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The Question of the Applicability of the Fourth Geneva Convention on Occupation to Judea, Samaria and Gaza

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The legal question of the applicability of the Fourth Geneva Convention of 1949 to Judea, Samaria and Gaza has been the source of great argument ever since the Israel Defense Forces restored them to the possession of the Jewish People and the State of Israel in the Six-Day War. Some analysts who have approached this question have relied only on Article 2 of the Convention to determine if it applies to these territories, when the actual answer is to be found by combining Article 2 with Article 6 of the Convention.

The relevant paragraphs of Article 2 read as follows:

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).

The relevant paragraphs of Article 6 state:

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1-12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. (emphasis added).

In light of the fact that Article 2(1) of the Convention applies to all cases of *declared war* or armed conflict between two or more of the High Contracting Parties and that the states engaged in the Six-Day War were and remain parties to the Convention, there can be no doubt that at the outset of the war on June 5, 1967 until its conclusion on June 10, 1967, all the provisions of the Convention applied to each of the combatant states of Israel, Egypt, Jordan and Syria and to the territories that Israel brought under its military control as a result of the war, regardless of their legal status or sovereignty at the time and regardless of whether or not they were to be considered “occupied territories” under international law. During the war, the

Convention also applied regardless of the formalistic question of whether it represented treaty law that required incorporation into the domestic law or customary law that did not require such incorporation. The discussion here will be limited to the applicability of the Fourth Geneva Convention to Judea, Samaria and Gaza *after* June 10, 1967 when the state of active war or hostilities between Israel and the combatant Arab states terminated, even without a peace treaty.

To begin with, it is important to note that the “military operations” referred to in Article 6 of the Convention ceased altogether on June 10, 1967, in accordance with three UN Security Council resolutions passed during the Six-Day War demanding an immediate cease-fire.¹ This call for a cease-fire was accepted by Israel and Syria between whom active fighting was still raging on the Golan Heights. The state of war may have technically continued to exist between Israel and Syria (as well as Egypt and Jordan), but there were definitely no further military operations between them, within the meaning of Article 6 of the Convention.

Article 6 distinguishes between two kinds of territory: 1) the territory of the parties to the conflict, and 2) occupied territory. In the case of the former, the application of the Fourth Geneva Convention ceases “on the general close of military operations”. But in the case of the latter - “occupied territory” – the Convention continues to apply until one year after the close of military operations and even beyond that date if the Occupying Power exercises the functions of government in such territory.

Inasmuch as the Six-Day War was not fought, neither within the existing borders of the State of Israel, nor within the borders of Jordan on the east bank of the Jordan River – the only recognized borders of the country under international law, the Convention was no longer applicable to those specific areas after the cease-fire or cessation of hostilities, except for those provisions of the Convention “which shall be implemented in peacetime”. The question of the further applicability of the Convention then turns on the question of whether Judea, Samaria and Gaza were “occupied territories” belonging to the Kingdom of Jordan and/or Egypt within the meaning of both Article 6 of the Convention and Article 42 of the Hague Regulations of 1907. These regulations constitute an annex to the Fourth Hague Convention Respecting the Laws and Customs of War on Land.

Article 42 of the Hague Regulations defines territory as being occupied *when the territory of the Hostile State is actually placed under the authority of a Hostile Army*. It is to be noted that the text of Article 42 refers only to “territory” in a general sense, but the heading² of Section III under which Article 42 appears – “Military Authority over Territory of the Hostile State” – makes it clear that the word “territory” can only be a reference to the “territory of the hostile state”, as is also

¹ The three Security Council resolutions calling for a cessation of all military activities, all of which were adopted unanimously, were: 1) Resolution No. 233 of June 6, 1967; 2) Resolution No. 234 of June 7, 1967; 3) Resolution No. 235 of June 9, 1967.

² In interpreting the text of a treaty or of an annex to it such as the Hague Regulations, recourse may be had according to Article 31 of the Vienna Convention on the Law of Treaties to the context to be given to the terms of the treaty and also to the treaty's object and purpose. Based on this general rule of interpretation, the term “territory” as used in Article 42 of the Hague Regulations can only refer to the “territory of the hostile state” over which the army of the other state (i.e., the Occupying state) has assumed military authority.

evident from Article 55 of that Section, which specifically mentions various immovable properties belonging to the “hostile state”. Article 42 further lays down that “the occupation extends only to the territory [of the Hostile State] where such authority has been established and can be exercised.”

At the conclusion of the Six-Day War, the territories of Judea, Samaria and Gaza were indeed placed under the authority of a “Hostile Army”, i.e., the Israel Defense Forces. However, these territories are not to be considered legally “under occupation”, unless they actually belong to either Jordan or Egypt. It is a well-known fact that though Jordan annexed Judea and Samaria on April 24, 1950, thus rendering this region a *de facto* part of the Kingdom of Jordan (i.e., the so-called “West Bank”), this unilateral annexation was never recognized as valid under the prevailing norms of international law, inasmuch as Jordan was an aggressor state in the Israel-Arab War of 1948.³ Thus Jordan never enjoyed sovereignty over Judea and Samaria, while Egypt never even claimed it over Gaza. Since neither Jordan nor Egypt (nor the fictitious “Palestinian People”) were recognized sovereigns of these territories, they cannot be legally classified as “occupied”. The only recognized sovereign over those territories under international law prior to the Six-Day War was the Jewish People as determined by several acts of international law. The first such act was the Smuts Resolution of January 30, 1919 (the precursor of Article 22 of the League Covenant), which in referring to the term “Palestine” must be interpreted in conjunction with the Balfour Declaration of November 2, 1917, the Lloyd George-Clemenceau Agreement of December 1, 1918, and the Weizmann-Feisal Agreement of January 3, 1919. It is thus evident that “Palestine” is a reference to the Jewish People and not to the local Arab inhabitants of the country. The other acts of international law that confirm the Jewish legal title to Palestine are the San Remo Resolution of April 25, 1920, the Mandate for Palestine of July 24, 1922, the Franco-British Boundary Convention of December 3, 1920 and the Anglo-American Convention Respecting the Mandate for Palestine of December 3, 1924. Since Israel, therefore, did not occupy the territory of a previous foreign sovereign, but only re-possessed the territory that the Principal Allied Powers of World War I had resolved was to be part and parcel of the Jewish National Home, as subsequently confirmed by the League of Nations, the Fourth Geneva Convention was not applicable to Israel’s rule over Judea, Samaria and Gaza. Accordingly, it is absolutely false to assert that Judea, Samaria and Gaza are “occupied Palestinian territory”, “occupied Arab territory” or simply “occupied territory” as claimed in many UN General Assembly and Security Council resolutions as well as by the Palestine Liberation Organization, the Palestinian Authority, the Arab League states, other governments and self-servingly, by the International Committee of the Red Cross.⁴ Furthermore, when the Six-Day War broke out on June 5, 1967, there was no

³ The principle of international law that applied to the situation was *jus ex injuria non oritur* [a right does not arise from a wrong]. Even the Council of the Arab League refused to recognize the Jordanian annexation of Judea and Samaria, and four states – Egypt, Saudi Arabia, Syria and Lebanon – voted to expel Jordan for violating the League’s anti-annexation resolution of April 13, 1950.

⁴The International Committee of the Red Cross (ICRC) principally formulated the four 1949 Geneva Conventions that were approved at a Diplomatic Conference for the Establishment of International Conventions for the Protection of the Victims of War, held in Geneva from April 21 to August 12, 1949. The ICRC has a special position in the implementation of these Conventions, charged with providing relief and affording protection for members of armed forces who are wounded, sick or shipwrecked; prisoners of war; and civilian persons in time of war (see, for example, Articles 3(2), 63 and 142 of Geneva Convention IV). Under the erroneous assumption of the ICRC that Judea, Samaria and Gaza are indeed “occupied territories”, the Government of Israel permits it to operate freely in these parts of the Land of Israel and the Jewish National Home. It is not without irony that the man who founded the

state in existence called “Palestine” whose territory could be considered “occupied” under international law, nor is there any such state even today, though if the Government of Israel continues to pursue the “two-state vision” of U.S. President George W. Bush, this state may yet emerge.

Despite the fact that Israel never occupied the sovereign territory of another Arab state or people, within the meaning of the Fourth Geneva Convention and the Hague Regulations, it has been falsely branded as an occupier of “Arab land”. This accusation has no basis in law but has persisted because of the false belief that has been nurtured since 1969 by the United Nations and the Arab States as well as the PLO, that Israel has conquered the national homeland of another people, the “Palestinians” who inhabit the non-existent state of “Palestine”. To dispel these falsehoods, it need only be remembered that Mandated Palestine was created in April, 1920 at the San Remo Peace Conference for the express purpose of the future independent state of the Jewish People, not for an imaginary people called “Palestinians”, whose existence as a separate nation was unknown during the whole period of the Mandate, especially to the Arabs themselves. Since Palestine was intended to be the Jewish National Home, the State of Israel, which inherited the national rights of the Jewish People to the country, can never be seen as the occupier of land that was specifically reserved for Jews and rightfully belongs, as a result, to Israel. It is only by ignoring these indisputable facts that the cry is incessantly raised that the “occupation” must end. Sadly, Israel itself was in large measure responsible for allowing this false conception to take root, when during the Six-Day War it made the fateful decision to apply the laws of war to the liberated Jewish territories rather than the corpus of its own law, thus failing to incorporate those territories into the Jewish State. This convinced world public opinion, especially that of American and European leaders, that Israel is indeed an occupier of foreign lands. To rectify this terrible mistake, which also violated existing Israeli constitutional law, Israel should not only strongly contest the allegation of “occupation” as baseless, but also pass legislation affirming Israel’s national rights to all areas of the Land of Israel and making it a criminal offense to describe its presence and status in any part of the land as “occupation”.⁵ This will then prevent Israel’s Supreme Court and most academic jurists in Israel’s institutions of higher learning from further spreading this insidious libel, as they have incredibly done up to now, to the acclaim of those who favour the re-partition of the Land of Israel.

Finally, it should be noted that the legal term “occupation”, as defined in international law, refers only to the occupation by a hostile army of territory belonging to a state. It does not refer to the people living in “occupied territory”, who as non-nationals of the Occupying Power enjoy the status of “protected persons” under the Fourth Geneva Convention. In reconquering areas of the Land of Israel in June 1967, what the Israeli Defense Forces really did was “repossessing” lands

International Red Cross, Jean Henri Dunant, a Swiss Protestant philanthropist, waged an unsuccessful campaign for the settlement of Jews in Palestine during the 1860s, even going so far as to establish an association for that very purpose. Herzl recognized Dunant’s unique efforts to promote Jewish settlement by referring to him as a Christian Zionist in his closing speech at the First Zionist Congress in 1897 in the Swiss city of Basle.

⁵ The Knesset on July 15, 2003 took an initial step in this direction when it passed, by a margin of 26 to 8, a resolution submitted by Gideon Sa’ar that read as follows: “...the Knesset affirms that the territories of Judea and Samaria are not occupied territories, either historically or from the standpoint of international law, and not according to the diplomatic accords signed by Israel...”.

internationally recognized ever since 1920 as belonging to the Jewish People, as originally reflected by the Hebrew phrase for those lands: *shtahim muhzakim* (“held” areas). This stressed that it was land, rather than people, that was repossessed. It is therefore a gross misuse of the term “occupation” to refer to Israel’s “occupation of the Palestinian People”, even without considering the question of whether Israel is a true occupier of what is now mistakenly termed “Palestinian land”, i.e., Judea, Samaria and Gaza. To give a parallel example, the United States may be said to be a military occupier of Iraq, ever since it overthrew the cruel regime of Saddam Hussein, but it cannot be said to “occupy the Iraqi people”. Those who accuse Israel of “occupying Palestinians” are using false and illogical terminology that has no basis in any instrument of international law. This terminology represents an unwarranted and unauthorized change of meaning of the term “occupation”, in that it wrongly conflates two non-synonymous categories. In actual fact, Israel neither occupies the land of Judea, Samaria and Gaza, the alleged homeland of the so-called “Palestinians”, nor does Israel “occupy” any nation of that name. Israel has a flawless legal right to govern all of the Land of Israel as well as all of its inhabitants, as the legitimate sovereign.