

Understanding the Fourth Geneva Convention

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Note: The same tired and worn out arguments are being brought forward today as the international community is tuning its collective ears to listen to the rants of individuals misrepresenting the Geneva Accords. I thought it was time to review some information from a while ago in order to be informed.

It was a warm September day here in Israel. My friends were either at the beach, sitting at a café or enjoying their family and IT all began, again! The IT I am referring to is the second Intifada. This was a planned, premeditated action by the Palestinian leadership (1) and for many of us it continues to this day. We welcome the new leadership indicating peace may now be possible, we listen to the words of the terrorist groups who indicate they will honor the “cease-fire”, and we are cautious with our optimism. We have been down this road before. Our “wanting to believe” is laid on top of our memories of the most recent past. The quiet time served only as a re-stocking, repositioning, reenergizing by all interested terrorist groups and Israeli children, mothers and fathers have paid the price for “wanting to believe.”

How did we arrive at this point in time? Some would have you believe that Israel’s occupation of Palestinian land is the reason why the conflict began and still rages on. If Israel would simply leave the territories the bloodshed would stop, peace would reign supreme. In a previous paper I shared an opposing point of view (2).

To legitimize the support of Palestinian terror, people and nations have turned to UN resolutions, international agreements and documents to “make Israel wrong”, in so doing the result is that the Palestinian positions are correct-even honorable. One such document that has found favor among those convinced that terrorism is a sanctioned activity is the 1949 Fourth Geneva Convention document.

There has been so much written about this document. However, many of the articles provide only a snapshot of the Fourth Geneva Convention and intentionally do so to support a political position. This kind of reporting clearly offers a singular and often simplistic perspective of events here in the Middle East. Let us examine context and perspective as they apply to the fourth Geneva Convention.

Historical context in a capsule:

The Geneva Conventions consist of treaties formulated in Geneva, Switzerland that set the standards of international law for humanitarian concerns. The conventions were the results of efforts by Henri Dunant (1862), who was motivated by the horrors of war he witnessed at the Battle of Solferino (1859).

The conventions, their agreements and two added protocols are as follows:

- First Geneva Convention (1864): Treatment of battlefield casualties and creation of International Red Cross
- Second Geneva Convention (1906): Extended the principles from the first convention to apply also to war at sea.
- Third Geneva Convention (1929): Treatment of prisoners of war.

- Fourth Geneva Convention (1949): Treatment relating to the protection of civilians during times of war "*in the hands*" of an enemy and under any occupation by a foreign power.
- Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
- Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
- In summary, the first three conventions were revised, a fourth was added, and the entire set was ratified in 1949; the whole is referred to as the "Geneva Conventions of 1949" or simply the "Geneva Conventions". Later conferences (Protocols) added the provisions prohibiting certain methods of warfare and addressing issues of civil wars. (3)

All of the preceding conventions occurred after the horror of war had once again dealt its misery upon human beings. One can notice over time that people attempted to make war less painful and less grotesque by attempting to get the world community to adopt more humane behavior and actions specific to the title of each convention. This paper makes no attempt to describe any of the preceding documents; rather, it is important to note that for nearly 150 years many in the world community have attempted to sanitize human war behavior and in so doing suggest to the non-warring people that war has rules that must be followed, during battle and after cessation of a war.

“War is an ugly business. For thousands of years, this has remained the case. Finally the Geneva Conventions came along in 1948, and the nations of the world joined hands to transform war from an ugly business into an ugly-business-described-by-solemn-buzzwords-and-unenforceable-guidelines, which allowed countries taking part in war to disavow the ugliness of the business without actually having to conduct the business in any meaningfully different manner. This is what we call "civilization.””(4)

Thus, one of the first things the newly formed U.N. did was sit down in Geneva, Switzerland, and try to find a kinder, gentler way to wage war. In December 1948, the U.N. Convention on the Prevention and Punishment of the Crime of Genocide passed the first article of what would be known as the Geneva Conventions. Genocide was defined as murder "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group." This convention drew up a list of punishable crimes "genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; [and] complicity in genocide." Other articles were added and produced the document we know as the Fourth Geneva Convention. The history of the Geneva documents is well worth studying. One discovers that each new set of guidelines has attempted to appease groups of violated people as well as trying to “civilize” an otherwise uncivil set of human behaviors. What happens when the “rules’ are broken?

Accusations of violation of the Geneva Conventions on the part of signatory nations are brought before the International Court of Justice at The Hague. The International Court of Justice (known colloquially as the World Court or ICJ) is the principal judicial organ of the United Nations. Established in 1945, its main functions are to settle disputes submitted to it by states and to give **advisory opinions** (non-binding) on legal questions submitted to it by the General Assembly or Security Council, or by such specialized agencies as may be authorized to do so by the General Assembly in accordance with the

United Nations Charter. The Statute of the International Court of Justice is the main constitutional document constituting and regulating the Court (5). The Court resides in The Hague, the Netherlands. It is composed of fifteen judges elected by the UN General Assembly and the UN Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration. Judges serve for nine years and may be re-elected. No two may be nationals of the same country. One-third of the Court is elected every three years. Each of the five permanent members of the Security Council (France, the People's Republic of China, Russia, the United Kingdom, and the United States) have always had a judge on the Court. Questions before the Court are decided by a majority of judges present. Article 38 of the Statute provides that in arriving at its decisions the Court shall apply international conventions, international custom, the "general principles of law recognized by civilized nations". It may also refer to academic writing and previous judicial decisions to help interpret the law, although the Court is not formally bound by its previous decisions. If the parties agree, the Court may also decide *ex aequo et bono*, or "in justice and fairness", in which the Court makes a decision based on general principles of fairness rather than specific law (5). The ICJ hears two distinct types of cases upon which the court may rule: **contentious issues between states** in which the court produces binding rulings between states that agree and **advisory opinions**, which provide reasoned, but non-binding, rulings on properly submitted questions of international law, usually at the request of the United Nations General Assembly. Please note that the court only hears contentious issues between states when both parties agree to participate in the court activity. If one nation does not agree to participate, the outcome is not binding; although historically the outcome has been used for political gain. I provide the preceding information for several reasons.

First, it is useful to note that the United Nations serves as the judge and the jury for international behavior transgressions-fortunately it has no power or authority to be also the executioner. The Fourth Geneva Convention was the result of the newly created United Nations, just after WWII, to ensure that future wars be more "humane". The ICJ, the legal interpreter/arm of the United Nations, operates within its auspices and structure thus serving as judge and jury. It is also useful to understand this direct relationship between the Geneva Conventions and the ICJ. From the very same organization who created the Geneva documents come the representative individuals who sit in judgment of misbehavior. They are therefore not independent agents. Is it possible they may have a vested political interest in the outcome of the arguments presented to the court?

Second, although it is true that most countries have signed onto the Geneva Conventions, it is important to note that even the United States did not sign onto the two additional protocols in 1977. There is **no** international law or court of law that has supreme jurisdiction over each and every country's behavior. There are no international police that enforce any of the Geneva judgments. Yet most civilized countries today do their best to adhere to the humanitarian language found within the Geneva documents.

Third, the Fourth Geneva Convention for all practical purposes is an advisory set of rules for the world community to operate within, it is truly not, in a practical manner, binding. However, the world, the media, the pundits and most of academia act as though it is mandatory. Countries call into question the behavior of some other (but not all) countries that do not meet the Fourth Geneva Convention specifications as they interpret them. The key is "as they interpret them". Herein lies the crux of the matter.

Perspective: Political Currency

Again, it is beyond the scope of this paper to offer all of the interpretive arguments all sides have presented. However, it may be instructive to demonstrate the relationship that exists between such interpretation and the gain of political capital by the international community of nations.

One of the more recent FGC (Fourth Geneva Convention) interpretations that illustrate this concept is the ruling by the ICJ regarding Israel's security barrier. This event clearly demonstrates all of the afore-mentioned considerations from interpretation to political motivation. The following is a general summary of the events surrounding the case of the security barrier and the 4th Geneva Convention:

- The traditional approach to international arbitration would have barred the ICJ from entering into this international conflict. Palestine, since it is not a recognized state, cannot sue before the ICJ in its own name. Israel did not consent to let the legality of the fence be decided by the ICJ. However, this did not stop the international community.
- December, 2003: The statute of the ICJ provides that the Court may only decide disputes submitted by states and then only with the consent of the states that are parties to the dispute. Israel chose not to participate. The U.N. General Assembly, at the prompting of Arab states, asked the Court to provide an "advisory opinion" on the dispute over the fence. The U.N. Charter allows for this procedure, but only in regard to "legal issues" and only in conformity with the overall scheme of the Charter. Here, the General Assembly was effectively asking the ICJ to endorse its own political conclusions, with its resolution describing the fence as a "wall" (most of it is, in fact, chain-link construction) on "occupied territory including East Jerusalem." The General Assembly was also seeking to have the ICJ do an end-run around the Security Council, which is supposed to have primary responsibility for resolving threats to peace (while at the same time circumventing the legal requirement that Israel consent to be judged in a case to which it was a party) (6).
- The Court had many legal grounds for refusing to decide this case. The Israeli government and also the U.S., Russia, the European Union and a majority of EU member states pressed such arguments on the Court. In other words, all the sponsors of the "road map," urged the Court to stay out of this heated political conflict. Many other governments around the world took the same view.
- The Court's own authority observed that the lack of consent to the Court's contentious jurisdiction by interested states has no bearing on the Court's jurisdiction to give an advisory opinion. So it went ahead anyway and provided an advisory opinion. A lengthy opinion piece emerged that addressed the "political sound bites" the Palestinians have used for months, e.g., occupation, location of the fence, freedom of Palestinian movement to name but a few. The political currency gained by this public performance resonates to even this day.
- Given the membership of the Court, where states hostile to Israel are plentifully represented, condemnation of the fence was to be expected. Most regrettable and upsetting, however, was that all five judges from **EU states** (UK, France, Germany, Netherlands, Slovakia) went along with the majority. Only the

American judge, Thomas Buergenthal, argued against taking this step and he also dissented on the essence of the arguments.

- Thus, a case that need not be heard by the Geneva's Convention legal court (ICJ) was encouraged by the Arab states and ultimately other countries to play out on the international stage. For those who do not understand how the Geneva Convention and ICJ work, they became willing recipients of what amounted to misinformation and disinformation about Israel's rights under international law. The belief one is left with is that Israel has no legal right to protect itself via a security barrier and that Israel continues to "break" the rules of the 4th Geneva Convention-nothing could be further from the truth yet the public relation damage had been done. Once again, the Palestinians were portrayed as victims of the Israeli government and its people.

This is but one example how certain countries have pronounced the legal rights and wrongs of the Mid-East conflict. European governments, already so eager to distance themselves politically from Israel have fallen lock step in this action with many other nations of the world.

The use of The Fourth Geneva Convention served to validate the Palestinian tactic of using the international community, and the United Nations in particular, as a forum for airing grievances against Israel, rather than resolving such matters through bilateral negotiations and the Oslo peace process. There are other examples of Geneva Convention interpretations being used for political gain. The following example is a common "other point of view" argument employed by Israel's detractors.

"Israel ratified the Fourth Geneva Convention with effect from 6 July 1951. The convention is considered to have been elevated to the status of "customary international law", which means it applies irrespective of whether a State has ratified it. Apart from Israel, the entire international community, has unambiguously accepted the applicability of the Fourth Geneva Convention to those territories captured and occupied by Israel in the 1967 war, which include the West Bank and Gaza."(7).

The authors then move into all of the "violations" of the Fourth Geneva convention by Israel and they do so using technical legal language. This is done not to offer clarity to the reader, rather it is done to impress the reader as well as to confuse the reader. At no time do these authors or others who employ this reporting strategy offer the counter argument still present today: the Geneva convention does not apply to the territories of Gaza and the West Bank. Thousands and thousands of articles have been written with the basic assumption that it is "common knowledge" that the Convention is applicable to these lands and under these documents Israel is in violation of international law. It is curious that the international community does not hold the Palestinians to these same opinions and ignores their daily violations of this same document. For example "by deliberately placing young Arab children in the front of large mobs that advanced menacingly upon Israeli soldiers, Palestinian leaders openly committed major violations of the Law of War. There is, in fact, a precise legal term for these violations, a term that applies equally to the Palestinian tactic of routinely inserting scores of gunmen among the lines of children. This codified crime under humanitarian international law is called "perfidy."(8)

The truth is that even to this day, the applicability of the Fourth Geneva Convention is being argued and challenged. For example, Dore Gold offers "The Fourth Geneva Convention is not applicable in the West Bank and Gaza because previous occupants [Jordan and Egypt] entered those territories illegally in 1948 during the Arab invasion of Israel." Since the Fourth Geneva Convention seeks to protect the sovereign from the occupying military power, and there has not been a recognized sovereign in the territories aside from the Jewish people since 1920, there is no factual basis for its application to the territories (9).

The Fourth Geneva Convention, composed in 1949, is the document, which most addresses the rights and obligations of Occupying Powers. Many argue that the Palestinian Arabs are not citizens of a country that has agreed to the Convention, but it is universally accepted that all of the articles that relate to the treatment of the civilian, non-combatant population still apply.

Former Chief Justice of the Supreme Court Meir Shamgar wrote in the 1970s that there is no de jure applicability of the 1949 Fourth Geneva Convention regarding occupied territories to the case of the West Bank and Gaza Strip since the Convention "is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign." In fact, prior to 1967, Jordan had occupied the West Bank and Egypt had occupied the Gaza Strip; their presence in those territories was the result of their illegal invasion in 1948, in defiance of the UN Security Council. Jordan's 1950 annexation of the West Bank was recognized only by Great Britain (excluding the annexation of Jerusalem) and Pakistan, and rejected by the vast majority of the international community, including the Arab states. At Jordan's insistence, the 1949 Armistice Line, that constituted the Israeli-Jordanian boundary until 1967, was not a recognized international border but only a line separating armies. The Armistice Agreement specifically stated: "no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either Party hereto in the peaceful settlement of the Palestine questions, the provisions of this Agreement being dictated exclusively by military considerations" (8).

Given that some argue that since Palestine is not a state, neither internal conflict nor international conflict applies (those are the only things the four Geneva Conventions apply to). "Some argue that Israel is an occupying power in the West Bank and Gaza. If this is the case, then there are specific laws concerning occupation in the Fourth Geneva Convention and customary international law. Under this convention, Palestinians who are residents of the Occupied Territories are considered protected persons. Protected persons have certain rights and immunities. If they choose to fight, however, they are not entitled to prisoner of war status. They would be subject to the laws or military orders of the occupying power. The debate is endless.

As of this date with respect to the rules of war the Geneva Convention is a multi-faceted set of documents that represent the sum total of humans' thinking. It should be of some interest to note that the US signed all four Geneva Convention agreements, and Congress ratified all but the two amended protocols of 1977. Similarly, Israel has also not signed the additional protocols, and these are not considered customary law. So, using international law neither the US nor Israel has committed "grave breaches" or any other violations. In the years since its adoption,

the Fourth Geneva Convention was convened only to discuss Israel, and never once met to deal with world atrocities including those in Bosnia, Rwanda, Kosovo, Sudan, Congo, and Tibet.

Since 1997, the Arab group at the United Nations has been trying to invoke the Fourth Geneva Convention against Israel, claiming that it applies to settlements in the West Bank and Gaza Strip. Again in February 1999 this group managed to get the General Assembly to adopt a resolution calling for a special UN session in Geneva to examine "persistent violations" by Israel. Although reduced in scope by the United States, a special UN meeting held in Geneva on July 15, 1999 unanimously passed a resolution stating that the Fourth Geneva Convention does apply to Israeli settlements in the "occupied territories." The closed-door meeting lasted a mere 45 minutes.

When the Second Intifada started in September 2000, the Arab group renewed its demand for a full reconvening of the High Contracting Parties. In response, Switzerland (the Depository for the Fourth Geneva Convention with the responsibility to convene meetings), in consultation with other countries, drafted a declaration that was critical of Israel, but was far more moderate than the draft document submitted by the Organization of Islamic Conference. Continuing their political maneuvers on December 5, 2001 (request of Arab states), Switzerland again reconvened a meeting of the High Contracting Parties of the Fourth Geneva Convention to discuss alleged Israeli violations of the Convention in its treatment of the Palestinians in the West Bank and Gaza Strip. The United States, Israel and Australia boycotted the meeting, because, as Israel warned that the meeting would be used "as a blunt tool for political attacks" against Israel. This meeting lasted a mere two hours, the expected result by the assembled parties adopted a resolution censuring Israel for alleged violations of the Fourth Geneva Convention in its treatment of Palestinians in the West Bank and Gaza Strip. Curiously this meeting was held in the shadow of deadly campaign of Palestinian homicide terrorism, which killed at least 25 Israelis. Does this not demonstrate the absurdity of the one-sided focus on alleged Israeli violations?

Actions produce responses and additional actions-there is cause and effect. The reconvening of the High Contracting Parties served to legitimize the Palestinian strategy of using the international community, and the U.N. in particular, as a forum for airing grievances against Israel, rather than resolving such matters through bilateral negotiations. Moreover one can argue that the reconvening of High Contracting Parties to discuss these issues dangerously politicized and violated the spirit of the Geneva Convention and its important humanitarian purpose.

The international hypocrisy over the application of the Fourth Geneva convention needs to be discussed in detail. I will only open this discussion door in this paper. Given that those in the world community of nations have used the document to make political points against Israel, these same countries have also accepted that all of the articles relating to the treatment of the civilian, non-combatant population still apply. For example, did you know that Article 23 – Allows Occupying Powers to limit the free passage of medical and other critical consignments when such materials may give direct or indirect aid to enemy fighting forces? Were you aware that Article 49 – Allows Occupying Powers to transfer, in part or in total, the occupied civilian population when there are “imperative military reasons”? Did you also know that Article 46 – Allows for “restrictive measures” regarding personal property of

civilians? The Fourth Geneva Convention does not define these measures. Perhaps you didn't know that Article 53 – Allows Occupying Powers to destroy personal property where “such destruction is rendered absolutely necessary by military operations.” Based upon this language Israel has the right to its actions; has this information been withheld from the common reader? This information contradicts what you have been led to believe is true. Selective use of the convention's language has been used for years by Israel's enemies. For what purpose? There is no real power behind the charges except the power of public opinion and resultant actions by their nations' government. If you can convince people that Israel is the prime reason for all of the Palestinians problems, then governments can “sell” their anti-Israel policies. In addition, this takes the spotlight off of any Arab country or even Western country with respect to its own internal difficulties. Finally, it once again demonstrates how the Palestinians have been victimized for decades-this resonates well in many of the world's countries. With the help of the media, academia, and international governments this misrepresentation of the truth continues to this day. We all pray that the Second Intifada of physical harm is over; please understand the Intifada of revisionism of history and misrepresentation of facts continues unabated. This helps keep the conflict brewing. Is it not time to change the rhetoric, to sit quietly and seek the truth? We are all truly insane to think things will change if we keep repeating the past and expect different results.

Notes

1. December, 2000 Speech by Emmad El-Faluji, Minister of Communications, PA
2. Understanding Occupation-paper appearing on SPME website, February, 2005
3. From http://en.wikipedia.org/wiki/Laws_of_war
4. www.rotten.com/library/history/war-crimes/geneva-conventions
5. From http://en.wikipedia.org/wiki/Laws_of_war
6. Rabkin, Jeremy. “Lawfare”, The Wall Street Journal. July 13, 2004
7. Richard Kuper and Daniella Jaff-Klein, “Israeli and International Law”, published by Jews for Justice for Palestinians, December, 2004.
8. Beres, Louis Rene, “Israel and Gaza”, Washington Post, May 27, 2004
9. Gold, Dore. FROM "OCCUPIED TERRITORIES" TO "DISPUTED TERRITORIES" No. 470 3 Shvat 5762 / 16 January 2002