] The various provisions and aspects of this Article will be examined below.

A. *The Basic Prohibition*

The core of Geneva IV is the first paragraph of Article 49. It provides: "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 provision was adopted in light of the German deportation practices during the Second World War, when extensive transfers of the populace of occupied countries, including France, Belgium, The Netherlands, Luxembourg, and Poland, took place.[3] However, a proposal to prohibit deportations had already been included in the Tokyo Draft adopted at the International Red Cross Conference of 1934.[4]

Six salient features of this paragraph should be emphasized. First, no distinction is made between individual and mass forcible transfers. This is unique to the law of war; the international human rights conventions clearly distinguish between mass expulsions and individual expulsions.[5]

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2. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, T.I.A.S. No. 3365, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 271 (Adam Roberts & Richard Guelff eds., 1989) [hereinafter Geneva IV].

3. *See infra* part III.

4. COMMENTARY TO THE IVTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4-5, 278 (Jean Pictet ed., 1958) [hereinafter COMMENTARY].

5. As far as expulsions of aliens are concerned, Article 13 of the 1966 International

Second, only "forcible" transfers are prohibited. Thus, Article 49 contains no absolute prohibition of all transfers of all kinds.[6] Provided, as some suggest,[7] that the reference in Article 147 of Geneva IV to "unlawful deportation or transfer" implies that some deportations are lawful, their lawfulness can result from the voluntary nature of the deportations.

Third, no distinction is made as to the destination of the deportation or transfer. Any deportation is forbidden, whether to the territory of the occupant or to any other country, occupied or not. Fourth, both transfers and deportations are prohibited. Whatever the distinction may be, Article 49 makes it clear that all types of forcible "relocation[s]" of civilians are prohibited. Presumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory.[8] As a result, the applicability of Article 49 does not depend on what the occupant claims he is doing; rather, Article 49 comes into play as soon as people are forcibly moved from their ordinary residences, except in case of evacuation[9] or internment.[10] Fifth, if read in conjunction with Article 49(6), no distinction is made between the deportation from or the transfer within occupied territory of enemy civilians and that of nationals of

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Covenant on Civil and Political Rights addresses only individual expulsions expressly; Article 1 of the 1984 Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms deals with individual expulsions; while Article 4 of the 1963 Protocol No. 4 thereto deals with collective expulsions, the same is true for Articles 22(6) and 22(9) of the 1969 American Convention on Human Rights and Articles 12(4) and 12(5) of the African Charter on Human and Peoples' Rights respectively, *reprinted in* INTERNATIONAL ORGANISATION AND INTEGRATION 376, 947, 1014-15, 1064 (student ed., 1986).

6. The Commentary to Geneva IV explains that this is so because:

> some might up to a certain point have the consent of those being transferred, . . . [e.g.] protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire [Geneva IV] . . . authorize[s] voluntary transfers by implication, and only [prohibits] "forcible" transfers.

COMMENTARY, *supra* note 4, at 279.

7. *See infra* part VI.B.

8. The ICRC Commentary to Geneva IV does not explain the distinction between transfer and deportation, but the wording of Article 49(1) suggests the explanation given above; otherwise, there would have been a comma after "deportations." In the original French version there is no comma either: "Les transferts forcés, en masse ou individuels, ainsi que les déportations de personnes protégées hors du territoire occupé . . . ," *reprinted in* 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 307 (1949).

9. *See infra* part II.B.

10. *See* Geneva IV, *supra* note 2, arts. 79-135, 75 U.N.T.S. at 338-79.

the Occupying Power into the occupied territory.[11] And sixth, nothing can justify a transfer or deportation,[12] except an evacuation.[13] This last exception will now be examined.

B. *The Evacuation Exception*

Article 49 contains an exception in the case of certain evacuations.[14] It provides:

> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

A genuine evacuation, as described in this Article, constitutes the exclusive justification for a deportation or a transfer of enemy civilians. This deviation is logical since its aim coincides with the aim of the basic prohibition of Article 49, and indeed the aim of Geneva IV in its entirety, namely, the protection of civilians. For a comparison, the Commentary to Geneva IV (the Commentary) prepared by the International Committee of the Red Cross (ICRC) refers to Articles 14, 15, and 17, in which the professed aim is similar.[15]

To prevent abuses of this exception, a number of safeguards are provided concerning evacuations. Evacuations may only be carried out in two cases, namely, when "the security of the population or imperative military reasons so demand."[16] Conversely, the same two reasons may justify a decision not to evacuate civilians, even when situated in an area particularly exposed to the dangers of war.[17] In practice, it may prove

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11. *See infra* part II.C.
12. Geneva IV, *supra* note 2, art. 49, para. 1, 75 U.N.T.S. at 318.
13. *Id.* art. 49, para. 2.
14. *Id.*
15. COMMENTARY, *supra* note 4, at 279-80.
16. Geneva IV, *supra* note 2, art. 49, para. 2, 75 U.N.T.S. at 318.
17. Article 49(5) provides as follows:

> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

But in such case, "real necessity must exist; the measures taken must not be merely an arbitrary infliction or intended simply to serve in some way the interests of the Occupying Power." COMMENTARY, *supra* note 4 at 283.

According to the Commentary:

more difficult to agree what constitute "imperative" military reasons or when the security of the civilian population warrants their evacuation.

In addition, an evacuation order has to be judged in light of the circumstances at the time of the order.[18] In his trial before the United States Military Tribunal at Nuremberg, on February 19, 1948, General Lothar Rendulic was accused of violating Article 23(g) of the 1907 Hague Regulations. The retreating forces under his command destroyed all public and private property that would have aided the expected enemy.[19] "Villages were destroyed . . . . Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had."[20] As part of his scorched earth tactics, Rendulic ordered the involuntary evacuation of the indigenous people of Finmark in the extreme north of Norway in October 1944.[21] According to the evidence, no loss of life occurred directly because of the evacuation. In the Court's opinion, Rendulic's conclusions were justified by "urgent military necessity," even though he might have erred in his judgment.[22]

In the trial of Field Marshal Erich von Manstein before a British military tribunal at Hamburg on December 19, 1949, count six of the indictment charged him with "the mass deportation and evacuation of civilian inhabitants" from the Ukraine in the Summer of 1944.[23] The justifications advanced for the evacuation were military security and de-

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> If therefore an area is in danger as a result of military operations, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.

Id. at 280. In principle, this provision represents an expression of common sense and knows no opposition.

18. In re List (Hostages Trial), 15 Ann. Dig. 632, 648 (1948); In re von Lewinski (called von Manstein), 16 Ann. Dig. 509, 522 (1949).

19. In re List, 15 Ann. Dig. at 649.

20. *Id.* at 648.

21. *Id.*

22. In the words of the Court:

> It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.

Id. at 649.

23. In re von Lewinski, 16 Ann. Dig. at 510.

priving the enemy of potential labor.[24] These reasons were held insufficient to justify the removal of civilians from their homes in such vast numbers. The purpose of denying army recruits and laborers to the Soviet army then advancing into the Ukraine was expressly repudiated.[25] From the above-described cases it is apparent that the defense of military necessity, therefore, is restricted to situations in which the army commanders judge that the safety of the civilian population requires that they be removed from the battle zone or the scorched area, and not when the same army commanders decide that military advantage would be gained by removing the population. The principle of military necessity was also the justification advanced for the evacuation of entire South Vietnamese villages and the declaration of "operational zones" by the United States forces in Vietnam.[26]

Article 49(2) contains two further safeguards. First, evacuation must not involve a displacement outside the bounds of the occupied territory, unless it is impossible materially to do otherwise. Consequently, "as a rule evacuation must be to reception centres inside the [occupied] territory."[27] Second, the evacuated civilians have to be repatriated in any event, as soon as the hostilities in the area have ceased. As a result, unlike the repatriation of prisoners of war, the repatriation of evacuees may have to take place before the end of all hostilities.[28]

Article 49(3) further adds a minimum standard of humanitarian safeguards in an effort to mitigate the unfortunate consequences of an evacuation. Article 49(3) provides:

> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in

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24. In a country so thickly populated as the Ukraine it was necessary for the security of the troops to remove the population from the battle or the combat zone. To do otherwise would have been to invite espionage. The evacuation of this zone was therefore mere military security. Further it was necessary to deprive the enemy of labour potential as the enemy put every able-bodied man into the army and utilised women and even small children. They could not afford to allow them to fall into the hands of the enemy.

Id. at 521.

25. *Id.* at 523.

26. *See* 3 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1972); CRIMES OF WAR (Richard A. Falk ed., 1971) (especially Jonathan Mirsky, *The Tombs of Ben Suc*, at 363); 2 THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk ed., 1969); JONATHAN SCHELL, THE VILLAGE OF BEN SUC (1967).

27. COMMENTARY, *supra* note 4, at 280.

28. *See* Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 75 U.N.T.S. 135, T.I.A.S. No. 3364.

satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.[29]

The ICRC had proposed this provision as an absolute obligation,[30] but at the diplomatic conference this proposal was watered down by inserting the words "to the greatest practicable extent."[31]

Article 49(3) has an interesting final clause urging the evacuator not to separate family members. This clause, together with Articles 25, 26, 27, and 82 of Geneva IV and Article 74 of Protocol I,[32] is an expression of a general concern embodied in the Geneva law of war to preserve or to restore family unity to the greatest extent possible.[33] The evacuation of children is regulated in Article 78 of Protocol I, complementing Article 49(2) in this respect.[34] A final guarantee is contained in Article 49(4),[35] imposing an *a posteriori* duty on the occupant to inform the

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29. Geneva IV, *supra* note 2, art. 49(3), 75 U.N.T.S. at 318. Here the term "transfers" refers to evacuations outside the bounds of occupied territory.

30. 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 120-121.

31. 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 759-760; 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 415-16. The Commentary defends this addition with an appeal to the common sense:

> It must not be forgotten, however, that this wording is intended to cover the contingency of an improvised evacuation of temporary character when urgent action is absolutely necessary in order to protect the population effectively against an imminent and unforeseen danger. If the evacuation has to be prolonged as a result of military operations and it is not possible to return the evacuated persons to their homes within a comparatively short period, it will be the duty of the Occupying Power to provide them with suitable accommodation and make proper feeding and sanitary arrangements.

COMMENTARY, *supra* note 4, at 281. It could not be otherwise.

32. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, Dec. 7, 1978, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977), *reprinted in* DOCUMENTS ON THE LAWS OF WAR 389 (Adam Roberts & Richard Guelff eds., 1989) [hereinafter Protocol I].

33. *See, e.g.*, Gerald Draper, *La réunion des familles en période de conflit armé*, 59 REVUE INTERNATIONALE DE LA CROIX-ROUGE 65 (1977). For an interesting application, see Rex J. Zedalis, *Right to Return: A Closer Look*, 6 GEO. IMMIGR. L.J. 499 (1992); John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIGR. L.J. 223 (1992).

34. 2 HOWARD LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 721 (1986); *see generally* Sandra Singer, *La protection des enfants dans les conflits armés*, 68 REVUE INTERNATIONALE DE LA CROIX-ROUGE 135 (1986); Colleen Maher, Note, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare*, 9 B.C. THIRD WORLD L.J. 297 (1989).

35. "The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place." Geneva IV, *supra* note 2, art. 49, para. 6, 75 U.N.T.S.

Protecting Power of any transfers or evacuations carried out.[36]

C. *Transfer of Persons into Occupied Territory*

According to Article 49(6) "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The purpose of this provision is "to prevent a practice adopted during the Second World War by certain Powers . . . for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."[37] This provision is not outdated, as this practice has continued after the Second World War, for example in the recent Gulf War[38] and arguably in the Israeli-occupied territories.

Indeed, it is argued that the Israeli settlements on the West Bank violate Article 49(6). This discussion has gained extraordinary fervor in the American, Arab, Israeli, and international political fora. In 1977, Kuttner argued that "[t]here can be no question but that such settlement *when actively pursued* by the Occupant, violates the final paragraph of Article 49 of the Fourth Geneva Convention."[39] He continued with an important practical argument that "[s]uch settlement is also seen by many as a prelude to annexation which is absolutely prohibited by Article 47 of the Convention."[40] The applicability *vel non* of Geneva IV to the West Bank and the Gaza Strip will be discussed in more detail below.

Whereas the Commentary notes that "transfer" and "deportation" in paragraph 6 have a "rather different" meaning from that of the rest of Article 49, "since they do not refer to the movement of protected persons

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at 318.

36. *See* COMMENTARY, *supra* note 4, at 281-282. Here too the term "transfers" refers to evacuations outside the bounds of occupied territory. *See also supra* note 29 and accompanying text.

37. COMMENTARY, *supra* note 4, at 283.

38. *See infra* part V.C.

39. Thomas Kuttner, *Israel and the West Bank: Aspects of the Law of Belligerent Occupation*, 7 ISR. Y.B. ON HUM. RTS. 166, 218 (1977) (emphasis added); *see also* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 135-144 (1993).

40. Kuttner, *supra* note 39; *see generally*, Mona Rishmawi, *The Administration of the West Bank under Israeli Rule*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 267, 293 (Emma Playfair ed., 1992) [hereinafter INTERNATIONAL LAW AND ADMINISTRATION OF OCCUPIED TERRITORIES].

but to that of nationals of the Occupying Power,"[41] this distinction does not seem useful. As argued above, the purpose of Article 49 is to protect civilians from a forced relocation (compulsory movement),[42] and, therefore, it is not important how this relocation is defined or termed.[43] Nevertheless, both prohibitions are aimed at the protection of the civilians in the occupied territory. In this respect, Article 49(6) has a purpose quite different from the principle of international human rights law prohibiting the expulsion of nationals.[44] The conclusion that Article 49(6) is aimed at the protection of the civilians in the occupied territory, rather than at the protection of the nationals of the occupant, is buttressed by its presence in Part III, Section III "Occupied Territories" rather than in Part III, Section I "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories."

D. *Relation to the Prohibition of Forced Labor*

Article 49 is related to Articles 51 and 52, which prohibit the occupant from compelling civilians to "serve in its armed or auxiliary forces" and from "creating unemployment or . . . induc[ing] [civilians] to work for the Occupying Power." In both World Wars, Germany deported non-Germans from occupied territories to Germany, and occasionally to other sections of occupied enemy territory, to supplement its labor potential.[45] The defense advanced for these deportations was that the occupant was

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41. COMMENTARY, *supra* note 4, at 283.

42. *Id.*

43. *See* Christopher M. Goebel, *A Unified Concept of Population Transfer*, 21 DENV. J. INT'L L. & POL'Y 29 (1992) (looking at deportations and settlements as a "unified" category of involuntary transfer).

44. *See* Article 9 of the 1948 Universal Declaration of Human Rights; Article 12 of the 1966 International Covenant on Civil and Political Rights (implicitly); Article 3 of Protocol 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 22(5) of the 1969 American Convention on Human Rights; *and* Article 12(2) of the 1981 African Charter on Human and Peoples' Rights (implicitly), *reprinted in* INTERNATIONAL ORGANISATION AND INTEGRATION 363, 376, 947, 1014-15, 1064 (student ed., 1986).

45. GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 69 (1957). For descriptions of German practices during the First World War, see W.R. Bisschop, *German War Legislation in the Occupied Territory of Belgium*, 4 TRANSACTIONS OF THE GROTIUS SOCIETY 110 (1919); J. van den Heuvel, *De la déportation des belges en Allemagne*, 24 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 261 (1917); John H.E. Fried, *Transfer of Civilian Manpower From Occupied Territory*, 40 AM. J. INT'L L. 303, 308-312 (1946); and the references in CHARLES ROUSSEAU, LE DROIT DES CONFLITS ARMÉS 158 (1983).

otherwise unable to feed the deportees and that the deportations enabled idle or unemployed individuals to find gainful employment.[46] So overall, it was argued, the deportation practice allowed the occupant to fulfill his legal duties toward the occupied population.[47] Article 52 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention IV, already contained a prohibition against involving civilians in "operations of war against their own country." The problem remained of course that "[t]he term 'military operations' is so elastic in scope that almost any labor short of actual combat has, at times, been classified as not falling into the prohibited category."[48]

During the Second World War, the German recruitment of labor from occupied territories expanded to an enormous scale.[49] In addition, most workers' wages were subjected to discriminatory taxes, which frequently confiscated their nominal wages.[50] This practice reduced them in fact to slaves. Fried summarizes the justifications advanced by Germany under the following headings: annexation (It was claimed that the annexation *e.g.*, parts of Poland, Eupen-Malmédy, added the workers of the annexed territories to the German workforce, and even to the German nationals and hence excluded them from the protection of the Hague Regulations.);[51] state treaties (Germany negotiated treaties with "German-friendly governments," *e.g.*, the Vichy regime, which authorized transfer of workers to Germany.);[52] and individual labor contracts (A practice initiated in the First World War, it was widely used during the Second World War. The contracts, however, were void because of coercion.).[53] The imagination of the wicked seems abysmal.[54] Notwith-

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46. von Glahn, *supra* note 45, at 69; Fried, *supra* note 45, at 309.

47. von Glahn, *supra* note 45, at 69-70.

48. *Id.* at 69.

49. *Id.* at 71. Fritz Saukel, one of the two officials in charge of foreign labor admitted that "out of the five million foreign workers who arrived in Germany not even 200,000 came voluntarily." *The Nuremberg Judgment, reprinted in* 2 THE LAW OF WAR 922, 953 (Leon Friedman ed., 1972).

50. von Glahn, *supra* note 45, at 71; Fried, *supra* note 45, at 315-19.

51. *Id.* at 319.

52. *See id.* at 319-21.

53. *Id.* at 322-23. Additionally, von Glahn reports that the Germans did not meet most of their obligations after the foreign worker had arrived in the Reich. von Glahn, *supra* note 45, at 72.

54. Another defense was that in total war deportation was permitted as a method employed *in extremis* for the purpose of avoiding subjugation. Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. J. 207, 217 (1975). On the scorched earth defense, see *supra* part II.B; von Glahn, *supra* note 45, at 228. The Germans also transformed prisoners of war into civilian foreign workers, both

standing Germany's original excuses, the International Military Tribunal at Nuremberg classified these deportations as a war crime in light of the Hague Regulations and existing customary international law.[55]

III. HAGUE LAW[56]

The 1907 Hague Regulations do not provide an explicit prohibition of deportations.[57] The Commentary to Geneva IV explains that this was probably so "because the practice of deporting persons was regarded at the beginning of this century as having fallen in abeyance."[58] When at war, civilized nations by 1907 no longer resorted to deportations. By the same token, the Hague Law does not contain special articles prohibiting cannibalism or execution at the stake. Such barbarities "did not seem to belong to the 20th century, and the thought of [massive deportations] would surely have evoked visions of the Assyrian and Roman campaigns to those delegates learned in ancient history."[59]

Nevertheless, the Hague Regulations contain several limitations to the exercise of military authority over the occupied territory of an enemy state. These Regulations, numbers 42 to 56, remain positive international law today.[60]

The argument can be made that, although the Hague Regulations do not contain an express prohibition of deportations, this practice is none-

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to supplement its labor force and to avoid international obligations toward them. Fried, *supra* note 45, at 323-24.

55. *See infra* part V.A.

56. *See generally* DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914 (1949); 9 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, THE LAWS OF WAR 161, 189, 364-68, 436-37 (1978).

57. Regulations annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, *reprinted in* LAWS OF LAND WARFARE: CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS AS EXISTING ON AUGUST 1, 1914 (Joseph Baker & Henry Crocker eds., 1919) and *in* DOCUMENTS ON THE LAWS OF WAR 48 (Adam Roberts & Richard Guelff eds., 1989).

58. COMMENTARY, *supra* note 4, at 279.

59. de Zayas, *supra* note 54, at 211.

60. G.I.A.D. Draper, *Human Rights and Law of War*, 12 VA. J. INT'L L. 326 (1972). As the Commentary notes:

> The Geneva Diplomatic Conference was not convened for the purpose of revising the Fourth Hague Convention. Consequently the 1949 Convention relative to the Protection of Civilian Persons does not abrogate the Regulations respecting the Laws and Customs of War on Land. It does not take the place of this latter text, which remains in force; but in the words of Article 154, it will "be supplementary to Sections II and III of the Regulations."

COMMENTARY, *supra* note 4, at 9.

theless incompatible with the Hague law. Article 46 provides: "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." Any deportation would necessarily violate this Article.[61] This conclusion is reinforced if Article 46 is read in conjunction with Articles 43 and 47-53 (especially Article 50).[62] This argument is quite persuasive, but still more persuasive is the argument that lies in the preamble of the 1907 Hague Regulations, which reads in part:[63]

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the *laws of humanity*, and the *dictates of the public conscience*. [emphasis added]

These notions are subject to evolution and their meaning has to be interpreted at the time of their application. In this age, the laws of humanity and the dictates of the public conscience undoubtedly outlaw the practice of tearing people away from their homes, separating them from their families, and deporting them from their country. But even in 1907 the public conscience would have condemned these practices since they were

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61. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 302 (1992); de Zayas, *supra* note 54, at 212. It should be questioned whether this interpretation goes beyond the purpose and wording of the respective articles. *See* LAWS OF LAND WARFARE: CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS AS EXISTING ON AUGUST 1, 1914, 306-27, 334-46, 367-71 (Joseph Baker & Henry Crocker eds., 1919).

62. Bassiouni, *supra* note 61, at 302; de Zayas, *supra* note 56, at 212. 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.

Geneva IV, *supra* note 2, art. 43, 75 U.N.T.S. at 318. Article 50 provides:

> 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." (emphasis added)

Id. art. 50.

63. This so-called Martens clause (or de Martens clause) has been the subject of much scholarly writing. *See, e.g.*, Shigeki Miyazaki, *The Martens Clause and International Humanitarian Law*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 433 (Christophe Swinarski ed., 1984); Fritz Münch, *Die Martens'sche Klausel und die Grundlagen des Völkerrecht*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 347 (1976).

not included in the Regulations because of desuetude. As Georg Schwarzenberger explains, deportations were not discussed in 1907, nor even in 1899, because they were "generally rejected as falling below the minimum standard of civilisation and, therefore, not requiring express prohibition. To raise the issue of the illegality of deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted."[64] He adds that "[t]his is one of the rare cases when complete silence on a subject in the preparatory material of the Hague Peace Conferences can be confidently adduced as evidence of a self-understood rule."[65]

In the wake of World War Two, the International Military Tribunal at Nuremberg applied the Charter of London, which characterized deportations as a crime against humanity.[66] This characterization was based on the Hague Regulations and on existing customary international law.[67]

IV. CUSTOMARY INTERNATIONAL LAW

Although Geneva IV did not "put forward any new ideas" as such,[68] it did, nevertheless, extend some of the international rules then in force. Hence, Geneva IV is generally considered, to the extent that it has enlarged the legal duties incumbent upon the occupying power, to be constitutive and binding only on signatories; to the extent that it merely clarifies customary law, especially as regards "standards of civilisation," it is declaratory.[69]

The prohibition of mass deportations was undoubtedly declaratory of customary international law as contained in Article 49(1). While it is not clear whether the prohibition of individual deportations had acquired that status by 1949, by now Article 49(1) has become declaratory of customary international law in its entirety.[70] The Commentary confirms

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64. 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, THE LAW OF ARMED CONFLICT 227 (1968).

65. *Id.* at 228.

66. *See infra* note 87 and accompanying text.

67. *See infra* part V.A.

68. COMMENTARY, *supra* note 4, at 9.

69. Schwarzenberger, *supra* note 64, at 19, 165; *see also* Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. ON HUM. RTS. 106, 111-112 (1979); G.I.A.D. Draper, *The Geneva Conventions of 1949*, 114 REC. DES COURS 63, 120 (1965); Raymund T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 411 (1952).

70. Professor Meron supports this opinion:

[T]he central elements of Article 49(1), such as the absolute prohibitions of forci-

this view, remarking that by 1958 the provisions of Article 49 could be regarded "as having been embodied in international law."[71] Support for this conclusion can also be found in Article 23 of General Order No. 100 of the U.S. Army, issued back in 1863 at the time of the Civil War: "Private citizens are no longer murdered, enslaved, or *carried off to distant parts*, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."[72] General Order No. 100, commonly referred to as the Lieber Code for its author Francis Lieber, remains "a benchmark for the conduct of an army toward an enemy army and population."[73] The Lieber Code "was the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."[74] Professor Meron goes further, adding that the Lieber Code "has had a major influence on the drafting of . . . such treaties as Hague Convention No. IV and the Geneva Conventions and, of course, on the formation of customary law."[75]

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ble mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1), are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices which led to the rule set forth in Article 49. Although it is less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law.

THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 48-49 (1989); *see also* Theodor Meron, *Deportation of Civilians as a War Crime Under Customary Law, in* BROADENING THE FRONTIERS OF HUMAN RIGHTS—ESSAYS IN HONOUR OF ASBJØRN EIDE 201 (Donna Gomien ed., 1993); Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987); Meron, *supra* note 69, at 111-12; Yoram Dinstein, *Expulsion of Mayors From Judea*, 8 TEL AVIV U.L. REV. 158 (1981).

71. COMMENTARY, *supra* note 4, at 279. The Commentary notes that Article 49 was adopted unanimously, with only some minor discussions about its wording. Article 49 has also been endorsed by the U.N. General Assembly in its Resolution on Protection of Civilians, Dec. 9, 1970, *reprinted in* 1 THE LAW OF WAR 755 (Leon Friedman ed., 1972).

72. U.S. Army General Order 100 (1863), *reprinted in* RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45, 49 (1983) (emphasis added); *see also* Yoram Dinstein, *Lieber's Code and the Law of War; The Forgotten Victim: A History of the Civilian*, 13 ISR. Y.B. ON HUM. RTS. 346 (1983) (book review); Richard R. Baxter, *Le premier effort moderne de codification du droit de la guerre: Francis Lieber et l'Ordonnance No. 100*, 45 REVUE INTERNATIONAL DE LA CROIX-ROUGE 155, 217 (1963).

73. Hartigan, *supra* note 72, at 1.

74. *Id.* at 1-2.

75. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOM-

The conclusion that the basic provisions of Article 49 are customary international law would be reinforced if it is agreed that there is an unwritten Hague rule against deportations, as there is no doubt that the Hague rules reflect customary international law. The Charter and the judgment of the International Military Tribunal at Nuremberg support this proposition since they condemned deportations as an international crime on the basis of the Hague Regulations and customary international law.[76]

When all the pieces of this international humanitarian law puzzle are put together, the picture becomes apparent. Deportations were prohibited under the Hague Regulations as falling below the standards of civilization. As such they have become part of customary international law merely clarified in Geneva IV. Being part of customary international law and prohibited by the Hague Regulations, the Charter of the International Military Tribunal did not run counter to the adage *"nullem crimen, nulla poena sine lege"* when it classified deportations as an international crime.

The question whether Article 49 reflects customary international law has been raised in the Israeli Supreme Court. In the 1988 *Affo* judgment, as well as in earlier judgments referred to therein, the Court asserted that Article 49 does not embody principles of customary international law but merely reflects conventional international law.[77] The Court boldly stated that "Article 49 in its entirety does not in any case form part of customary international law."[78] This controversial interpretation will be discussed in more detail below.

V. DEPORTATION AS AN INTERNATIONAL WAR CRIME[79]

A. *The Nuremberg Trial*[80]

At the time of the Nuremberg war trials, Article 49 had not yet been formulated. On the other hand, the Hague Regulations, as well as the

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ARY LAW 49 n.131 (1989).

76. *See infra* part V.A.

77. Affo v. Commander of the IDF Forces in the West Bank, H.C.J. 785/87, H.C.J. 845/87, H.C.J. 27/88, Apr. 10, 1988, 42(2) P.D. [Piskei Din] [Judgments of the Israeli High Court] (1988), 29 I.L.M. 139 (1990).

78. *Id.* at 149.

79. *See generally* DONALD WELLS, WAR CRIMES AND LAWS OF WAR (2d ed. 1991).

80. *See generally* THE NUREMBERG TRIAL AND INTERNATIONAL LAW (George Ginsburgs & V.N. Kudriavtsev eds., 1990); 1 INTERNATIONAL CRIMINAL LAW, CRIMES (M. Cherif Bassiouni ed., 1986); INGRID DETTER DE LUPIS, THE LAW OF WAR 352-

"laws of humanity" and the "dictates of the public conscience" referred to in the preamble thereof, were in effect. In response to the deportation practice of the Germans, the Allied Powers made it clear on several occasions throughout the war that they considered this practice to be criminal and that they would seek prosecution and punishment of those guilty and responsible for those crimes.[81]

After the defeat of the Axis Powers, the Charter of London established the International Military Tribunal (IMT) and defined its jurisdiction in the annexed Charter.[82] The crimes coming within the jurisdiction of the IMT included "War Crimes"[83] and "Crimes against Humanity,"[84] which both include deportation of civilians.

Counts 3B, 3J and 4A of the Nuremberg indictment dealt with the deportation issue. The IMT unequivocally condemned the German deportation practice as a crime against humanity.[85] In Part VI of its judgment, the Nuremberg Tribunal stated that "not only in defiance of well-established rules of international law, but in complete disregard of the elementary dictates of humanity . . . [w]hole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected with the war effort."[86] The judgment held that crimes defined by Article 6(b) of the IMT Charter

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359 (1987); Leo Gross, *The Punishment of War Criminals—The Nuremberg Trial*, 2 NETH. INT'L L. REV. 356 (1955) (part I), 3 NETH. INT'L L. REV. 10 (1956) (part II).

81. D.W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 AUSTL. Y.B. INT'L L. 46, 63-4 (1985); de Zayas, *supra* note 54, at 213-14; Bassiouni, *supra* note 61, at 305-08.

82. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 39 AM. J. INT'L L. 258 (1945 Supplement), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 689 (Dietrich Schindler & Jiri Toman eds., 1973).

83. "*War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population . . . ." *Id.* at 692.

84. "*Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . ." *Id. See* Bassiouni, *supra* note 61, at 301-17 (on deportation and population transfer); Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1946).

85. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 56-59 (IMT Secretariat trans., 1947); 13 ANN. DIG. 203, 213-214 (1946). Consequently, the person in charge of the German workforce and the man responsible for the deportations to forced labor, Fritz Sauckel, was sentenced to death. Rousseau, *supra* note 45, at 159.

86. *Judgment of the International Military Tribunal*, Oct. 1, 1946, *reprinted in* CASES ON UNITED NATIONS LAW 888 (Louis B. Sohn ed., 1956).

were already recognized as war crimes under international law.[87] And because these rules even reflected customary law, it was not substantial whether all parties to the conflict were party to the 1907 Hague Regulations.[88] As a logical result, the Germans' defense that they were charged with acts that did not constitute a crime at the time of their commission (ex post facto laws) failed.[89] The defense that no express prohibition of deportations was in force was brushed aside for the same reasons.[90]

B. *The Draft Code of Crimes Against the Peace and Security of Mankind* [91]

At the close of the proceedings of the IMT, the General Assembly endorsed the Nuremberg principles and entrusted the International Law Commission (ILC) with the preparation of a draft Code of Offenses against the Peace and Security of Mankind.[92] After years of discussions, questionnaires and reports,[93] the ILC issued an extensive update of its

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87. 1946 *Judgment of the International Military Tribunal at Nuremberg: Extracts on Crimes Against International Law, reprinted in* DOCUMENTS ON THE LAWS OF WAR 155, 156 (Adam Roberts & Richard Guelff eds., 1989).

88. *Id.* Because of the danger of legalistic arguments of this kind, aimed at the evasion of the humanitarian provisions, the Geneva Conventions no longer contain a *clausula si omnes.*

89. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 85, at 56-9.

90. *Id.*

91. *See generally* CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980).

92. G.A. Res. 95(I), U.N. Doc. A/236 (1946), at 1144 [hereinafter Draft Code]. *See* THE WORK OF THE INTERNATIONAL LAW COMMISSION 34-36, 121-125 (4th ed. 1988), U.N. Sales No. E.88.V.1; Bassiouni, *supra* note 91. *See also* Leo Gross, *Draft Code of Offenses Against the Peace and Security of Mankind*, 16 ISR. Y.B. ON HUM. RTS. 162 (1986); Leo Gross, *Some Observations on the United Nations Draft Code of Offenses Against the Peace and Security of Mankind*, 15 ISR. Y.B. ON HUM. RTS. 224 (1985); Leo Gross, *Some Observations on the Draft Code of Offenses Against the Peace and Security of Mankind*, 13 ISR. Y.B. ON HUM. RTS. 9 (1983).

93. The most important documents include: Jean Spiropoulos, *Formulation of Nuremberg Principles*, 1950 Y.B. INT'L L. COMM'N, Vol. II, 181 and 253, U.N. Doc. A/CN.4/22 (first report); Jean Spiropoulous, *Draft Code of Offenses Against the Peace and Security of Mankind*, 1957 Y.B. INT'L L. COMM'N, Vol II, 43, U.N. Doc. A/CN.4/44 (second report); Jean Spiropoulous, *Draft Code of Offenses Against the Peace and Security of Mankind*, 1954 Y.B. INT'L L. COMM'N, Vol. II, 112, U.N. Doc. A/CN.4/85 (third report); Memorandum Prepared by the U.N. Secretariat, 1950 Y.B. INT'L L. COMM'N, Vol. II, 278, U.N. Doc. A/CN.4/39; *Draft Code of Offenses against the Peace and Security of Mankind*, 1954 Y.B. INT'L L. COMM'N, Vol. II, 149, U.N. Doc. A/2693.

1954 draft on July 15, 1991.[94]

Article 22 of the draft Code deals with "exceptionally serious war crimes."[95] These words attain extra vigor in light of the purpose of the entire draft Code to "cover only the most serious among the most serious of crimes."

Three conditions must be met for an act to constitute an exceptionally serious war crime: (a) a violation of principles and rules of international law of war, including customary international law;[96] (b) a violation that is exceptionally serious; and (c) the seriousness must be such that the act constituting a crime falls within any one of the enumerated categories.[97] Whether this means that any deportation is an exceptionally serious war crime, or whether only deportations of an exceptionally serious nature qualify, is not entirely clear. The draft report seems to contain an answer, though, explaining that the enumerated categories are "exhaustive even though it falls to the court to determine or assess whether some acts or omissions fulfill the character of exceptional seriousness for each category."[98] This means that the determinative factor for a deportation to qualify as an exceptionally serious war crime is its exceptional seriousness, a circular equation with two undetermined variables. Are the deportations of Palestinians from the West Bank serious enough to qualify (provided Geneva IV applies)? They would constitute a breach of Article

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94. International Law Commission (43rd session), Draft Report of the International Law Commission on the Work of its Forty-Third Session, July 15, 1991, U.N. Doc. A/CN.4/L.464/Add.4, Annex A. The first draft was adopted by the ILC in 1954, Y.B. INT'L L. COMM'N, Vol. II, 149 (1954) and was revised in 1987, U.N. Doc. A/CN.4/404 (1987); 1988, U.N. Doc. A/43/539 (1988); and 1989, U.N. Doc. A/CN.4/419 (1989). *See also* A GLOBAL AGENDA—ISSUES BEFORE THE 46TH GENERAL ASSEMBLY OF THE UNITED NATIONS 235-241 (John Tessitore & Susan Woolfson eds., 1991-1992).

95. Article 22(2) defines an exceptionally serious war crime as:

> an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:
>
> (a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in forces of a hostile power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];
>
> (b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory; . . .
>
> (e) large-scale destruction of civilian property . . .

U.N. Doc. A/CN.4/L.464/Add. 4 at 30.

96. *Id.* at 30-31.

97. *Id.* at 30.

98. *Id.* at 31.

49, and under Article 147 of Geneva IV and Article 85(4)(a) of Protocol I, this would even be a grave breach, i.e. a war crime, but, presumably, not an exceptionally serious war crime. How about the deportation of 415 Palestinians? Which standard should be taken to judge the seriousness of a deportation, World War II? The draft report states that the seriousness "is marked, to a great extent, by the seriousness of the effects of the violation."[99] This does not shed much more light on the issue. Arguably, only an exhaustive list of crimes, as detailed as possible, would solve the problem of open notions like "serious" and "exceptional."

Interestingly, the establishment of settlers in an occupied territory and changes in its demographic composition, prohibited by Article 49(6) of Geneva IV and Article 85(4)(a) of Protocol I, are also included in Article 22 and for the same good reasons. The ILC regards the establishment of settlers in an occupied territory as constituting "a particularly odious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seem to the Commission to be such a serious act it could echo the seriousness of genocide."[100]

It should be noted that this draft Code is only concerned with individual criminal responsibility,[101] but prosecution of an individual "does not relieve a State of any responsibility under international law for an act or omission attributable to it."[102] At present, state responsibility for international crimes is the subject of Article 19 of the ILC's draft Articles on State Responsibility.[103] Article 19(2) defines an international crime for this purpose as a breach of "an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole." It is hoped that a deportation that constitutes an exceptionally serious war crime also qualifies as an international crime for the purpose of

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99. *Id.*

100. *Id.* at 32. Draft Code, *supra* note 92, art. 3.

101. *See generally* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS (1992); B.V.A. Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 REVUE BELGE DE DROIT INTERNATIONAL 8 (1976).

102. Draft Code, *supra* note 92, art. 5.

103. THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY 179-180 (Shabtai Rosenne ed., 1991). Among the host of recent studies on this provision, see especially INTERNATIONAL CRIMES OF STATE—A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph H.H. Weiler et al. eds., 1989).

determining state responsibility. As a matter of fact, it would make more sense to incorporate a provision concerning state responsibility for war crimes into the draft Code of Crimes against the Peace and Security of Mankind because, if the draft Code "is to be worth anything, it must include state as well as individual criminal responsibility."[104]

C. *The Occupation of Kuwait* [105]

Most press reports and law review articles dealing with the civilian fate during the Kuwaiti conflict focused on the taking of international hostages.[106] However, there were also substantial allegations of deportations of Kuwaitis to Iraq and of settlement of Iraqis in Kuwait. The Security Council condemned the deportations and the relocations in Resolution 674 of 29 October 1990,[107] while resolution 677 of 28 November 1990 specifically condemned Iraq's attempts to alter the demographic composition of Kuwait by combining deportation and relocation.[108]

Both practices are prohibited under Articles 49(1) and 49(6) respectively of Geneva IV. That Geneva IV applied to Kuwait was uncontested.[109] In Resolution 670[110] and 674,[111] the Security Council reaf-

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104. Sharon Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind*, *in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES 109, 114 (M. Cherif Bassiouni ed., 1986).

105. *See generally*, *Humanitarian Law and the Iraq-Kuwait Crisis*, *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES 163 (1992); THE GULF WAR (Newsweek 1992); NORMAN FRIEDMAN, DESERT VICTORY (1991); Diana Vincent-Daviss & Radu Popa, *The International Legal Implications of Iraq's Invasion of Kuwait: A Research Guide*, 23 N.Y.U. J. INT'L L. & POL. 231, 263-273, 307-316 (1990); Joe Verhoeven, *Etats alliés ou Nations Unies? L'O.N.U. face au conflit entre l'Irak et le Koweït*, 36 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 145 (1990).

106. *See, e.g.*, Colin Warbrick, *The Invasion of Kuwait by Iraq*, 40 INT'L COMP. L.Q. 482, 489-90 (1991); Peter Sisler, *Hostages of Peace?*, WASH. TIMES, Nov. 13, 1990, at A1. On the taking of hostages, see generally Hernan Burgos, *La prise d'otages en droit international humanitaire*, 71 REVUE INTERNATIONALE DE LA CROIX-ROUGE 187 (1989).

107. 29 I.L.M. 1561, *reprinted in* 1 THE KUWAIT CRISIS: BASIC DOCUMENTS 95 (Elihu Lauterpacht, *et al.* eds., 1991) [hereinafter KUWAIT CRISIS].

108. 29 I.L.M. 1564. *See* Erik Suy, *International Humanitarian Law and the Security Council Resolutions on the 1990-1991 Gulf Conflict*, *in* HUMANITARIAN LAW AND ARMED CONFLICT: CHALLENGES AHEAD—ESSAYS IN HONOUR OF FRITS KALSHOVEN 515 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) [hereinafter HUMANITARIAN LAW].

109. Iraq may be excepted because it annexed Kuwait on August 8, 1990. Colin Warbrick, *supra* note 106, at 483. The Nuremberg Tribunal rejected a similar defense by Germany. Sohn, *supra* note 86, at 889; Rousseau, *supra* note 45, at 138.

firmed the applicability of Geneva IV to Kuwait and said that Iraq was bound to comply with it and that Iraq was liable in respect of the grave breaches it committed.

Pursuant to Article 147 of Geneva IV,[112] supplemented by Article 85 of Protocol I,[113] the grave breaches referred to by the Security Council include deportations and transfers of civilians.[114] The commission of these grave breaches, a euphemism for war crimes, entails the individual penal and disciplinary responsibility of persons directly guilty thereof and of persons who were able to prevent or suppress such breaches but failed to do so.[115]

The Security Council seriously considered the prosecution of the Iraqi war criminals. Resolution 674 of 29 October 1990 reflects this option.[116] In addition to condemning Iraq's deportation of Kuwaitis and its relocation of Iraqis into Kuwait and reminding Iraq that it is liable for any

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110. 29 I.L.M. 1334-1337 (1990), *reprinted in* KUWAIT CRISIS, *supra* note 107, at 94.

111. 29 I.L.M. 1561, 1562, 1563.

112. Article 147 declares that "[g]rave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: . . . unlawful deportation or transfer. . . ." Geneva IV, *supra* note 2, art. 147, 75 U.N.T.S. at 287.

113. Article 85(4)(a) regards the following act as a grave breach "when committed wilfully and in violation of the Convention or the Protocol":

> the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

Note, however, that Iraq is not a party to Protocol I. Michel Veuthey, *De la guerre d'octobre 1973 au conflit du Golfe 1991: les appels du CICR pour la protection de la population civile, in* HUMANITARIAN LAW, *supra* note 108, at 537.

114. On the characterization of grave breaches under the 1949 Geneva Conventions and the 1977 Protocol I, see Ghislaine Doucet, *La qualification des infractions graves au droit international humanitaire*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 79 (Frits Kalshoven & Yves Sandoz eds., 1989); Emmanuel J. Roucounas, *Les infractions graves au droit humanitaire*, 31 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 57 (1978).

115. Articles 86-87 of Protocol I. *See* Igor P. Blishchenko, *Responsibility in Breaches of International Humanitarian Law, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 283, 291 (UNESCO 1988); *see also* Julian J.E. Schutte, *The System of Repression of Breaches of Additional Protocol I, in* HUMANITARIAN LAW, *supra* note 108, at 177; Christine Van Den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I, in* HUMANITARIAN LAW, *supra* note 108, at 199; Michael Bothe, *Prevention and Repression of Breaches of International Humanitarian Law*, 1986-87 Y.B. INST. HUMANITARIAN L. 115.

116. 29 I.L.M. 1561.

injury, damage or loss, this resolution invited states to "collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Security Council."[117] Adam Roberts reports evidence from the Second World War that "blunt reminders that war crimes will be punished can induce restraint."[118] Was that the actual purpose the Security Council had in mind?

If reports are correct, Iraq's treatment of the Kuwaitis could "provide a . . . formidable slate of charges."[119] The official letters of complaint of the exiled government of Kuwait to the United Nations clarified Kuwait's allegations concerning the deportations and relocations.[120] Many sources confirm these allegations.[121]

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117. *Id.* at 1562. *See* Paul Lewis, *U.N. To Weigh Iraqi War Crimes Inquiry*, N.Y. TIMES, Oct. 21, 1990, at 12; Olivia Ward, *U.N. Votes to Hold Iraq Responsible for Kuwait Damage*, TORONTO STAR, Oct. 30, 1990, at A2; *U.N. Supports Call for War Crimes Inquiry*, DAILY TELEGRAPH, Oct. 22, 1990, at 12.

118. Adam Roberts, *Crisis in the Gulf, Inducing Iraq to Comply with the Rules of War*, THE INDEPENDENT, Sept. 6, 1990, at 11.

119. Christian Tyler, *Desert Trial for the Laws of War*, FIN. TIMES, Sept. 8, 1990, at 1.

120. Kuwait complained that:

1. Iraqi forces arrested Kuwaiti nationals and transferred them to Baghdad;
2. Iraq transported large numbers of Iraqi families to Kuwait for the purposes of settlement and alteration of the country's demographic structure;
3. Iraq, "in its efforts to change the demographic structure of Kuwait and to erase the identity of the country," had embarked on a "novel practice of depopulating Kuwait from its own inhabitants and settling Iraqi families in Kuwaiti homes," after expelling the Kuwaiti families from their homes (this clearly violated Geneva IV); and
4. Iraq made "life under occupation so intolerable that the population was forced out of the country in order to alter the demographic structure of Kuwait."

Letter from the Deputy Prime Minister and Minister for Foreign Affairs of Kuwait addressed to the Secretary-General, Aug. 7, 1990, *reprinted in* KUWAIT CRISIS, *supra* note 107, at 267. Letter from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General, Sept. 2, 1990, *reprinted in id.* at 268. Letter from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General, Sept. 15, 1990, *reprinted in id.* at 270. Letter from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General, Oct. 4, 1990, *reprinted in id.* at 273. Letter from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General, Sept. 17, 1990, *reprinted in id.* at 271.

121. *See, e.g.*, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 1419, 1466 (1992) (Iraq and Kuwait); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 1457, 1507 (1991) (Iraq and Kuwait); David Mutch, *Iraq Scores High on Abuses*, CHRISTIAN SCIENCE MONITOR, Aug. 28, 1990, at 8; Christopher Greenwood, *Now Force is Given the Teeth*

Under the Geneva Conventions[122] as well as under the Charter of the IMT[123] and the draft Code of Crimes against the Peace and Security of Mankind,[124] the deportations and relocations carried out by Iraq constitute international war crimes. In particular, the odious attempt to alter the demographic composition of Kuwait, supposedly to justify its annexation, constitutes "the most serious of the most serious war crimes." The government of Iraq, Saddam Hussein, military commanders, and other members of the Iraqi army who carried out these practices are criminally responsible and punishable for these war crimes. Responsibility for these crimes is not affected by any motives invoked by the accused, which are not covered by the definition of the crime.[125] Since no statute of limitations is supposed to run against war crimes,[126] Saddam Hussein and any other Iraqi "war criminals" could still be brought to trial in the future for any acts committed during the recent Gulf War, as well as for war crimes committed during the Iran-Iraq Gulf War (mass deportations into Iraq,[127] use of poison gas[128]). For purposes of avoiding any doubt as to the impartiality of the tribunal that would sit on these cases, it would preferably be an international tribunal[129] and most preferably be composed of Arab judges. The existence of an international criminal court might not preclude the raising of the impartiality issue, although it would alleviate the practical problems involved in setting up an international court.[130]

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of Law, TIMES, Aug. 27, 1990, at 2; Daniel Johnson, *The Human Shield that Puts Saddam Beyond the Pale*, TIMES, Aug. 21, 1990, at 3; *A Mighty Undertaking*, TIMES, Aug. 21, 1990, at 4; *An Ultimatum to Iraq*, TIMES, Aug. 20, 1990, at 5.

122. Geneva IV, *supra* note 2, arts. 146-47, 75 U.N.T.S. at xxx; Protocol I, *supra* note 32, art. 85.

123. Art. 6(9), 6(c), *reprinted in* ENCYCLOPEDIA OF UNITED NATIONS AND INTERNATIONAL AGREEMENTS (1985), at B6.

124. Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 94, art. 22.

125. *Id.* art. 4.

126. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Draft Code of Crimes against the Peace and the Security of Mankind, *supra* note 94, art. 7. *See generally*, Friedl Weiss, *Time Limits for the Prosecution of Crimes Against International Law*, 53 BRIT. Y.B. INT'L L. 163 (1983).

127. P. Tavernier, *Combatants and Non-Combatants, in* THE GULF WAR OF 1980-1988: THE IRAN-IRAQ WAR IN INTERNATIONAL LEGAL PERSPECTIVE 129, 133 (Ige F. Dekker & Harry H.G. Post eds., 1992).

128. Frits Kalshoven, *Prohibitions or Restrictions on the Use of Methods and Means of Warfare, in id.* at 97, 101.

129. Roberts, *supra* note 118, at 11.

130. *See generally* William N. Gianaris, *The New World Order and the Need for*

Article 88 of Protocol I requires states to cooperate in the prosecution of war criminals and in the matter of extradition. Furthermore, pursuant to Article 146 of Geneva IV, states even have a duty to prosecute those who commit the grave breaches referred to above.[131] But whether this will actually take place is not exclusively a matter of law. International politics will first determine whether the prosecution would be opportune and practically possible.[132] As of yet, this has not been the case. Never-

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an International Criminal Court, 16 FORDHAM INT'L L.J. 88 (1992-1993); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); Whitney R. Harris, *A Call for an International War Crimes Court: Learning from Nuremberg*, 23 U. TOLEDO L. REV. 229 (1992); Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223 (1992); John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 213 (Mark W. Janis ed., 1992); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1 DUKE J. INT'L & COMP. L. 135 (1991); John B. Anderson, *An International Criminal Court—An Emerging Idea*, 15 NOVA L. REV. 373 (1991); Bernhard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT'L L. 67 (1990).

131. *See generally* Paolo Benvenuti, *Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligations of Third States to Ensure Respect of IHL*, 1989-90 Y.B. INT'L INST. HUMANITARIAN L. 27 (1992); Christopher Greenwood, *Ensuring Compliance with the Law of Armed Conflict*, *in* CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW 195 (W.E. Butler ed., 1991); L.C. Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, *in* L.C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 239 (1985).

132. *See generally* Kenneth A. Williams, *The Iraq-Kuwait Crisis: An Analysis of the Unresolved Issues of War Crimes Liability*, 18 BROOKLYN J. INT'L L. 385 (1992); Louis René Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law after the Gulf War*, 10 DICKINSON J. INT'L L. 425 (1992); Louis René Beres, *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VAND. J. TRANSNAT'L L. 487 (1991); Louis René Beres, *Toward Prosecution of Iraqi Crimes under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L.J. 127 (1991); *Special Section on Iraqi War Crimes*, 31 VA. J. INT'L L. 351 (1991), John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis*, 31 VA. J. INT'L L. 403 (1991); 14 SUFFOLK TRANSNAT'L L.J. 1 (1990) dedicated to the Gulf War; *Symposium: The Iraqi Crisis, Legal and Socio-Economic Dimension*, 15 S. ILL. U. L.J. 411, (1991); David Raic, *The Gulf Crisis and the United Nations*, 4 LEIDEN J. INT'L L. 119 (1991); Marc Weller, *The Kuwait Crisis: A Survey of Some Legal Issues*, 3 AFR. J. INT'L & COMP. L. 1 (1991); William McBryde, *War Crimes in Kuwait*, 12 THE SCOTS LAW TIMES 132 (1991); Theodor Meron, *Prisoners*

theless, this is a unique opportunity to establish a new, important precedent in the law of war and to shed more light on, and to develop the concept of, international war crimes. Maybe the Yugoslav Dismemberment War will provide a sad opportunity to perform this service to international humanitarian law. This possibility will be discussed further below.

Iraq could also be made to pay for all damages caused.[133] Article 91 of Protocol I stipulates that a party to a conflict that violates the provisions of the Conventions or of the Protocol shall be liable to pay compensation. In other words, in addition to the individual criminal responsibility, Protocol I confirms the state responsibility for damages caused by war crimes and breaches of the Geneva law.[134] This result would also follow from Article 19 of the Draft Articles on State Responsibility. Whereas the United Nations has not taken further action on the prosecution of Iraqi war criminals, it has gone all the way in the compensation process.

On April 3, 1991, the United Nations Security Council passed Resolution 687 which provided for the creation of a Compensation Fund and a Compensation Commission.[135] Under this resolution Iraq is liable for any direct loss or injury to foreign governments, nationals, and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait.[136] The fifteen member Compensation Commission, based in Geneva, is a subsidiary organ of the Security Council.[137] To date the Commission has already processed some 400,000 individual claims.[138] Corporate claims could be filed beginning January 1, 1993, and govern-

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of War, Civilians and Diplomats in the Gulf Crisis, 85 AM. J. INT'L L. 104 (1991); Peter Rowe, *The Gulf and the Laws of War*, 141 NEW L.J. 228 (1991).

133. S.C. Res. 674, 29 I.L.M. 1561 (1990). *See* 2 LASSA OPPENHEIM, INTERNATIONAL LAW 593 (7th ed., Hersch Lauterpacht ed., 1952) (based on Article 3 of the 1907 Hague Convention).

134. Blishchenko, *supra* note 119, at 282, 292.

135. 30 I.L.M. 846, paras. 16-19 (1991); *see* Nicolas C. Ulmer, *The Gulf War Claims Institution*, 10 J. INT'L ARB. 85 (1993); *U.N. Security Council Passes Resolution Ordering Iraq to Pay Economic Reparations*, INT'L TRADE REP., Apr. 10, 1991.

136. 30 I.L.M. 846, para. 16.

137. *See* David D. Caron, *United Nations Compensation Commission: Report with Decisions of the Governing Council - Introductory Note*, 31 I.L.M. 1009 (1992); Jeffrey A. Jannuzzo, *United Nations Establishes Compensation Commission for Iraqi War Damages*, MIDDLE EAST EXEC. REP., Vol. 14, No. 6, at 8 (1991); Charles N. Brower, *Stage Set for Gulf War Claims*, FIN. TIMES, May 16, 1991, at 18.

138. Stephanie Nebehay, *Turkish Company Files First Claim Against Iraq*, REUTER LIBR. REP., Jan. 6, 1993; *see also* Report dated 1 September 1992 on the Activities of the United Nations Compensation Commission (July 1991-June 1992), U.N. Doc. S/24589, 31 I.L.M. 1018 (1992).

ments and international organizations could file their claims beginning February 1, 1993.[139] The funding of the Compensation Fund remains the main obstacle to full compensation. Initially it was planned that thirty percent of Iraq's oil sale revenues would go to the fund,[140] but Iraq has not exported oil to the world market since 1990.[141] Therefore, the Security Council issued Resolution 778, on October 2, 1992, which provides for the transfer of some of the proceeds of past Iraqi oil sales that are frozen by United Nations member states, unless funds become available from oil exports by Iraq.[142]

As far as the victims of deportations to Iraq are concerned, they can claim business losses as a result of their absence.[143] Furthermore, it appears that these victims can also claim compensation for mental pain and anguish. Decision 3 of the Governing Council of the Compensation Commission regulates the compensation for "[p]ersonal injury and mental pain and anguish."[144] It defines serious personal injury and mental pain and anguish for which compensation can be claimed as comprising physical or mental injury arising from illegal detention for more than three days.[145] Detention is defined as "the holding of persons by force in a particular location by Iraqi authorities."[146] Persons who were deported from Kuwait should qualify for compensation under this definition. As the United States Department of State reports, "a large number of Kuwaitis . . . were detained and imprisoned in Iraq, including . . . civilians."[147] It remains to be seen, however, whether such claims have actually been filed and how the Compensation Commission will treat them.

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139. Nebehay, *supra* note 138.

140. S.C. Res. 705 (1991), 30 I.L.M. 1715 (1991).

141. Markham Ball, *U.N. Claims Process: Steps Taken to Date, Issues to Resolve*, MIDDLE EAST EXEC. REP., Vol. 15, No. 10, at. 9 (1992); *see also* Markham Ball, *The Iraq Claims Process—A Progress Report*, 9 J. INT'L ARB. 37 (1992).

142. Markham Ball, *U.N. Claims Process: Steps Taken to Date, Issues to Resolve*, *supra* note 141.

143. *See* Decision 4 "Business losses of individuals eligible for consideration under the expedited procedures" taken by the Governing Council of the Compensation Commission on October 18, 1991, 31 I.L.M. 1030 (1992); *see also* Decision 9 "Propositions and conclusions on compensation for business losses: types of damages and their valuation" of March 6, 1992, 31 I.L.M. 1037 (1992).

144. Decision 3 of Oct. 18, 1991, 31 I.L.M. 1028 (1992).

145. *Id.* at 1029.

146. *Id.* at 1028.

147. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, 1470 (1992) (Kuwait).

D. *The Yugoslav War of Dismemberment*

Recent developments surrounding the war in the former Yugoslavia indicate a willingness of the world community to prosecute war crimes committed during this conflict. The Security Council, in Resolution 771 of July 13, 1992 and Resolution 780 of October 6, 1992, has invited states and nongovernmental organizations (NGO's) "to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions being committed in the territory of the former Yugoslavia."[148] As a result, evidence of war crimes is being gathered and may be submitted later if perpetrators eventually should be put on trial.[149]

Resolution 780 also established a Commission of Experts to examine and analyze such information submitted to it by states and NGO's and to conduct its own investigations.[150] So far, the Commission has not been able to conduct any investigations itself.[151] Instead, it has been working solely on the basis of documents submitted to it.[152] The Commission of Experts completed an interim report that was submitted to the Security Council on February 9, 1993.[153] In its interim report, the Commission observed that a decision to establish an ad hoc international tribunal would be consistent with the direction of its work.[154] A War Crimes Commission set up by the Allied Forces in 1943 led eventually to the establishment of an ad hoc international tribunal after World War Two,

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148. S.C. Res. 780 (1992), para. 1, 31 I.L.M. 1476 (1992); *see also* S.C. Res. 771 (1992), para. 5, 31 I.L.M. 1470, 1471 (1992).

149. *See infra* note 174 and accompanying text.

150. S.C. Res. 780 (1992), para. 2, 31 I.L.M. 1476, 1477 (1992); *see U.N. Yugoslav War Crimes Body to be Based in Geneva*, REUTER LIBR. REP., Oct. 14, 1992; *Probe Ordered into Bosnia War Crimes*, MIDDLE EAST NEWS NETWORK, Oct. 8, 1992; Mark Tran & Hella Pick, *United Nations: Security Council to Set Up Commission to Investigate Atrocities in Former Yugoslavia*, GUARDIAN, Oct. 7, 1992; *UN Panel to Study War Crimes in Bosnia*, CHI. TRIB. , Oct. 7, 1992, at 3C. The commission is chaired by Professor Frits Kalshoven and consists further of Professor Cherif Bassiouni, William Fenrick, Judge Keba Mbaye, and Professor Torkel Opsahl. *UN Announces Commission of Experts on Yugoslavia*, NEWSL. AM. SOC'Y INT'L L. 13 (Jan.-Feb. 1993).

151. The Commission has, nevertheless, sent a team from the Boston human rights group, Physicians Without Frontiers, to investigate a mass grave found near Vukovar. Philippe Naughton, *U.N. Expert Says No Precedent for Milosevic Indictment*, REUTER LIBR. REP., Dec. 17, 1992. The interim report, referred to below in the main text, may reveal some information concerning this mission.

152. U.N. Doc. S/25274.

153. *Id.*; *see also* Anthony Goodman, *U.N. War Crimes Panel May Propose Setting Up a Court*, REUTER LIBR. REP., Jan. 23, 1993.

154. *Id.*

the IMT referred to above.[155] Resolution 780 allowed the United Nations Secretary-General to recommend "further appropriate steps,"[156] and also alluded to the possibility of setting up an ad hoc war crimes tribunal. On January 13, 1993, at a meeting in Paris, the European Community expressed its readiness to set up such a court.[157] The United Nations General Assembly, in a resolution of December 18, 1992, appealed to the Security Council to consider recommending the establishment of an ad hoc international war crimes tribunal.[158] The United States also favored such a move.[159] As a result, on February 22, 1993, the Security Council adopted Resolution 808 in which it decided that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[160] In the same resolution, the Security Council requested the Secretary-General to submit for consideration "a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision [to set up a tribunal]."[161] On May 3, 1993 the Secretary-General presented his report containing a draft statute of the ad hoc tribunal.[162] This report was approved by the Security Council in Resolution 827 of May 25, 1993, in which the Council formally established the ad hoc tribunal.[163] The establishment of the tribunal as such will not, of course, solve any of the outstanding difficulties this tribunal will face, such as the practical im-

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155. A Far Eastern Sub-Commission of the War Crimes Commission was set up in 1944 with headquarters in Chunking, China. According to the Chairman of the current Commission of Experts, Professor Frits Kalshoven, there is a difference between the two commissions: "[W]hereas the World War Two commission had been mandated to seek out guilty people, [our] commission [is] charged with examining trends and analysing whether war crimes [have] in fact occurred." Naughton, *supra* note 151.

156. S.C. Res. 780 (1992), para. 4, 31 I.L.M. 1476, 1477 (1992).

157. Goodman, *supra* note 153.

158. *Id.*

159. Larry Pressler, *Justice Must Be Demanded for 'Ethnic Cleansing' Crimes*, CHRISTIAN SCIENCE MONITOR, Dec. 29, 1992, at 19.

160. S.C. Res. 808 (1993), para. 1; *see also* Richard C. Hottelet, *Enforcing New Rules for a New World*, CHRISTIAN SCIENCE MONITOR, Apr. 22, 1993, at 18; *UN War Crimes Tribunal: Crucial First Step Outweighs Risk*, OTTAWA CITIZEN, Feb. 26, 1993, at A10; Paul Lewis, *U.N. Council Moves to Create Balkan War-Crimes Tribunal*, N.Y. TIMES, Feb. 19, 1993, at A3; M. Cherif Bassiouni, *War-Crime Tribunal: The Time Is Now*, CHI. TRIB., Feb. 11, 1993, at 29.

161. S.C. Res. 707, *supra* note 160, para. 2.

162. U.N. Doc. S/25704 (May 3, 1993), 33 I.L.M. 1159 (1993).

163. S.C. Res. 827, 32 I.L.M. 1203 (1993).

possibility for prosecutors to get their hands on suspects because, unlike the situation after World War Two, foreign forces are not going to occupy the former Yugoslavia.[164]

The draft statute proposed by the Secretary-General lists among the tribunal's competence *ratione materiae* the grave breaches of Geneva IV (including deportation and transfer of civilians)[165] and crimes against humanity (including deportation).[166] Hence, in the event war criminals will actually be put on trial, the charges must include violations of Article 49 of Geneva IV. Indeed, the fifth United States government report on violations of humanitarian law in former Yugoslavia, as well as the four previous reports, documents examples of "mass forcible expulsion and deportation of civilians."[167] It would be beneficial for the development of international humanitarian law to have an international court pronounce on these practices, especially in light of their employment in ethnic cleansing campaigns. The Security Council has taken an unequivocal stand on these campaigns. It has expressed "grave alarm" at the practice of ethnic cleansing,[168] has "strongly condemn[ed]" it,[169] and has stated that the practice is "unlawful and unacceptable."[170] These campaigns might well constitute the crime of genocide expressly outlawed by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[171] That Convention defines genocide as "the intentional destruction of a national, ethnic, racial, or religious group, in whole or in part, by (a) killing its members; (b) causing them serious physical or mental harm; or (c) imposing conditions of life calculated to bring about their physical destruction . . . ."[172] It is submitted that mass forcible

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164. *See* 1993 Annual Meeting of the American Society of International Law, Panel on the United Nations Ad Hoc Crimes Tribunal for the Former Yugoslavia, April 1, 1993 (to be published in the 1993 Proceedings).

165. U.N. Doc. S/25704 at 10.

166. *Id.* at 13.

167. Richard Boucher, *State Department Regular Briefing*, FEDERAL NEWS SERVICE, Jan. 26, 1993; *see also* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 719, 724-725 (1993) (Bosnia and Herzegovina); S.C. Res. 771 (1992), 31 I.L.M. 1470 (1992).

168. S.C. Res. 780 (1992), 31 I.L.M. 1476 (1992); S.C. Res. 808 (1993).

169. S.C. Res. 771 (1992), para. 2, 31 I.L.M. 1470, 1471 (1992); S.C. Res. 819 (1993) ("reaffirm[s] its condemnation"); S.C. Res. 820 (1993) ("condemned").

170. S.C. Res. 787 (1992), para. 2, 31 I.L.M. 1481, 1482 (1992); S.C. Res. 820 (1993) ("unlawful and totally unacceptable").

171. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951); *see also* Pressler, *supra* note 159, at 19.

172. 78 U.N.T.S. at 280, art. II. For an interesting proposal, see Manya S. Deehr,

expulsions and deportations of civilians as well as the uprooting of civilians in general, the destruction or *de facto* expropriation or confiscation of their property as part of ethnic cleansing campaigns, constitute acts of genocide. It is hoped that an international war crimes tribunal will concur, for such would underline the new world's resolve to enforce the basic prohibition of deportations of civilians. The draft statute submitted by the Secretary-General does confer jurisdiction on the tribunal for acts of genocide.[173]

On March 20, 1993, Bosnia-Herzegovina filed an application with the International Court of Justice (ICJ) to have it adjudge and declare Yugoslavia (Serbia and Montenegro) in breach of, *inter alia*, the Genocide Convention, the Geneva Conventions, and the Hague Regulations.[174] At the same time, Bosnia sought interim protection, especially injunctive relief, from Yugoslavia's actions.[175] In its order of April 8, 1993, the ICJ unanimously indicated as a provisional measure that Yugoslavia should "immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide."[176] Although the Court has yet to pronounce on whether breaches of the Genocide Convention had actually occurred, it seems to suggest implicitly that the Serb ethnic cleansing campaign is tantamount to genocide.[177] Rather than making any premature conclu-

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Comment, *A Proposal for the International Monitoring of Potential Genocide Conditions*, 9 WISC. INT'L L.J. 491 (1991).

173. U.N. Doc. S/25704 (May 3, 1993), art. 4, at 37-38.

174. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Order, Apr. 8, 1993, para. 2.

175. *Id.* para. 3.

176. *Id.* para. 52. Furthermore, in a 13-1 vote (Tarassov dissenting) the Court also indicated as a provisional measure that Yugoslavia should in particular:

> insure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, or conspiracy to commit genocide, or direct any public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.

Id. The ICJ did not indicate any provisional measures with regard to the lifting of the arms embargo for Bosnia-Herzegovina.

177. Eugene Robinson, *World Court Orders Belgrade to Prevent "Genocide" in Bosnia*, WASH. POST, Apr. 9, 1993, at A19; *see also* Stephen Kinzer, *Belgrade is Urged to Control Serbs*, N.Y. TIMES, Apr. 9, 1993, at A5; Tamara Jones, *Yugoslavia Told to Prevent Genocide*, L.A. TIMES, Apr. 9, 1993, at A11.

sion, it is advisable to await the final decision on this case with confidence and with hope.

VI. DEPORTATIONS IN THE WEST BANK AND THE GAZA STRIP: THEORY AND PRACTICE

The applicability of Geneva IV, and the scope of Article 49 in particular, has been the subject of an ongoing debate with respect to the deportation of Palestinians from the West Bank and the Gaza Strip.[178] One author eloquently depicts the occupied territories as "the most notable testing ground of the modern law of belligerent occupation."[179] For this reason, and in light of the recent expulsion of some 400 Palestinians, the Israeli deportations will be discussed at some length.

At the outset, it should be noted that this debate is not taking place in a juridical vacuum. Every argument is molded in the framework of opposite interests. The reader is forewarned that, as one author notes, this will be an illustration of "the limited efficacy of legal tools for solving the intricate political, religious and cultural problems of a Jewish state in

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178. *See* Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485 (1990); John L. Habib, Comment, *Israeli Deportations of Palestinians under International Law*, 4 EMORY INT'L L. REV. 133 (1990); Sipho Mahamba, *The Controversy of the Applicability of the Fourth Geneva Convention to the Israeli Occupied Territories Revisited*, 14 S. AFR. Y.B. INT'L L. 1 (1988-89); Peter J. Morgan III, *Recent Israeli Security Measures Under the Fourth Geneva Convention*, 3 CONN. J. INT'L L. 485 (1988); W.G. Rabus, *De Overbrenging en Deportatie uit Militair Bezette Gebieden [Transfer and Deportation from Military Occupied Territories]*, 63 NEDERLANDS JURISTENBLAD 753 (1988); RAJA SHEHADEH, OCCUPIER'S LAW: ISRAEL AND THE WEST BANK (1988); W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER (1986); ESTHER ROSALIND COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982 (1985); MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS (Meir Shamgar ed., 1982); Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L L. 542, 543, 548-550 (1978); J.G.C. van Aggelen, *Protection of Human Rights in Israeli Held Territories since 1967 in the Light of the Fourth Geneva Convention*, 32 Revue ÉGYPTIENNE DE DROIT INTERNATIONAL 82 (1976); ASHER D. GRUNIS, *The United Nations and Human Rights in the Israel Occupied Territories*, 7 INT'L LAW. 271 (1973); *see also* Diana Vincent-Daviss, *The Occupied Territories and International Law: A Research Guide*, 21 N.Y.U. J. INT'L L. & POL. 575 (1989); the numerous sources cited in the footnotes of this subdivision, especially Allison M. Fahrenkopf, *A Legal Analysis of Israel's Deportation of Palestinians From the Occupied Territories*, 8 B.U. INT'L L.J. 125 (1990), and the sources cited therein.

179. Kuttner, *supra* note 40, at 220.

the midst of an Arab region."[180]

As a matter of clarity, East Jerusalem and the Golan Heights, which "have been brought directly under Israeli law, by acts that amount to annexation," are not discussed below although "both of these areas continue to be viewed by the international community as occupied, and their status as regards the applicability of international rules is in most respects identical to that of the West Bank and Gaza."[181]

A. *Applicability of Geneva IV in General*

The scope of application of the Convention is set out in common Article 2, which reads in part:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of *the territory of a High Contracting Party*, even if the said occupation meets with no armed resistance. [emphasis added]

Israel claims that, in 1967, when it seized the West Bank and the Gaza Strip from Jordan and Egypt respectively, these two states did not have a legitimate claim to those territories.[182] In other words, prior to the Six

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180. Wendy Olson, *UN Security Council Resolutions Regarding Deportations From Israeli Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 24 STAN. J. INT'L L. 611, 612-613 (1988).

181. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 60 (1990); *see also* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 25, 42; Benvenisti, *supra* note 39, at 108-114 (discussing the West Bank and Gaza, East Jerusalem, and the Golan Heights separately).

182. The Israeli Attorney General, Meir Shamgar, argued that "[t]he whole idea of the restrictions 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," but that "Israel never recognized the rights of Egypt and Jordan to the territories occupied by them till 1967." Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. ON HUM. RTS. 262, 263 (1971) (footnotes omitted); *see also* Richard A. Falk & Burns H. Weston, *The Israeli-Occupied Territories, International Law, and the Boundaries of Scholarly Discourse: A Reply to Michael Curtis*, 33 HARV. INT'L L.J. 191 (1992) (*citing* Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457 (1991); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinians Rights in the West Bank and Gaza: In*

Day War of 1967, the West Bank and the Gaza Strip were not "the territory of a High Contracting Party" as required by Article 2(2). The land belonged to no one and, therefore, Israel is not an occupier under Geneva IV.[183] Because of the term of art[184] "territory of a High Contracting Party," application of Geneva IV would, according to Israel, entail recognition of Jordanian and Egyptian sovereignty in the Occupied Territories.[185] According to Netanel Lorch, it is unfortunate that Geneva IV "is worded in a way whereby admitting the applicability of the Convention requires ipso facto recognition of certain lines as international boundaries," especially since most wars involve some disputed territories.[186]

The main objection to this Israeli argument is that, notwithstanding its wording, Geneva IV was not intended to settle sovereignty questions.[187] Its sole purpose and intention is the protection of civilians.[188] As the Commentary warns, "[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."[189] Furthermore, Article 2(2) speaks of "territory," not "sovereign territory," which indicates, according to Stephen Boyd, that the ICRC did not expressly consider the sovereignty question in

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Legal Defense of the Intifada, 32 HARV. INT'L L.J. 129 (1991); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 125.

183. Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 291-294 (1968); Carol Bisharat, *Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza*, 12 HASTINGS INT'L & COMP. L. REV. 325, 336-337 (1989). Israel and Jordan ratified the four Geneva Conventions in 1951, Egypt in 1952, and Syria in 1953.

184. Netanel Lorch, Discussion *in Symposium on Human Rights in Time of War*, 1 ISR. Y.B. HUM. RTS. 366 (1971) [hereinafter Forum].

185. On Israel's concern that application of Geneva IV to the West Bank and the Gaza Strip would concede Egyptian and Jordanian sovereignty in those territories prior to the Six Day War, see Olson, *supra* note 180, at 625-26.

186. Netanel Lorch, *in* Forum, *supra* note 184, at 367.

187. *See* Jordan J. Paust, Gerhard von Glahn & Günter Woratsch, *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1, 7 (1990); Stephen Boyd *in* Forum, *supra* note 184, at 368.

188. Bisharat, *supra* note 183, at 337-338; *see also* Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *supra* note 181, at 45-47.

189. COMMENTARY, *supra* note 4, at 21. For an account of the ICRC's emphasis on the humanitarian spirit of Geneva IV, see ICRC, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 3 (1975).

drafting the Convention.[190] Therefore, it is also not essential whether Jordan and Egypt themselves have claimed sovereignty over the West Bank and the Gaza Strip.

Furthermore, Article 2(2) "only refers to cases where the occupation has taken place without a declaration of war and without hostilities," which is a significantly different situation from that in the West Bank and the Gaza Strip.[191] Adam Roberts concludes from this that the Commentary "leaves little room for doubt that it is the first paragraph that is relevant to the territories occupied by Israel in the 1967 War."[192]

The interpretation stressing the humanitarian aspect of Geneva IV and denying it any bearing on the status of any territory has been codified in Article 4 of Protocol I.[193] The emphasis in Protocol I on nonalteration of legal status was intended to be supplementary to, and focus on, the humanitarian spirit of Geneva IV.[194] The formal applicability of Protocol I to Israel is doubtful, however, as Israel has not made any indication of adherence to Protocol I.[195]

It can be further argued that, if Geneva IV does not apply because of Article 2(2), it applies pursuant to Article 4(1):

> 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.

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190. Boyd, *in* Forum, *supra* note 184, at 367; *see also* Stephen Boyd, *The Applicability of International Law to the Occupied Territories*, 1 ISR. Y.B. ON HUM. RTS. 258 (1971).

191. COMMENTARY, *supra* note 4, at 21. "The wording of the paragraph is not very clear. Nevertheless a simultaneous examination of paragraphs 1 and 2 leaves no doubt as to the latter's sense: it was intended to fill the gap left by paragraph 1." *Id.* at 21-22. Article 2(1) and 2(2) are linked by "also" in 2(2).

192. Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, *supra* note 181, at 64.

193. This Article provides:

> The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. 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.

1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977).

194. Yoram Dinstein, *Another Step in Codifying the Laws of War*, 1974 Y.B. WORLD AFF. 278, 281.

195. Egypt has signed but not ratified and Jordan ratified in 1979. Syria acceded in 1983, upon which Israel declared that it would adopt "an attitude of complete reciprocity." DOCUMENTS ON THE LAWS OF WAR 466-67 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

This Article defines the applicability of Geneva IV in personam.[196] Because it is the Convention's aspiration to protect individuals, it can be argued that this Article should bear more weight in the applicability decision. As a result, since the Palestinians are not nationals of Israel, they should benefit from the protection of Geneva IV.[197]

But Israel does not characterize the Palestinians as a specific people, because Palestine has always been inhabited by a mixture of Moslems, Christians, and Jews.[198] Under this view, the Arabs of the West Bank can only claim Jordanian protection or nationality since a Palestinian state does not exist.[199] In this light, Meir Shamgar does not characterize the deportation of a West Bank resident to Jordan as a prohibited deportation under Article 49, because the person in question is simply being returned to his own country.[200] According to this interpretation, it re-

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196. *See* Theodor Meron, *Protected Persons under the Fourth Geneva Convention, in* THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FORTY YEARS SINCE THE FOUR FREEDOMS ADDRESS 155 (Asbjørn Eide & Jan Helgesen eds., 1991).

197. Bisharat, *supra* note 183, at 338. Bisharat adds that: "Finally, when one of the parties to the conflict is not a signatory to the Convention, the [High Contracting Parties] remain bound by the Convention in their mutual relations. Thus, regardless of the status of the Palestinians, Israel is bound to follow the Convention because both Israel and Jordan are [High Contracting Parties]." *Id.* at 338-339 (footnote omitted).

198. According to Bisharat this is the principal roadblock to a solution of the conflict. *Id.* at 325. On the Palestinians as a people, Alain Pellet, *The Destruction of Troy Will Not Take Place, in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 169, 180-186; Alain Pellet, *La destruction de Troie n'aura pas lieu*, 4 PALESTINE Y.B. INT'L L. 44, 58-64 (1987-1988); Richard Ober, *Current Israeli Practices and Policies in the West Bank and the Gaza Strip: A Historical and Legal Analysis*, 10 B.C. THIRD WORLD L.J. 91, 92-100 (1990).

199. West Bank residents hold Jordanian passports. Cheryl Reicin, *Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515, 556 (1987). Gaza residents hold stateless Palestinian passports. Olson, *supra* note 180, at 631.

200. Shamgar reasoned:

> Deportation of a person to Jordan is, according to the conceptions of the persons deported, neither deportation to the territory of *the occupying power* nor to the territory of *another* country. It is more a kind of return or exchange of a prisoner to the power which sent him and gave him its blessing and orders to act. There is no rule against returning agents of the enemy into the hands of the same enemy. Article 49, therefore, does not apply at all.

Shamgar, *supra* note 182, at 274 (emphasis in original). As recently as 1985, Meir Shamgar, in his capacity of President of the High Court, referred to the deportation of a Palestinian to Jordan as "the explusion of a Jordanian citizen to the Kingdom of Jordan." Nazal v. IDF Commander of Judea and Samaria, H.C.J. 256/85, 39(3) P.D. 645

mains unclear, however, "how Israel can deport residents of Gaza, who are definitely not Jordanian citizens, to Jordan, or West Bank residents to Lebanon, which is not their country of origin."[201] An explanation may be contained in Article 45 of Geneva IV, which does permit the "transfer" of aliens within the occupied territory to that of a third Power Party to the Convention.[202] However, to invoke Article 45 would suppose that the West Bank and Gaza Palestinians are aliens in those territories. This is an unacceptable premise. Shamgar's explanation remains at odds with common sense logic.

Israel is of course correct in stating that Jordan and Egypt were not sovereign in the West Bank and Gaza respectively when Israel seized those territories in 1967. But overall this cannot override the imperative concern to interpret Geneva IV to give full effect to its provisions in light of its object and purpose, the protection of civilians.[203] The Israeli interpretation of Article 2(2) thwarts this very purpose. An expansive use of Israel's sovereignty argument might spell danger for Geneva IV. What about the conquerer's argument against applicability of Geneva IV that it is, and was, the legitimate sovereign of the conquered territory and that, consequently, it did not conquer "the territory of a High Contracting Party"? This argument is false and it would lead to an unacceptable result, namely that a conquerer or occupant does not have to apply Geneva IV if it claims or disputes the sovereignty over the territories at issue. According to such an interpretation, Iraq might not have been obliged to abide by Geneva IV during its invasion and occupation of Kuwait, since Iraq claimed sovereignty in all or part of Kuwait. But, if it is true that in most wars there are some disputed territories, as pointed out above, then why would the applicability of Geneva IV depend on the absence or solution of such territorial disputes? In many instances this interpretation would defy the applicability of Geneva IV from the outset, which may explain why "[t]he rejection of the applicability of the Fourth Geneva Convention has rather been the rule and not

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(1985), *quoted in* 16 ISR. Y.B. ON HUM. RTS. 329 (1986).

201. Joost Hiltermann, *Israel's Deportation Policy in the Occupied West Bank and Gaza*, 3 PALESTINE Y.B. INT'L L. 154, 171-72 (1986); Olson, *supra* note 180, at 630-31.

202. *See generally* FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 54 (1987); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW, THE REGULATION OF ARMED CONFLICTS 128-29 (1990).

203. *See* Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, *reprinted in* INTERNATIONAL ORGANISATION AND INTEGRATION 64, 73 (student ed., 1986).

the exception in the practice of states."[204] This practice clearly flies in the face of the special character of Geneva IV as highlighted in Article 1, according to which: "The High Contracting Parties undertake to respect and to ensure respect *in all circumstances.*"[205] In other words, "No loophole is left."[206]

B. *Application of International Law Concerning Deportation*

In the notorious *Affo* judgment, the Israeli High Court addressed this issue at some length.[207] The case concerned three Palestinians who were ordered to be deported from the West Bank because of security reasons. There was substantial evidence that they were involved in hostile and terrorist actions against Israel.[208] The Palestinians claimed that Article 49 of Geneva IV prohibited this deportation. The High Court rejected this contention because Article 49 could not be enforced in Israeli courts.

Israeli law automatically incorporates the rules of customary international law.[209] Conventional international law, on the other hand, becomes binding only after it has been transformed into domestic law by

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204. Ruth Lapidoth, *The Expulsion of Civilians from Areas Which Came Under Israeli Control in 1967: Some Legal Issues*, 2 EUR. J. INT'L L. 97, 101 (1990); *see* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 43 (1987). This comment raises an interesting question, which we will not try to answer here. This question is whether the state practice of denying applicability to Geneva IV has affected its customary status? In other words, has the practice of states actually modified custom, or is Geneva IV, on the other hand, denied applicability simply because of the particular circumstances of each case?

205. (emphasis added) "Its prominent position at the beginning of each of the 1949 Conventions gives it increased importance. By undertaking at the very outset to respect the clauses of the Convention, the Contracting Parties drew attention to the special character of that instrument." COMMENTARY, *supra* note 4, at 15.

206. *Id.* at 60. Articles 8 and 47 of Geneva IV buttress this proposition.

207. Affo v. Commander of the IDF Forces in the West Bank, H.C.J. 785/87, H.C.J. 845/87, H.C.J. 27/88, Apr. 10, 1988, 42(2) P.D. (1988), 29 I.L.M. 139 (1990). For earlier cases, see Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 11 ISR. Y.B. ON HUM. RTS. 344 (1981) [hereinafter *Judgments*].

208. 29 I.L.M. 164, para. 12 (1990) (concerning Abd al Nasser al Aziz Abd al Affo); *id.* at 167, para. 13 (concerning Abd al Aziz Abd Alrachman Ude Rafia); *id.* at 170, para. 14 (concerning J'mal Shaati Hindi).

209. Ober, *supra* note 198, at 101. *See* Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISR. L. REV. 24, 25 (1992); Ruth Lapidoth, *International Law Within the Israel Legal System*, 24 ISR. L. REV. 451, 452 (1990); B. Rubin, *The Adoption of International Treaties into Israeli Law by the Courts*, 13 MISHPATIM 210 (1983).

the Knesset.[210] No such law has transformed Geneva IV into Israeli law. In line with earlier opinions, the High Court denied Article 49 customary status so that it could not be invoked on that basis either.[211] Israel only considers itself bound by the Hague Regulations, which it recognizes as embodying customary international law, although it has reduced its scope of practical application to a minimum.[212] The provisions of the Hague Regulations were declared by the International Military Tribunal at Nuremberg to constitute customary international law.[213] It is noteworthy that Israel has never objected to the applicability of the Hague Regulations, which contain a similar provision to Article 2 of Geneva IV, namely that occupied territory is "territory of the hostile state."[214] The High Court's refusal to accord Article 49 customary status has been met with incisive criticism.[215] The Israeli High Court claims that Article 49 does not reflect customary international law notwithstanding overwhelming arguments and authorities to the contrary.[216] Why? The answer is remarkably simple. Israel interprets Article 49 as a mere "reference to those arbitrary deportations of groups of nationals as were carried out during World War II for purposes of subjugation, extermination and for similarly cruel reasons."[217] The High Court rejects the interpretation that any physical removal from the occupied territories is prohibited. To prohibit any deportation would not be logical since this would preclude the extradition of a criminal and would make the occupied territories a safe haven for any murderer. Thus, "[i]t seems reason-

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210. 29 I.L.M. 155-63, paras. 4-7 (1990).

211. *Id.* at 155, para. 4; *see* Ayub v. Minister of Defense (Beth-El or Beit-El case), H.C.J. 606/78, 33(2) P.D. 113 (1979), 2 PALESTINE Y.B. INT'L L. 134 (1985); Fania Domb, *Judicial Decisions, Supreme Court of Israel*, 9 ISR. Y.B. ON HUM. RTS. 334, 337 (1979); *see also* Yoram Dinstein, *Settlements and Deportation in the Administered Territories*, 7 TEL AVIV U.L. REV. 188 (1979); *contra* Kawasme v. Minister of Defense (No. 1), H.C.J. 698/80, 35(1) P.D. 617 (1980) (Cohn, J., dissenting), *cited in Judgments*, *supra* note 207, at 352-54; *see generally* Mazen Qupty, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 87, 101-19.

212. Qupty, *supra* note 211, at 101.

213. Esther Rosalind Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 484 (1986); *see supra* part V.A.

214. Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, *supra* note 181, at 65.

215. Yoram Dinstein, *Deportation from Administered Territories*, 13 TEL AVIV U. L. REV. 403 (1988).

216. *See supra* part IV.

217. 29 I.L.M. 153, para. 3(k) (1990).

able to limit the sweeping literal words of Article 49 to situations at least remotely similar to those contemplated by the draftsmen, namely the Nazi World War II practices of large-scale transfers of populations . . . ."[218] It appears that the Court would recognize that, in its restrictive, "original" meaning, Article 49 reflects customary law. This is logical; the prohibition of mass deportation to slave labor has an almost undeniable claim to customary status.[219] However, because of the danger of a changing interpretation, the Court seems to consider it more opportune to declare all of Article 49 as merely conventional international law.

So, even if Article 49 could be invoked in court, either as customary law or pursuant to a legislative act, the deportation of Palestinians who pose a threat to security would be upheld. Israel claims it even has a duty to remove such persons, because Article 43 of the Hague Regulations imposes on the occupant an obligation to restore and maintain order and security.[220] Israel finds further support for this position in Article 147 of Geneva IV. That Article's reference to "unlawful deportation or transfer" is interpreted by Israel as meaning that some deportations are lawful, namely the security-motivated deportations to which it resorts. However, the lawful/unlawful distinction refers rather to the evacuation exception and to the voluntary character that can render deportations and transfers legal under exceptional circumstances.[221]

As a result, the entire case hinges on treaty interpretation. A literal interpretation supports the Palestinians; consideration of the object and purpose favors the Israeli position.[222] The Court's interpretation is contrary to Article 31(1) of the Vienna Convention, according to Professor Meron, because the ordinary meaning of the words is clear, and, therefore, no resort is to be had to supplementary means of interpretation.[223] "In any event," he adds, "the object and purpose of Geneva Convention

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218. 29 I.L.M. 149, para. 2(g) (quoting JULIUS STONE, NO PEACE—NO WAR IN THE MIDDLE EAST 17 (1969)).

219. *See also* Kawasme v. Minister of Defense (No. 1) (Cohn, J., dissenting), *supra* note 211.

220. For a detailed analysis of this argument, see Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank, in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 205-38.

221. *See supra* parts II.A. and II.B.

222. *See* Articles 31 and 32 of the Vienna Convention on the Law of Treaties, *reprinted in* INTERNATIONAL ORGANIZATION AND INTEGRATION 64, 73 (student ed., 1986).

223. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 49 n.131 (1989).

No. IV, a humanitarian instrument *par excellence*, was not only to protect civilian populations against Nazi-type atrocities, but to provide the broadest possible humanitarian protection for civilian victims of future wars and occupations, with their ever-changing circumstances."[224] The Commentary's observation that "no loophole is left" and the express statement in Article 49 that deportations are prohibited regardless of their motive underscore Professor Meron's conclusion.

This is a perfect example of the mind-boggling dilemma of an international provision that was adopted in light of a certain practice and is now being invoked in a different situation. Because of the enormous political interests at stake, that dilemma is exacerbated in this case by a lack of indispensable serenity to resolve the intricate interpretational problems of Article 49. The conclusion comes to mind that Article 49 is nothing but yet another gentle weapon in an otherwise violent dispute.

C. *Position of the International Community*

The entire international community, except for Israel, of course, supports the applicability of Geneva IV and Article 49 thereof to the occupied territories.[225] The Security Council has so declared on various occasions. In the wake of the Six Day War, Security Council Resolution 237 of June 14, 1967 declared that Israel should comply with all obligations of Geneva IV.[226] In 1976, the Security Council issued a decision holding unequivocally that Geneva IV applies to the occupied territories.[227] During 1980, the Security Council adopted several resolutions invoking Geneva IV in response to deportations.[228] Security Council Resolution 607

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224. *Id.*

225. *See* Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, *supra* note 181, at 74-88; Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 282 (1984). The question should also be raised, however, whether the international community was as adamant in ensuring the applicability of Geneva IV to the West Bank when Jordan "occupied" or "administered" it.

226. S.C. Res. 237, U.N. SCOR Supp., 22d sess., 1361st mtg., at 5, U.N. Doc. S/INF/22/Rev. 2 (1967).

227. S.C. Decision of May 26, 1976, *reprinted in* UNITED NATIONS COMMITTEE ON THE EXERCISE OF THE INALIENABLE RIGHTS OF THE PALESTINIAN PEOPLE, RESOLUTIONS AND DECISIONS OF THE GENERAL ASSEMBLY AND THE SECURITY COUNCIL RELATING TO THE QUESTION OF PALESTINE 1976-1979, U.N. Doc. A/AC.183/L.2/Add.1 (1980).

228. S.C. Res. 468, U.N. SCOR, 35th Sess., 2221st mtg., at 9, U.N. Doc. S/INF/36 (1981); S.C. Res. 469, U.N. SCOR, 35th Sess., 2223d mtg. at 9-10, U.N. Doc. S/INF/36 (1981); S.C. Res. 471, U.N. SCOR, 35th Sess., 2226th mtg. at 10-11, U.N. Doc. S/INF/36 (1981).

of January 8, 1988, adopted unanimously,[229] called upon Israel to refrain from deporting any Palestinian civilians from the occupied territories and strongly requested Israel, as an Occupying Power under the Geneva Convention, to abide by its obligations arising under the Convention.[230] Security Council Resolution 608 of January 14, 1988,[231] called upon Israel to rescind a deportation order and to ensure the safe and immediate return of those already deported.[232] A third resolution on the subject, which was proposed in 1988, was vetoed by the United States because it was considered " 'redundant and inappropriate.' "[233] The Security Council, with the support of the United States, has very recently reiterated its view on the applicability of Geneva IV to the occupied territories. On December 18, 1992, a day after Israel deported some 400 Palestinians, the Security Council "reaffirm[ed] the applicability of the Fourth Geneva Convention . . . to all the Palestinian territories occupied by Israel since 1967, including Jerusalem, and affirm[ed] that deportation of civilians constitutes a contravention of its obligation under the Convention."[234]

In declaring Geneva IV applicable to the West Bank and the Gaza Strip, the Security Council is supported by the ICRC,[235] the United Nations General Assembly,[236] the United Nations Secretary-General,[237]

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229. Thomas L. Friedman, *Israelis Unhappy at U.S. Vote in U.N.*, N.Y. TIMES, Jan. 7, 1988, at 3, col. 1.

230. S.C. Res. 607, U.N. SCOR, 43rd Sess., 2780th mtg., at 1, U.N. Doc. S/INF/44 (1989).

231. The vote was 14 in favor, with the United States abstaining. Paul Lewis, *U.N. Council Again Asks Israelis to Stop Deporting Palestinians*, N.Y. TIMES, Jan. 15, 1988, at 9, col. 1.

232. S.C. Res 608, U.N. SCOR, 43rd Sess., 2781st mtg., at 2, U.N. Doc. S/INF/44 (1989).

233. *U.S. Vetoes U.N. Resolution Critical of Israel*, N.Y. TIMES, Apr. 16, 1988, at 4, col. 3.

234. S.C. Res. 799(1992), U.N. SCOR, 3151st mtg., U.N. Doc. S/RES/799 (1992) (para. 2). This resolution does not distinguish the deportees as to nationality or visa status. It may be that some deportees had entered the territories illegally, or that some were there on a visa which could be revoked, or that some did not actually live in the territories, or were nationals of a third country. However, the deportees were treated as a homogeneous group. Notwithstanding the wording of Article 49, it seems equitable to take these factors into account, if they were present.

235. ICRC, ANNUAL REPORT 83-84 (1987); ICRC, THE ICRC WORLDWIDE 1988, at 18 (1989); 160 ICRC BULLETIN 1 (1989); Boyd in Forum, *supra* note 184, at 367-368.

236. Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 282 n.122 (1984).

237. Report Submitted to the Security Council by the Secretary-General in Accor-

NGOs,[238] leading Israeli international lawyers[239] and judges,[240] and a number of states friendly to Israel, including the United States, that explicitly consider the deportations to contravene Article 49.[241]

The Security Council has the authority to interpret Geneva IV on the basis of Article 24 of the United Nations Charter. Some argue, however, that it would be more appropriate to leave this authority to the International Court of Justice (ICJ).[242] In recent years, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) has formally advanced the idea of requesting an advisory opinion from the ICJ on a related issue, namely the legality of Israeli settlements in the occupied territories.[243] However, the Sub-Commission's parent body, the United Nations Commission on Human Rights, under strong United States pressure, rejected this proposal in its latest session in early 1993.[244] The United States would similarly oppose any other attempt to clarify the legal status of the occupied territories through an advisory opinion.[245] Roberts concedes that going to

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dance with Resolution 605, U.N. Doc. S/19443 (1988), *reprinted in* 17 J. PALESTINE STUD. 66 (1988).

238. An example is the International Commission of Jurists. *See* Paust, von Glahn & Woratsch, *supra* note 187.

239. *See, e.g.*, Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. ON HUM. RTS. 105, 106-108 (1978); Cohen, *supra* note 178, at 51-56; Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV U. STUD. IN L. 59, 63-67 (1988).

240. Kawasme v. Minister of Defense (No. 1) (Cohn, J., dissenting) *supra* note 211.

241. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, 103d Cong., 1st Sess., 1019, 1020 (1993); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, 102d Cong., 2d Sess. 1440, 1443 (1992); Reicin, *supra* note 203, at 518 n. 13 (1987); *see also* Stephen M. Boyd, *The Applicability of International Law to the Occupied Territories*, 1 ISR. Y.B. ON HUM. RTS. 258, 259 (1971); *United States Reaffirms Position on Jerusalem*, 61 U.S. DEP'T OF STATE BULLETIN 76 (1969).

242. Olson, *supra* note 180, at 615-619. For examples of questions the Court could be asked to rule on in an advisory opinion, see Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *supra* note 181, at 101-02.

243. *See, e.g.*, Joe W. (Chip) Pitts III & David Weissbrodt, *Major Developments at the U.N. Commission on Human Rights in 1992*, 15 HUM. RTS. Q. 122, 151 (1993).

244. Personal inquiry with Mr. Reed Brody, Executive Director, International Human Rights Law Group and with Mr. (Asbjørn Eide, Member of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.

245. John Dugard, *Enforcement of Human Rights in the West Bank and the Gaza Strip*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 461, 468-69. Dugard assesses the questions whether the ICJ would hand down an advisory opinion if requested; what type of opinion could be ex-

the ICJ may not lead to a resolution of these problems.[246]

D. *The Israeli Deportation Practice*

Although it has not declared Geneva IV to be applicable to the West Bank and the Gaza Strip, Israel claims that it has pragmatically applied the humanitarian provisions of Geneva IV[247] and in fact "has done a great deal above and beyond the provisions of the Fourth Geneva Convention, particularly in the field of non-application of the death penalty."[248] Indeed, General Staff Order No. 33.0133 of July 20, 1982 commands all soldiers of the Immigration and Deportation Forces (IDF) "to act in accordance with the provisions included in" Geneva IV.[249] Israel also deserves credit for cooperating with the ICRC monitoring of the conditions of occupation.[250]

The deportations are carried out pursuant to the 1945 Palestine Defense (Emergency) Regulations.[251] Deportation orders thus are based on

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pected; whether the opinion would be accepted by Western nations and Israel; and what an advisory opinion could achieve. *Id.* at 468-475.

246. According to Roberts:

> Not all such questions are necessarily amenable to resolution by a legal body of this kind; and any such resolution would not of itself necessarily change political and military realities. The principal ground for considering the proposal at all is that, more than two decades after this occupation began, there is still basic disagreement about what parts of international law are formally applicable to the situation in the territories.

Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, supra* note 181, at 102; *see also* Th. A. van Baarden, *Is It Expedient to Let the World Court Clarify, in an Advisory Opinion, the Applicability of the Fourth Geneva Convention in the Occupied Territories*, 10 NETH. Q. HUM. RTS. 4 (1992).

247. Raphael Israeli & Rachael Ehrenfeld, *Between the Peak and the Pit: Human Rights in Israel*, 13 SYRACUSE J. INT'L L. & COM. 403, 424 (1987); Qupty, *supra* note 211, at 103-104; Benvenisti, *supra* note 39, at 114-123.

248. Lorch *in* Forum, *supra* note 184, at 367; *see* Lapidoth, *supra* note 204, at 100.

249. *Quoted in* Hillel Somer, *The Application of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, as Israeli Law*, 11 TEL AVIV U. L. REV. 263 (1986).

250. See the ICRC statement on the 20th anniversary of the occupation, 137 ICRC BULLETIN 1 (1987) noting that the ICRC has had free access to all the occupied territories, but listing a number of "persistent violations" of Geneva IV; Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, supra* note 181, at 63; *contra* Boyd *in* Forum, *supra* note 192, at 367: "[T]he failure to acknowledge the applicability of the Geneva Convention has to some extent hindered the ICRC in carrying out its functions under the Convention."

251. In particular Regulation 112(1) reads: "The High Commissioner shall have power to make an order, under his hand . . . for the deportation of any person from Palestine. A person in respect of whom a Deportation Order has been made shall remain

a law which was in force in the region prior to the occupation. Under Article 64(1) of Geneva IV and Article 43 of the Hague Regulations, such laws must not be changed by the occupant.[252]

While the occupation is allegedly carried out with due respect for Geneva IV, it should be cautioned that "formal applicability versus de facto application is not always a distinction without a difference."[253] First and foremost, any deportation seems to violate Article 49 as such. As explained, Israel contends that, although not formally bound by it, it lives up to Article 49 because that Article does not prohibit deportations for security reasons as carried out by Israel. "Secondly, the rejection of formal applicability . . . has been one factor occasionally making the courts reluctant to base their decisions directly on 1949 Geneva Convention IV."[254] In 1990, Roberts wrote that Israel's "arguments could not allay the deep fears among the Palestinian population that the deportations actually carried out by Israel were the thin end of the wedge, to be followed by larger expulsions."[255] It is hoped that the recent deportation of some 400 Palestinians, the first deportation of this magnitude, does not point in this direction. Furthermore, while it is true that deportations are only carried out for security reasons, "an allegation of being a supporter of the PLO or of Islamic fundamentalists is enough of a 'security reason' to justify deportation."[256] In addition, the deportation procedure itself is criticized for its lack of due process and for its use as an extra-judicial punishment, resulting from the nearly unlimited discretion the government enjoys in defining "security reasons."[257] A deportee may appeal an order of deportation to a military advisory committee and then to the

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out of Palestine so long as the Order remains in force."

The 1945 Palestine Defence (Emergency) Regulations were passed in accordance with the Emergency Powers (Defence) Act of 1945, a British imperial statute. The text of both acts are in 26 HALSBURY'S STATUTES OF ENGLAND (2nd) at 209, 241. Regulation 112(1) of the Palestine Defence (Emergency) Regulations is also reprinted in 3 PALESTINE Y.B. INT'L L. 134, 137 (1986).

252. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 40, at 241, 247.

253. Roberts, *supra* note 236, at 283.

254. *Id.*

255. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *supra* note 181, at 84.

256. Ober, *supra* note 198, at 113.

257. Hiltermann, *supra* note 201, at 173-184. The recent deportation of some 400 Palestinians shows that such allegations can be erroneous. Several deportees were mistakenly deported and were, consequently, allowed to return forthwith. Such mistakes nevertheless raise liability questions for Israel.

Israeli High Court of Justice,[258] but the High Court has never reversed a deportation order.[259]

In its most recent decision on the issue of deportation, on January 28, 1993, the High Court held that the absence of the right of prior hearing did not invalidate the expulsion orders of some 400 Palestinians on the condition that each deportee would be permitted to appeal his or her deportation retroactively.[260] The Court did strike down a Temporary Expulsion (Temporary Provision) Order.[261] That order provided for the possibility of carrying out temporary expulsions forthwith while granting a right of appeal only after the expulsion.[262] Relying on one important precedent,[263] the High Court reiterated that expulsions can be carried out before an appeal has been granted in cases of pressing emergency conditions[264] but that the Temporary Expulsion Order did not detail such circumstances.[265] Hence the Order was void under Israeli law. The applicants' argument that the expulsions were void *ab initio* under Article 49 of Geneva IV was not addressed by the Court. Such arguments, the Court held, have to be advanced in the appeals proceedings to be organized after the expulsions.[266] As a result, Israel had to set up an appeals office near the tent camp of the deportees.[267] However, the Palestinians have categorically refused to lodge appeals because they consider the deportations per se illegal under Article 49 of Geneva IV.[268] For the same reason, the Palestinians even refused an offer to return 100 deportees and to reduce the deportation term from two years to one year

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258. Morgan, *supra* note 178, at 492.

259. Ober, *supra* note 198, at 115.

260. Subachi Anabathawi v. Minister of Defence, H.C.J. 5973/92, para. 17(1) (to be published in 32 I.L.M. (1993)); *see also* Clyde Haberman, *Israel's Highest Court Upholds the Deportation of Palestinians*, N.Y. TIMES, Jan. 29, 1993, at A1, A9; Bob Hepburn, *Israeli Court Backs Expulsions*, TORONTO STAR, Jan. 28, 1993, at A3; Marjorie Olster, *Israeli Court Backs Government on Expulsions*, REUTERS, Jan. 28, 1993.

261. H.C.J. 5973/92, para 17(2).

262. *Id.* para. 4.

263. *See* Kawasme v. Minister of Defense (No. 2), H.C.J. 320/80, 35(3) P.D. 113 (1980).

264. This is provided an appeal is granted afterwards.

265. Subachi Anabathawi v. Minister of Defence, H.C.J. 5973/92, paras. 12(d), 13.

266. *Id.* para. 17(3).

267. *Israeli Forces in Lebanon Setting Up Appeal Tent*, REUTER LIBR. REP., Jan. 29, 1993.

268. *See* Haitham Haddadin, *Deportees Boycott Israeli Appeals Process*, REUTER LIBR. REP., Jan. 29, 1993; Bradley Burston, *Israel's Hopes to Defuse Deportee Crisis Fade*, REUTER LIBR. REP., Jan. 29, 1993.

for the remaining deportees.[269]

The entire deportation process conspicuously resembles peace time deportations with the procedural guarantees of a human rights instrument.[270] In particular, they are usually carried out over a rather lengthy period of time due to those procedural guarantees. This seems to be part of the Israeli strategy to emphasize the ordinary security purpose of the deportations in order to disconnect them completely from the field of application of Article 49.

A final question should be raised. Does the exceptional length[271] of the Israeli occupation justify its distinction from other occupations?[272] Does it warrant a different occupation regime? According to Roberts, "Some or all of the underlying purposes of the law on occupations remain relevant in prolonged occupations. However, there may sometimes be tension among the various purposes . . . ."[273] The drafters of Geneva IV had probably not envisioned occupations of this long a duration, but they did foresee a scaling down of the obligations of the occupant after a year.[274] This scaling down does not, however, apply to Article 49, which binds the occupant for the entire duration of the occupation.[275]

E. *Conclusion*

It is encouraging that the Hague Regulations and Geneva IV have been accepted by all sides as the yardstick for the legality of the conduct of the occupation. Nevertheless, the basis of Israel's acceptance of Geneva IV remains highly controversial. Whatever the answer to the appli-

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269. Hugh Carnegy & Lionel Barber, *Israel to Take Back 100 Deportees: Pressure From US Prompts Reversal of Policy on Stranded Palestinians*, FIN. TIMES, Feb. 2, 1993, at 16.

270. *See, e.g.*, International Covenant on Civil and Political Rights, art. 13 (1966), *reprinted in* INTERNATIONAL ORGANIZATION AND INTEGRATION 373, 376 (student ed., 1986). But in wartime too, "the administration of justice must accord with internationally recognized norms." MCCOUBREY, *supra* note 202, at 136.

271. Prolonged occupations, lasting more than five years, have not been uncommon in the post-1945 world. For examples of prolonged occupation before 1945, see ARMIES OF OCCUPATION (Roy A. Prete & Hamish Ion eds., 1984).

272. *See* Adam Roberts, *supra* note 225, at 261 (distinguishing seventeen types of occupation); William M. Brinton, *Israel: What is Occupied Territory? A Reply to the Legal Adviser*, 2 HARV. J.L. & PUB. POL'Y 207 (1979).

273. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, *supra* note 181, at 95; *see also* Greenwood, *supra* note 252, at 262-65; Benvenisti, *supra* note 39.

274. Art. 6(3). Although Protocol I has in effect rescinded the arrangement of Article 6, Israel is not a party to Protocol I.

275. *Id.*

cability question of Geneva IV may be, it is fortunate that Israel's assertion that its occupation is not governed by Geneva IV de jure is tempered by a willingness to apply its provisions de facto. Needless to say, the interpretations of those conventions are widely divergent, especially with respect to Article 49 of Geneva IV. "However, this is to be expected wherever strategic, political and legal interests are at stake—and all the more so when such involve armed conflict."[276]

In conclusion, this author would concur with Justice Bach in his dissenting opinion in the *Affo* judgment in which he observed that there are means other than expulsion by which the occupying power can ensure public safety and order in the occupied territories in accordance with Regulation 43 of the 1907 Hague Convention IV.[277] Implementing Regulation 43 does not prevent Israel from complying with Article 49 of Geneva IV; there is no conflict between these two standards of international law. Israel is implementing one international legal obligation by violating another. However, it could abide by both standards by resorting to imprisonment instead of deportation.

At any rate, the entire controversy about Geneva IV and Article 49 is merely symptomatic. It is just one symptom of a complicated disease that has troubled the Middle East for over two thousand years. Therefore, it should not divert too much from the fundamental causes that are at the origin of this dispute. The single most fundamental issue in that respect is the mutual recognition of Israelis and Palestinians as a people,[278] which should also include the mutual respect for the exercise of both peoples' right of self-determination.[279] That is the sole peace-generating response to the odd situation of "a Jewish state in the midst of an Arab region."

VII. DEPORTATION AND TRANSFER DURING INTERNAL WAR

In case of civil war, for which the Hague Regulations have no application, Geneva IV only has limited application pursuant to common Article 3. Nevertheless, it would appear from Article 3 that, unless there

276. Kuttner, *supra* note 39, at 221.

277. 29 I.L.M. 178-79 (1990).

278. *See supra* note 198 and accompanying text.

279. On Palestinian self-determination, see Jean Salmon, *Declaration of the State of Palestine*, 5 PALESTINE Y.B. INT'L L. 48 (1989); Jean Salmon, *La proclamation de l'Etat palestinien*, 34 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 37 (1988); Sally V. Mallison & W. Thomas Mallison Jr., *The Juridical Bases for Palestinian Self-Determination*, 1 PALESTINE Y.B. INT'L L. 36 (1984).

are valid military reasons to justify an evacuation,[280] common Article 3 can be applied to prohibit deportations and transfers as "violence to life and person" and as an "outrage upon personal dignity."[281] It is difficult to imagine an involuntary (mass) deportation that would not violate these standards.[282] Furthermore, the prohibition of deportations as a crime against humanity also applies to internal conflicts.[283] Most importantly, Article 17 of Protocol II provides that:

> 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
>
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.[284]

This provision corresponds more or less to Article 49 of Geneva IV.[285] However, Geneva IV and Protocol I do not contain an identical provision "applicable to a Party's own nationals in national territory not occupied by an adverse Party."[286] The practices against which Article 17 is directed include the counter insurgency tactics of relocating civilians in

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280. Although Article 3 does not contain such a clause, this limitation is an inherent standard of customary international law applicable to the entire field of international humanitarian law. *See, e.g., supra* notes 14 and 15 and accompanying text; *infra* note 290 and accompanying text.

281. de Zayas, *supra* note 54, at 220-221.

282. *See* Robert Weiner, *The Agony and the Exodus: Deporting Salvadorans in Violation of the Fourth Geneva Convention*, 18 N.Y.U. J. INT'L L. & POL. 703, 716-17 (1986); Pictet, *supra* note 1, at 44-49 (1985).

283. Draft Report of the ILC on the Work of its 43rd Session, U.N. Doc. A/CN.4/L.464/Add. 4, at 31.

284. Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 610, 616, 16 I.L.M. 1391, 1443; *see generally* NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 (Michael Bothe, Karl J. Partsch & Waldemar A. Solf eds., 1982) [hereinafter NEW RULES]; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987).

285. NEW RULES, *supra* note 284, at 690-92. "Article 17 does not correspond to any provision of Protocol I, but rather to Art. 49 of the Fourth Convention. . . . The first sentence of para. 1 is derived from para. 2 of Art. 49. . . . The second sentence of para. 1 is based on the third paragraph of Art. 49. . . . Paragraph 2 is derived from the first paragraph of Art. 49."

286. *Id.* at 690-91 (except common Article 3, of course, and Article 1 of Protocol I).

"secure centres in order to deprive guerilla groups of the logistical, political and intelligence support they derive voluntarily or through duress, from the civilian community . . . [and the] displacements of ethnic groups in order to facilitate the domination of the area involved by another more favoured group."[287] Like Article 49 of Geneva IV, Article 17 of Protocol II does not prohibit the voluntary movement of civilians.[288]

Finally, it should be noted that, in an internal war, it is always very difficult to distinguish civilians from combatants. It even proved impossible to define "a civilian" in Protocol II.[289]

VIII. CONCLUSION

"Elementary notions of humanity, [dictates of public conscience,] or whatever similar expression is used, are available as a basis for principles or rules of law, but they have to be transformed into such principles or rules by the practice of States, or through being recognised and acted upon by an international tribunal."[290] The respect for civilians during armed conflict or belligerent occupation is such an elementary notion. As an expression of this elementary notion, a firm rule of international humanitarian law exists prohibiting deportations and transfers of civilians during armed conflict or occupation. This rule, laid down in Article 49 of Geneva IV, reflects customary international law. A breach of Article 49 is a grave breach of the Convention and constitutes an international war crime. These conclusions have emerged from the practice of states, from The Hague to Geneva and from Nuremberg to Kuwait and the former Yugoslavia.

The only remaining uncertainty is one of interpretation. This uncertainty is witnessed in the ongoing dispute over the deportations from and the settlements in the Israeli-occupied territories. This dispute, however, has such a political content that the intrinsic value of the legal arguments advanced is reduced.

There is, in addition, an important gap with respect to the regulation of individual and state responsibility for policies leading to a mass exodus of refugees or an internal displacement of civilians as a result of war. Refugees and displaced persons are a corollary of armed conflict. From the point of view of the effect, a refugee, a displaced person, and a deportee do not differ significantly. All are forced to leave their ordinary

287. *Id.* at 691. For an example, see BLOODSHED IN THE CAUCUSUS: ESCALATION OF THE CONFLICT IN NAGORNO KARABAKH 19-31 (Helsinki Watch 1992).

288. *Id.* at 692.

289. Kalshoven, *supra* note 206, at 143.

290. Greig, *supra* note 81, at 65.

dwellings. The protection of civilians would be significantly enhanced if this issue were adequately addressed. Only then could countries be held liable for the flow of refugees and displaced persons, such as Iraq has caused and is still causing, in both Iraq and Kuwait, by its aggressive and discriminatory policies.[291] In the end, it is hoped that this Article has shed some light on what the "laws of humanity" and the "dictates of the public conscience" prescribe at the end of the second millennium.

291. For a basis of an assessment of Iraq's responsibilities for the flow of refugees it caused, see Florentino P. Feliciano, *Coerced Movements of People Across State Boundaries: Some Problems of International Humanitarian Law*, 58 PHILIPPINE L.J. 256 (1983); Florentino P. Feliciano, *International Humanitarian Law and Coerced Movements of Peoples Across State Boundaries*, 9 AUSTRALIAN Y.B. INT'L L. 113 (1985); see also S.C. Res. 688 (1992) in which the Security Council characterized Iraq's treatment of the Kurdish people in Northern Iraq as a threat to peace, not because of what happened within Iraq but because of the effects on third-party states to which the Kurds were driven.