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

Part One

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Howard Grief served as a legal advisor to Professor Yuval Ne'eman at the Ministry of Energy and Infrastructure in matters of international law pertaining to the Land of Israel and Jewish rights thereto. A Jerusalem-based attorney and notary, as well as a specialist in Israeli constitutional law, **Howard Grief** is the author of the "Petition to Annul the Interim Agreement" which was presented to Israel's Supreme Court. (The Court, calling the Petition "a political position" extricated itself from dealing with the matter.) The Petition was published as ACPR's Policy Paper No. 77 and describes the illegal nature of the Israel-PLO Agreements under Israeli law and their non-applicability under international law. Several feature articles of his have appeared in the pages of *Nativ*.

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.
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> *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

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[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.

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 heading[2] 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 evident from Article 55 of that Section, which specifically mentions various immovable properties belonging to the "hostile state". Article 42 furthers lays down that "the occupation extends only to the territory [of the Hostile State] where such authority has been established and can be exercised."

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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.

Part Two will appear in the next issue of *NATIV*

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