

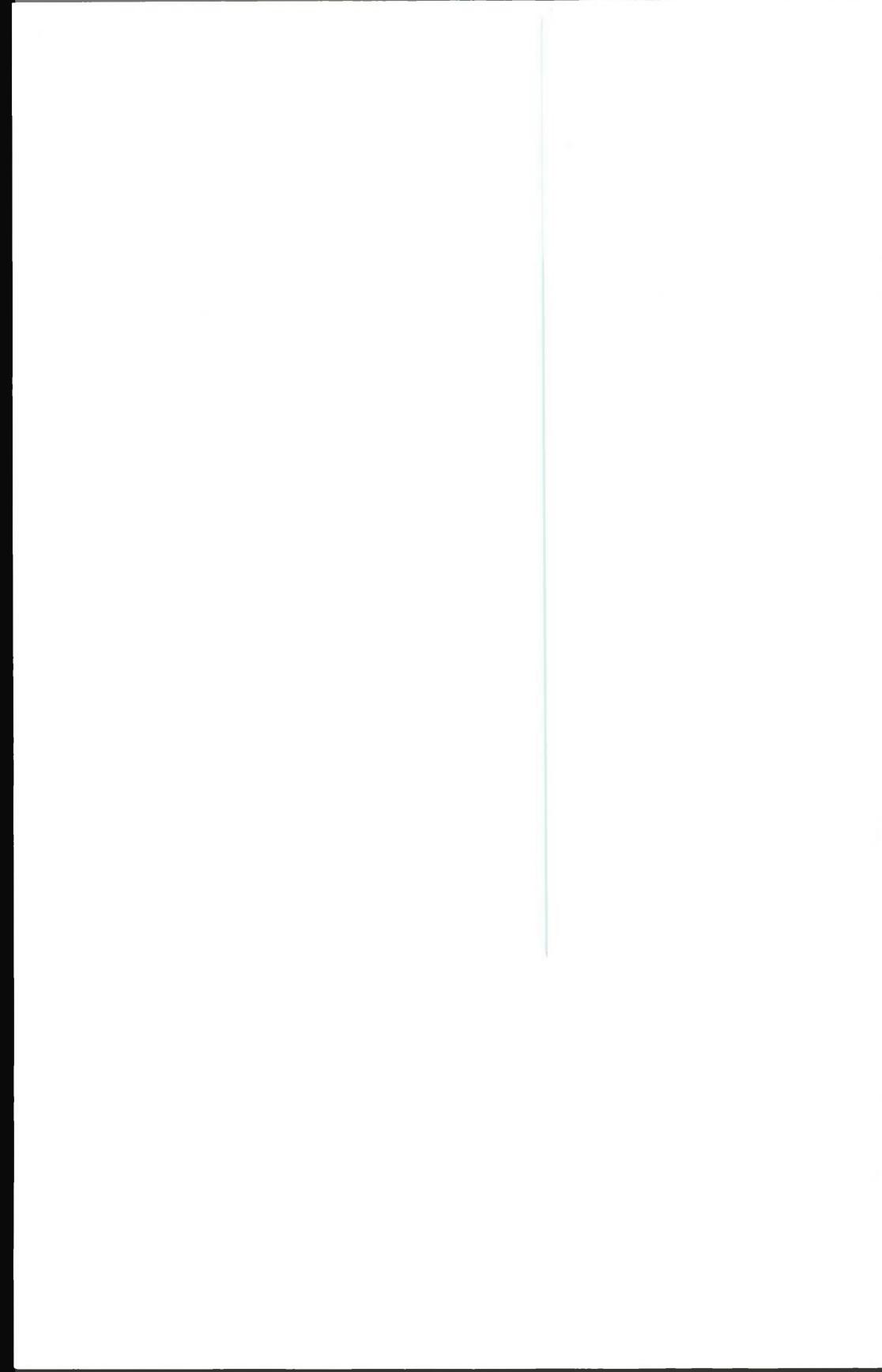
Jerusalem, March 1997

**ISRAELI SETTLEMENT IN THE
OCCUPIED TERRITORIES AS A
VIOLATION OF HUMAN RIGHTS:
LEGAL AND CONCEPTUAL ASPECTS**

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**The Israeli Information Center for Human Rights
in the Occupied Territories**



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מרכז המידע הישראלי לזכויות האדם בשטחים (ע.ר.)

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B'Tselem Report No. 14

ISSN 0793-520X

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B'Tselem thanks the following organizations and individuals for their assistance in preparing this report:

- LAW – The Palestinian Society for the Protection of Human Rights and the Environment
- Quaker Legal Aid Service
- Palestinian Human Rights Information Center
- Al-Haq
- Attorney Eliahu Abrams
- Dr. Eyal Benvenisti
- Attorney Usama Halabi
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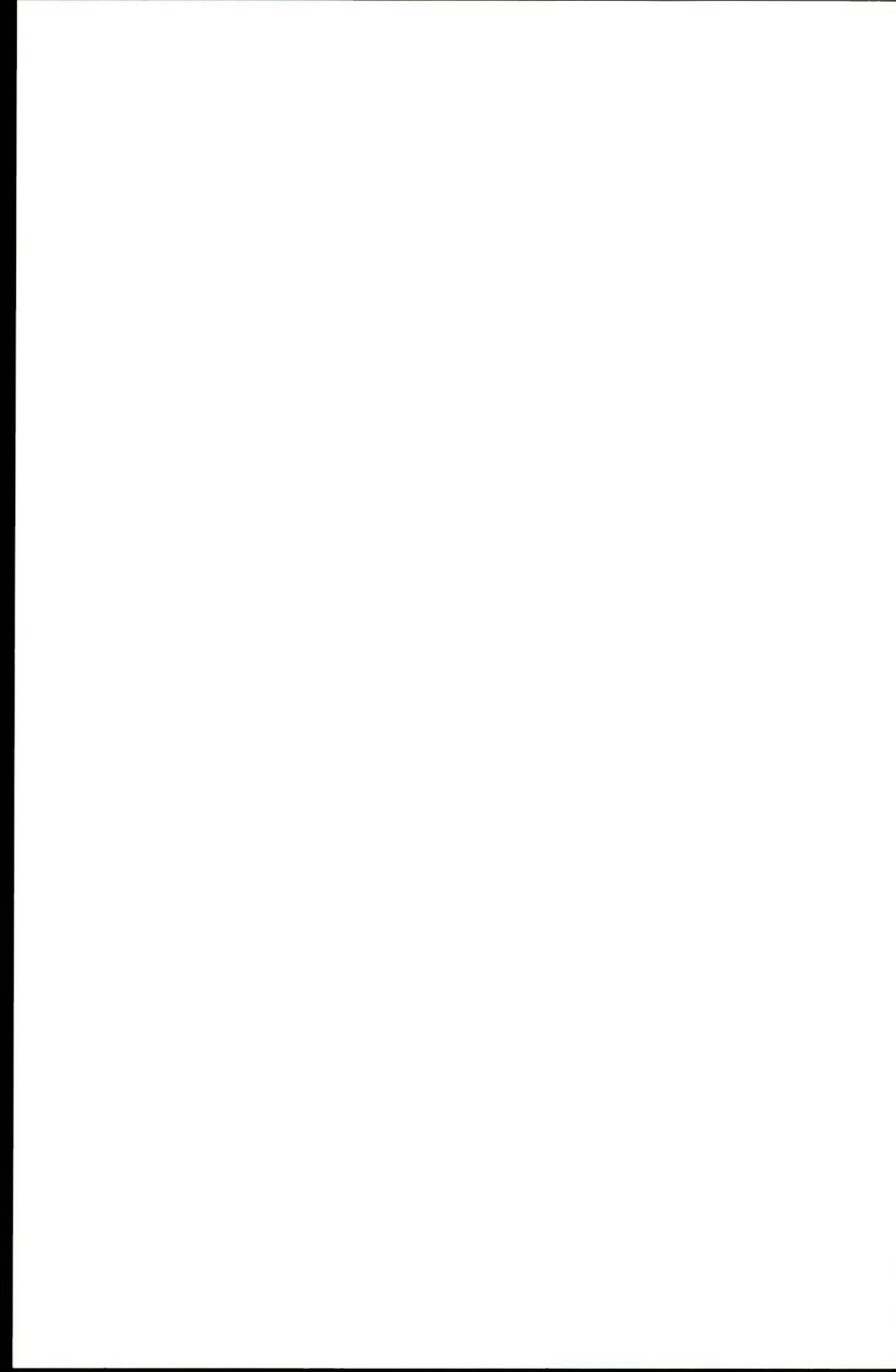
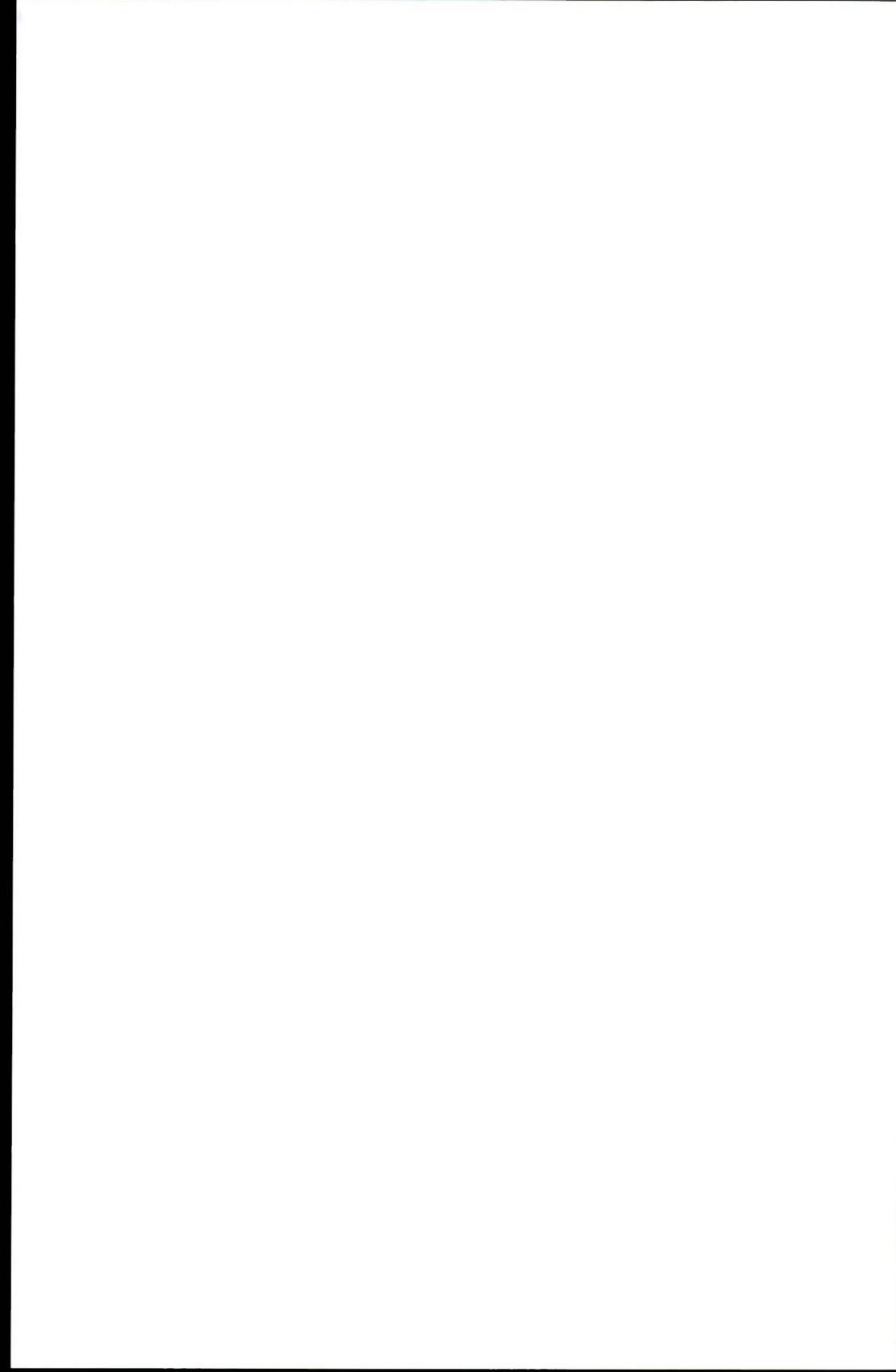


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INTRODUCTION

Between 1967 and 1995, one hundred and thirty-six Israeli settlements were established in the West Bank and Gaza Strip.¹ These settlements contained 138,600 residents.² The various Israeli governments established the vast majority of settlements directly, and all settlements received governmental support for infrastructure, construction, establishment of public institutions, and the like.

Establishing the settlements, populating them with Jewish Israeli citizens, and expanding them was carried out while the Occupied Territories were controlled by the Israel Defense Forces and subject to "belligerent occupation," i.e., to occupation resulting from war. Pursuant to the agreements between Israel and the Palestinians, the future of the settlements will be determined only at the stage of negotiations on the final agreement, which the parties intend to reach in 1999. Until then, the IDF, as the occupying army, must act in accordance with international humanitarian law, i.e., the laws of war, particularly those relating to treatment of the civilian population residing in occupied territory.

This report analyzes, from a conceptual-legal perspective, the legality of the settlements. It will examine, *inter alia*, the question whether the Fourth Geneva Convention applies to the Occupied Territories, the provisions of international law relating to settlement, and the interpretation of these provisions by Israeli governments and Israel's Supreme Court.

Examination of Israeli settlement in the West Bank and Gaza Strip from the human rights perspective means that Israeli settlement will not be considered in its narrow political context. Questions relating to the right of one people or another to the Occupied Territories, or to the ultimate permanent boundaries of the region's states are matters to be decided by political negotiations. As a human rights organization,

1. The data do not relate to Israeli settlement in East Jerusalem. Although **B'Tselem** considers East Jerusalem occupied territory, whose status is the same as the West Bank, this report will not discuss Israeli settlement in East Jerusalem or its legal status. For a discussion on this matter, see **B'Tselem**, *A Policy of Discrimination: Land Expropriation, Planning and Building in East Jerusalem* (Jerusalem, 1995).

2. The Central Bureau of Statistics, *1996 Statistical Abstract of Israel* (Jerusalem: Central Bureau of Statistics, 1996), Table 2.7, at p. 50, Table 2.5, at p. 47, respectively.

B'Tselem welcomes peace negotiations, but takes no position on these questions, and will support any agreement that will ensure the human rights of all persons concerned.

The sole criteria used to examine the act of Israeli settlement are those set by the international community, including Israel, concerning military conduct in territories occupied during war.

1. APPLICABILITY OF THE INTERNATIONAL HUMANITARIAN CONVENTIONS TO THE OCCUPIED TERRITORIES

Even after signing of the Israeli-Palestinian interim agreements and during their implementation, Israel, more precisely its army, has had total control over all the Israeli settlements in the West Bank and Gaza Strip. Until a final agreement is signed, the international law applicable to the status of Israeli settlement is international humanitarian law. Two major international instruments, which relate to treatment of civilians during war, deal with the subject: the Hague Regulations (1907)³ and the Fourth Geneva Convention (1949).⁴

Israel's position on the applicability of these two agreements confuses two issues:

- a. The question of whether these instruments apply to Israel's acts in the Occupied Territories; that is, does Israel's control of the Occupied Territories constitute "occupation" according to these agreements?

In 1971, Meir Shamgar, Israel's Attorney General at the time and later Justice and President of its Supreme Court, framed Israel's formal position on this point. In his opinion, the Hague Regulations and the Fourth Geneva Convention apply only to areas occupied by a legitimate sovereign government. Since Egyptian and Jordanian sovereignty over the land occupied by Israel in 1967 had never been recognized, and most countries had considered their control to be illegitimate,⁵ these territories were not, prior to their occupation, under the sovereignty of any state, and could not, therefore, be considered "occupied territory" once Israel seized control. Shamgar concludes from these determinations that Israel is not bound by international law to comply with the Hague Regulations and the Fourth Geneva Convention. Nevertheless, Shamgar added, Israel would comply *de*

3. Regulations annexed to the Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907).

4. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

5. Only Great Britain and Pakistan recognized Jordan's annexation of the West Bank, and Egypt never claimed that the Gaza Strip was Egyptian territory.

facto with the "humanitarian provisions" of these two instruments.⁶ The applicable provisions have never been specified.

- b. The question of whether Israeli courts have "jurisdiction" to decide matters under these international agreements; that is, are the instruments part of Israel's municipal law, which would empower Israeli courts to adjudicate, in accordance with the instruments, the government's actions?

As regards the Hague Regulations

Since the Beit El case, in 1978, the HCJ has considered the Hague Regulations of 1907 as part of customary international law. i.e., as part of the principles of conduct binding all states, including those not parties to any agreements dealing with these matters.⁷ Customary international law is broadly applied because it reflects a consistent legal policy of most states as regards what is permitted and what is prohibited, and in the case of humanitarian law – what is permitted and prohibited during war.

Under the Israeli legal system, an international agreement is not, as a rule, incorporated into municipal law as long as the Knesset [Parliament] has not enacted the agreement's provisions into Israeli law. However, this rule does not apply to agreements reflecting customary international law, which are "automatically" considered part of municipal law. When the High Court of Justice recognized the Hague Regulations as a reflection of customary international law, they thus became justiciable by it.

The HCJ examined, therefore, Israeli policy in the Occupied Territories in the light of the Hague Regulations. Pursuant to the government's formal position, described above, the government should have opposed this, since the Hague Regulations deal with "Military Authority over the Territory of the Hostile State,"⁸ just as the Fourth Geneva Convention does. However, the government never opposed the "justiciability" of the Hague Regulations by the HCJ, or referred to one regulation or another as "humanitarian" or as not being such.

6. See Meir Shamgar, "The Observance of International Law in the Administered Territories," *Israel Yearbook of Human Rights* 1 (1971) 262, esp. pp. 262-266.

7. HCJ 606, 610/78, *Suleiman Tawfiq Ayyub et al v. Minister of Defense et al*, Piskei Din 33 (2) 113, 120-122 (hereafter: *Beit El*). See also p. 26 below.

8. Section III, which includes the articles relating to occupied territory.

As regards the Fourth Geneva Convention

Contrary to the Hague Regulations, the HCJ views the Geneva Conventions as belonging, as a rule, only to treaty-based law, i.e., they are included among those instruments that bind only the State Parties (Israel being among them). Since the Knesset has not yet "adopted" the Fourth Geneva Convention, the HCJ ruled that it is not justiciable in the local courts. Once the HCJ determined that the Geneva Convention is not justiciable before it, the court refrained, as a rule, from deliberating over its provisions.⁹

B'Tselem's position

B'Tselem maintains that the HCJ should reexamine the status of the Fourth Geneva Convention to determine whether it has become part of customary international law.¹⁰ Reconsideration is necessary due to the following facts:¹¹

- almost every state has signed the Geneva Conventions;
- the vast majority of states have unequivocally supported the provisions of the Fourth Geneva Convention (for example, in decisions of the UN General Assembly and Security Council, among them decisions against Iraq and Israel);
- no states or legal experts have contended that compliance with these provisions is not required;
- a body of comprehensive human rights legislation has developed, some of which duplicates provisions of the Geneva Conventions, and many of whose provisions are considered customary;
- international humanitarian law has continued to develop, the development being largely based on the Geneva Conventions,

9. See Justice Vitkon's comments in *Beit El*, pp. 122-123: "Arguments based on article 49 of the Geneva Convention may not be raised in this court."

10. In the past, the HCJ also considered the Hague Convention as solely treaty-based law: see, e.g., HCJ 337/71, *Al-Jam'uyyah al-Masihiyah lil-Aradi al-Muqaddasah (The Christian Association for Holy Places) v. Minister of Defense et al*, Piskei Din 26(1) 574, 580; HCJ 500/72, *Maryam Khalil Salem Abu Al-Tin v. Minister of Defense et al*, Piskei Din 27(1) 481, 485; HCJ 302, 306/72, *Sheikh Suleiman Hussein 'Odeh Abu Hilu et al v. Government of Israel et al*, Piskei Din 27(2) 169, 180 (hereafter: *Pithat Rafah*).

11. See, for example, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1989), *passim*, esp. pp. 41-62.

particularly the protocols added to them in 1977, to which most states also became party.¹²

More extensive discussion of the justiciability of the Fourth Geneva Convention in Israeli courts¹³ is unnecessary here, as the non-justiciability of a convention in local courts does not detract from the state's international obligation to comply with it. The Israeli Supreme Court shares this position. Justice Aharon Barak wrote:

As regards the obligation of the occupying state vis-a-vis the international community, these rules are found both in customary international law and treaty-based law, to which the state is party, and they apply to the matter.¹⁴

Nevertheless, the question of whether the Fourth Geneva Convention applies to Israeli administration in the Occupied Territories is extremely relevant to Jewish settlement there, as the Convention unequivocally prohibits the settlement of citizens of an occupying country in occupied territory.

B'Tselem shares the position held by other human rights organizations and the international community that Israel must *fully* comply with the Geneva Convention as well as the Hague Regulations, and that the Israeli government's refusal to recognize that the Fourth Geneva Convention applies to the Occupied Territories is a serious and dangerous evasion of its obligation as a member of the international

12. 1977 Protocol I and II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International and Non-International Armed Conflicts. Israel is not a party to these protocols.

13. For such a discussion, see e.g., Eyal Benvenisti, "Consequences of Security Considerations and Foreign Relations on Application of the Conventions in Israeli Law" (in Hebrew), *Mishpatim* 21 (1992) 222; Amnon Rubinstein, *The Constitutional Law of Israel* (in Hebrew) (Jerusalem: Schocken, 1991), pp. 99-103. **B'Tselem** considers Israeli courts to be involved in breaching international law to the extent that they approve governmental acts that breach this law. Cf. the aforementioned Benvenisti article, pp. 229-230.

14. HCJ 392/82, *Jam'iyyat Iskan al-Mu'aliman al-Mahddudat al-Mas'uliyah, Teachers' Housing Cooperative Society, Duly Registered at Judea and Samaria Headquarters v. Commander of IDF Forces in Judea and Samaria et al*, Piskei Din 37(4) 785, 793 (hereafter: *Teachers' Society*). Justice Vitkon expresses a similar view: "It is wrong to think... that the Geneva Convention is not applicable to Judea and Samaria. It applies, but it... is not justiciable in this court." HCJ 390/79, *'Azat Mahmud Mustafa Dweikat et al v. State of Israel et al*, Piskei Din 34(1) 1, 29 (hereafter: *Elon Moreh*).

community. Without providing a detailed legal brief,¹⁵ we shall present the main arguments supporting this position.

a. Compliance with the entire Geneva Convention as a single unit that should be complied with in full

Israel's undertaking to comply only with the "humanitarian provisions" of the Fourth Geneva Convention implies a division of the Convention into "humanitarian parts," in the words of Justice Barak,¹⁶ and to those that are supposedly not included within that category, which are not binding.

Humanitarian law, including the Fourth Geneva Convention, is, by definition and nature, entirely humanitarian, and deals with the most difficult and dangerous situation in relations between nations – war. War inevitably results in harm to individuals and their rights. The humanitarian law conventions are intended to establish the maximum borders of this harm that the international community is willing to accept, and to enable, even under war conditions, protection of basic rights and human dignity.¹⁷ Israel's position, which holds that under

15. For such a discussion, see e.g., Meir Shamgar, "The Observance of International Law in the Administered Territories;" Yoram Dinstein, "Zion in International Law Will be Redeemed," *Hapraklit* 27 (1971) 5; Yehuda Blum, "Zion in International Law is Redeemed," *Hapraklit* 27 (1972) 315; Yoram Dinstein, "And the Redeemed is not Redeemed" or – 'Not Demonstrations, but Acts'," *Hapraklit* 27 (1972) 519; Yehuda Blum, "East Jerusalem is not Occupied Territory," *Hapraklit* 27 (1973) 183; Yoram Dinstein, *Laws of War* (Tel-Aviv: Schocken and University of Tel-Aviv, 1983), pp. 209-213; Menachem Hofnung, *Israel – State Security versus the Rule of Law* (Jerusalem: Nevo, 1991), pp. 285-288. All of the above are in Hebrew. Amnon Rubinstein, "The Changing Status of the Occupied Territories: From a Held Deposit to a Mixed Legal Creation," *Iyunei Mishpat* 11 (1986), pp. 439-456. See also Raja Shehadeh, *Occupier's Law*, Revised Edition (Washington, D.C.: Institute for Palestinian Studies, 1988), pp. xi-xiv; Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton Univ. Press, 1993), pp. 108-113; Usama R. Halabi, *The Status of the West Bank under International Law*, a paper published by Land and Water Establishment, Jerusalem, 1991.

16. In *Teachers' Society*, Barak wrote: "We can leave for further review the excellent question of whether the Fourth Geneva Convention's humanitarian parts, which Israel decided to comply with... do not constitute binding norms..." (see pp. 793-794). This decision was written in 1983, and since then, the HCJ has preferred to refrain from dealing with this question.

17. See e.g., L. Oppenheim, *International Law: A Treatise, Vol. II: Disputes, War and Neutrality*, Seventh Edition, ed. H. Lauterpacht (London: Longmans, 1969), p. 202.

certain circumstances, it is permissible to transgress and disregard these borders, contradicts these principles and must be rejected outright.

Moreover, division of the Geneva Convention into "humanitarian" and "non-humanitarian" parts opens a dangerous path, which any State Party to this humanitarian convention or to other humanitarian conventions can exploit to evade its undertakings, and to decide which provisions it wishes to implement, and which not.

b. Previous sovereignty over the occupied territory does not affect applicability of the Convention

The laws relating to occupation, or "belligerent occupation," do not condition their application on recognition of the sovereignty of a power that controlled the territory prior to occupation.¹⁸

The Fourth Geneva Convention does not deal with questions like who initiated the war or which side was justified in fighting the war, nor does it relate to the status of the territory prior to the conflict. The Convention stipulates that it applies to all civilians in a war or under occupation, whom the Convention terms "protected persons." Article 4 of the Convention defines "protected persons" as follows:

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 [our emphasis].

Israel's position, based on the argument that the Fourth Geneva Convention is not applicable to territory that had not been under the control of another recognized sovereign prior to occupation, is, therefore, insupportable.

18. See e.g., Dinstein, *Laws of War*, pp. 212-213; Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988," in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992), pp. 25-85, esp. 43-49.

c. Broad international agreement that the Convention applies to the Occupied Territories

Consensus exists among the international community that the Fourth Geneva Convention applies to the Occupied Territories. This consensus also encompasses Israel's closest friends, and has been expressed, *inter alia*, in the 1981 resolution of the UN General Assembly, supported by 141 states, which only one state opposed. The International Committee of the Red Cross, which is charged with implementing the Convention, considers the Convention to be applicable in the Occupied Territories,¹⁹ as do the vast majority of international law experts who have expressed their opinion on this matter.²⁰

Israel stands alone in accepting Shamgar's interpretation, which most leading jurists in Israel also dispute.²¹

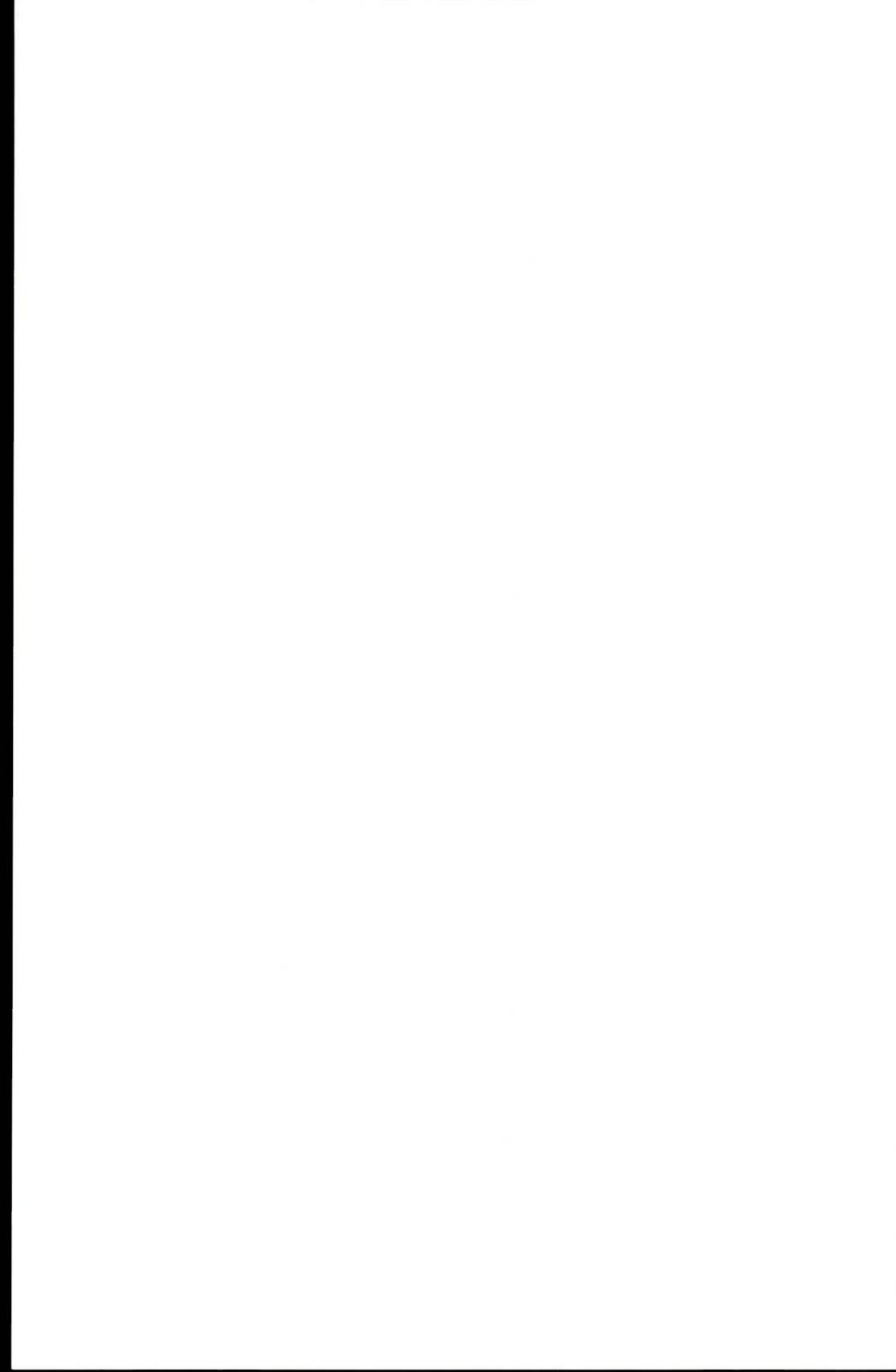
If Israel does not intend to harm residents of the Occupied Territories by violating the Fourth Geneva Convention, it has no reason not to undertake to implement all of its provisions, even without recognizing its applicability to the Occupied Territories.²² Israel's failure to define the Convention's provisions it considers to be "humanitarian provisions" reinforces the suspicion that it had adopted its position only to try to evade complying even with those, and to grant the government almost free rein in the Occupied Territories, allowing it to disregard the protection granted their residents by the Convention.

19. This position has continuously been expressed in the organization's annual reports since 1968.

20. See e.g., the articles of Adam Roberts, Alain Pellet, Richard Falk and Burns H. Weston, Christopher Greenwood, and Antonio Cassese in Playfair (ed.), *International Law and the Administration of Occupied Territories*.

21. Among those who disagree with Shamgar's interpretation are Professor Yoram Dinstein, Professor Amnon Rubinstein, and Dr. Eyal Benvenisti. See footnote 15 above.

22. See Rubinstein, *The Constitutional Law of Israel*, p. 101.



2. INTERNATIONAL LAW ON THE LEGALITY OF SETTLEMENTS

Israeli settlement in the Occupied Territories violates two principles of international humanitarian law: the prohibition on transfer of civilians from the occupying power to the territory occupied, and the prohibition on creating in the occupied territory permanent change that does not benefit the local population.

a. Prohibition on transferring civilians from the territory of the occupying power to the occupied territory

Article 49 of the Fourth Geneva Convention explicitly stipulates:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

The ICRC's commentary to this article states that the article

is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories.²³

Transfer of citizens of the occupying power, and even housing them temporarily in the occupied territory, is permitted, but only to assist the military administration in the occupied territory. Dinstein maintains that "... where the occupation extends for a lengthy period, it is acceptable to bring civilian professionals who will operate within the framework of the military administration, and will assist it in various matters."²⁴ The Jewish settlers in the Occupied Territories clearly do not come, as a whole, within this category of persons.

23. Jean S. Pictet (ed.), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), p. 283. See also Oppenheim, *International Law*, p. 452.

24. Dinstein, *Laws of War*, p. 214.

According to Dinstein, the prohibition on settlement in occupied territory under article 49 should be interpreted narrowly. He contends that the intention of the article is "to prevent basic demographic change in the occupied territory's population structure." Consequently, he argues, "it is not necessarily wrong" where there is "voluntary settlement, little by little, of civilians of the occupying power in the occupied territory... if it is neither done by the government of the occupying power nor in an official manner."²⁵

Dinstein's interpretation is problematic from two perspectives:

First, the Fourth Geneva Convention defines "protected persons" as the residents of an occupied territory (and not the civilian population of the occupying power),²⁶ and the goal of article 49 is to protect them from civilians of the occupying power who settle on their land. It is unclear, therefore, why Dinstein holds that voluntary settlement – in contrast to actions of the occupying power to settle its civilians there – causes less harm to the inhabitants of the occupied territory, and justifies the removal of this protection from them.²⁷

Second, Dinstein's interpretation is inconsistent with the language of article 49. Contrary to the prohibition on deportation of protected persons from the occupied territory, stated at the beginning of the article, which prohibits "individual or mass *forcible* transfers, as well as deportations of protected persons (our emphasis)," the end of the article stipulates that the occupying power "shall not deport or transfer" its civilians into the territory it occupies. The word "forcible" is absent from this latter prohibition. The prohibition on transferring a civilian population from the occupying power to the occupied territory is, therefore, broader, and also includes *non-forcible* transfers. Many international law experts accept this interpretation, among them Prof. Yehuda Blum, who would later serve as Israel's ambassador to the United Nations:

The distinction between (prohibited) "deportation or transfer" of a population of the occupying power to the occupied territory, and (permitted) "settlement" of its citizens "as such" into the occupied territory would be interesting were it not for the official commentary of the Fourth Geneva Convention that was published by the International Committee of the Red Cross, which states that the relevant provision is intended, *inter alia*, to

25. *Ibid.*, p. 226.

26. Article 4 of the Fourth Geneva Convention.

27. See Benvenisti, *The International Law of Occupation*, p. 140.

prevent "colonization" of the occupied territory by the occupier.²⁸

However, even if Dinstein's interpretation is accepted, the lenient conditions he presents are not met in the case of Israeli settlement in the Occupied Territories:

1. The declared purpose of the settlers, like that of Israeli governments that establish the settlements, was and continues to be to create "basic demographic change in the population structure," whether throughout the occupied territory (the Likud policy),²⁹ or in portions of the occupied territory (the Ma'arach [coalition of the Labor and MAPAM parties] policy).³⁰ Such a change was actually accomplished, at least in those areas in which there is congested Israeli settlement.
2. The Israeli government initiated most of the Jewish settlement in the Occupied Territories. All of the relevant ministries and authorities assisted by expropriating land, planning, implementation, and financing. The State Comptroller's Annual Report of 1983 enumerates 125 settlements that the Ministerial Committee for Settlement Matters had decided to establish.³¹ The various Israeli governments encouraged and continue to encourage Israeli civilians

28. Blum, "East Jerusalem is not Occupied Territory," p. 189. In mentioning "the official commentary on the Fourth Geneva Convention," Blum is referring to the commentary of Jean Pictet, *supra*. Although the ICRC continues to rely on the commentary of Pictet, it is no longer called "the official commentary" of the organization. Other jurists have stated similar opinions. See e.g., Roberts, "Prolonged Military Occupation," p. 67.

29. As contemplated, for instance, by the settlement plan of April, 1983, which was implemented by the Ministry of Agriculture in cooperation with the Rural Settlement Department of the World Zionist Organization. This plan, calling for the establishment of Jewish settlements housing 800,000 persons in the West Bank, outlines the settlement policy of the Likud governments. See Meron Benvenisti and Shlomo Khayat, *The West Bank and Gaza Atlas* (Jerusalem: West Bank Database Project, 1988), pp. 58-59, 94.

30. The Ma'arach's position was clearly stated on 3 May 1982 when its leader, Shimon Peres, addressed the Knesset:

On this, we say that the settlement policy must deal with those areas of Judea, Samaria, and the Gaza Strip in which we shall insist on sovereignty, which is necessary for security, and not sovereignty by itself and the settlements by themselves: the Jerusalem periphery, the Jordan Valley, Gush Etzion, the southern Gaza Strip, and of course, the Golan Heights. On the other hand, we must refrain from settling areas heavily populated by Arabs...

31. The State Comptroller, *Annual Report 34 (for the year 1983 and audit of the 1982 fiscal year)*, pp. 84-85, and the tables on page 82.

to move to the Occupied Territories by providing benefits, like grants and loans under favorable terms.³²

Even where the settlers, rather than the government, established the settlements (as in the cases of Kedumim, Shilo, and Ofra), the government acted retroactively to turn them into permanent settlements. To achieve this, the government assisted with planning, infrastructure, establishment of public buildings and institutions, expropriation of land to expand the settlements, and by encouraging other Israeli civilians to live there.

Settlements established pursuant to the decision of a government committee, through governmental planning and implementation and governmental assistance and encouragement cannot be considered "voluntary settlement" of private persons. Consequently, the act of settlement in the Occupied Territories breaches article 49 of the Fourth Geneva Convention even when it is narrowly construed.

b. Prohibition on creating in occupied territory permanent changes not intended to benefit the local population

A fundamental principle of international humanitarian law relating to territory subject to belligerent occupation is, according to Pictet, that "the occupation of territory in wartime is essentially a temporary, *de facto*, situation."³³ The temporary nature of occupation entails limitations imposed on the occupying power regarding the creation of permanent facts in the occupied territory.

Article 46 of the Hague Regulations prohibits the confiscation of private property. Article 52 allows the occupying power to take land for compensation, but only to meet its military needs. Requisition of

32. See *ibid.*, pp. 96-98 concerning the ways in which the government finances establishment of the settlements and how it assists their residents, and at pp. 106-107, 114 concerning the assistance that had been granted to residents of the Alfe Menashe settlement. The government recently (13 December 1996) decided to grant the status of "Development Area A" [preferred status] to all the settlements.

33. Pictet, *Commentary*, p. 275.

land, contrary to confiscation, is temporary by definition, and the occupying power does not obtain ownership.¹⁴

As regards government property, article 55 of the Hague Regulations stipulates:

The occupying State shall be regarded only as administrator and usufructuary³⁵ of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.³⁶

This rule applies, in this or another form, to all of the occupied territory's natural resources.³⁷ "Underlying all the limitations," Dinstein writes, "is the idea that the occupying power is not the sovereign in the territory."³⁸ Consequently, the occupying power may not do any act that constitutes "unilateral annexation of all or part of the occupied territory."³⁹ The occupying power may, however, quarter "administrative units in buildings...", "work the land and harvest the crops, rent or lease land to private individuals, and the like," but with the limitation that "the leasehold may not exceed the period of the occupation."⁴⁰

The High Court of Justice also recognized the temporary nature of the occupation. Justice Barak held that the powers of the military

34. As regards the rights and obligations of the occupying power concerning private property, see Oppenheim, *International Law*, pp. 403-405; Gerhard von Glahn, *The Occupation of Enemy Territory* (Minneapolis: The Univ. of Minnesota Press, 1958), pp. 185-191, 193-196; George Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Vol. II: *The Law of Armed Conflict* (London: Stevens & Sons, 1968), pp. 266-307.

35. *Black's Law Dictionary* defines "usufruct" as a "real right of limited duration on the property of another." In defining the Latin origin of the term, *usus fructus*, the right is also described as temporary. *Black's Law Dictionary* (Sixth Edition) (St. Paul, Minn.: West Publishing Co., 1990).

36. For an interpretation of this article, see Oppenheim, *The International Law*, p. 396-398; von Glahn, *The Occupation of Enemy Territory*, pp. 176-180; Schwarzenberger, *The Law of Armed Conflict*, pp. 311-313.

37. See Palestinian Hydrology Group and Land and Water Establishment, *Legal Status of West Bank Groundwater Resources* (Jerusalem, 1991), pp. 8-21.

38. Dinstein, *Laws of War*, p. 220.

39. *Ibid.*, p. 211.

40. Eyal Zamir, *State Lands in Judea and Samaria: A Legal Survey* (in Hebrew) (Jerusalem: The Jerusalem Institute for Israel Studies, 1985), p. 11.

commander "are, legally, temporary by their nature, since belligerent occupation is temporary by its nature."⁴¹

Since the military commander is not the sovereign in the territory and his administration there is only temporary, he may exercise only two considerations when making decisions concerning the occupied territory: the welfare of the local population and his security needs. Justice Barak explains this point as follows:

The Hague Regulations revolve about two main pivots: one – ensuring the legitimate security interest of those holding the land by belligerent occupation; and the other – ensuring the needs of the civilian population in the territory subject to belligerent occupation... The military commander may not weigh national, economic, or social interests of his country insofar as they have no ramifications on his security interest in the area, or on the interest of the local population. Even military needs are his [i.e., the military commander's] needs and not national security needs in their broad sense.⁴²

However, the occupying power may institute permanent changes intended to benefit the local population, and the HCJ used this principle in permitting construction of roads in the Occupied Territories:

Basic investments that create permanent change likely to remain after expiration of the military administration are allowed if they are reasonably necessary to meet the needs of the local population.⁴³

Since it has never been contended that the settlements were established to benefit the residents of the Occupied Territories, the legal justification for their establishment must be that they were intended for security needs. In petitions to the HCJ regarding settlements established on privately-owned land, the court adopted the State's contention that the settlements are temporary and are militarily necessary, and approved their establishment.

41. *Teachers' Society*, p. 794. See also HCJ 351/80, *The Jerusalem District Electric Company Ltd. v. Minister of Energy and Infrastructure et al.* Piskei Din 35(2) 1549.

42. *Teachers' Society*, pp. 794-795. See also Antonio Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources," in Emma Playfair (ed.), *International Law and Administration of Occupied Territories*, pp. 419-421.

43. *Teachers' Society*, p. 805. See also von Glahn, *The Occupation of Enemy Territory*, p. 186. As regards construction of roads, see Chapter Four below.

3. THE HIGH COURT OF JUSTICE – THE JUDICIAL APPROVAL FOR ISRAELI SETTLEMENT

The legal discussions in the High Court of Justice on the settlements focused primarily on those established in the 1970's on private land expropriated on the pretext of military necessity. The HCJ granted approval in principle to expropriations for that purpose and for the establishment of civilian settlements on the expropriated land. As of the end of the 1970's, most of the settlements were established on "state lands," and the HCJ also approved this procedure. In this way, the HCJ legitimized Jewish settlement and ultimately blocked all judicial means to oppose it.

a. The 1970's: settlement on private land as a "temporary act to meet security needs"

During the 1970's, residents of the Occupied Territories whose land had been taken to erect settlements filed several petitions with the HCJ.⁴⁴ In all of its judgments, the HCJ held that expropriating private land for the purpose of establishing a civilian settlement is legal as long as it is for military needs and is temporary.

The three main judgments issued on this subject were in the Pithat Rafah, Beit El, and Elon Moreh cases.

Pithat Rafah

In the Pithat Rafah case, the army ordered Bedouin tribes to move from their places of residence in order to establish a "partition zone" between Sinai and the Gaza Strip. Nine heads of these tribes petitioned the HCJ. The possibility of "Jewish settlement and presence" in the

44. HCJ 834/78, *Salameh et al v. Minister of Defense et al.* Piskei Din 33(1) 971; *Beit El*: HCJ 258/79, *Amirah et al v. Minister of Defense et al.* Piskei Din 34(1) 90 (hereafter: *Na'alim*); *Elon Moreh*. For a discussion on Jewish settlement before and after the 1970's, see Hofnung, *Israel – State Security versus the Rule of Law*, pp. 300-304.

"partition zone" and its involvement in security activity were raised in the affidavit submitted to the HCJ by the head of the General Staff Section, General Israel Tal.⁴⁵

For the first time, and for what would serve as a long-standing precedent, the HCJ ruled that civilian settlement in the Occupied Territories is legitimate as a security measure. According to Justice Vitkon,

Clearly the fact that the said land is intended, in whole or in part, for Jewish settlement does not negate the security nature of the act as a whole... The area (or part of it) is intended for settlement of Jews, which also, in the instant case, is a security measure.⁴⁶

Beit El

In the Beit El case, several landowners petitioned the HCJ against the requisition of their land to build the Beit El and Beqa'ot settlements. In both instances, the military commander of the region issued an order in which he held that the lands were required for "necessary and urgent military needs." The HCJ rejected the petition, accepting the State's argument that requisition of the land was temporary and intended to meet security needs.

Despite the court's position that "military and security matters... are not included within those matters appropriate for the judicial authority to decide,"⁴⁷ the justices discussed at length the contribution of the settlements to the area's security. For example, Justice Vitkon explained the importance of the settlements:

As regards the pure military consideration, there is no doubt that the presence of settlements – even "civilian" – of the occupying power in the occupied territory substantially contributes to the security in that area and facilitates the execution of the duties of the military. One does not have to be an expert in military and security affairs to understand that terrorist elements operate more easily in an area populated only by an indifferent population or one that supports the enemy, as opposed to an area in which there are persons who are likely to observe them and inform the authorities about any suspicious movement. Among them no refuge, assistance, or equipment will be provided to terrorists. The matter is simple, and details are unnecessary.⁴⁸

45. Paragraphs 2 and 3 of the affidavit, respectively.

46. *Pithat Rafah*, p. 182.

47. *Pithat Rafah*, p. 181.

48. *Beit El*, p. 119. See also the comments of Justice Ben Porat at pp. 132-133, and the comments of Justice Landau in *Na'alim*, pp. 93-95.

The HCJ held that since the commander of the region is empowered to weigh security considerations, and since the justices found that the settlements unequivocally contribute to security, the issuance of the orders was legal.

The HCJ further held that requisition of the land was also legal under international law. On this issue, Justice Vitkon relied on article 52 of the Hague Regulations, and distinguished between "requisition of land for consideration" and confiscation of land:

There is a clear distinction between confiscation (which is nothing more than expropriation without consideration for an illegal purpose) and requisition, which in the case of real property, is only a demand that the owners, for consideration, provide the use of their property without relinquishing their ownership. According to counsel for the State, this is how the action of the military administration must be viewed, and if so, I am satisfied that this action does not violate articles 23(g) and 46 of the Hague Convention.⁴⁹

In response to the question of Petitioners' counsel as to how a permanent settlement can be established on land taken temporarily, Justice Landau stated:

It seems to me that Mr. Bach is correct in stating that the civilian settlement can exist in the same location only as long as the IDF holds the territory under the expropriation order. This holding may terminate some day as a result of international negotiations that will result in a new arrangement that would be valid under international law and would determine the fate of this settlement, as it would for all the other settlements in the Occupied Territories.⁵⁰

Justice Ben Porat also held that establishment of a settlement might satisfy international law concerning the temporary nature of the acts of the occupying power:

I was bothered by the question that perhaps the term "permanent settlement" indicates an intention to take the property forever, but I concluded that the adjective "permanent" must be understood as just a *relative* term (emphasis in original).⁵¹

49. *Beit El*, pp. 123-124. Von Glahn writes: "... a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity (our emphasis)." See also the comments of Justice Landau in *Beit El*, pp. 131-132.

50. *Beit El*, p. 131.

51. *Beit El*, p. 134.

Elon Moreh

About six months after ruling in *Beit El*, the HCJ issued its judgment in the matter of Elon Moreh. This judgment ended the requisition of private property to establish new settlements.

In January of 1979, the Elon Moreh founders attempted to establish a settlement in Samaria. When the military forbade establishment of the settlement, the group refused to evacuate the site and held a demonstration that the authorities declared was illegal. Subsequently, on 7 January 1979, the Ministerial Committee for Security Matters decided in principle that the group could erect the settlement and that the government would consider their requests at the time the location and date of establishment of the settlement would be decided.

Following this decision, the Ministerial Committee for Settlement Matters toured the area to locate a site for the settlement. After the army approved the area selected, the Chief of Staff, Raphael Eitan, ordered, on 11 April 1979, the territory to be requisitioned for military purposes. On 3 June 1979, the government approved the decision by a vote of eight to five, with two ministers abstaining. Two days later, the commander of the Judea and Samaria region, Benyamin Ben Eliezer, signed the order requisitioning properties belonging to residents of Rujib village, contending that the action was a military necessity. On the morning of 7 June 1979, construction of the settlement began and the requisition orders were served on the residents. On 14 June 1979, the landowners petitioned the HCJ.

In its opinion, the justices repeated the comments made in *Beit El* that requisition of private land to establish a civilian settlement is legal as long as the requisition is temporary and is intended to meet military needs. However, unlike earlier petitions, the justices found in favor of the Petitioners after holding that in this instance, the orders were not intended to meet military needs and the settlement was intended to be permanent.

Justice Landau held that in this instance, the primary reasons for requisitioning the land were the ideology of the decisionmakers (the Ministerial Committee) and the pressure of Gush Emunim [religious group that established and populated Jewish settlements in the Occupied Territories] to establish the settlement, and not security needs:

I came to the opinion that the Chief of Staff's professional view, by itself, would not have led to the decision to establish the Elon Moreh settlement were it not for another reason, which was the reason that propelled the decision taken by the Ministerial Committee for Security Matters and the entire government, i.e.,

the bold desire of Gush Emunim to settle in the heart of the Land of Israel, as close as possible to Nablus. As regards the discussions in the Ministerial Committee and the government, we could not follow them by studying the minutes of the discussions, but even without them, we have sufficient indications in the evidence before us that both the Ministerial Committee and most of the government were decisively influenced by the Zionist philosophy of settling all of the Land of Israel.⁵²

Two members of the Elon Moreh founding group joined the Respondents and submitted an affidavit, in which they stated their view concerning the purpose of the settlement:

Basing the requisition orders on security grounds in their narrow, technical meaning rather than their basic and comprehensive meaning as explained above can be construed only in one way: the settlement is temporary and replaceable. We reject this frightening conclusion outright. It is also inconsistent with the government's decision on our settling on this site. In all our contacts and from the many promises we received from government ministers, and most importantly from the prime minister himself, we all consider Elon Moreh to be a permanent Jewish settlement no less than Deganya or Netanya.⁵³

In view of these comments, it was impossible to consider the settlement to be a temporary act, and Justice Landau held, therefore:

The decision to establish a permanent settlement intended *ab initio* to remain there forever, and even beyond the period of the military administration established in Judea and Samaria faces a legal obstacle that cannot be overcome. The reason is that the military administration cannot create in its territory military needs that are *ab initio* intended to exist after military government of that territory terminates, when the fate of the territory at the conclusion of the military government is as yet unknown.⁵⁴

Basing its decision on the way in which the government had reached its decision to establish the settlement, and on the fact that the justices

52. *Elon Moreh*, p. 16. See also the comments of Justice Vitkon at pp. 26-27. The Chief of Staff and the Defense Minister disagreed over the military necessity of the Elon Moreh settlement. Chief of Staff Eitan submitted an affidavit that emphasized the military value of the settlement at the site. Defense Minister Ezer Weizmann did not consider the settlement vital. See *Beit El*, pp. 7-9.

53. *Beit El*, pp. 21-22. Deganya and Netanya are a kibbutz and a town located within the Green Line.

54. *Beit El*, pp. 23-24.

were not convinced that in this instance there was a military necessity for the settlement, the HCJ ordered the IDF to evacuate the settlement and return the land to their owners. The government was compelled to find an alternative site to establish the "Elon Moreh" settlement.

Criticism

The late Yitzhak Rabin, as Prime Minister and Defense Minister, held that most of the settlements added nothing to security, and even were a burden on the army.⁵⁵ Annexed to the various petitions to the HCJ were affidavits of former generals who questioned the contention that there was a security need to establish settlements.⁵⁶

Consequently, the unequivocal determination of the court that the settlements contribute significantly to state security cannot be considered a factual determination, but rather a value judgment only, and as such cannot constitute a legal basis to legitimize settlement.

One branch of the IDF is NAHAL, one of whose functions is to establish temporary military settlements. These encampments, even where they exist for years, and even where those living there cultivate the land, raise fish, and the like, do not constitute a permanent settlement. The reason is that the soldiers reside there only until they complete their military service at the site, and do not establish their homes within the encampment. Clearly, this type of settlement does not violate international law. In this context, Dinstein writes that "there is nothing wrong in establishing NAHAL settlements, since these are within the category of military bases."⁵⁷ NAHAL settlements were indeed established in the Occupied Territories, but most of them were a preliminary stage of the establishment of permanent civilian settlements.

The HCJ's ruling that establishment of a "permanent settlement" does not "create permanent facts" emasculates the relevant provisions of international law. Military actions in occupied territory, among them the establishment of camps and facilities, and even housing military personnel, are temporary in both form and content, and are allowed,

55. See e.g., *Al Hamishmar*, 27 January 1995.

56. In *Elon Moreh*, for example, the Petitioners annexed affidavits of Major General (Res.) and MK (Member of Knesset) Haim Bar Lev, of the Labor Party, and General (Res.) Matiyahu Peled. In *Na'alim and Beit El*, an affidavit by General Peled was submitted.

57. Dinstein, *Laws of War*, p. 226.

as mentioned earlier, under international law. However, building permanent civilian settlements and housing civilians in them constitutes a patent act of creating permanent facts, which is prohibited under international law.

A distinction must be made here between creating permanent facts and creating an irreversible situation. Few human acts are irreversible, and almost no human act lasts forever. The vast majority of human acts are "just relative," in the language of Justice Ben Porat, and are changeable. But keeping this in mind, few human acts are more permanent than building a house, housing a family within it, raising children there, sending them to schools erected for them, and establishing cemeteries.

Israeli governments, and in their wake the HCJ, preferred to ignore these known and simple facts of human life. The HCJ time and again accepted the government's position that the settlements are temporary, and elected to disregard the "matters that are common knowledge to every Israeli citizen,"⁵⁸ such as the government's unambiguous out-of-court declarations, on "establishment of security encampments and permanent settlements, rural and urban, on the soil of the homeland."⁵⁹

What the expropriation or requisition of tens of thousands of dunams, establishment of thousands of residential dwellings and public buildings, settlement of thousands of Jews, establishment of cemeteries in some of the settlements, and numerous explicit declarations of settlers and politicians concerning the eternal nature of the settlements failed to accomplish, one affidavit of the settlers on the eternal nature of their settlement succeeded in doing, and it was that which created "a legal obstacle that cannot be overcome."

58. Justice Landau used this expression in an attempt to refute the position of General Peled that the settlements are not important for security. See *Na'alim*, pp. 93-95.

59. The quotation is taken from the "Government's Platform" [the Likud government established after the Knesset elections of 1969], Chapter 1 - Primary Tasks, Section 4, approved by the Knesset on 15 December 1969. The platform of the first Likud government, which the Knesset approved on 20 June 1977, stated in part:

- b. The Jewish people have the historic and eternal right to the Land of Israel, the possession of our forefathers, which is not subject to question.
- c. The government will prepare, establish, and encourage rural and urban settlements on ground of the homeland.

B'Tselem's position on the human rights of settlers

Since the settlements violate international law, the settlers have no right to settle there permanently. However, beyond this point, this violation does not affect their rights as individuals. The obligation to comply with international human rights law applies as a rule to states and governments, and not to persons. The latter are obligated to comply with the laws of the state in which they are citizens (except where such laws are patently illegal). Consequently, insofar as the settlers have complied and comply with those laws, their rights must not be denied, and even punishment imposed on lawbreakers may not violate their basic human rights.

B'Tselem has continuously monitored and handled cases where the authorities violated settlers' rights, among them instances of violence against protesters, arbitrary detention, and illegal means of interrogation.⁶⁰ **B'Tselem** has also opposed sweeping measures taken by the authorities against the settlers, among them administrative detention and banning political movements.

Because the settlements violate international law, the demand to evacuate the settlements in the context of the Israeli-Palestinian peace arrangements is legitimate. However, it is clear that this in no way justifies the killing of settlers. The position of the Palestinian Authority that "all means"⁶¹ must be used in the battle against Jewish settlement is unacceptable, and blatantly contradicts international law, which distinguishes between legal means and means that are illegal in any situation.

60. See **B'Tselem**. *Torture during Interrogation: Testimonies of Palestinian Detainees, Testimonies of Interrogators*, Information Sheet, November, 1994, p. 12; **B'Tselem**. *Impossible Coexistence: Human Rights in Hebron since the Massacre in the Cave of the Patriarchs*, Information Sheet, September, 1995, pp. 24-26.

61. As stated in a resolution passed by a joint meeting of the Executive Committee and Ministerial Council of the Palestinian Authority on 13 December 1996. Reported by *Al-Quds* on 14 December 1996.

If a future peace agreement includes evacuation of some or all of the settlers, **B'Tselem** will demand that it be done nonviolently, and that those evacuated be compensated for their lost property, loss of employment, and the like, and that the authorities do everything possible to facilitate transfer of the settlers to areas within the borders of Israel.

If a future agreement stipulates that the settlers or settlements will remain in territory governed by the Palestinian Authority or another government, **B'Tselem** will demand that the settlers be granted full rights equal to others residing under the control of that authority or government, and that their fundamental human rights be respected.

b. The 1980's and 1990's: settlement on "state lands" and neutralizing the HCJ

Shortly after the decision in *Elon Moreh*, the government overcame this legal obstacle.⁶² When the government learned that widescale requisition of private land to establish settlements was problematic and subject to substantial delay, and that it would have to ensure in each instance that the military heads initiated the requisition of land, that they all support it, and that the settlers who would populate the settlements were willing to refrain from declaring that their purpose was to create permanent settlements, the government was compelled to seek other ways to requisition land in order to establish settlements.

The government changed tactics.⁶³ It abandoned the "security" justification for establishing the settlements, and turned to extensive settlement on "state lands." To accomplish this, Israel began a process of "proclaiming lands to be state lands," the primary goal being to expand the amount of land considered "state lands" in the Occupied Territories.

The process worked as follows: The Civil Administration's supervisor of government property made the "proclamation of land as state lands" following an examination, based on the Ottoman Lands Law of 1855, by the Civil Division of the State Attorney's Office. The supervisor's representative would inform the local village mukhtars about the intention to proclaim the land "state lands," and the residents had forty-five days in which to appeal the decision to the Military Appeals Committee. If no appeal was filed, possession of the land passed to the military. If an appeal was filed, the matter was heard by an appeals committee appointed for that purpose, the person claiming ownership having the burden of proof.⁶⁴

62. On the *Elon Moreh* case and the implications of the decision, see Shehadeh, *Occupier's Law*, pp. 18-22; Hofnung, *Israel – State Security versus the Rule of Law*, pp. 304-307; Ian Lustick, "Israel and the West Bank after *Elon Moreh*: The Mechanics of *De Facto* Annexation," *Middle East Journal* 35, no. 4 (Autumn, 1981), pp. 557-577.

63. According to attorney Pliyah Albeck, who was head of the Civil Division of the State Attorney's Office from 1969-1992, the policy change had already occurred in 1977 as a result of the political and social ideology of the Likud government, and not following *Elon Moreh*. See Pliyah Albeck, *Land in Judea and Samaria* (in Hebrew) (Tel-Aviv: Tel-Aviv Jaffa District Comm., Israel Bar Assoc., 1985), p. 3.

64. On this procedure, see Albeck, *Lands in Judea and Samaria*, pp. 7-9; Zamir, *State Lands in Judea and Samaria*, pp. 31-34; Hofnung, *Israel – State Security versus the Rule of Law*, pp. 307-309; Shehadeh, *Occupier's Law*, pp. 22-23; Raja Shehadeh, *The Law of the Land* (Jerusalem: PASSIA, 1993), pp. 11-30.

This procedure had numerous flaws. It was not provided for in Jordanian law; it circumvents the procedure of land registration under this law, a procedure which the military commander in the West Bank froze ("suspended," in the order's terminology);⁶⁵ it imposes the burden of proof regarding land registration and use on the person claiming ownership; and disregards landowners who are outside the Occupied Territories at the time the procedure is being conducted. Our concern here, however, is not with the procedure's legality, but with the legality of its use for the purpose of building settlements.

Under international law, where a question arises as to whether land is publicly or privately owned, it is considered public unless proven otherwise.⁶⁶ Ownership of two-thirds of West Bank land is not recorded in an orderly manner and results from long-term possession. Thus, placing the burden of proof as to ownership on the residents eases the path for the State when it proclaims land to be public.

Indeed, as a result of the proclamation procedure, "state lands" increased substantially. Prior to the Israeli occupation, 527,000 dunams of land in the West Bank, whose total area encompassed some 5.5 million dunams, were recorded as Jordanian government lands. According to data collected by Meron Benvenisti and Shlomo Khayat, by 1973, the amount of "state lands" had increased to some 700,000 dunams. Most of the increase, however, occurred in the early 1980's. By 1984, the amount of lands that had been proclaimed and taken as "state lands" had reached, according to Benvenisti and Khayat, 1.8 million dunams.⁶⁷ According to data of the YESHA [Judea, Samaria, and Gaza Strip] Council, at the beginning of 1993, some 2.5 million dunams of the West Bank were "state lands," an increase of 450 percent since 1967.⁶⁸ In other words, the area of "state lands" in the West Bank increased, according to those sources, from about 10 percent to about 45 percent.

The HCJ rejected arguments that the procedure of proclaiming "state lands" was illegal under both the international law and military law applying in the Occupied Territories. As regards the proclamation itself,

65. Order concerning Arrangement of Lands and Water (Judea and Samaria) (No. 291), 1968 (KMZT 1968, 591).

66. See Hofnung, *Israel - State Security versus the Rule of Law*, pp. 307-308; Schwarzenberger, *The Law of Armed Conflict*, pp. 308-310; von Glahn, *The Occupation of Enemy Territory*, p. 179.

67. See Benvenisti and Khayat, *Atlas*, pp. 60-61.

68. Among which some one million dunams have been registered as state-owned in the Land Registry Office, some one million were proclaimed state lands but have not yet been registered. "and some 500,000 dunams were proclaimed state lands in the past ten years." Nadav Ha'etzni, "The Struggle over State Lands," *Ma'ariv*, 22 January 1993.

the residents could appeal, as previously mentioned, to the appeals committee, and the HCJ directed the Petitioners to the committee and rejected objections relating to the very existence of the committee.⁶⁹

Since we have reached, as previously mentioned, the conclusion that enactment of the orders concerning government property and arrangement of the appeals committee were not defective, and since the Petitioners were ensured, as stated, the right to appeal to the appeals committee... we have decided to reject the petition.

While the HCJ had previously found it necessary to intervene in the procedure of requisitioning private land in order to protect the owner's property rights, now, when the settlements are being built on what is declared to be "state property," the HCJ refrained from intervening. From the moment that it found the proclamation procedure lawful, i.e., that the State owned the lands, the HCJ did not recognize the *locus standi* of Palestinian residents in matters dealing with the use made of the land, even if they had previously claimed ownership, because no petitioner could prove that the use harmed him or her individually. Thus the president of the Supreme Court at the time, Meir Shamgar, held:

The Petitioner raised the question as to what the status of the land, owned by the State, that had been made available to the "Hadassah" settlement, would be in the long term. It is not necessary for us to deal with this matter because this question does not relate at all to the matter before the court, and in any event, the Petitioner has no *locus standi* on this question.⁷⁰

In 1991, the HCJ heard a petition in the matter of "settlement of civilian residents of the State in settlements in the territories occupied, under belligerent occupation, by the Israel Defense Forces." The court, composed of the president, Meir Shamgar, and Justices Goldberg and Ohr, unanimously rejected the petition, and with this decision, the involvement of the HCJ in settlement matters ended. President Shamgar stated:

In my opinion, the petition must be rejected because it is defective in that it relates to political matters that are preserved for other arms of democratic government, and raises a subject

69. See the comments of Justice Shamgar in HCJ 285/81, *Fadil Muhammad a-Nazar et al v. Commander of Judea and Samaria et al*, Piskei Din 36(1) 701, 705. See also HCJ 277/84, *Sabri Mahmud Eghrayyeb v. Appeals Committee pursuant to the Order concerning Government Property, Judea and Samaria Region et al*, Piskei Din 40(2) 61, 69.

70. Eghrayyeb, p. 69.

whose political markings predominate and patently overcome any legal minutiae inherent in it.⁷¹

The court held that the petition is general and does not relate to a concrete dispute, and the court cannot, therefore, adjudicate it:

The clear purpose of the petition is to attack the general government policy in effect at the time the petition was filed and heard, without relating to concrete acts or omissions. The petition is a general objection to government policy. The court does not deal with abstract problems unless they are connected to a dispute which has concrete implications; the court will certainly not deal with matters involving abstract problems of a predominantly political nature.⁷²

Thus there remained no possibility of questioning the legality of the settlements, even where they were not established for military necessity, and even where they were "intended *a priori* to remain there forever." Those who initiated the proclamation procedure apparently sought to achieve this situation. According to Dr. Menachem Hofnung:

The new procedure was in accordance with the security legislation and ostensibly granted judicial relief to those harmed. The existence of a quasi-judicial tribunal is intended to prevent appeals to the HCJ, as the power of the HCJ to issue orders against authorities is dependent on the absence of alternative relief. The existence of alternative relief does not totally negate the power of the HCJ, but it significantly reduces its willingness to intervene.⁷³

Criticism

It was the procedure of "proclaiming land state lands" that enabled the massive settlement in the 1980's and thereafter.

Article 55 of the Hague Regulations, which deals with public land, allows exploitation of lands insofar as "enjoyment of their fruits" (usufruct) is concerned, and is, therefore, only temporary. In contrast, the settlements are established, as mentioned previously, as permanent settlements in every regard, with "state lands" being leased to the

71. HCJ 4481/91, *Gabriel Bargil et al v. Government of Israel et al*, Piskei Din 47(4) 213, 216.

72. *Ibid.*, p. 216.

73. Hofnung, *Israel – State Security versus the Rule of Law*, p. 308.

settlers for forty-nine years, like lands leased by the Israel Lands Authority to home and apartment owners within Israel. In addition, the perception of permanent settlement established for settlement of civilians of the occupying power as "fruits" of the land is unreasonable.

Moreover, the use of government property allowed the occupying power is subject to its obligation "to restore, and ensure, as far as possible, public order and safety,"⁷⁴ i.e., to act, where its security needs do not prevent it, for the welfare of the local population.⁷⁵ Therefore, the use of "state lands," or even the procedure of "proclaiming land state lands," would be legitimate only where it is done in conformity with international law and benefits the Palestinians in the Occupied Territories. No Israeli official has yet claimed that the settlements were established for the benefit of that population.

The government and the HCJ have indeed emphasized both the occupying power's obligation, under article 55 of the Hague Regulations, "to safeguard the integrity of public property,"⁷⁶ and the principle of international law that where doubt exists, property is considered public until proven otherwise, if such should be the case.⁷⁷ However, the reason that lies behind the procedure of "proclaiming land state lands" should be understood as attorney Albeck, who headed the Civil Division of the State Attorney's Office, explained it:

How, then, were a hundred settlements established in such a short period of time? The answer is that the government directed the Attorney General to determine whether land is privately owned before a decision is made to build a settlement on it. Over the years, it developed that the matter required my own meticulous examination and approval, rather than that of the Attorney General, of any area that was required for the purpose of establishing a Jewish settlement or enlarging a settlement.⁷⁸

In other words, examination of the ownership of land for the purpose of proclaiming it "state land" was conducted as regards "any area that

74. Article 43 of the Hague Regulations.

75. On the importance of article 43 as "having supreme status in the chapter discussing the belligerent occupation in the Hague Regulations," and as the article to which other provisions are subject, see Yoram Dinstein, "At the Margins of Court Judgments: Value Added Tax in the Occupied Territories (HCJ 493/81 & 69/81)" (in Hebrew), *Iyunev Mishpat* 10 (1984), pp. 159-164. The quotation appears on p. 163.

76. In the words of Justice Shamgar in *A-Nazar*, p. 704.

77. *Ibid.*, pp. 704-705.

78. Albeck, *Lands in Judea and Samaria*, p. 3.

was required for the purpose of establishing a Jewish settlement," and was intended for that purpose. The proclamation was not, therefore, made to safeguard public property, but was intended *ab initio and intentionally* to dispossess the Palestinian public, whose property the IDF was obligated to protect under international humanitarian law, and to transfer its permanent possession to another "public," which had been transferred illegally from the territory of the occupying power, namely, to the Jewish settlers.

In its 1993 decision in *Bargil*,⁷⁹ the HCJ refrained from discussing in principle the act of Jewish settlement, and continued its line of nonintervention in the process of establishing settlements. This line, which began when it accepted the State's argument concerning the military necessity of the settlements and their temporary nature, continued in one episode of intervention in a specific case (*Elon Moreh*), which changed the arrangements for establishing settlements but not the fact of their establishment, and ended in nonintervention because of the predominance of "political matters."

In effect, the HCJ provided judicial approval of the settlements, in all their forms, thus decisively contributing to the establishment of settlements in the Occupied Territories, to the violation of human rights of the Palestinian residents of the Occupied Territories, and to the breach of international law.

79. See footnote 71.



4. BYPASS ROADS

In the context of implementing the Oslo Accords, Israel has built roads in the West Bank. These roads are intended to bypass the Palestinian population centers and consequently enable settlers and the military forces protecting them to move more safely throughout the West Bank.

According to the Palestinian human rights organization LAW, Israel has constructed 400 km of bypass roads. To accomplish this, more than 16,000 dunams of land were requisitioned,⁸⁰ much of them fertile land under cultivation.⁸¹ In some instances, demolition of homes, among them residential dwellings, accompanied the expropriations.⁸²

The HCJ rejected petitions filed against construction of these roads and the accompanying expropriation of land. The grounds for the decisions were security needs, on the one hand, and the benefit provided to all the residents, on the other hand.

Decisions reached by the HCJ in 1996 in two petitions concerning the Hebron-Halhul portion of the Hebron bypass road (Road 35) illustrate the rash and uncritical attitude of the HCJ towards actions of the military authorities. The two petitions, one filed by the Hebron Municipality, and the other by the landowners, challenged the expropriation of lands and the construction of the road in this area.

The HCJ rejected the petition of the Hebron Municipality on the following grounds:⁸³

The road that will be built according to the plan is intended to link the Judean plain and the upper portion of Hebron mountain, and to provide a solution to the traffic congestion that is increasing in this area, to the benefit and advantage of all the

80. Land and Water Establishment for Studies and Legal Services, *Bypass Road Construction in the West Bank*, 28 February 1996, p. 1.

81. *Ibid.*

82. For example, according to the Hebron Municipality, to build the Hebron bypass road, Israel expropriated 1,150 dunams, some of which were fields under cultivation, and demolished twenty-four structures. According to the HCJ, 730 dunams are involved, and "most of the structures... were built illegally, even if the local committee professed that it had granted building permits for them." See HCJ 6592/94, *Hebron Municipality et al v. Minister of Defense et al*, decision of 12 April 1996, par. 3(a).

83. See *ibid.*, par. 1(a) concerning the location of the expropriated land.

area's residents; and the road being constructed is not a military road intended to protect the Jewish settlements in that region.⁸⁴

In contrast, the HCJ rejected the petition of twenty-six Palestinian residents concerning the same portion of the same road,⁸⁵ accepting the State's position that

along the northern outskirts of Hebron, and as part of redeployment there, *a vital and urgent military necessity* arose to build a road that will enable movement of Israelis and military forces in the territory north of Hebron, between the area of south Mt. Hebron, Kiryat Arba, and the Jewish settlement in the heart of Hebron, westward, towards the coastal plain, and also towards the Telem and Adora settlements (our emphasis).⁸⁶

The HCJ holds, in its own words:

Indeed, the Petitioners also argued that requisition of land to build a bypass road does not constitute a requisition to meet security needs. However, the court has already rejected this argument several times concerning requisition of land to build bypass roads in other locations in Judea and Samaria.⁸⁷

In other words, the HCJ rejects one petition concerning the Hebron-Halhul portion of Road 35 on the grounds that "the road being constructed is not a military road intended to protect the Jewish settlements in that region," and in another petition concerning the same segment of road, it rejects the petition on the grounds that "a vital and urgent military necessity arose" to enable movement between Jewish settlements. When the Petitioners in *Wafa* argue that the road is not intended to meet security needs – i.e., raising the same contention that the HCJ itself had voiced as regards this segment of road in response to the petition of the Hebron Municipality – the HCJ rejects the argument, and in effect its own argument.

It is difficult to free oneself of the feeling that the HCJ readily accepts, without any question or examination (and also without reviewing its

84. *Ibid.*, par. 3(a).

85. HCJ 2717/96, *Wafa 'Ali and 25 others v. Minister of Defense et al.*, decision of 4 July 1996. As regards the expropriated portion being part of Road 35, see par. 6. According to the statement of the State to the HCJ, the area involved "is alongside the northern outskirts of Hebron," (*ibid.*, par. 10), i.e., in the direction of Halhul.

86. *Ibid.* (quotation from par. 13 of the State's answer). Earlier, reference was made to "definitive security needs" (*ibid.*, quotation from par. 12), and that the bypass roads will also, generally, protect the safety of the Arab residents (par. 13, and see below), but in any event, the sole justification is security.

87. *Ibid.*, par. 10.

own earlier decisions), every argument offered by the military authorities to justify their actions, even where it results in the HCJ contradicting itself.

Moreover, the judgments reflect an increasing severity in the HCJ's overall attitude towards the rights of Palestinian residents. The HCJ has, in effect, taken two additional steps towards judicially legitimizing the settlements.

First, the settlers, whose presence in the occupied territory is ostensibly justified only as a temporary security measure,⁸⁸ become residents holding the same status as the Palestinians when the HCJ accepts the general justification of the authorities to build the bypass roads, according to which

the necessary solution is to build roads that will bypass large Palestinian population centers primarily, and that will move through open territory, enabling effective protection of the safety, security, and lives of those using the roads, among them the area's residents, Jews and Arabs alike.⁸⁹

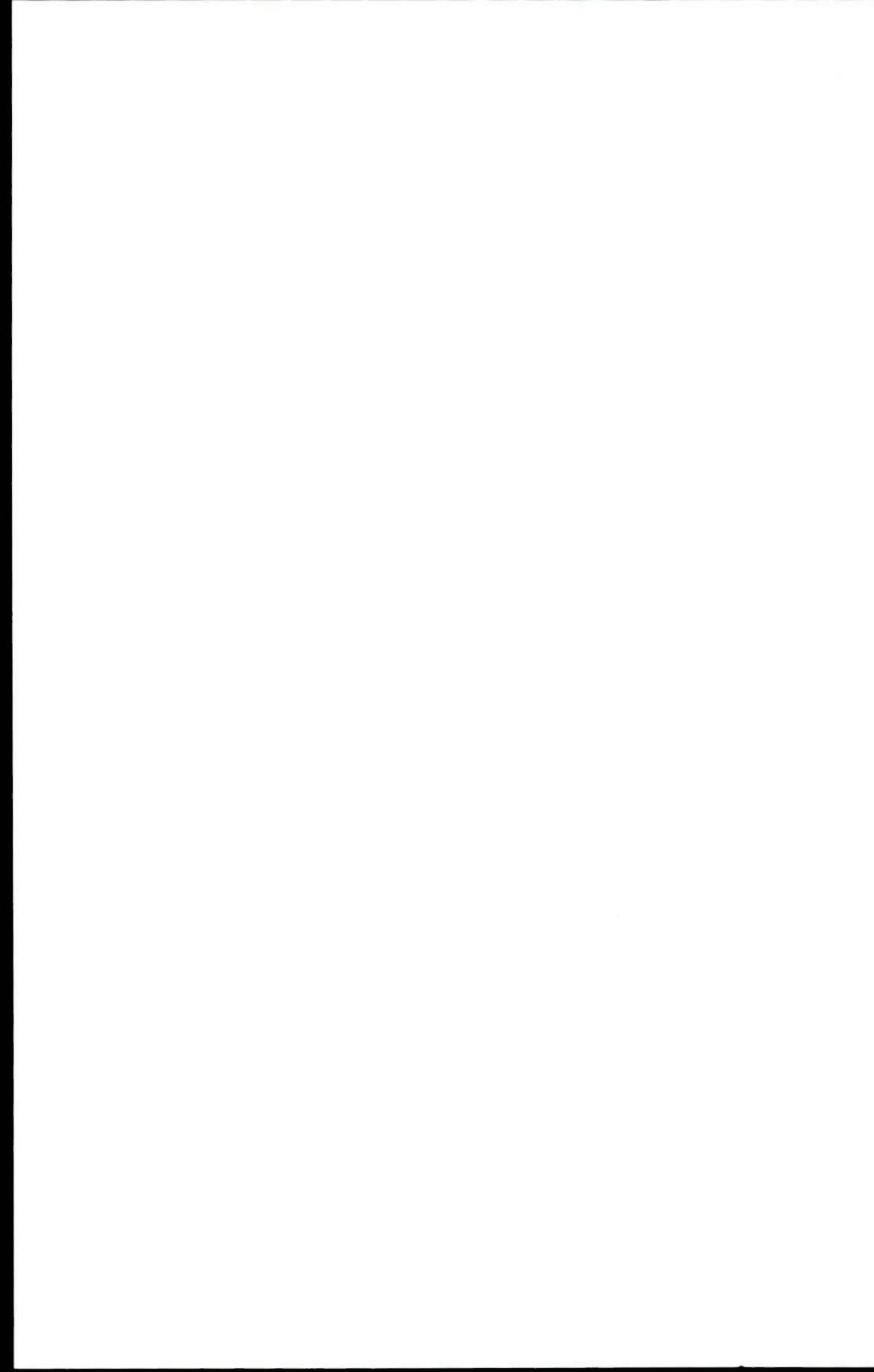
This approach ignores the fact that the need for the bypass roads, including the need for movement of military vehicles, results *entirely* from the presence of the settlers, which created the need to protect them.

Second, the HCJ accepts the State's explanations specifically relating to construction of the bypass roads in the Hebron area. In this instance, the State does not even attempt to rely on any need of the Palestinians, that had been, it will be recalled, the condition that the HCJ set for legitimizing building of roads and other measures constituting "permanent change."⁹⁰ The road is intended to enable "movement of Israelis and military forces" and no more. In other words, the HCJ currently approves permanent changes made in the occupied territory that harms the population under occupation (through expropriation of land, some private), and which is intended solely for the benefit of the population that was transferred from the territory of the occupying power.

88. See the discussion on *Beit El* and *Elon Moreh* above.

89. *Wafa*, par. 10 (quotation from par. 13 of the State's answer).

90. *Teachers' Society*, p. 805, and see the discussion of that case in Chapter Three above.



CONCLUSIONS

The establishment of permanent civilian settlements in the Occupied Territories contravenes international humanitarian law. According to that law, an occupying power is prohibited from transferring population from its territory into territory it occupies, and from performing any act that is not intended to meet its military needs or benefit the local population. In addition, international law prohibits creating permanent change not intended for the benefit of that population. In their settlement policy, the various Israeli governments have violated international law, in general, and international agreements to which Israel is a party, in particular.

The settlement policy could be implemented, *inter alia*, because the High Court of Justice refused to view these violations for what they are, and order their cessation. One of the world's leading commentators on the laws of war, Georg Schwarzenberger, whom the HCJ frequently cites, maintains:

As in international law in general, and the laws of war in particular, what matters is not the appearance, but the reality of a situation.⁹¹

The HCJ preferred to ignore this principle, granting legitimacy to civilian settlements under the guise of "military-security action," the requisition of land under the guise of "safeguarding the safety of public property," and their transfer to the permanent possession of settlers under the guise of "administration of government property" or temporary "enjoyment of the fruits."

The HCJ ruled in this manner although it is common knowledge that the Israeli government had expropriated hundreds of thousands of dunams of land from Palestinians on which it settled Jews with the goal of changing the demography of the region and of creating political facts on the ground. Israel did all this, as stated above, in patent violation of both the language and spirit of international law.

The Israeli-Palestinian agreements, first signed in September of 1993, in effect perpetuated the special status of the settlements, at least until the parties reach a final agreement. During implementation of the interim agreements, Israel evacuated numerous military bases in the Gaza Strip and throughout the West Bank. However, it did not

91. Schwarzenberger, *The Law of Armed Conflict*, p. 284.

evacuate even one settlement. Israel insisted that all the settlements remain where they are, even where it is especially difficult to defend the settlers, as in Hebron.

In implementing the interim agreement in the West Bank, Israel has invested substantial efforts and means to protect the settlements and their residents. Israel has also expropriated or requisitioned additional Palestinian lands, both private and public, to expand and defend settlements, and to build roads bypassing Palestinian towns and villages in order to increase settlers' security. These actions ended once and for all the arguments presented by the various Israeli governments to the HCJ, and the holdings of the HCJ itself, that "military-security necessity" is involved, for it is clear that protection of the settlers cannot be considered a military necessity of an occupying army. In spite of this obvious fact, the HCJ approved these expropriations as well.

It is thus clear that establishment of the settlements was, and is, a political, and not a military, act. Its goal, as this report shows, is to create permanent facts that will perpetuate Israeli control in the settlement areas. For the time being, this goal has been accomplished to a large extent.

All Israeli governments have declared that in future negotiations, they would demand the annexation of the Occupied Territories, or part of them, to Israel. However, political demands should be sought and realized around the negotiation table and following mutual agreement, and not by unilateral acts that violate the rights of Palestinian residents and breach international conventions to which Israel is party.

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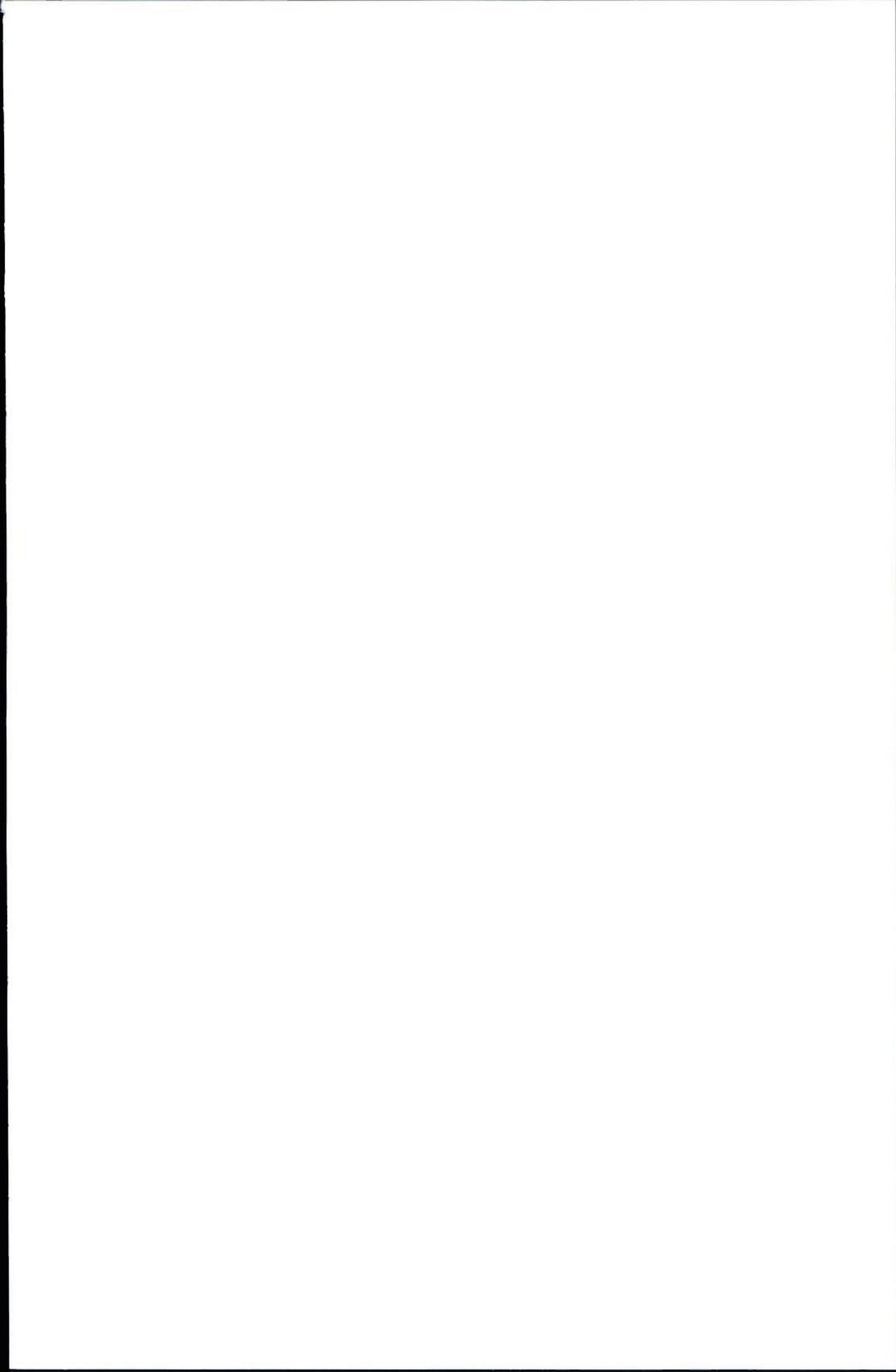
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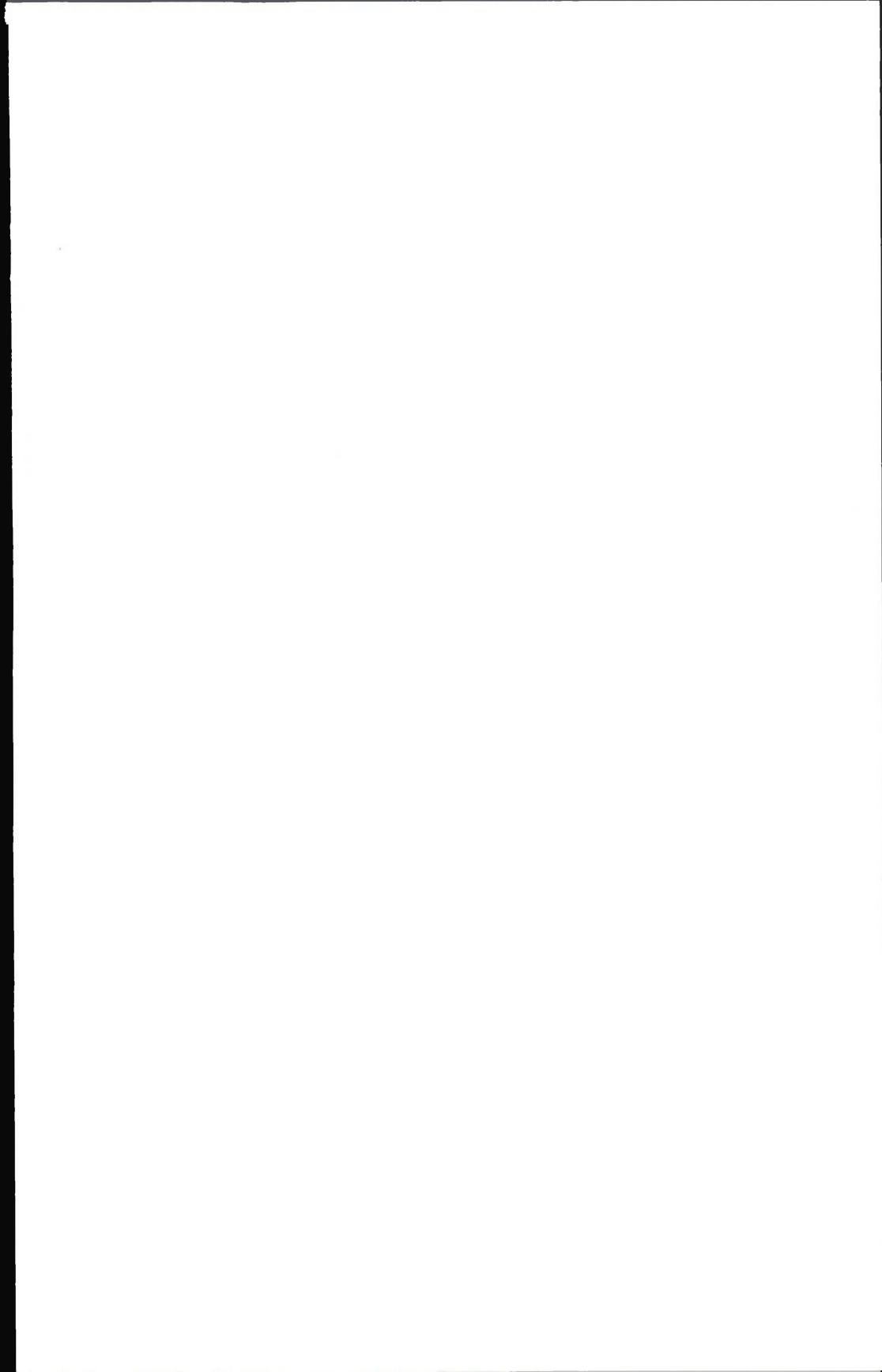
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B'Tselem's work is made possible by the support of the following foundations:

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B'TSELEM - The Israeli Information Center for Human Rights in the Occupied Territories was established in 1989 by a diverse group of academics, attorneys, journalists, and public figures. It endeavors to educate the general public and policymakers about human rights violations in the Occupied Territories, and to press for policy changes in human rights issues.

B'TSELEM thoroughly scrutinizes all information it publishes. Fieldwork data and findings are cross-checked with relevant documents, official government sources, most notably the IDF Spokesperson, and information from other sources, among them Israeli and Palestinian human rights organizations.

As a human rights organization, B'TSELEM acts primarily to change Israeli policy in the Occupied Territories, and to ensure that Israel complies with its obligations to respect human rights and international humanitarian law. B'TSELEM's mandate is limited to monitoring and documenting human rights violations in the Occupied Territories. However, B'TSELEM also strongly opposes human rights abuses committed by any party, whether committed in the Occupied Territories or elsewhere.

Despite the potential of ending military administration of the Occupied Territories offered by the signing of the Declaration of Principles in 1993, the necessity of safeguarding human rights remains. As the peace process progresses, B'TSELEM shall continue its efforts to ensure respect for human rights.