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**Eyal Benvenisti: The International Law of Occupation**

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## *Preface to the Paperback Edition* \_\_\_\_\_

THE DOZEN or so years that have elapsed since this book went to press in 1992 have seen several new instances of occupations. A number of them, where neighbors clashed, became the sites of horrific crimes. Forces controlled by Croatia and Serbia committed mass atrocities in occupied parts of Bosnia and Herzegovina between 1992 and 1995. Both Ethiopian and Eritrean occupation forces were responsible for numerous war crimes committed in areas held under the control of both armies during the 1998–2000 Eritrean-Ethiopian war. In Congo, parts of which have been occupied since 1998 by the armed forces of Uganda, Rwanda, Burundi, or their proxies, it is estimated that up to three million people have been killed, millions more have become internally displaced or have sought asylum in neighboring countries, and the country's natural resources have been pillaged by the occupants.

The law of occupation, which requires the occupant to care for individuals—“protected persons”—in the areas under its control, was, of course, not recognized by any of those occupants as applicable to those cases. This in itself was not a new phenomenon. The great majority of post-World War II occupations have honored the law of occupation by virtue of its breach. The declaration by the International Military Tribunal in Nuremberg that the Hague Regulations on the law on occupation reflected customary international law did not hinder most occupants from disregarding this law using a variety of disingenuous claims. Occupants either asserted their own sovereign title to the occupied land, disputed the sovereign title of the ousted government to the land, denied having control over the occupied area, or assigned responsibility to ostensibly independent proxies. But for the first time since the military tribunals at the end of World War II, international tribunals dealing with the consequences of the violations of the law of occupation have had the opportunity to react to such claims in a clear and resolute fashion. Cutting through the traditional pretexts of occupants for disregarding the laws of war in general and the law of occupation in particular, the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) opted for an approach that centered on the individuals who find themselves as “protected persons” in the hands of powers to whom they owe no allegiance. The Appeals Chamber of the ICTY declared in the Tadic case (1999) the necessary implications of the evolution of the law from a tool that defined armies' obligations toward each other into “international

humanitarian law” that aimed at securing the well-being of individual civilians:

Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.<sup>1</sup>

Similarly, the Eritrea-Ethiopia Claims Commission rejected the link between the disputed status of certain territories and the protection of individuals present in those territories. “The alternative,” the Commission opined, “could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of territory.”<sup>2</sup> The international law of occupation, according to the Commission, does not suggest that “only territory the title to which is clear and uncontested can be occupied territory.”<sup>3</sup>

The atrocities committed against civilian populations by occupying armies raised questions relating to the enforcement of international humanitarian law in general and the law of occupation in particular. The collective response—criminal prosecution—was ultimately institutionalized as the International Criminal Court, whose Statute includes grave breaches of the law of occupation as initially defined in the Fourth Geneva Convention of 1949. In addition, several European countries have recognized their universal jurisdiction to prosecute such crimes, and have exercised this jurisdiction with respect to war crimes committed in the former Yugoslavia. Both the focus on civilians rather than on governments’ disingenuous claims, and the earnest collective effort to impose criminal sanctions for grave breaches are welcome responses to unwelcome crimes.

Besides the acute question of enforcement, the more theoretically challenging task for international lawyers in the context of the law of occupation has been that of adapting the law to the challenges of modern governance. This is why the 2003 occupation of Iraq by the United States and the United Kingdom has been the most significant development in the

<sup>1</sup> *Prosecutor v. Tadic* (Case IT-94-1-A) (1999) paragraph 168 (<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>).

<sup>2</sup> Partial Award, Central Front, Ethiopia’s Claim No. 2, April 28, 2004, paragraph 28 (<http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award.pdf>).

<sup>3</sup> *Id.* at paragraph 29.

law of occupation in recent years. The occupants did not explicitly acknowledge their status as occupying powers, nor did they invoke the Hague Regulations of 1907 or the Fourth Geneva Convention as applicable to their actions in Iraq. In fact, they were initially reluctant to use the term *occupation*.<sup>4</sup> But they did declare their mission in Iraq using concepts and even language reminiscent of the Hague and Geneva instruments. The letter of May 8, 2003,<sup>5</sup> from the permanent representatives of the United Kingdom and the United States to the president of the UN Security Council communicates the two states' pledge to "strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq." It also outlines specific goals and mechanisms to attain these goals. The Security Council, in its Resolution 1483 "noted" this letter but moved on to explicitly "recogniz[e] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command." The two occupants set up the "Coalition Provisional Authority" (CPA) which replaced the domestic system of governance with a temporary command structure that ruled the country based on the authority of the "relevant U.N. Security Council resolutions, and the laws and usages of war."<sup>6</sup> The setting up of an occupation administration based on the law of occupation provided a mechanism to legitimate the temporary control of Iraq, granting considerable powers to the occupying authorities but for a limited period of time. The establishment of the CPA also ensured that

<sup>4</sup> During the fighting, the U.S. military was of the opinion that the areas that were occupied were still not occupied in the legal sense, perhaps implying that the determination of an area as occupied requires something more than a factual test. *See* Briefing on Geneva Convention, EPW's and War Crimes (April 7, 2003) (Q&A with W. Hays Parks, Special Assistant to the Army Judge Advocate General), DefenseLINK ([http://www.defenselink.mil/news/Apr2003/t04072003\\_t407genv.html](http://www.defenselink.mil/news/Apr2003/t04072003_t407genv.html)). ("The term 'military occupation' is one of those that's very, very misunderstood. When you are an infantry company commander, and you're told to take the hill, you physically occupy it. That's military occupation with a smaller—lower-case 'm' and lower-case 'o.' It certainly does not mean that you have taken over it with the intent to run the government in that area. That's the very clear-cut distinction, that until the—usually, until the fighting has concluded and is very conclusive, do you reach the point where technically there might be Military Occupation—capital 'M,' capital 'O'—and a declaration of occupation is issued. That's a factual determination; it's a determination by the combatant commander in coordination with others, as well. Obviously, we occupy a great deal of Iraq at this time. But we are not, in the technical sense of the law of war, a military occupier or occupation force.")

<sup>5</sup> Letter dated May 8, 2003, from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations, addressed to the President of the Security Council, UN Doc. S/2003/538.

<sup>6</sup> *See, e.g.*, the preamble to the Coalition Provisional Authority Order Number 1 (De-Baathification of Iraqi Society), May 16, 2003 (<http://www.cpa-iraq.org/regulations/CPAORD1.pdf>). The CPA was formally recognized by the UN Security Council in Resolution 1511 of October 16, 2003.

it would have a monopoly on the exercise of governmental powers in Iraq,<sup>7</sup> thereby excluding other “coalition members,” the United Nations, and other states and organizations from claims to authority.<sup>8</sup>

This recourse to the law of occupation was a complicated undertaking, because it was not simply a task of looking up the relevant articles in the Hague Regulations or the Fourth Geneva Convention. International law has evolved significantly since the time these two instruments were drafted. The fundamental concepts of human rights and self-determination of peoples, which had transformed international law in the latter half of the twentieth century, have not been duly reflected in the constituting documents of the law of occupation. Issues concerning the management of public resources, including scarce natural resources, and even transboundary natural resources, had to be governed by rules that reflected the late nineteenth-century conception of public property as one that belongs to the sovereign ruler but not to his people. The law of occupation had to adapt itself to offer responses to enormous challenges such as the effort at transforming a previous dictatorship into a complex constitutional democracy, the rebuilding of its economy, and the management of its natural resources, primarily its abundant oil reserves and its share of the Tigris and the Euphrates rivers.

Security Council Resolution 1483 of May 22, 2003, which recognized the presence of U.S. and U.K. forces in Iraq as occupying powers subject to the law of the Hague Regulations and the Fourth Geneva Convention, is therefore a significant event in the history of the troubled law of occupation. A rich body of laws developed during the late nineteenth century and early twentieth century, and honored more by its breach since then, was set in motion to face contemporary challenges. When the Security Council announced the applicability of the law of occupation to 2003 Iraq, it had to adapt a law that initially reflected the premise that kings were the sovereigns and that international law should protect their possessions during wartime, to a new philosophy—the philosophy of international *humanitarian* law—which posited that peoples were the true sovereigns and that human rights had to be respected. These fundamental changes in international law required the law of occupation to revise its

<sup>7</sup> CPA Regulation Number 1, Section 1(1): “The CPA shall exercise powers of government temporarily . . .”; Section 1(2): “The CPA is vested with all executive, legislative and judicial authority to achieve its objectives . . .” (May 16, 2003) (<http://www.cpa-iraq.org/regulations/REG1.pdf>).

<sup>8</sup> CPA Regulation Number 5 from June 17, 2003, established the Council for International Coordination whose task is to “work, on behalf of the CPA, to support, encourage and facilitate participation of the international community in relief, recovery and development efforts with respect to Iraq” (Section 1). This Council was to be composed of representatives from Coalition member states and other countries whose participation would be approved by the Council (Section 2).

approach toward the consequences of the downfall of the domestic regime and take into due account the relevancy of human rights law.

Resolution 1483 can be seen as the latest and most authoritative restatement of several basic principles of the contemporary law of occupation. It endorses several theses developed in this book. First, it revives the neutral connotation of the doctrine. Occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefiting also, if not primarily, the civilian population. As such, occupation does not amount to unlawful alien domination that entitles the local population to struggle against it. Second, sovereignty inheres in the people, and consequently regime collapse does not extinguish sovereignty. Thus, the Resolution implicitly confirms the demise of the doctrine of *debellatio*, which would have passed sovereign title to the occupant in case of total defeat and disintegration of the governing regime. Instead, and notwithstanding the requirement of Article 43 of the Hague Regulations to “respect . . . , unless absolutely prevented, the laws in force in the country,”<sup>9</sup> Resolution 1483 grants a mandate to the occupants to transform the previous legal system to enable the Iraqi people “freely to determine their own political future and control their own natural resources . . . to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender.” Hence, the law of occupation, according to Resolution 1483, connotes respect to popular sovereignty, not to the demised regime. Third, the Resolution recognizes in principle the continued applicability of international human rights law in occupied territories in tandem with the law of occupation. Human rights law may thus complement the law of occupation on specific matters. Fourth, Resolution 1483 envisions the role of the modern occupant as the role of the heavily involved regulator, when it calls upon the occupants to pursue an “effective administration” of Iraq. This call stands in contrast to the initial orientation of the Hague Regulations, which envisioned a disinterested occupant who does not intervene in the lives of the occupied population. In the years since, such an “inactive custodian” approach has been rejected as unacceptable. The call to administer the occupied area “effectively” acknowledges the several duties that the occupants must perform to protect the occupied population. It precludes the occupant from hiding behind the limits imposed on its powers as a pretext for inaction.

In the context of managing Iraq’s natural resources, the Resolution offered further two important contributions. It acknowledged that the

<sup>9</sup> Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, October 18, 1907.

occupant was fully entitled to utilize public resources provided such use benefits the lawful owner, namely, the people of Iraq. This reading was consonant with the traditional reading of Article 55 of the Hague Regulations, and ended a debate over whether oil could be exploited by the occupant and, if so, for what purposes. Even more important was the institutional innovation of the Resolution, the establishment of monitoring processes to oversee the occupant's measures. This was a necessary addition to a law that virtually lacked effective international mechanisms to monitor occupant's decision making as being compatible with the law.<sup>10</sup>

Resolution 1483 did not address a number of key questions concerning the further adaptation of the law of occupation to contemporary governance. One gray area concerns the question of whether an occupant can undertake international obligations as part of its temporary administration of the occupied territory. Contemporary management is no longer an exercise in domestic policing. Rather, it requires cooperation with neighboring countries, for example in the area of transboundary resources management, and with the international community at large, for example in the context of international trade. But does the occupant have the authority to negotiate agreements with other states? And will such negotiations yield agreements that would be binding after the expiration of the occupant's control? Given the contemporary philosophy underlying this law, which emphasizes humanitarian concerns, an initial response would not restrict the occupant's choice of legal means in realizing its duties. The occupant may implement existing legislation or amend those if necessary to promote the legitimate goals of the administration. The same logic would apply with equal force to the occupant's authority to coordinate its activities with neighboring states. This perspective would suggest that there should be no *a priori* restriction on the occupant's authority to negotiate or renegotiate agreements with other neighboring states. But the occupant's authority is essentially limited in time—it lasts only as long as the occupant exercises effective control. Therefore the occupant cannot create rights and obligations that will bind the sovereign power of the post-occupation government once it regains authority and until that government manages to renegotiate the treaty or to show that a “fundamental change of circumstances”<sup>11</sup> has occurred which entitles it to terminate the treaty. Hence it is suggested that agreements between

<sup>10</sup> The International Advisory and Monitoring Board (IAMB). The IAMB's members include representatives of the Secretary-General of the UN, the Managing Director of the International Monetary Fund, the Director-General of the Arab Fund for Economic and Social Development, and the President of the International Bank for Reconstruction and Development. For the terms of reference of IAMB, see <http://www.iamb.info/tor.htm>.

<sup>11</sup> Article 62 of the 1969 Vienna Convention on the Law of Treaties.

the occupant as the administrator of the occupied country and other states, whether or not formally qualified as “treaties” under the Vienna Convention on the Law of Treaties, would be valid for the duration of the occupation and subject to the sovereign’s authority to renegotiate such agreements when occupation ends. But this response is not free from complications. A question of conflict of interests may arise when the occupant is itself an interested party. May the occupant negotiate an agreement with its own government as the second party to an international agreement? And in cases of partial occupation of a territory, when the sovereign government continues to act in the international plane, who has the authority to represent the occupied area vis-à-vis other states?<sup>12</sup>

Another possible area of contention concerns the international responsibility of the occupant itself, or the independent responsibility of the administration that the occupant has established in the occupied area (whose authority is independent of the occupant state), for acts committed in the occupied territory by the occupant (or the occupation administration) acting on behalf of the civilian population, or for its omission to control activities of the local population that adversely affect the interests of third parties in or outside the occupied territory.

The year that elapsed since the beginning of the occupation in Iraq does not offer sufficient perspective to assess the performance of the Coalition Provisional Authority. Thus far the record seems mixed. On the one hand, the orders the CPA has issued reflect an earnest effort to transform Iraq into a market-oriented democracy.<sup>13</sup> The CPA committed itself to conform with international human rights standards. It established a Ministry of Human rights<sup>14</sup> and prohibited “torture and cruel, degrading or inhuman treatment or punishment” by Iraqi judges and police.<sup>15</sup> While these policies depart from a strict reading of Article 43 of the Hague

<sup>12</sup> For more on these questions, see Eyal Benvenisti, *Water Conflicts During the Occupation of Iraq*, 97 AJIL 860 (2003).

<sup>13</sup> See, e.g., Order no. 1 (De-Baathification of Iraqi Society) (May 16, 2003); Order no. 39 (Foreign Investment) (September 19, 2003); Order no. 40 (Bank Law) (September 19, 2003); Order no. 64 (Amendment to the Company Law No. 21 of 1997) (March 3, 2004); Order no. 74 (Interim Law on Securities Markets) (April 19, 2004); Order no. 87 (Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law) (April 26, 2004). Full text for all CPA orders and regulations can be found at <http://www.cpa-iraq.org/regulations/>.

<sup>14</sup> On September 3, 2003, the CPA appointed an Interim Minister of Human Rights and on February 22, 2004, established the Ministry of Human Rights (Order no. 60). The Ministry’s tasks were to promote human rights and fundamental freedoms in Iraq and to “assist all the people of Iraq . . . in healing from the atrocities committed by the Ba’athist regime” (Section 2).

<sup>15</sup> Order no. 7 (Penal Code) (June 10, 2003), Section 3(2).

Regulations,<sup>16</sup> they would seem to conform to a contemporary reading of the law.<sup>17</sup> On the other hand, several months into the occupation it became apparent that Iraqis detained by U.S. forces in Iraq had been subjected to coercive interrogation practices. These practices, approved by a U.S. Army field manual, included the forcing of prisoners to crouch for up to forty-five minutes; sleep deprivation; the use of blindfolds, earmuffs, and other materials, all for up to seventy-two hours; the use of loud music and bright lights; isolation for more than thirty days; and interrogations in the presence of “trained” dogs.<sup>18</sup> Moreover, U.S. Army personnel have been recorded subjecting Iraqi detainees under their control to perverse acts of torture, including sexual abuse of male and female prisoners. It remains to be seen how the U.S. Army and the CPA will react to these clear violations of the Fourth Geneva Convention, of basic standards of international human rights law,<sup>19</sup> and of the pledges of the CPA to the Iraqi people and to the international community.

Security Council Resolution 1546 of June 8, 2004, endorsed the transfer by June 30, 2004, of authority in Iraq from the CPA to the interim Iraqi government, which had been set up on June 1, 2004. Resolution 1546 deemed that with this transfer of authority, the occupation of Iraq would come to an end. Noting that the presence of the multinational force in Iraq was at the request of the Iraqi interim government, the Council granted that force “the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq” in accordance with the letters exchanged between the Prime Minister of the Iraqi interim government and the U.S. Secretary of State.<sup>20</sup> The Council viewed these two letters as establishing a “security partnership”—indeed a “full partnership”—between the interim Iraqi government and the multinational force (Article 11).

Resolution 1546 does not elaborate on the international legal obligations to which the multinational force is subject when exercising its authorities. The only reference to this issue appears in the letter of Secretary of State Colin Powell, who asserts that “the forces that make up the [multinational force] are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.” The law of occupation, part of

<sup>16</sup> See *supra* note 9 and accompanying text.

<sup>17</sup> See *infra* Chapter 2.

<sup>18</sup> *Precise Rules for Handling Iraq Detainees*, N.Y. Times, May 14, 2004.

<sup>19</sup> Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL Insights (May 2004) (<http://www.asil.org/insights/insigh134.htm>).

<sup>20</sup> Article 10, Resolution 1546. The two letters, dated June 5, 2004, are annexed to the Resolution.

which is set out in the Fourth Geneva Convention, requires such a commitment. Although the formal occupation of Iraq ended on June 28, 2004, to the extent that the United States and other foreign troops operating in Iraq continue to wield effective control over Iraqis and Iraqi property, they are bound by this body of laws.<sup>21</sup> As the ICTY noted in the Tadic case mentioned above,<sup>22</sup> the Fourth Geneva Convention “does not make its applicability dependent on formal bonds and purely legal relations. . . . Article 4 [of that Convention] intends to look to the substance of relations, not to their legal characterisation as such.”

Aside from the various challenges posed by the occupation of Iraq and other contemporary occupations, another set of questions arises related to the applicability of the law of occupation to UN peacekeeping operations that derive their authority from Chapter VII of the UN Charter. In its various interventions under Chapter VII during the 1990s to end conflicts, the UN preferred not to assume direct governmental functions in the territories that came under its control, but instead relied upon domestic institutions. But when such institutions were not available, responsibility had to be assigned to the forces in charge. In the case of Somalia, the Security Council essentially left the question of authority open. Instead, its Resolution 794 of December 3, 1992, authorized the Secretary General and “Member States cooperating” to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia” (Article 10). Only the Australian contingency responsible for parts of Somalia chose to apply the law of occupation to the areas under its authority.<sup>23</sup> In 1999 the UN had to address this question again in the context of its governance of both Kosovo and East Timor. Security Council Resolution 1244 of June 19, 1999, established “international civil and security presences” (Article 5). This resolution granted the UN Interim Administration Mission in Kosovo (UNMIK) wide-ranging powers, without any restrictions. The Special Representative who was appointed to direct UNMIK issued a regulation, by which he declared that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative.”<sup>24</sup> This asser-

<sup>21</sup> See also Adam Roberts, *Iraq's Day of Reckoning*, The Guardian, May 25, 2004. (“If coalition forces are used against insurgents, if they take prisoners, or if they find themselves exercising authority in an operational area, then they will continue to be bound by the Geneva conventions.”)

<sup>22</sup> *Supra* note 1.

<sup>23</sup> For an in-depth analysis of the applicability of the law of occupation to UN-supported peace-enforcement operations in general and the operation in Somalia in particular, see Michael J. Kelly, *Peace Operations* (1997).

<sup>24</sup> Article 1(1) of Regulation No. 1999/1 on The Authority of the Interim Administration in Kosovo, July 25, 1999 (<http://www.unmikonline.org/regulations/1999/reg01-99.htm>).

tion of wide-ranging authority was subject only to “internationally recognized human rights standards” and “the mandate given to UNMIK under United Nations Security Council resolution 1244.”<sup>25</sup> In Resolution 1272 of October 25, 1999, the Security Council, acting under Chapter VII, established the United Nations Transitional Administration in East Timor (UNTAET) and endowed it with “overall responsibility for the administration of East Timor” and the power to “exercise all legislative and executive authority, including the administration of justice” (Article 1). Regulation Number 1 of UNTAET declared that

All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people.<sup>26</sup>

Similarly to UNMIK, UNTAET was to be subjected only to international human rights standards and the UN Security Council.<sup>27</sup>

The UN peacekeeping forces came to control these areas not through international armed conflicts. Formally, in the absence of such conflict the laws of war are inapplicable. But as suggested in Chapter 1 of this book, the law of occupation should apply to any case of “effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.” The resolutions in both cases created trusteeships toward the indigenous communities and the ousted governments, trusteeships of the kind the law of occupation is designed to address.<sup>28</sup> The application of this law seems pertinent in these two cases. Particularly in Kosovo, the lack of any clear guidelines on the exercise of those wide-ranging governmental powers led to confusion as well as to pressures by domestic interests to amend the

<sup>25</sup> *Id.* Articles 2 and 3.

<sup>26</sup> Article 1.1 of Regulation No. 1999/1 on The Authority of the Transitional Administration in East Timor, November 27, 1999 (<http://www.un.org/peace/etimor/untaetR/etreg1.htm>).

<sup>27</sup> *Id.* Articles 2 and 3.

<sup>28</sup> See also Tobias H. Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation*, 44 *German Yb. of Int'l L.* 353, 383–87 (2001); but see David J. Scheffer, *Beyond Occupation Law*, 97 *AJIL* 842, 851 (2003). (“[L]iberating armies that operate with international authority, advance democracy, and save civilian populations from atrocities should be regulated by a modern occupation regime that can be created under the UN Charter.”)

existing laws to suit their political demands.<sup>29</sup> Recourse to the framework of the law of occupation may have enabled both the government and the governed to draw upon the rich experience that has accumulated over the years and to inform their policies and expectations.

In its advisory opinion of July 9, 2004, on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>30</sup> the International Court of Justice found Israel in breach of several international law obligations by its construction of a separation wall on West Bank territory. The opinion addresses several significant questions that arise in relation to the Israeli occupation in particular and to the law of occupation in general. The Court flatly rejects the Israeli claims concerning the inapplicability of the Fourth Geneva Convention to the West Bank and concerning the inapplicability of Article 49 to the Jewish settlements in the areas occupied by Israel. Neither have these claims gained serious support from the international community.<sup>31</sup> The Court views the wall as obstructing the Palestinians' right to self-determination on West Bank territory and as a violation of several rights that individual Palestinians are entitled to under both international humanitarian law and human rights law.

The opinion confirms the applicability of human rights law to occupied territories. The Court enumerates several rights arising from the Covenant on Civil and Political Rights; the Covenant on Economic, Social, and Cultural Rights; and the Convention on the Rights of the Child that are applicable also in occupied territories. The Court further finds the occupant's obligations under international humanitarian law to be *erga omnes* obligations, whose violation raises the obligation of other states to ensure compliance by the occupant with its obligations. In particular, the Court declares that states party to the Fourth Geneva Convention have an obligation, "while respecting the United Nations Charter and international law, to ensure compliance by Israel [as an occupant] with international humanitarian law as embodied in that Convention."<sup>32</sup> This assertion remains "without any argument in its reasoning" and without elaboration of the scope of that obligation.<sup>33</sup>

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<sup>29</sup> See Hansjoerg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor*, 95 AJIL 46, 58–59 (2001); Irmscher, note 28, at 392.

<sup>30</sup> Advisory Opinion, July 9, 2004 (<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>).

<sup>31</sup> On these questions see pp. 109–14, 140–41.

<sup>32</sup> Advisory Opinion, *supra* note 30, paragraph 159. *But see* the dissent of Judge Kooijmans on this question: separate opinion of Judge Kooijmans, paragraphs 40–50.

<sup>33</sup> See the separate opinion of Judge Kooijmans, paragraph 50.

In 1993, when this book was first published, there was a fresh promise of global cooperation in a post–Cold War world. Attention was given to conflict prevention rather than to conflict management, let alone to conflict regulation. A truly active Security Council was poised to reduce and even eliminate regional violence. Europe was collectively devising means to ensure stabilization and justice in Central and Eastern Europe. Following the 1993 Oslo Accords, hopes were even high for the cessation of conflict in the Middle East and the end of occupation of Palestinian territories. This promise was only partially fulfilled. In the following years, new occupations presented new challenges. Some of these challenges called for more effective enforcement measures, such as the establishment of an international criminal court and other tribunals. Other challenges call for adaptation of the law to contemporary perceptions and needs. Such adaptation requires an understanding of the basic premises of the law of occupation and its links to other spheres of international law. Such an understanding is what this book tries to offer.

*Tel Aviv*  
*July 2004*