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ENFORCEMENT OF INTERNATIONAL LAW

IN THE ISRAELI – OCCUPIED TERRITORIES

AL–HAQ

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ENFORCEMENT OF INTERNATIONAL LAW

in the Israeli – occupied territories

The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances.

(Article 1 of the Geneva
Conventions of 12 August 1949)

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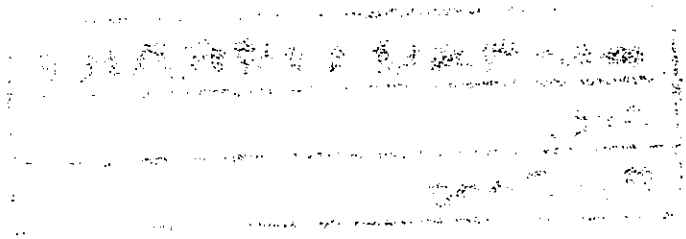

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INTRODUCTION

The purpose of this paper is to show that states have a legal obligation to ensure that the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) is applied by Israel within the Occupied Territories. The vast majority of the world's states have declared, individually and through the United Nations, that the Fourth Geneva Convention is applicable in law to the Occupied Territories. [1]. From the point of view of these states, Israel is bound by the Fourth Geneva Convention both by virtue of its ratification of the Convention in July 1951 and because in the collective opinion of these states Israel is engaged in a belligerent occupation.

However, as is well known, Israel does not recognise the applicability of the Convention to the Occupied Territories and its inhabitants because she does not acknowledge the legal status of her presence in the West Bank and Gaza Strip as a belligerent occupation. [2].

From the point of view of the inhabitants of the West Bank and Gaza Strip this situation urgently requires a solution. The challenge for them is to utilise international law in a creative but above all practical way in order to circumvent Israel's refusal to recognise the applicability of the Convention. The problem is the familiar one of enforcement. In the absence of an international executive capable of guaranteeing the observance of the law why should states bother with it at all? Why should Israel heed collective world opinion and indeed international law itself, given that no penalty automatically follows a decision to ignore them?

One good reason why states generally do make the effort to comply with their

international obligations is the basic dislike, shared by states and individuals alike, of political and/or economic ostracism by their peers. However, in the case of Israel this informal means of enforcing the law has failed to operate since states in general have been slow to withdraw their support, both moral and material, for Israel's conduct in the Occupied Territories.

This paper attempts to find a solution to the problem through Article 1 of the Fourth Geneva Convention which states that the High Contracting Parties undertake not only to respect but to ensure respect for the Convention. The analysis of Article 1 revolves around two questions: Is it valid to interpret Article 1 as imposing on states the duty to make sure that Israel abides by the Convention whether or not Israel is prepared to agree to its applicability? And if so, is the duty a legal one or a purely moral one? If such a legally binding duty did exist it would be harder for states, as a matter of politics, to refuse to intervene.

Unfortunately, even legal duties are often simply evaded. It is therefore the double objective of this paper to provide the necessary legal/theoretical foundations for a platform of enforcement so that states can no longer dismiss their duties under Article 1 as purely moral ones, and also to give the argument as wide a currency as possible in order that the national constituencies of states are aware of the legal duties of their governments.

It will be apparent, however, that this paper discusses more than just Article 1. It attempts to explore and develop in as comprehensive a way as possible a number of other legal bases (each of which stands on its own) on which to found a case for international intervention in the Occupied Territories.

It will also be apparent that the arguments are relevant not just to the Occupied Territories but to many other areas of conflict to which the Geneva Conventions apply; indeed some of the legal sources used themselves spring out of regional conflicts elsewhere.

In order that both lawyers and non-lawyers alike may take advantage of the paper, short summaries of each of the legal bases are included at the beginning of each section. Wherever possible, legal technicalities have been explained, although in one or two cases this has proved rather difficult. In addition, a short explanation of the sources of international law has been included which it is hoped will help non-lawyers to follow the argument more easily.

Note on the Sources of International Law

Article 38.1 of the Statute of the International Court of Justice (ICJ) states that in assessing international law the Court shall apply a) international conventions, b) international custom, c) the general principles of law recognised by civilised nations, and d) judicial decisions and the teachings of highly qualified publicists. [3].

a) International Conventions

Treaties are generally the clearest source of international law; however, where there is disagreement concerning the meaning of their provisions, particular legal techniques regulate their interpretation. These include assessing the words of the treaty in the light of their plain meaning as well as attempting to ascertain the intentions of the parties to the treaty and its aims and objects (see Appendix).

On the question of whether a particular international agreement is legally binding and is thus enforceable in international law rather than "merely a statement of common purpose", the International Law Commission has stated rather unhelpfully that the agreement must be "governed by international law". [4]. Are the Geneva Conventions "governed by international law"? This is a question which can only be answered in the light of a full examination of the relevant legal sources.

b) International Custom as Evidence of a General Practice Accepted as Law

Customary law does not require to be included in a treaty or agreement in order to be binding on a state. On the contrary, as its name suggests, customary law derives its strength from the fact that through habitual usage a particular rule or principle is so widely recognised as not to need incorporation in a treaty. Evidence of customary law can be found in state practice, learned writings and indeed in treaties which may either codify existing custom or themselves count as indicative of state intentions.

c) General Principles of Law

These include principles of municipal (i.e. national) law where relevant, as well as international law.

d) Judicial Decisions and Writings of Learned Publicists

Again, judicial decisions comprise not only international decisions in the International Court of Justice but decisions of national courts where these have a bearing on general principles of law. The weight of academic opinion on a particular subject can

also have the effect of creating new law.

A. THE LEGAL OBLIGATIONS OF STATES UNDER ARTICLE 1 OF THE FOURTH GENEVA CONVENTION

1. Summary of the Arguments

The four Geneva Conventions of 1949 and the First Protocol of 1977 have a common Article 1:

> The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances. [5].

Article 1, it is argued, entails two sets of obligations:

a) the obligation of states to ensure that they and their agents apply the provisions of the Conventions, and

b) the obligation to ensure that other states apply the Conventions also.

The first obligation is based on the well-known doctrine of State Responsibility. This was clearly articulated in the Massey Claim:

> Whenever misconduct on the part of persons in state service, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants. [6].

Thus it is the High Contracting Party -HCP- (Articles 1-46), or Occupying Power (Articles 47 et seq.) who is charged with carrying out the bulk of the provisions contained in the Convention and who is responsible for any breach by its servants or agents.

The second obligation for states within Article 1, it is argued, requires that state A ensure that state B respect the Convention. This obligation will be called the "inter-state" obligation of Article 1.

The Fourth Geneva Convention, like any agreement, creates obligations which may or may not be legally binding as between the parties. In addition, treaties may reflect pre-existing customary law or come to be regarded as having created general norms applicable to parties and non-parties alike. For example, as a result of consistent state practice non-parties may be said to be bound by the Hague Convention IV of 1907 as representing customary international law. The Geneva Conventions, while not reflecting customary international law to the same extent, nevertheless do so in so far as their general principles are concerned (see below).

Just as the first obligation of states under Article 1 to ensure that their agents respect the Conventions is underpinned by the doctrine of State Responsibility, so the second inter-state obligation of states preserves and expresses a parallel norm of international customary law. In construing Article 1 attention is therefore paid to the text a) as giving rise to legal obligations as between the parties, and also b) as material evidence (together with other sources) of the existence of a general legal norm which will be discussed subsequently as a second source of legal obligation.

2. Article 1

The first problem to be faced may be phrased as follows: "Is it valid to interpret Article 1 as imposing obligations on state A to ensure that state B respects the Geneva Conventions and if so, what is the status of that obligation?" In seeking to establish the

validity of this interpretation full use will be made of the range of sources described in Article 31 of the Vienna Convention, namely the text itself, subsequent practice and relevant rules of international law.

a) The Text and Context

In the authoritative commentary on the Geneva Conventions Jean Pictet states with regard to Article 1:

> ...in the event of a power failing to fulfil its obligations the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally. [7].

In contrast to this clear statement, the discussion of Article 1 in the Final Record of the Diplomatic Conference of Geneva 1949 shows some disagreement over its meaning. The American and Norwegian delegates agreed that "ensure respect" merely emphasised the respect due by all the population for the Conventions. In the opinion of the Italian delegate, on the other hand, such an interpretation made the word "ensure" redundant since under the theory of State Responsibility states are already under an obligation to ensure that their agents respect the Conventions. Rather, the Italian delegate claimed, Article 1 created a new legal concept, i.e. joint and several (i.e. independent) commitments by the parties to the Conventions to safeguard its

provisions. In support of this latter view the International Committee of the Red Cross (ICRC) representative stated that the ICRC proposal at the Stockholm Conference the previous year required states to do all in their power to see that the Conventions were universally applied. [8].

Article 1 of the 1949 Conventions marked a new departure in humanitarian law. The two Geneva Conventions of 1929 require the parties to "respect" the Conventions in all circumstances. This was certainly a radical break with precedent in so far as they call for absolute and unconditional adherence to the Conventions, and in this sense the 1929 Conventions are a model for the 1949 Conventions. However, in so far as the 1949 Conventions imply inter-state obligations in the comprehensive sense argued for here, they represent a new legal concept. [9].

Nor should this be a source of surprise. The 1949 Geneva Conventions were drafted at a time of heightened expectations and renewed determination to see the precepts of the international law of war observed. It is thus highly likely that a more wide-ranging formula than those found in previous Conventions should be intended. In addition, we find the same formula in the First Protocol of 1977, thus reaffirming Article 1 in the light of its legal development in the intervening period.

There are several provisions in the Fourth Geneva Convention which clearly envisage cooperation and intervention by parties not involved in an armed conflict or occupation, for example the articles concerning the role of Protecting Powers (Articles 9, 11 and 12). As Pictet states in his commentary: "Article One applies just as much to a Protecting Power which is a party to the Convention as it does to the Belligerent Powers". [10]. However, it is a notorious feature of the Protecting Power mechanism that

it is dependent on the agreement of the Belligerent Powers. It is not a unilateral commitment but a reciprocal one. The situation in the Israeli-occupied West Bank and Gaza Strip is as good an example of this as any.

In discussing Article 7 of the Convention (in which parties are forbidden to contract out of the Convention), Pictet recognised that the agencies responsible under the Convention for supervising the regular application of the Convention would receive help from other quarters including:

> pressure by Powers party to the Convention but not involved in the conflict, pressure of public opinion, the fear of the Government in power of being subsequently disavowed or even punished, and court decisions. The correct application of the Convention is not a matter for the belligerents alone; it concerns the whole community of states and the nations bound by the Convention. [11].

Articles 7, 9, 11, and 12 clearly envisage that implementation of the Geneva Conventions by parties to a dispute is a matter of concern to the HCP as a whole. In addition, Articles 146-148 outline specific and distinct circumstances in which third parties are obliged to intervene in a dispute. These will be addressed later as a separate legal obligation.

b) Subsequent Practice

The second source upon which we shall draw to establish the existence of inter-state obligations under Article 1 consists of customary law as indicated by state practice (including UN resolutions) and declarations by the ICRC.

i) State Practice as Indicated in the UN and Elsewhere

A principal indication of state practice is the substantial body of material for which the UN is principally responsible in the form of resolutions and declarations, highlighting the obligations of HCP to take action to ensure that Israel respects the Fourth Geneva Convention.

However, the legal status of United Nations General Assembly (UNGA) resolutions is not clear. The extent to which they may be regarded at least as evidence of customary international norms will depend upon the terms and intent of the resolutions, voting patterns, community of expectations and acceptance in state practice. [12]. However, the ICJ in its Advisory Opinion on Namibia in 1971 stated: "it would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases, resolutions which have determinative or operative design". [13]. Decisions of the Security Council, on the other hand, are clearly binding under Article 25 of the UN Charter.

In addition, collective state practice in the UN may be indicative of customary law. When states assent to resolutions in the UN by significant majorities, they are interpreting the Charter from which they derive their duties as an independent political body and also acting collectively as member states capable of developing international law, inside as well as outside the UN. The resulting resolutions are at least material evidence of customary law. However, whether they technically attain the status of customary law or remain evidence of it is perhaps unimportant since either is capable of providing a legal basis for later action taken in pursuance of them. [14].

Many UNGA resolutions exist on most aspects of the Arab-Israeli conflict. These resolutions employ a series of phrases and formulae linking each resolution with previous ones and use uniform terms designed to provide standards by which the gravity of particular situations may be compared. Those resolutions which are based upon the provisions of the Fourth Geneva Convention commonly call upon states, explicitly or implicitly, to fulfil their inter-state obligations under Article 1.

For example, on 16 December 1981, in Res. 36/147 (based on the Report of the Special Committee), the General Assembly:

> Taking into account that States Parties to that Convention undertake, in accordance with Article 1 thereof, not only to respect but also to ensure respect for the Convention in all circumstances,
>
> 2: Condemns the failure of Israel as the Occupying Power to acknowledge the applicability of the Geneva Convention to the territories it has occupied since 1967, including Jerusalem;
>
> 4: Urgently calls upon all States Parties to the Geneva Convention to exert all efforts in order to ensure respect for and compliance with its provisions in Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem. [15].

Other resolutions too numerous to list make similar calls on states, based on the wording of Article 1. [16].

In 1983, the International Conference on the Question of Palestine published the outcome of its deliberations in the "Geneva Declaration on Palestine and Programme of Action for the Achievement of Palestinian

Rights". [17]. Part 1, paragraph 22 recommends that states:

> Act in accordance with their obligations under existing international law, in particular with regard to the Geneva Conventions of 1949 which require States Parties to respect and to ensure respect for those Conventions in all circumstances, and in particular ensure the respect by Israel for the Geneva Conventions of 1949 in the Occupied Palestinian and other Arab Territories.

Paragraph 25 recommends that states:

> Strive for the adoption of international measures so that Israel will implement in the West Bank and Gaza the provisions of the Hague Regulations 1907 and the Geneva Convention Relative to the Protection of Civilian Persons, in the light of Security Council Resolution 456 (1980). [18].

These resolutions which are typical of those concerning the Fourth Geneva Convention, clearly envisage that states have a duty to ensure that Israel respects the terms of the Convention. Moreover, the General Assembly's frequent reiteration of the duties imposed by Article 1 upon the HCP, beginning with Resolution 2851 (xxvi) of 20 December 1971 and continuing to the present day with the overwhelming majority of states voting in favour, undoubtedly possesses many of the features mentioned already of law-making resolutions and declarations. [19].

In contrast, the Security Council has been much slower to invoke Article 1 - a lonely example occurring in 1981 in which it deplored the actions of Israel in the Occupied

Territories while "recalling the Fourth Geneva Convention of 1949 and in particular Article 1". [20]. The reasons for this and the implications for the states responsible will be explored later under the heading of 'derivative state responsibility'.

Most recently, a report was submitted to the Security Council by the Secretary General on the basis of information obtained by the Under-Secretary for Special Political Affairs, Marrack Goulding, during his visit to the Occupied Territories on 8-17 January 1988. [21]. The Secretary-General's recommendations included the following and are worth quoting at some length:

> Under that Convention [i.e. Fourth Geneva Convention] each contracting state undertakes a series of unilateral engagements, vis a vis itself and at the same time vis a vis the others, of legal obligations to protect those civilians who are found in occupied territories following the outbreak of hostilities. This is why article one states that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances' (emphasis added). The phrase "in all circumstances" is intended to include declared or undeclared war, recognized or unrecognized state of war, partial or total occupation with or without armed resistance, or even under certain circumstances when the opponent is not a contracting Party (see article 2).

The Report continues:

> The most effective way, pending a political settlement, of ensuring the safety and protection of the civilian population of the occupied territories

> would thus be for Israel to apply in full the provisions of the Fourth Geneva Convention. To this end I recommend that the Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, drawing their attention to their obligation under article 1 of the Convention to '...ensure respect for the present Convention in all circumstances' and urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention.

At the International Conference on Human Rights at Tehran in 1968, on the 20th anniversary of the Universal Declaration of Human Rights, a resolution underlining the "inter-state" obligations under Article 1 of the Fourth Geneva Convention was adopted by 67 votes to none. [22]. In 1970, following the "Zerka" affair (when 3 aircraft were grounded in the Jordanian Desert by Palestinians), the official Swiss adviser to the federal government moved that the Swiss government approach third parties (including the Soviet Union, China, and France) with a view to their intervening in the dispute in pursuance of their obligations as signatories to ensure respect for the Geneva Conventions. The results of this diplomatic move were not made public, but the fact of the Swiss intervention was. [23].

ii) The International Committee of the Red Cross

The ICRC has also publicly requested parties to conflicts and non-party signatories of the Conventions to ensure respect for their provisions. Such a step is only taken

in cases of extreme urgency when all the long-term advantages of discretion and private initiative are outweighed by the nature and scale of human rights violations. For example, on 19 March 1979, the ICRC asked Great Britain and other states to support its demand that parties to the conflict in Zimbabwe respect humanitarian law. [24].

Again on 7 May 1983, the ICRC publicised Iran and Iraq's violations of the Geneva Conventions, saying:

> The ICRC makes this solemn appeal to all states party to the Geneva Convention to ask them pursuant to the commitment they have undertaken in Article 1 of the Conventions to ensure respect, to make every effort so that ... [emphasis in original]. [25].

On 10 February 1984, the ICRC was compelled to make another appeal (again with respect to the Iran-Iraq war), stating:

> The ICRC is convinced that the States Parties to the Conventions are aware of what is truly at stake in the steps proposed, and that it will be their desire and intention to translate into action the commitment which they undertook in adopting Article 1 common to the four Geneva Conventions of 12th August 1949. [26].

Again, on 23 November 1984, President Hay of the ICRC appealed to the Contracting Parties, concluding:

> Under Article 1 of the Geneva Conventions, it is the legal duty of States Parties to ensure that governments engaged in an armed conflict respect these Conventions: the efforts of the ICRC to ensure the protection of prisoners of war in Iran

> will fail unless the Iranian authorities are brought to realize that it is the political will of the Community of States to see humanitarian law observed.

The President of the ICRC further emphasised that HCP have "a legal duty ... to ensure that governments engaged in armed conflicts respect these instruments". [27]. The public aftermath of these appeals involved the Security Council of the UN which in Resolution 548 (1983) of 31 October 1983 condemned all violations of international humanitarian law, inviting the parties to the conflict to observe the principles and rules applicable to armed conflicts.

c) Relevant Rules of International Law

Finally, at the basis of treaty interpretation are a number of fundamental rules, in particular the well-known principle pacta sunt servanda * which was codified in Article 26 of the Vienna Convention on the Law of Treaties 1969:

> Every treaty in force is binding upon the parties to it and must be performed in good faith. [28].

The requirement of good faith has been interpreted by the ICJ as requiring performance of legal duties in fact as well as law. By virtue of pacta sunt servanda, a purely literal reading of Article 1 would contravene the basic requirement of good faith if it were to defeat the object of the Convention.

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* pacta sunt servanda: literally, 'treaties are to be observed', i.e. treaties are to be performed in good faith.

It would also defeat the principle laid down in the Corfu Channel case in 1949. In that case, the aims and objects of the Special Agreement concerned were taken into account. The International Court of Justice held that:

> It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect. [29].

This approach, known in legal jargon as the teleological approach, leaves no room for interpretations of clauses which clearly defeat their object. It is submitted that a reading of Article 1 which excluded inter-state obligations and enabled Israel to avoid the provisions of the Fourth Geneva Convention simply by denying its applicability would be to deny its main object as described in the title of the Convention itself, namely the protection of civilians in time of war.

Having established that the words "ensure respect" are capable of and indeed demand a construction entailing the obligation of states to supervise not only their own activities with regard to the Geneva Conventions but also those of other states, it remains to examine the separate question of whether this obligation is a legal obligation and binding on parties.

Whether a treaty imposes legal duties on the parties to it depends on whether the treaty is "governed by international law" according to the International Law Commission. [30]. However, nowhere is it authoritatively stated what is meant by such a phrase and how in a particular case it is to be decided whether a treaty is so governed. In the absence of legal dicta in international conventions or customary law, resort will be

had to the third source hallowed in the Charter of the ICJ, namely general principles of law. It is submitted that an agreement is governed by international law where the parties have made promises giving rise to rights and duties which the law will seek to protect. There is no requirement in international law of consideration, although the phrase "governed by law" does incorporate an intention to create legal relations. [31].

Do the inter-state obligations in Article 1 amount to such promises or are they merely declarations of intent? This is a question of construction. In English contract law, performance by a party to an agreement cannot be enforced while it depends on prior performance of a condition precedent. Moreover, in certain circumstances a party may be entitled to rescind a contract where there has been a substantial failure of performance by the other party. Apart from these situations, and excluding the possibilities of defects in its formation (such as illegality, mistake, etc.), a valid contract is prima facie enforceable.

In construing the nature of inter-state obligations under Article 1 - do they constitute legal and enforceable promises or not - regard will be had therefore to general principles of law and in particular to the degree to which the obligation under Article 1 may be said to be unilateral, absolute and immediate.

Articles 31 and 32 of the International Law Commission's Draft Articles on State Responsibility provide that a prima facie illegal act may be rendered licit by a plea of force majeure, accident or extreme distress. However, apart from these cases the obligations of HCP under Article 1 are absolute. Condorelli and Boisson have also pointed out that it is the unilateral nature of the Conventions and Protocol 1 which is

responsible for the absolute prohibition on reprisals or avoidance of their provisions by consent or agreement. [33].

Reprisals against protected persons and their property are prohibited under Article 33 of the Fourth Geneva Convention. In other words, even if reprisals against these persons and objects constitute a proportionate response in law, they are nevertheless strictly forbidden under the terms of the Convention.

Regarding Article 33, J. Pictet had this to say:

> The solemn and unconditional character of the undertaking entered into by the States Parties to the Convention must be emphasised...The prohibition against reprisals is closely connected with the provisions which, by ensuring that the Convention is applied in all circumstances...[see Articles 1, 7 and 8] give it the character of a Primary duty based on the protection of the human person. [34].

Finally, Article 148 of the Fourth Geneva Convention, which concerns "grave breaches", eliminates the possibility of "contracting out" of the Convention as follows:

> No HCP shall be allowed to absolve itself or any other HCP of any liability incurred by itself or by another HCP in respect of breaches referred to in the preceding Article.

Thus, at least where grave breaches are concerned, Article 148 does not permit of any deviation from the undertaking in Article 1.

The special place of humanitarian treaties in the broad subject of treaty interpretation is encapsulated in Article 60

of the Vienna Convention.* Under paragraph 2, a material breach by a party to a multilateral treaty entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part, or to terminate it. However, under paragraph 5, exception is made for "provisions relating to the protection of the human person, contained in treaties of a humanitarian character, in particular provisions prohibiting any formal reprisals against persons protected by such treaties". Barring a perverse effort to classify it as excluded from the wording of paragraph 5 by its character, the Fourth Geneva Convention sits squarely among those treaties, humanitarian in character, that fall outside the pale of reciprocity.

Draper confirms the unilateral nature of Article 1 as follows:

> This short and incisive Article makes it clear that the obligations undertaken by states under these Conventions are unilateral and not reciprocal in character. The states concerned have entered into a series of absolute legal obligations whose binding force is not limited to the extent that other states observe their obligations under the Conventions. thus these Conventions have in a sense a legislative rather than a contractual character. [36].

The Geneva Conventions are subject to general treaty law, according to which, as we have seen, Article 1 imposes unilateral, not reciprocal, obligations on the HCP.

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* Although the Convention was only ratified in 1980, in its Advisory Opinion on Namibia, in 1971, the ICJ stated that Article 60 had codified customary law, and proceeded to apply

Finally, the wording of Article 1 may be placed in the context of other international humanitarian treaties. These treaties may be divided into those imposing qualified and progressive obligations and those imposing absolute and immediate obligations, although they are all widely recognised as binding in international law. [37].

i) Qualified and Progressive Obligations

Article 2(1) of the International Covenant on Economic Social and Cultural Rights states:

> each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means including particularly the adoption of legislative measures.

Part II of the European Social Charter and paragraph 26 of the American Convention on Human Rights contain similar qualified and progressive obligations. Clearly, Article 1 of the Geneva Conventions is phrased in terms that demand action of a far greater immediacy and force than these.

ii) Absolute and Unconditional Obligations

An example of an absolute and unconditional obligation is contained in

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apply it to the South African Mandate of 1920 which clearly pre-dates the 1949 Geneva Convention. [35].

Articles 55 and 56 of the United Nations Charter. Article 56 states: "all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." In the Advisory Opinion on Namibia, the International Court of Justice stated (obiter) that these articles "bind member states of the UN to observe and respect human rights".

Article 2, paragraph 1 of the International Covenant on Civil and Political Rights states: "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

Article 1 of the European Convention on Human Rights and Fundamental Freedoms states: "the HCP shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention."

Article 1(1) of the American Convention on Human Rights and Article 1 of the African Charter on Human and People's Rights contain similar absolute and immediate obligations.

It is submitted that Article 1 of the Geneva Conventions and First Protocol takes its place at the head of this list as the most absolute and immediate obligation found in humanitarian treaties, because the HCPs undertake specifically to fulfil their obligations in all circumstances. Even Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide (in which the Contracting Parties undertake to prevent and to punish genocide) does not reinforce the undertaking with the words "in all circumstances". In support of this we may quote the International Association of Democratic Lawyers' Report on the West Bank of October 1984 which highlighted the words "in

all circumstances" and concluded that: "there can be no grounds whatever for releasing Israel from the obligation to stand by its commitments". [38].

It is now clear that Article 1 of the Geneva Conventions contains two obligations: the obligation of states to ensure that they and their agents respect the Conventions, and the "inter-state" obligation to ensure that other states also respect them. This interpretation of the Article is based on a wide range of material, some of which is itself of law-making status.

These obligations are "governed by international law", i.e. they are legally binding on the signatories. They are absolute, immediate, unilateral and incapable of rescission. Indeed we may conclude that ratification of the Conventions marked a significant concession of sovereignty by the signatories in favour of a binding accord with international legal status.

3. The Existence of Inter-State Obligations in Customary Law as Codified by Article 1

On 27 June 1986, in Nicaragua v. United States of America, the ICJ decided that distribution by the US of a manual to the Contras in Nicaragua entitled "Psychological Operations in Guerilla Warfare", in circumstances where it knew its advice was likely to be acted upon, constituted a breach of the principle in Article 1 of the Fourth Geneva Convention that States respect and ensure respect for the Conventions. [39]. Due to a reservation made by the US in 1946, in its acceptance of the ICJ's jurisdiction, the latter decided the case purely on the basis of customary law. The Court stated specifically that Article 1 reflects customary international law, and it was the latter that the Court applied. In giving assistance to

the Contras, constituting a breach of the principles in Article 3 of the Convention, the US was in breach of its inter-state obligation to ensure respect for the Convention. [40].

Thus the legally binding nature of the Convention as a document is underpinned in certain of its articles, including Article 1, by the existence of parallel principles in customary law. The Nicaragua case stated what has become evident in the years since 1949 and perhaps before, in the resolutions and declarations of states, IGOs and the ICRC, and the writings of academics and lawyers, that the duty of states to ensure that other states "ensure respect" is a general legal norm brooking no exception. As Adam Roberts has said:

> in view of the large number of States Parties to the 1949 Geneva Conventions and the status which the Conventions have acquired in the international community, it is reasonable to assume that the Conventions are (at least in part) declaratory of customary law. This is particularly the case in respect of the general principles contained therein. [41].

B. INTERNATIONAL CRIMINAL RESPONSIBILITY OF INDIVIDUALS AND STATES

1. Summary of the Arguments

Independent of all that has been said so far on the subject of Article 1 of the Geneva Conventions, there exists a set of legal considerations known collectively as international responsibility. These can be broken down into individual and state crimes.

The principle of individual crimes can be further categorised as either 'customary' (namely war crimes) or 'conventional' (namely appearing in the Fourth Geneva Convention 1949); however, both categories have in common the consequence that states have the right -indeed the legal duty- to prosecute individuals guilty of such crimes.

Crimes for which individuals can be prosecuted include crimes against peace (i.e. aggressive or otherwise illegal wars), war crimes (i.e. violations of the laws or customs of war), and crimes against humanity (i.e. murder, extermination, enslavement, deportation, and political, racial or religious persecution in pursuance of certain crimes).

Grave breaches (the conventional equivalent of war crimes) are listed in Article 147 of the Convention. These include: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, wilfully depriving a protected person of the rights of fair and regular trial, and extensive destruction and appropriation of property not justified by military necessity.

The importance of individual criminal responsibility for the purposes of enforcement

lies not so much in the prospect that states will in reality locate, investigate and prosecute large numbers of war criminals as in the fact that individual officials may respond to pressures such as adverse publicity and the possibility (however remote) of prosecution when travelling abroad for example. The fact that states have a duty to prosecute individuals may also contribute indirectly to a sense that states have a duty to intervene in other ways pursuant to their duties under Article 1.

The notion of State Crimes in contrast is exclusively a principle of customary law. While not entirely free of controversy, the idea that certain acts by states may give any other state the right to bring an action in the International Court of Justice is sufficiently well supported in international case law to permit its application in the case of Israel.

The class of crimes giving rise to such international rights of prosecution is not closed but probably includes the areas of torture, freedom of association, racial discrimination, military aggression and breaches of the peace and of the principle of equal national rights and self-determination.

Again from the point of view of enforcement, the strength of this argument derives not so much from a real prospect that states will in fact prosecute Israel for various state crimes as from the public classification of certain acts as crimes and the attendant pressures both on the perpetrator to discontinue its acts and on states in general to enforce this.

2. War Crimes in Customary International Law

The existence of acts or omissions constituting crimes for which individuals are

internationally liable has been recognised since the latter 19th century. Trial and punishment of such criminals takes place in suitable international tribunals, national courts and the military tribunals. Both international tribunals and national courts exercise jurisdiction by virtue of the fact that they apply international law and are justified in so doing by international law. Confirmation of this may be found in Attorney-General of the Government of Israel v. Adolf Eichmann where the court said that "the obligation of HCP in the Geneva Conventions to track down war criminals is one from which none may withdraw including neutral parties". [42].

The sort of crimes by individuals that establish such international jurisdiction were listed in the Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945. [43]. They include:

> a) crimes against peace, namely planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for any of the foregoing;
>
> b) war crimes, namely violations of the laws or customs of war...
>
> c) crimes against humanity, namely murder, extermination, enslavement, deportation and other inhumane acts committed before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.

The Tribunal in its judgment underlined

the separateness of such crimes from any notion of State Responsibility:

> That international law imposes duties and liabilities upon individuals as upon states has long been recognized... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence under international law.

The principles contained in the 1945 Nuremberg Charter subsequently were affirmed by a unanimous resolution of the General Assembly on 11 December 1946 as "principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal". [45].

International offences for which Israeli agents are responsible have been extensively documented and clearly constitute crimes for which as individuals they are subject to international jurisdiction. States thus have an obligation to seek out and prosecute individuals guilty in particular of violations of the laws of war and crimes against humanity: for example, the practice of establishing settlements in the Occupied Territories, deportation, and depriving persons of the rights of fair and regular trial.

3: Grave Breaches: Articles 146-148

An important section of the Fourth Geneva Convention provides some indication of how states carry out their inter-state duties:

namely, the articles providing for penal sanctions. Not only do these articles support the general thrust of Article 1, but they are themselves an independent source of legal obligation.

Expressing the relationship between the customary international law described above and the requirements of the Conventions that parties search for and prosecute persons guilty of grave breaches, Ian Brownlie has commented:

> The Conventions avoid the term 'war crimes' in relation to 'grave breaches' but there can be no doubt that the latter constitute war crimes and are concerned with individual responsibility for breaches of the laws of war. The ambiguity is to be explained by a desire to emphasize the obligations of the contracting states to suppress and punish the acts prohibited. [46].

Article 146 of the Convention states that the HCP are under an obligation to enact legislation necessary to search for and try persons guilty of committing or ordering others to commit grave breaches of the Conventions. [47]. The article moreover does not restrict itself to grave breaches: each HCP shall take measures necessary to suppress all acts contrary to the provisions of the Convention other than grave breaches.

Article 147 lists the grave breaches intended by the Convention: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, wilfully depriving a protected person of the rights of fair and regular trial, and extensive destruction and appropriation of property not justified by

military necessity.

Article 148 underlines the absolute nature of the breaches: no HCP may absolve itself or any other HCP of any liability in respect of such breaches.

These articles clearly supplement and expand upon the principle of inter-state obligations in Article 1. They are absolute, immediate and unilateral. In addition, they are specific both as to the breaches concerned and the means to be employed in controlling these.

4. State Crimes and the Principle of "Erga Omnes"

Like individuals, states may also be guilty of international crimes for which they are (internationally) liable regardless of any treaty or agreement to the contrary. Such crimes arise out of the violation of principles so fundamental, inalienable and inherent that only the creation of equally fundamental opposing norms in general law can change them. These principles form a body of law known as "ius cogens".* Because they are so fundamental, these principles affect the whole world community, not just the parties to a dispute, i.e. they are applicable "erga omnes".# [48].

This principle of erga omnes has had a turbulent history. In the South-West Africa Cases of 1962 and 1966, one of the preliminary objections of the Respondent South Africa each

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* ius cogens: literally, "law that forces or compels".

erga omnes: "all have an interest" (in having certain rights protected).

time concerned the locus standi* of the two Applicants, Ethiopia and Liberia. The thrust of the Applicants' argument was that South Africa was failing in its obligation under the Mandate and the "sacred trust of civilization" contained therein. Article 7 of the Mandate provides that in the event of dispute between the mandatory and another member of the League of Nations relating to the interpretation of the Mandate, such dispute shall be referred to the ICJ. South Africa argued that there was no dispute in the present case as it did not affect any material interests of the applicants or their nationals. The court rejected this argument, Judge Jessup in a separate opinion stating that: "international law has long recognized that states may have legal interests in matters which do not affect their financial, economic... material... physical or tangible interests". [49]. His Honour quoted the Genocide Convention and the Constitution of the International Labour Organisation as examples of when states had a legal interest in the protection of the general interests of mankind.

By a dubious legal distinction, the Court in 1966 avoided the charge of res judicata@ and declared that the Appellant had no locus standi. The Court declared that the idea of "a right resident in any member of a community to take legal action in vindication of a public interest ... is not known in international law as it stands at present", and "the Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by

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* locus standi: the right to bring a matter before a court.

@ res judicata: the rule which states that a matter which has already been decided upon by a court of competent jurisdiction cannot be further adjudged.

some text or instrument or rule of law; - and that in the present case, none were [sic] ever vested in individual members of the League under any of the relevant instruments". [50].

The decision of 1966 has attracted wide-spread criticism. The difference between the majority and the minority is seen as a conflict of judicial philosophy between a traditional, literal, Austinian approach on the one hand, and a creative, modern, equitable one on the other. In addition, the case stands in stark contrast to others which establish the principle of erga omnes. [51].

In the Northern Cameroons Case 1963, it was held that as long as a judgment would have "some practical consequence, in the sense that it can affect existing legal rights or obligations of the parties", then jurisdiction is not limited by the fact that no "material" interests are affected. [52].

In the important Barcelona Traction Case the Court by a large majority affirmed the existence of obligations "towards the international community as a whole", stating: "such obligations derive for example in contemporary international law from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". [53]. Brownlie also suggests that the principles of permanent sovereignty over natural resources and self-determination may have this status. [54].

With one eye on the Barcelona Traction decision, the International Law Commission has explicitly recognised the existence of ius cogens and international crimes. Article 19, paragraph 2 (which has been approved by the UN) states:

> an internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime. [55].

Examples of such crimes listed by the ILC include: a) a serious breach of an obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression; b) a serious breach of international obligation of essential importance for safe-guarding the right of self-determination of peoples such as that prohibiting the establishment or maintenance by force of colonial domination; c) a serious breach on a wide-spread scale of an international obligation of essential importance for safe-guarding the human being, such as those prohibiting slavery, genocide and apartheid.

The Vienna Convention on the Law of Treaties in Article 53 also defined ius cogens in connection with the requirement that treaties should not conflict with such norms:

> a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. [56].

A few commentators have discussed the applicability of the principle of erga omnes to the Geneva Conventions. In his commentary Pictet, in discussing the general provision in Article 4 of the Fourth Geneva Convention that

"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," said:

> the spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable erga omnes, since they may be regarded as the codification of accepted principles. It must be recognised however that the Conventions themselves stipulate that in order to be binding on states they must be ratified by those states". [57].

It is of course true that for Parties to be bound by the Conventions themselves they must have ratified them. However, some principles contained within the Conventions have an existence separate from the Conventions as customary law and further as constituting ius cogens giving rise to criminal liability and universal jurisdiction erga omnes.

These principles apply in Israel's case in the areas of torture, freedom of association and racial discrimination, according to Antonio Cassese. [58]. Another writer, Ingo Schoenfelder, has highlighted Israeli military aggression and breaches of the peace as crimes prohibited by Article 2 of the UN Charter, and breach of the principle of equal national rights and self-determination as prohibited by Article 1 of the UN Charter, as a result of the continuing occupation. [59].

The fact that the violation of these fundamental principles constitutes international crimes giving rise to jurisdiction erga omnes is a fifth legal basis for action by states to ensure respect for the

Fourth Geneva Convention as required by Article 1.

C. THE LEGAL CONSEQUENCES OF STATES' FAILURE TO ACT

1. Summary of the Arguments

Since 1967 States with the duty and means to ensure the protection of Palestinian human rights in the Israeli-occupied territories have not only failed to do so but have in fact encouraged and supported the prevailing situation in which human rights are regularly violated.

Under the Charter of the UN states have a duty to preserve international peace and security through the Security Council. Frequently, however, the Security Council has been thwarted in its intended initiatives - primarily through the blocking vote of the US. However, the General Assembly, which usually delegates the power to act to the Security Council, can itself take action through resolution 377 A (v) known as the "Uniting for Peace Resolution". When the Security Council is paralysed because of lack of unanimity among its members, the General Assembly has the duty to take "collective measures" to "maintain or restore international peace and security".

There is a clear link between the preservation of international peace and the monitoring and control of Israeli conduct in the Occupied Territories. It is therefore suggested that resort be had to Resolution 377 A (v).

Others have suggested that where states block the endeavours of others to take action through the UN, not only does this represent a dereliction of duty under the UN Charter but may in fact result in the sharing of criminal responsibility between the perpetrator state and its backers. A logical extension of this argument would implicate states that failed to

undertake their duties under Article 1 since this is the means above all others to ensure that Israel observes its duties under the Convention.

2. The Duty of States Under the UN Charter

Inter-state obligations to take action to ensure respect may further be derived from the intermediate offices of the General Assembly and Security Council of the United Nations. In its Advisory Opinion on Namibia, in 1971, the Court was asked: "What are the legal consequences for states of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?" Having found that the UNGA resolution which had first declared the Mandate at an end had legal dispositive force, the Court held that as a result of the Security Council resolution which called on states to take specific steps such as diplomatic and economic ostracism of South Africa, states were under an obligation -i.e. a legal obligation- to recognise the illegality and invalidity of South Africa's continued presence in Namibia [60].

However, it is not only on the basis of Security Council resolutions that states may have a duty to act. The power to maintain peace and security is conferred on the Security Council by Article 24 of the UN Charter, which states:

> In order to ensure prompt and effective action by the UN, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf. [61].

In other words the Security Council acts on the basis of power delegated to it by the members of the United Nations, who in the event of the delegate being prevented from exercising its authority are entitled in accordance with general principles of law as principals to take collective measures.

An example of action being taken by the General Assembly in their capacity as principals occurred in the Korean War. In resolution 377 A (v), known as the "Uniting for Peace Resolution", the General Assembly resolved that:

> If the Security Council because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security. [62].

This statement of the General Assembly's right as principal to take action pursuant to its own decisions rests not only on Article 24 but also Article 1 of the UN Charter, which states as a purpose of the United Nations the maintenance of international peace and security and, to that end, the taking of collective measures. In other words, it is an obligation binding on members to take action in pursuit of the Charter's goals in the event of the failure of the Security Council to act.

The "Uniting for Peace Resolution" was

used a second time during the Arab-Israeli War in 1956. In that case, France and the United Kingdom who were involved on the Israeli side vetoed action by the Security Council. A special emergency session of the General Assembly was called in November 1956 and a resolution adopted calling for an immediate ceasefire. In addition, the UN Emergency Force was established to secure the cessation of hostilities.

"Uniting for Peace Resolution" 377 A (v) was used a third time in the Congo in 1960, again to circumvent the paralysis of the Security Council.

It is time that recourse be had for a fourth time to Uniting for Peace Resolution 377 A (v), in the territories occupied by Israel since 1967. The legal basis for such action is clear and indisputable. As shown above, the UNGA has frequently stated that states have an obligation to ensure respect for the Fourth Geneva Convention in the Occupied Territories. Moreover, they have recognised that the situation constitutes a threat to international peace and security as long ago as 1948, since when the situation can hardly be said to have improved. As is well known, the Security Council has frequently been prevented from adopting measures by the veto of the United States, and others (resolutions of the Security Council in 1972 and 1975 condemning Israel's raids on refugee camps in Lebanon and Syria, in 1976 censuring Israel's acts in Jerusalem, and in 1980 stating the right of the Palestinians to self-determination) have all been vetoed by the United States. Moreover, the Security Council has only once referred to the obligation of states to ensure respect for the Convention.

It is submitted that "Uniting for Peace Resolution" 377 A (v) provides the means by which states may fulfil their legal obligation to ensure respect for the Fourth Geneva

Convention through the United Nations. The connection between Israel's belligerent occupation of the West Bank and international security or lack of it is too obvious to need restating, yet perhaps so well known that it has been taken for granted and thus not yet resulted in the positive remedial action that is legally as well as politically and morally required.

3. Derivative State Responsibility

A seventh and final legal threat that may be levelled at states which persist in ignoring Article 1 of the Geneva Conventions is that they may themselves become responsible for violations of the Convention by virtue of the doctrine of derivative state responsibility. [63].

A state may be responsible for acts committed by another state in a number of ways, for example where a state permits its territory to be used by another state to launch aggression against a third state, or where a state violates territorial sovereignty of another state by sending in mercenaries. A state may also be responsible for omissions: for example, failing to try to prevent acts of insurgent forces using its territory from affecting foreign nationals. Also, in the case of mandates, the mandatory power bears "derivative responsibility" for acts by which the government of the mandated territory causes injury to foreign citizens.

A state is responsible for the acts of another state where it gives money intending that money to be used in violation of international norms or knowing it will be so used. The responsibility is similar to that governing the law of secondary liability in municipal criminal law or perhaps more accurately, that governing the responsibility of defendants for the torts of third parties

where the defendant is in a position of responsibility vis a vis the third party - see the famous Dorset Yachts case in English law. [64]. This is not vicarious liability as a state is not liable where it has taken all precautions to avoid the third party's tort, unlike the employer who may be vicariously liable in spite of such precautions.

In Nicaragua v. United States, the United States was accused of publishing "The Psychological Operations in Guerilla Warfare" in circumstances where it knew its advice was likely to be acted upon. [65]. The Court held that under customary law as reflected in Article 1 of the Fourth Geneva Convention, the US was "under an obligation not to encourage persons or groups engaged in a conflict in Nicaragua to act in violation of Article 3 common to the four 1949 Geneva Conventions." By publishing "Psychological Operations in Guerilla Warfare" the US was in breach of its obligations.

However, in addition, the Court considered the Nicaraguan submission that actions of the Contras were imputable to the United States. The Court found that the publication of "Psychological Operations" did not constitute sufficient direction and control of the Contras to render their actions imputable to the US. However, the case remains a significant one as it underlines the real possibility that states may be found directly responsible for the acts of other states under the doctrine of derivative state responsibility.

Are states legally responsible on this basis for failing to ensure respect for the Fourth Geneva Convention in Israel? There is a strong chance that the United States, knowing as it does of the violations of human rights in the Occupied Territories and funding Israel to the extent that it does, is liable. However, in addition, it seems that the

actions of certain states in preventing the implementation of General Assembly resolutions on a regular basis amount to acts or omissions from which may be derived responsibility for Israeli actions. The occupation by Israel has continued for twenty-one years. Article 1 of the Fourth Geneva Convention, as we have seen, requires that states take action to ensure that other states respect its provisions. States' persistent breach of their obligations under Article 1 through omission to 'ensure respect' combined with positive steps to block the initiatives of the Security Council over an extended period while knowing of the violations of human rights that continue to occur are factors exercising the greatest measure of direction and control over the actions of Israel in the Occupied Territories. It is submitted that those responsible for allowing Israel to continue to violate the Fourth Geneva Convention are themselves arguably liable under the doctrine of state responsibility.

D. CONCLUSION - PRACTICAL STEPS

The steps which a state or (states) may be expected to take in pursuance of the seven legal obligations outlined above may be divided into steps required as a matter of law, and secondly steps which states are able and willing to take beyond those required as a minimum by law and without transgressing the prohibition against the use of force contained in the UN Charter. State action may further be classified as follows: political and diplomatic action; judicial inquiry and investigation; and the institution of criminal proceedings before criminal courts.

In the 1983 Geneva Declaration on Palestine and Programme of Action for the Achievement of Palestinian Rights, the conference called upon states:

> To take prompt, firm and effective steps and actions ... and carry out the accords of the international peace conference including the following:
>
> a) taking measures consistent with the principle of the inadmissibility of the acquisition of territory by force to ensure Israel's withdrawal from the Palestinian and other Arab territories occupied by Israel since 1967 including Jerusalem, within a specific timetable.
>
> b) undertaking effective measures to guarantee the safety and security and legal and human rights of the Palestinians in the Occupied Territories. [66].

What are these measures? In its Namibia Advisory Opinion of 1971, the ICJ did not specify exactly what measures were appropriate for states to take consistent with the illegality and invalidity of South Africa's

Mandate declared in Resolution 276 (1970). However the court did say that states were under a legal obligation to abstain from: 1. treaty relations with South Africa in which she purports to act on behalf of South-West Africa; 2. applying existing bilateral treaties concluded by South Africa on behalf of South-West Africa; 3. maintaining diplomatic and consular relations in so far as they extend to South-West Africa; and 4. entering into economic relations with South Africa where it acts on behalf of South-West Africa "which may entrench its authority over the territory". [67]. The Court explicitly recognised the limits on its recommendations by stating that the precise determination of appropriate measures was a matter for political organs. In addition, they were made with regard to the duty of non-recognition and not with regard to the maintenance of international peace and security, a feature of the case which has led critics to question the Court's finding that the Security Council resolution concerning the legality of the Mandate was binding. However, as an indication of the measures which the ICJ considers to be valid inter-state actions, the judgement retains its use in the present context. Particularly interesting is the implication that economic sanctions may be a legal requirement and not just a legal option. As a minimum legal requirement, the withholding of economic intercourse with Israel "which may entrench its authority over the territory", has a clear precedent as regards the duty of non-recognition of the occupation and is clearly relevant to the obligations of states under Article 1 of the Conventions.

What other measures of enforcement, in addition to those actually required by law, may states take? Certain factors peculiar to Israel should be borne in mind when considering this question, in particular Israel's public espousal of the idea, in

principle, of an impartial investigation similar to the missions of enquiry regularly sent by the Director-General of the ILO; Israel's pride in its democratic credentials; the rift that exists between the UN and Israel; and the sensitivity of Israel to the statements of individual states as opposed to the community of states. [68].

Given the failure of countless UN resolutions to have any effect on Israel's domestic policy, diplomatic measures should include bilateral contacts asking Israel to abide by the Geneva Conventions and other international norms. Such approaches would also fulfil the normal requirement that states employ diplomatic negotiations to provide material evidence of a legal dispute prior to bringing a claim in the International Court of Justice.

Judicial proceedings could also be brought against Israel in the ICJ whose jurisdiction Israel might accept on a forum prorogatum basis, i.e. by virtue of an agreement between it and the appellant. It would be difficult for Israel to refuse to accept the ICJ as an unbiased judicial body without seriously compromising its self-proclaimed adherence to the rule of law and democratic precepts.

Inherent in such judicial action is the notion of reparation. As was stated in the Chorzow Factory Case (Indemnity) Merits: "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation". [69]. Such reparation may involve a declaratory judgement, payment of compensation, an apology, punishment of individuals responsible, the taking of steps against any further breach of a duty and any other measures of restitution and satisfaction.

In addition states should institute enquiries under Article 149 of the Fourth Geneva Convention. In particular the UN should take steps to facilitate an investigation of violations of human rights by the UN Committee on the Occupied Territories and other local UN bodies such as the United Nations Relief and Works Agency. These sentiments were echoed by the Committee itself in 1976:

> the Protecting Power formula has failed ....the international community has a clear responsibility to act impartially and free from all political partisanship... to secure the scrupulous adherence to the provisions of the Fourth Geneva Convention and ensure its efficacy. [70].

Finally, states should institute criminal proceedings against individuals guilty of grave breaches as required by Article 146 of the Fourth Geneva Convention, or in the exercise of the universal jurisdiction to try war criminals, referred to in AG of Israel v. Eichmann. [71].

What should law-abiding states do to encourage other states to abide by their obligations under Article 1 to ensure that Israel respects the Conventions? Firstly, it is a political truism that states prefer to act with the law rather than against it. It is therefore to be hoped that the underlining of states' legal obligations, of which this paper forms part, will serve to pressure states to act accordingly. The question of Palestine and European public opinion has been discussed by Charles Saint-Prot who states that Arab efforts in the sphere of information and media should be directed "at those categories and groups which have an unbiased approach to the problem, [who] should be provided with all the documentary and ideological assistance needed for the purpose

of coordinated action." [72]. In particular, these groups should be informed of the legal duties of the states of which they are nationals to "ensure respect" under Article 1. The preference of states to be seen to be acting legally within the public sphere also lies at the basis of the suggestion by Antonio Cassese that states be requested by other states to make public declarations to the Secretary-General of the United Nations as to whether they have availed themselves of Article 1 of the Geneva Conventions and if not, of the precise reason why not.

Secondly, the General Assembly should suggest that individual states take lawful domestic measures not amounting to retaliation or reprisal, in pursuance of Article 1: for example, the imposition of economic and commercial measures.

Thirdly, states should consider suing other states, who are in breach of Article 1 by failing to take any steps to ensure respect, at the ICJ. Such an action could only be started by states who felt themselves immune from precisely the same accusation.

Whichever strategy is employed, the degree and duration of current international inertia in the face of the level of human rights abuse prevalent in the Occupied Territories is undoubtedly contrary to international law. Only by publicising this fact is there any hope of seeing the rule of law respected.

NOTES

[1]. See, for example, Security Council Resolution 237 of 14 June 1967 and resolutions of the United Nations General Assembly, Economic and Social Council and Commission on Human Rights.

[2]. Esther Cohen, Human Rights in the Israeli Occupied Territories 1967-82 (Manchester: Manchester University Press, 1985), pp. 43-65.

[3]. International Law Commission's Fourth Special Rapporteur in First Report on the Law of Treaties, United Nations, Yearbook of the International Law Commission, Vol. II, 1962, at p. 32, reprinted in Harris, Cases and Materials in International Law (London: Sweet and Maxwell, 3rd ed., 1983), p. 568.

[4]. Ian Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 3rd ed. reprinted 1982), p. 3.

[5]. Jean S. Pictet, The IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Commentary. Geneva: International Committee of the Red Cross, 1958.

[6]. Massey Claim (1927), United Nations, Reports of International Awards, Vol IV, p. 155; see also Brownlie, op. cit., p. 447.

[7]. Pictet, Commentary, p. 16.

[8]. Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II session 13, p. 53, published by the Federal Political Department, Bern.

[9]. Luigi Condorelli and Lawrence Boisson de Chazourney, "Quelques Remarques a Propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire

'en toutes circonstances'", Christophe Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles (International Committee of the Red Cross, 1984), p. 9.

[10]. Pictet, Commentary, p. 92.

[11]. Ibid., pp. 71-72.

[12]. W. Thomas Mallison and Sally V. Mallison, An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question (New York: United Nations, 1979), see generally.

[13]. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970). 1971 ICJ Reports 16, 453-481 (opinion). Quoted in Harris, op. cit., p. 107.

[14]. Mallison and Mallison, op. cit., p. 5.

[15]. See, for example: Resolutions and Decisions of the General Assembly and the Security Council Relating to the Question of Palestine 1980-1981 (United Nations Publication No. A/AC. 183/L. 2/Add. 2, 13 May 1982), p. 47. Adopted 142 - 1 - 0.

[16]. For example on 11 December 1980, in Res. A/35/122 (based on the Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories), the General Assembly:

> 2: strongly deplores the failure of Israel to acknowledge the applicability of that Convention to the territories it has occupied since 1967;
>
> 4: urges once more all States Parties

to that Convention to exert all efforts in order to ensure respect for and compliance with its provisions in Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem."

Adopted 141-1-1. Ibid. at p. 10.

On 3 November 1988, during the Palestinian uprising (intifada) which began on 9 December 1987, the General Assembly in A/RES/43/21 (8 November 1988):

> 5. Calls upon all the High Contracting Parties to the Convention to take appropriate measures to ensure respect by Israel, the occupying Power, for the Convention in all circumstances in conformity with their obligation under article 1 thereof;

[17]. A/CONF. 114/41 16 September 1983 (United Nations Publication no. 83-23316 0934g (E)), p. 6. The International Conference was called for by resolutions of the General Assembly in 1981 and 1982, and its proceedings were adopted by acclamation on 7 September 1983 and endorsed in Resolution 38/58C on 13 December 1983.

[18]. Security Council Resolution 456 called (inter alia) for the extension of the UN Disengagement Observer Force mandate for six months.

[19]. See Sami Musallam (ed.), Collected Resolutions 1947-1972 (Beirut: The Institute for Palestine Studies, 1974), passim.

[20]. Security Council Resolution 469, United Nations Doc.s/INF/36 (1981), reprinted in 19 International Legal Materials 829 (1980). Adopted 14-0 (US abstaining).

[21]. Report Submitted to the Security Council by the Secretary-General in accordance with Resolution 605 (1987), S/19443, 21 January 1988.

[22]. Condorelli and Boisson, op. cit., p. 26.

[23]. Ibid., p. 27.

[24]. Ibid., p. 28; see Revue International de la Croix Rouge, No. 716 (Geneva), pp. 89-92.

[25]. ICRC memorandum, Geneva.

[26]. Ibid.

[27]. Ibid.

[28]. Vienna Convention, Article 26, reprinted in Harris, op. cit., p. 591.

[29]. Corfu Channel Case (Merits) U.K. v. Albania, 1949 ICJ Reports 4 at p. 24, reprinted in Harris op. cit., p. 597.

[30]. Fourth Report on the Law of Treaties, United Nations Yearbook of the International Law Commission, Vol. 2 (1965), p. 32., reprinted in Harris op. cit., p. 567.

[31]. Ibid., loc. cit., at p. 12.

[32]. International Law Commission Draft Articles on State Responsibility. See United Nations, Yearbook of International Law Commission, Vol. 2 (1980), Part II, pp. 26-34.

[33]. Condorelli and Boisson, op. cit., p. 20.

[34]. Pictet, op. cit., p. 228.

[35]. Advisory Opinion, 1971 ICJ Reports 16. Reprinted in Harris, op. cit., p. 107.

[36]. G. I. A. D. Draper, The Red Cross Conventions of 1949, (London: Stephens, 1958), p. 8.

[37]. Paul Sieghart, International Law of Human Rights (Oxford: 1983). The ensuing articles may be found reprinted at pp. 56-61. Emphases added.

[38]. International Association of Democratic Lawyers, Territories Occupied by Israel (West Bank), IADL Mission of Inquiry, October 1984, p. 6.

[39]. Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits, 1986 ICJ Reports 14.

[40]. Ibid.

[41]. Adam Roberts and Richard Guelff, Documents on the Law of War (Oxford: 1982), p. 70.

[42]. Reprinted in H. Lauterpacht, International Law Reports, Vol. 36 (1968), p. 38.

[43]. Brownlie, op. cit., p. 561.

[44]. Ibid., p. 562.

[45]. General Assembly Resolution 95(1), 'Confirmation des principes de droit international reconnus par le statut de la cour de Nuremberg', in Djonovich (ed.), United Nations Resolutions Series 1, Resolutions of the General Assembly Vol. 1, 1946-48 (Oceania Publications Inc., 1972), p. 175.

[46]. Brownlie, op. cit., p. 563.

[47]. In so far as is relevant, Article 146 states:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such

> grave breaches, and shall bring such persons, regardless of their natiion-ality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Article 147 states:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biolo-gical experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the right of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[48]. Brownlie, op. cit., pp. 512-515.

[49]. South West Africa Cases (Preliminary Objections) 1962 ICJ Reports 318 at 424-33. Reprinted in Brownlie op. cit., p. 467.

[50]. South West Africa Cases (Second Phase) 1962 ICJ Reports 6 at 47. Reprinted in Brownlie op. cit., at p. 469.

[51]. See generally John Dugard, South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations. California and London: University of California Press, 1973.

[52]. Northern Cameroons Case (Preliminary Objections), 1963 ICJ Reports 15; reprinted in Brownlie, op. cit., p. 470.

[53]. Barcelona Traction, Light and Power Co. Case, 1970 ICJ Reports 3, reprinted in Harris op. cit., p. 453.

[54]. Brownlie, op. cit., p. 513.

[55]. International Law Commission Draft Article 19 loc. cit., reprinted in Harris op. cit., p. 376.

[56]. Reprinted in Harris, op. cit., p. 616.

[57]. Pictet, op. cit., p. 48.

[58]. Antonio Cassese, Applicability of International Norms of Human Rights to the Population of the Territories Occupied by Israel, United Nations Doc. /HR/Geneva/1982/BP. 2. Background paper to United Nations Seminar on Violation of Human Rights in the Palestinian and other Arab Territories Occupied by Israel, p. 27.

[59]. Ingo Schoenfelder, Legal Aspects of the UN Responsibility for the Implementation of the Inalienable Rights of the Palestinian People, p. 149, Sixth United Nations Seminar on the Question of Palestine, held in Malta, 12-16 April 1982, United Nations Publication no. 82-19921.

[60]. Advisory Opinion of the ICJ, see Dugard op. cit., p. 479.

[61]. Reprinted in Henry Cattan, The Implementation of United Nations Resolutions

in Palestine, pp. 77 et seq., First United Nations Seminar on the Question of Palestine, at Arusha, 14-18 July 1980. This section is largely based on this paper.

[62]. Henry Cattan, op. cit., p. 75.

[63]. See generally J. Quigley, United States Responsibility Under International Law for Israeli Violations of Palestinian Rights in the West Bank and Gaza Strip, Fifth United Nations Seminar on the Question of Palestine, New York, 15-19 March 1982.

[64]. Dorset Yacht Company Limited v. Home Office, [1970] Appeal Cases 1004.

[65]. 1986 ICJ Reports 1. See also James P. Rowles commentary in Human Rights Internet Reporter, September 1986.

[66]. A/CONF. 114/41 16 September 1983 (United Nations Publication no. 83-23316 0934 g (E)).

[67]. Dugard, op. cit., p. 479.

[68]. Cassese, op. cit., p. 29 et seq.

[69]. Chorzow Factory Case (Indemnity) (Merits) Germany v. Poland (1928), 13th Judgement of the ICJ, Permanent Court of International Justice Reports, Series A, No. 17, at p. 29. Reprinted in Harris, op. cit., p. 375.

[70]. Report of the Special Committee to Investigate Israeli Practices affecting the Human Rights of the Population of the Occupied Territories on 1 October 1976 at p. 65. United Nations Publication A/ 31/ 218.

[71]. Lauterpacht, loc. cit.; see note 42 above.

[72]. Charles Saint-Prot, The Question of Palestine and European Public Opinion, in

Sixth United Nations Seminar on the Question of Palestine, p. 91.

APPENDIX: TREATY INTERPRETATION

The methods used by lawyers to interpret texts differ according to the priority accorded to each of three main modes of interpretation: the textual or "plain meaning" approach, the "intentions of the parties" approach and the "teleological" or "aims and objects" approach. [1]. The emphasis of each is self-evident from its 'title'. The three approaches are not mutually exclusive, although the latter approach is used particularly in the interpretation of humanitarian treaties. The present paper will use all three approaches in order to avoid the charge of selectivity. In addition a mixture of all three approaches is used in the Vienna Convention on the Law of Treaties of 1969 (which came into force in 1980). In so far as is relevant here, Article 31 states :

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
>
> a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

and

> 3. There shall be taken into account, together with the context:
>
> a) any subsequent agreement between the parties regarding the interpretation of the treaty or the

application of its provisions;

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable. [2].

Although the treaty is explicitly of non-retroactive effect, many of its provisions both codify and develop existing customary law and may therefore be used to interpret the Fourth Geneva Convention. [3].

NOTES TO APPENDIX

[1]. Fitzmaurice, "The Law and Freedom of the ICJ: Treaty Interpretation and Certain Other Treaty Points," British Yearbook of International Law, Vol. 28 (1951), reprinted in Harris, Cases and Materials in International Law (London: Sweet and Maxwell, 1983), p. 595.

[2]. United Kingdom Treaty Series, No. 58 (1980) Cmnd 7964 which came into force in 1980. See also Harris, op. cit., pp. 598 and 601-2.

[3]. Harris, op. cit., p. 563.