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## Palestine's Accession to Geneva Convention III: Typology of Captives Incarcerated by Israel

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### Abstract

Upon the 2014 State of Palestine's accession to Geneva Convention III, captured Palestinians who took part in belligerent acts against the occupier should be treated as prisoners of war due to the fact that they belong to a party to an armed conflict. These individuals fall under three categories: members of security forces, affiliates of armed resistance groups, and uprisers who fight the occupant spontaneously on an individual basis. Contrary to established rules of IHL, Israel does not make any distinction regarding the status of these three types. Unilateral Israeli treatment of its captives does not hold water under international law. Such actions may trigger liability based on international criminal law, particularly as the ICC decided in 2021 that it possesses jurisdiction to investigate crimes occurring in the territory of Palestine. The mere fact of confining prisoners of war after the cessation of hostilities may constitute a ground for criminal prosecution.

**Keywords:** Geneva Convention III; Palestinian prisoners; Israeli occupation; prisoners of war; armed resistance; international humanitarian law

By the end of September 2020, there were 4,184 Palestinians held in Israeli custody.<sup>1</sup> As of July 2021, this figure totaled 4,850, with 80 people serving more than 20 years and 544 undergoing life sentences.<sup>2</sup> These persons have been incarcerated based on the applicable pre-1967 penal and emergency regulations (chiefly British Mandate and Jordanian law) in addition to a series of military orders and other legislation applied by the Israeli military forces in the occupied State of Palestine.<sup>3</sup> Despite being a State Party to both the Geneva

1. "Statistics on Palestinians in the Custody of the Israeli Security Forces" *B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories* (1 April 2021), online: B'Tselem <[https://www.btselem.org/statistics/detainees\\_and\\_prisoners](https://www.btselem.org/statistics/detainees_and_prisoners)>. Since October 2020, the Israel Prison Service has stopped providing B'Tselem with figures on prisoners.

2. "Statistics", *Addameer Prisoner Support and Human Rights Association* (30 July 2021), online: Addameer <<http://addameer.org/statistics/2021/07>>. Numbers go up and down across time as the Israeli army conducts ongoing arrests, while certain persons are released after ending their sentence, and some detainees are acquitted upon interrogation.

3. "Presumed Guilty: Failures of the Israeli Military Court System—An International Law Perspective" *Addameer Prisoner Support and Human Rights Association* (November 2009), online: Addameer <<https://www.addameer.org/sites/default/files/publications/addameer-report-presumed-guilty-nove2009.pdf>> at 6–13.

Convention III relative to the Treatment of Prisoners of War<sup>4</sup> and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War since 6 July 1951,<sup>5</sup> Israel has long denied the applicability of these conventions in the Palestinian territory. Further, Israel is not party to the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts of 8 June 1977,<sup>6</sup> which comprises provisions pertaining to the classification of prisoners during armed conflict or occupation. According to Convention III, persons classified as prisoners of war [POW or POWs] may not be subject to trial and should be released upon cessation of active hostilities.<sup>7</sup> Thus, the status of persons held in Israel's custody could be changed in accordance with the Convention's classification and rights thereof.

Although Palestine acceded to the Geneva Conventions III and IV as well as to Protocol I on 2 April 2014,<sup>8</sup> the Israeli treatment of Palestinians incarcerated at the military occupation facilities continues to remain unchanged. This paper argues that, since the accession of Palestine to the Geneva Conventions and Protocol I, the status of Palestine has been upgraded into a State Party and the classical debates relating to the applicability of Geneva Conventions to Palestinians,<sup>9</sup> particularly the Israeli contentions, have become redundant.

Part I of this paper explores the applicability of Geneva Convention III and Protocol I after Palestine's accession to these instruments. Part II examines, in detail, the typology of Palestinians confined by Israel and their status under the said Convention and Protocol.

## I. Palestine's accession to the Geneva Conventions

Under international humanitarian law [IHL], three key treaties define the status of captured persons in times of war or belligerent occupation: Geneva Conventions III and IV as well as Protocol I. In the light of Palestine's accession to these instruments in 2014, we will compare the applicability of these instruments to Palestine before and after becoming a State Party.

Before the accession of Palestine to the Geneva Conventions and Protocol I, Israel claimed that the West Bank, including East Jerusalem, and the Gaza Strip did not constitute occupied lands. Instead, Israel referred to these regions as "contested territories", arguing that its seizure of the territories resulted from the June 1967 war, whereby the West Bank was under Jordanian rule and Gaza under Egyptian administration. Israel contended that, as Jordanian and Egyptian control was illegitimate,<sup>10</sup> and as the sovereignty over the West Bank and Gaza Strip "remained in abeyance" due to the armistice agreements between Israel and its neighbours (namely Egypt and Jordan),<sup>11</sup> the status of the territories should be settled through negotiations.<sup>12</sup> This argument has already been

4. 75 U.N.T.S. 135 (entered into force 21 October 1950) [*Geneva Convention III or Convention III*].

5. 75 U.N.T.S. 287 (entered into force 21 October 1950) [*Geneva Convention IV or Convention IV*].

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1978) [*Protocol I*].

7. *Geneva Convention III*, *supra* note 4 at art. 118.

8. "Treaties, State Parties and Commentaries—Palestine" *International Committee of the Red Cross*, online: ICRC <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=PS](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS)>.

9. Christopher C. BURRIS, "Re-examining the Prisoner of War Status of PLO Fedayeen" (1997) 22 *North Carolina Journal of International Law and Commercial Regulation* 943.

10. Yehuda Z. BLUM, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (1968) 3 *Israel Law Review* 279; Meir SHAMGAR, "The Observance of International Law in the Administered Territories" (1971) 1 *Israel Yearbook on Human Rights* 262.

11. State of Israel, Office of the Attorney General, "The International Criminal Court's Lack of Jurisdiction Over the So-Called 'Situation in Palestine'" *Ministry of Justice* (20 December 2019), online: Ministry of Justice <<https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf>> at para. 29.

12. Eyal BENVENISTI, *The International Law of Occupation*, 2nd ed. (Oxford: Oxford University Press, 2012) at 201–48.

refuted by the international community through overwhelming positions expressed by the United Nations Security Council [UNSC], General Assembly [UNGA], International Court of Justice [ICJ], Human Rights Council, International Criminal Court [ICC], and the unilateral positions of vast numbers of states,<sup>13</sup> well before Palestine's recent accession to the Geneva Conventions and Protocol I. Yet Israel maintains the same position to this day.<sup>14</sup>

In the *Wall Advisory Opinion*, the ICJ declared:

The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.<sup>15</sup>

This position was reaffirmed on 5 February 2021 through the ICC Pre-Trial Chamber I decision over the territorial jurisdiction in the Situation of Palestine which recognized Gaza, the West Bank, and East Jerusalem as “the occupied Palestinian territories” that compose together the State of Palestine as a Party to the Court.<sup>16</sup>

Despite Israel's “Disengagement Plan” from the Gaza Strip in 2005, Israel has nonetheless continued to occupy it.<sup>17</sup> In the Israeli narrative, the occupation of Gaza ended with Israel's withdrawal in 2005.<sup>18</sup> In the *Al-Bassiouni* case, the Israeli Supreme Court confirmed this position by stating that Israel has no longer effective control over Gaza. It thus ruled that:

[T]he State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip.<sup>19</sup>

13. Security Council Resolutions: *SC Resolution 242*, UN Doc. S/RES/242 (1967), *SC Resolution 338*, UN Doc. S/RES/338 (1973), *SC Resolution 465*, UN Doc. S/RES/465 (1980), *SC Resolution 476*, UN Doc. S/RES/476 (1980), *SC Resolution 478*, UN Doc. S/RES/478 (1980), *SC Resolution 1515*, UN Doc. S/RES/1515 (2003), *SC Resolution 1850*, UN Doc. S/RES/1850 (2008), and *SC Resolution 2334*, UN Doc. S/RES/2334 (2016); General Assembly Resolutions: *GA Resolution 43/176*, UN Doc. A/RES/43/176 (1988), *GA Resolution 58/292*, UN Doc. A/RES/58/292 (2004), and *GA Resolution 66/17*, UN Doc. A/RES/66/17 (2011).

14. State of Israel, Office of the Attorney General, *supra* note 11 at 6–11, 32–3. Victor KATTAN, “A Critical Assessment of the Government of Israel's Memorandum to the ICC—Part I” *EJIL:Talk!* (30 January 2020), online: <https://www.ejiltalk.org/a-critical-assessment-of-the-government-of-israels-memorandum-to-the-icc-part-i/>.

15. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] I.C.J. Rep. 136 at 167, para. 78 [*Wall Advisory Opinion*].

16. *Situation in the State of Palestine*, 5 February 2021, Case No. ICC-01/18-143, Pre-Trial Chamber I at paras. 116–18 [*Situation in the State of Palestine*].

17. Shane DARCY and John REYNOLDS, “An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law” (2010) 15 *Journal of Conflict and Security Law* 211.

18. “Disengaged Occupiers: The Legal Status of Gaza” *Gisha* (January 2007), online: [https://www.gisha.org/UserFiles/File/publications\\_english/Publications\\_and\\_Reports\\_English/Disengaged\\_Occupiers\\_en.pdf](https://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf) at 22–3.

19. *Al-Bassiouni Case (Jaber Al-Bassiouni Ahmed and others v. Prime Minister and Minister of Defense)*, HCJ 9132/07 (30 January 2008), online: ICRC <<https://casebook.icrc.org/case-study/israel-power-cuts-gaza>> at para. 12.

However, the international community still considers Gaza as an occupied region.<sup>20</sup> Indeed, Israel retains military control over Gaza's territorial waters, airspace, entry of persons, supply of products and services such as electricity, fuel, telecommunication, population registry, and collection of export duties.<sup>21</sup> The Israeli army has also reinforced its grip through a terrestrial buffer zone over an area representing approximately seventeen percent within Gaza's imposed borders.<sup>22</sup> According to Article 42 of the customary law Hague Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907 and its Annex (Regulations concerning the Laws and Customs of War on Land), a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army", and "[t]he occupation extends only to the territory where such authority has been established and can be exercised".<sup>23</sup> The end of occupation occurs when the military forces of an occupier cease holding *de facto* control over the concerned region.<sup>24</sup> As Israel retains control over its sea, airspace, and border, Gaza remains therefore an occupied terra.<sup>25</sup>

Prior to its upgrading to a non-member observer state by UN General Assembly Resolution in 67/19 of 29 November 2012, Palestine was viewed in the UN bodies as an "entity", not a "State".<sup>26</sup> This status barred it from accessing most international treaties, including the Geneva Conventions.<sup>27</sup> In 1989, Switzerland, acting as the depository of the said Conventions and their Protocols, did not accept the instrument consigned by the Palestine Liberation Organization [PLO] to join the Conventions.<sup>28</sup> The Swiss Federation argued that it was not in a position to decide whether the letter sent by the Permanent Observer of Palestine to the UN Office at Geneva amounted to an accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".<sup>29</sup> Nonetheless, Switzerland stressed that the PLO's unilateral declaration of the applicability of the four Geneva Conventions and the additional Protocol I remains valid.<sup>30</sup>

At that time, the PLO was considered a national liberation movement under Article 1 (4) of Protocol I that applies to armed conflicts in which people fight against "colonial domination and alien occupation ... in the exercise of their right of self-

20. PLO Negotiations Affairs Department, "The Israeli 'Disengagement' Plan: Gaza Still Occupied" *UN Committee on the Exercise of the Inalienable Rights of the Palestinian People* (September 2005), online: UN <<https://www.un.org/unispal/document/auto-insert-205755/>>.

21. *Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN General Assembly, UN Doc. A/61/470 (2006).

22. Nicholas STEPHANOPOULOS, "Israel's Legal Obligations to Gaza after the Pullout" (2006) 31 *Yale Journal of International Law* 524; Mustafa MARI, "The Israeli Disengagement from the Gaza Strip: An End to Occupation?" (2005) 8 *Yearbook of International Humanitarian Law* 356.

23. 36 Stat. 2277, 1 Bevans 631 (entered into force 26 January 1910) at art. 42 [*The Hague Regulations*].

24. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, by John DUGARD, UN Doc. A/HRC/4/17 (2007).

25. Yoram DINSTEIN, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009) at 276–9.

26. Mutaz M. QAFISHEH, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (Newcastle: Cambridge Scholars Publishing, 2013).

27. John QUIGLEY, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge: Cambridge University Press, 2010).

28. M. Cherif BASSIOUNI, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors" (2008) 98 *Journal of Criminal Law and Criminology* 711 at 749–50, n. 148.

29. Basheer AL-ZOUGHBI, "The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations" in Mutaz M. QAFISHEH, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (Newcastle: Cambridge Scholars Publishing, 2013), 162 at 177–8.

30. Swiss Federal Department of Foreign Affairs, "Note of Information" (1990) 5 *Palestine Yearbook of International Law* 322.

determination”.<sup>31</sup> Although the right of the Palestinians to self-determination had been acknowledged, and even with a recognized body (the PLO) as its representative, the status achieved did not resemble that of states.<sup>32</sup> Since the door was not open to non-state actors to be parties to the Geneva Conventions or the Protocol, the PLO was unable to access them.<sup>33</sup> Further, as a non-member to Protocol I, Israel disputed the Protocol’s extension to national liberation groups,<sup>34</sup> and the customary nature of the said Article 1(4).<sup>35</sup> Israeli assertions have affected the rights of captured Palestinian citizens.<sup>36</sup> By considering them individuals who do not belong to a State Party, nor to a liberation movement, this means that such persons cannot be considered as POWs.<sup>37</sup> Such a contention represents a wider policy toward the application of IHL for the Israeli-Palestinian conflict.<sup>38</sup> Indeed, as M. Cherif Bassiouni observed: “Israel always claims that all forms of violence by Palestinians, even when used in accordance with IHL, are terrorism, and that all of its retaliations, even when in violation of IHL, are justified.”<sup>39</sup> Hence, Israel has already been legally bound by the Geneva Conventions *vis-à-vis* the PLO despite Israel’s argument to the contrary, based on the customary nature of the aforementioned Article 4 as well as the PLO’s declaration to accept the application of the Conventions to the Israeli-Palestinian conflict. In this connection, Article 2(3), common to the four Conventions, provides the basis for the possibility of the Conventions’ application to a non-party “Power”, “if the latter accepts and applies the provisions thereof”. For many commentators, the term “Power” extends to “entities that are not States”.<sup>40</sup> We will not discuss this further as the situation shifted with Palestine’s accession to the Conventions.

Palestine’s status was refined once it was acknowledged as a non-member observer state by the United Nations in 2012.<sup>41</sup> At last, the state could accede to the Geneva Conventions and Protocol I, among dozens of other treaties,<sup>42</sup> pushing the debate on the applicability of Geneva Conventions that preceded that motion to the sidelines.<sup>43</sup> A new discussion may now point out the rights and duties of this newly recognized state.

31. Christopher GREENWOOD, “A Critique of the Additional Protocols to the Geneva Conventions of 1949” in Helen DURHAM and Timothy L.H. MCCORMACK, eds., *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Martinus Nijhoff, 1999), 3 at 3–20.

32. Anis F. KASSIM, “The Palestine Liberation Organization’s Claim to Status: A Juridical Analysis under International Law” (1980) 9 *Denver Journal of International Law and Policy* 1.

33. Noelle HIGGINS, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime: A Study of the South Moluccas and Aceh*, International Humanitarian Law Series vol. 93 (Leiden: Martinus Nijhoff, 2010).

34. *Human Rights in Palestine and Other Occupied Arab Territories*, Report of the United Nations Fact Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48 (23 September 2009) at 72 [*Goldstone Report*].

35. Noelle HIGGINS, “The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements” (2009) 17 *Human Rights Brief* 12 at 13.

36. Eric DAVID, *Principes de droit des conflits armés*, 2nd ed. (Bruxelles: Bruylant, 1999) at 157–9.

37. “The Military Prosecutor v. Omar Mahmud Kassem and Others (Israeli Military Court, Ramallah, 13 April 1969)” (1979) 60 *International Law Studies Series* 771 at 776–7 [*Kassem case*].

38. Ramin MAHNAD, “Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict” (2013) 16 *Yearbook of International Humanitarian Law* 33 at 45.

39. Bassiouni, *supra* note 28 at 781, n. 283.

40. Yves SANDOZ, Christophe SWINARSKI, and Bruno ZIMMERMANN, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague: Martinus Nijhoff, 1987) at 507.

41. John CERONE, “Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State” (2012) 16 *American Society of International Law Insights*, online: ASIL <<https://www.asil.org/insights/volume/16/issue/37/legal-implications-un-general-assembly-vote-accord-palestine-status>>.

42. Shadi SAKRAN and Mika HAYASHI, “Palestine’s Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences” (2017) 25 *Journal of International Cooperation Studies* 81.

43. Yuval SHANY, “More Clarity and/or Ambiguity? The Legal Status of the Palestinian Territories after the Planned Declaration of Independence” in *Palestine’s Application to the United Nations and its Impact on the Protection of Civilians: Conference Report* (Jerusalem: Diakonia IHL Resource Centre, 2011), 11 at 14.

Michael Lynk, the current Special Rapporteur on the Situation of Human Rights in the Palestinian Territories, upon accession to a series of treaties on 2 April 2014, stated that the move “would enhance Palestine’s acquisition of an international legal State personality”.<sup>44</sup> Consequently, Palestine’s new status after its UN statehood recognition and accession to the Geneva Conventions has elevated its legal potential.<sup>45</sup>

Notwithstanding that the relevance of Geneva Convention IV to Israeli-Palestinian conflict attracted substantial attention by international bodies and scholars,<sup>46</sup> Convention III has not been addressed to the same extent. However, it can be demonstrated that Convention III applies to the parties of the conflict just as Convention IV does. In 1969, Security Council Resolution 271 called upon Israel to “observe the provisions of the Geneva Conventions and international law governing military occupation”,<sup>47</sup> without excluding any of the four Conventions. In 2004, the ICJ relied on common Article 2 of the four Conventions when it concluded that Convention IV applies to Palestinian territories.<sup>48</sup> In 2009, a UN mission of inquiry posited the validity of Convention III as it found that Israeli soldier Gilad Shalit, who was then held captive by the Al-Qassam Brigades of Hamas in Gaza, “meets the requirements for prisoner-of-war status under the Third Geneva Convention”.<sup>49</sup> Logically, a convention cannot benefit one side of a given conflict while ignoring its opponent.

Most Geneva Convention III rules “constitute customary law”,<sup>50</sup> as well as Protocol I.<sup>51</sup> Former Special Rapporteur on the Situation of Human Rights in the Palestinian Territories John Dugard stated that “[i]t is at least a tenable argument that Article 1(4) [of Protocol I] reflects customary international law”.<sup>52</sup> State Parties to the Protocol reached 174 by July 2020.<sup>53</sup> The International Committee of the Red Cross [ICRC] and Amnesty International confirm this position,<sup>54</sup> and even the Israeli Supreme Court has accepted that certain Protocol I provisions echo customary law.<sup>55</sup>

44. Michael LYNK, “Palestine’s New Obligations: Treaties and Conventions”, UN Round Table on Legal Aspects of the Question of Palestine Convened by the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 24–25 April 2014.

45. Matthias LANZ, Emilie MAX, and Oliver HOEHNE, “The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the Duty to Ensure Respect for International Humanitarian Law” (2014) 96 *International Review of the Red Cross* 1115 at 1127.

46. Ardi IMSEIS, “On the Fourth Geneva Convention and the Occupied Palestinian Territory” (2003) 44 *Harvard International Law Journal* 66.

47. *SC Resolution 271*, UN Doc. S/RES/271 (1969).

48. *Wall Advisory Opinion*, *supra* note 15 at 173–5.

49. *Goldstone Report*, *supra* note 34 at 284–5.

50. Leslie C. GREEN, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993) at 188; Horst FISCHER, “Protection of Prisoners of War” in Dieter FLECK, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 321 at 325; Howard LEVIE, “Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War” (1997) 7 *United States Air Force Academy Journal of Legal Studies* 37; *Kassem case*, *supra* note 37 at 772, 775.

51. L. Lynn HOGUE, “Identifying Customary International Law of War in Protocol I: A Proposed Restatement” (1990) 13 *Loyola of Los Angeles International and Comparative Law Review* 279 at 303; Waldemar A. SOLF, “Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I” (1986) 1 *American University Journal of International Law and Policy* 117 at 130, 135.

52. *United Nations International Meeting on the Question of Palestine*, The Legal Status of Palestinian Political Prisoners in International Law, by John DUGARD, UN Doc. CPR/IMQP/2012/5 (3–4 April 2012), at 3.

53. “Treaties, State Parties and Commentaries—Protocol I” ICRC, online: ICRC <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470)>.

54. “Israel/Occupied Palestinian Territories: The Conflict in Gaza: A Briefing on Applicable Law, Investigations and Accountability” *Amnesty International* (19 January 2009), online: Amnesty International <<https://www.amnesty.org/en/documents/mde15/007/2009/en/>> [Amnesty International Investigations].

55. *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. Government of Israel* (2006) H.C.J. 769/02, [2006] 2 *Israel Law Reports* 459 at 479 [Targeted Killings case].



Israel refuses to extend Convention III to incarcerated Palestinians, contending that they do not belong to a party of the conflict.<sup>56</sup> Captives, in Israeli eyes, represent “criminals for all purposes”.<sup>57</sup> They are held pursuant to a body of law that Israel chooses.<sup>58</sup> In the *Kassem* case, an Israeli court inferred that the lack of recognition of an armed group by the state precludes the application of Convention III.<sup>59</sup> Yet, on 11 April 2014, the Swiss Federation declared that Palestine had become a High Contracting Party to the Geneva Conventions and Protocol I.<sup>60</sup> This step compels Israel to adjust its treatment of Palestinians.<sup>61</sup> Further, ahead of Palestine’s accession to Convention III, Pulido concluded that “the characterization of certain groups as ‘terrorists’ and ‘unlawful combatants’ is a tool expressly designed to exclude groups from the scope of international law”.<sup>62</sup> Hence, the application of Convention III to individuals locked in Israeli jails can no longer be ignored under IHL.

The binding effect of the Geneva Conventions and Protocol I is no different from the other hundred or so treaties that Palestine has acceded to over the past decade. Treaty law affirms the *de jure* existence of Palestine as a state vis-à-vis other states, at least when it comes to the purpose of each given instrument. UNESCO Conventions, such as the Convention Concerning the Protection of World Cultural and Natural Heritage,<sup>63</sup> to which Palestine became party on 8 December 2011,<sup>64</sup> establish rights and duties for states.<sup>65</sup> Pursuant to its 2015 accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,<sup>66</sup> Palestine communicates with the Convention’s Secretariat.<sup>67</sup> Member States to the Vienna Convention on Diplomatic Relations<sup>68</sup> and the Vienna Convention on Consular Relations<sup>69</sup> have established diplomatic and consular missions in Palestine after it became a party to these two conventions; and the ICJ perceives Palestine as a state in the case relating to US Embassy relocation by receiving its application.<sup>70</sup> The ICC General Assembly of States

56. Abeer BAKER and Anat MATAR, eds., *Threat: Palestinian Political Prisoners in Israel* (London: Pluto Press, 2011) at 141.

57. *Kassem case*, *supra* note 37 at 777.

58. Anne SUCIU and Limor YEHUDA, “Possible Implications of the Recognition of Palestinian Statehood” in *Palestine’s Application to the United Nations and its Impact on the Protection of Civilians: Conference Report* (Jerusalem: Diakonia IHL Resource Centre, 2011), 21 at 32.

59. *Kassem case*, *supra* note 37 at 773, 775; *Batya Arad v. Israel* (2006) HCJ 2967/00, [2000] 54 Knesset 188 at 190.

60. Issa QARAQE, *Opening Remarks*, UN Round Table on Legal Aspects of the Question of Palestine Convened by the Committee on the Exercise of the Inalienable Rights of the Palestinian People, 24–25 April 2014.

61. Higgins, *supra* note 35 at 14.

62. Magdalena PULIDO, “Palestinian Prisoners in Israeli Jails in Light of the Third Geneva Convention: From Jails to Prisoner of War Camps” in Mutaz M. QAFISHEH, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (Newcastle: Cambridge Scholars Publishing, 2013), 268 at 268–9, 288.

63. 1037 U.N.T.S. 151, 11 I.L.M. 1358 (entered into force 17 December 1975).

64. Entered into force for Palestine on 8 March 2012.

65. Larry JOHNSON, “Palestine’s Admission to UNESCO: Consequences within the United Nations” (2011) 40 *Denver Journal of International Law and Policy* 118.

66. 1673 U.N.T.S. 57, 28 I.L.M. 657 (entered into force 5 May 1992); entered into force for Palestine on 2 January 2015.

67. Selma ABDEL-QADER and Tanya L. ROBERTS-DAVIS, “Toxic Occupation: Leveraging the Basel Convention in Palestine” (2018) 47 *Journal of Palestine Studies* 28.

68. 500 U.N.T.S. 95 (entered into force 24 April 1964); enforced in Palestine 2 April 2014.

69. 596 U.N.T.S. 261 (entered into force 19 March 1967); enforced in Palestine 2 April 2014.

70. Basheer ALZOUGHBI, “The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): A Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine’s Application” (2019) 4 *University of Bologna Law Review* 114; Jean GALBRAITH, “Palestine Brings a Case against the United States in the International Court of Justice at a Fraught Time for U.S.-Palestine Relations” (2019) 113 *American Journal of International Law* 143.

Parties, as well as the Court itself, deal with Palestine as “a State Party to the [Rome] Statute”.<sup>71</sup> Palestine has been particularly accepted as a state in the recent practice of UN human rights bodies after accession to core conventions.<sup>72</sup> Treaty bodies have requested Palestine to undertake actions arising from its obligations, and state reports were received by at least four UN committees: the Committee on the Elimination of All Forms of Discrimination against Women [CEDAW],<sup>73</sup> the Committee on the Elimination of All Forms of Racial Discrimination [CERD],<sup>74</sup> the Committee on the Rights of the Child,<sup>75</sup> and the Committee on the Rights of Persons with Disabilities.<sup>76</sup> Two committees have discussed Palestine’s reports and issued concluding observations, demanding adherence to certain stipulations:<sup>77</sup> CEDAW in 2018,<sup>78</sup> and CERD in 2019.<sup>79</sup>

Palestine was admitted as a party on 10 April 2019 to the individual complaints mechanisms after acceding to the Optional Protocol to the Convention on the Rights of the Child,<sup>80</sup> the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,<sup>81</sup> and the Optional Protocol to the Convention of Persons with Disabilities.<sup>82</sup> Accordingly, individuals who claim rights infringements under the relevant conventions may complain against the offending state.<sup>83</sup> As it bears duties arising from these treaties, Palestine may also benefit from the rights regulated thereunder; including the rights set forth in Convention III with regard to persons held by Israeli captors. In sum, Convention III, as well as Convention IV and Protocol I, applies in the context of Palestinian-Israeli conflict, like other treaties.

Incarcerated persons holding Palestinian citizenship should be treated as individuals belonging to a State Party to the conflict under Geneva Conventions III and IV, as well as Protocol I.<sup>84</sup> States view permanent inhabitants of the West Bank and Gaza as Palestinian citizens;<sup>85</sup> diplomatic missions issue entry visas on Palestinian passports; citizens’ rights are legally upheld within Palestine’s sphere; citizens vote in legislative

71. *Situation in the State of Palestine*, supra note 16 at 60; ICC Bureau of the Assembly of States Parties, “First Meeting” ICC (18 February 2021), online: ICC <[https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP20/Bureau01.agenda%20and%20decisions%20-%20ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Bureau01.agenda%20and%20decisions%20-%20ENG.pdf)> at 1, n. 2: re-election of Palestine as a member State of the ICC Bureau.

72. Mutaz M. QAFISHEH and Osayd AWAUDA, “The Implementation of Human Rights Conventions at the National Level: The Case of Palestine” (2020) 9 *International Review of Law* 11.

73. *Consideration of Reports Submitted by States Parties under Article 18 of the Convention Pursuant to the Simplified Reporting Procedure, Initial Reports of States Parties due in 2015: State of Palestine*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/PSE/1 (2017).

74. *Initial and Second Periodic Reports Submitted by the State of Palestine under Article 9 of the Convention, due in 2017*, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/PSE/1-2 (2018).

75. *Initial Report Submitted by the State of Palestine under Article 44 of the Convention, due in 2016*, Committee on the Rights of the Child, UN Doc. CRC/C/PSE/1 (2019).

76. *Initial Report Submitted by the State of Palestine under Article 35 of the Convention, due in 2016*, Committee on the Rights of Persons with Disabilities, UN Doc. CRPD/C/PSE/1 (2019).

77. Michael O’FLAHERTY, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 *Human Rights Law Review* 27.

78. *Concluding Observations on the Initial Report of the State of Palestine*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/PSE/CO/1 (2018).

79. *Concluding Observations on the Combined Initial and Second Periodic Reports of the State of Palestine*, Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/PSE/CO/1-2 (2019).

80. UN Doc. A/RES/66/138 (entered into force 14 April 2014); enforced in Palestine 10 April 2019.

81. 2131 U.N.T.S. 83 (entered into force 22 December 2000); enforced in Palestine 10 April 2019.

82. 2518 U.N.T.S. 283 (entered into force 3 May 2008); enforced in Palestine 10 April 2019.

83. Markus G. SCHMIDT, “Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform” (1992) 41 *International and Comparative Law Quarterly* 645.

84. Bartram BROWN, “Nationality and Internationality in International Humanitarian Law” (1998) 34 *Stanford Journal of International Law* 347.

85. Fateh AZZAM, “Palestinian (Non)Citizenship” (2019) 73 *The Middle East Journal* 573.



elections and municipal councils,<sup>86</sup> hold public office,<sup>87</sup> become ministers or judges,<sup>88</sup> own real estate,<sup>89</sup> join professional unions,<sup>90</sup> have unrestricted right to work,<sup>91</sup> and form political parties and establish professional associations,<sup>92</sup> and Palestine exercises diplomatic protection for its citizens abroad.<sup>93</sup> Palestinians may be considered by states and international organizations as citizens for diverse purposes, for instance in cases involving private international law disputes,<sup>94</sup> refugee status determination,<sup>95</sup> and appointment in global institutions.<sup>96</sup> Thus, the status of some five million residents of the West Bank and the Gaza Strip is akin to the citizens of sovereign states.<sup>97</sup> Palestinian citizens who are confined by Israeli forces, who fall within the classification determined in Convention III, should be treated as POWs on the same footing as citizens of State Parties to the Geneva Conventions and Protocol I.<sup>98</sup>

Besides the application of Geneva Convention IV that has been repeatedly reaffirmed, as shown above, the applicability of Convention III is manifested in the words of Article 2, common to the four Conventions. The relevant part of this Article provides that “[t]he Convention shall ... apply to all cases of partial or total occupation of the territory of a High Contracting Party”. As the State of Palestine is a High Contracting Party, and as its spatial landscape remains under occupation, there is no question regarding the applicability of Convention III to Palestinian POWs of various categories. The question should be rather diverted toward how Convention III applies, as the next typology illustrates.

## II. Typology of incarcerated Palestinians

Geneva Conventions III and IV, as well as Protocol I, set out the conditions for people who fall into the hands of an adversary in an armed conflict.<sup>99</sup> Such people are classified as either combatants, i.e. “prisoners of war”, or non-combatants and therefore incarcerated as civilians or “internees”. Specific rights and privileges are assigned to each category.

86. Decree Law No. 1 of 2 September 2007 Concerning General Elections, Palestine Gazette (P.G.) No. 72, 9 September 2007, at 2, art. 27; Election of Local Councils Law No. 10 of 15 August 2005, P.G. No. 57, 18 August 2005, 79, art. 7.

87. Civil Service Law No. 4 of 28 May 1998, P.G. No. 24, 1 July 1998, at 20, art. 24.

88. Judicial Authority Law No. 1 of 14 May 2002, P.G. No. 38, 5 September 2001, at 279, art. 16.

89. Law on Lease and Sale of Immovable Property by Foreigners No. 40 of 27 January 1953, Jordan Gazette No. 1134, 16 February 1953, at 558, art. 3.

90. Legal Profession Law No. 3 of 24 January 1999, P.G. No. 30, 10 October 1999, at 5, art. 3.

91. Labour Law No. 7 of 30 April 2000, P.G. No. 39, 25 November 2001, at 7, art. 14.

92. Associations Law No. 1 of 16 January of 2000, P.G. No. 32, 29 February 2000, at 71, art. 1.

93. Palestine has reached bilateral agreements with various states on different matters, including trade, agriculture, communications, education, health, gas, migration, security, etc.

94. Amin DAWWAS, *Conflict of Laws in Palestine* (Amman: Shorok Press, 2001).

95. Mutaz M. QAFISHEH and Francesca ALBANESE, “Article 1D” in Andreas ZIMMERMANN and Terje EINARSEN, eds., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2022, forthcoming).

96. After becoming a party on 2 April 2014 to the Convention on the Rights of the Child of 20 November 1989 (1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990)), Palestine can nominate its citizens as members to the UN Committee on the Rights of the Child in accordance with art. 43(2).

97. Mutaz M. QAFISHEH, “Who Has the Right to Become a Palestinian Citizen? An International Law Analysis” (2017) 18 Yearbook of Islamic and Middle Eastern Law 112 at 115–36.

98. Ka Ho TSE, “The Relevancy of Nationality to the Right to Prisoner of War Status” (2009) 8 Chinese Journal of International Law 395 at 397.

99. Delbert D. SMITH, “The Geneva Prisoner of War Convention: An Appraisal” (1967) 42 New York University Law Review 880; Donald E. HACKER, “The Application of Prisoner-of-War Status to Guerrillas Under the First Protocol Additional to the Geneva Conventions of 1949” (1978) 2 Boston College International and Comparative Law Review 131.

Through its 2002 Incarceration of Unlawful Combatants Law,<sup>100</sup> Israel has created a third type that it has named “unlawful combatants” with a view to exclude captured Palestinians from the scope of POW and permit prolonged incarceration with reduced guarantees.<sup>101</sup> In the 2006 *Targeted Killings* case, a court summarized the official position of the Israeli government as follows:

The terrorists and their organizations, against which the State of Israel is conducting an armed conflict of an international character, are not included in the category of combatants. They do not belong to the armed forces nor are they included among the units that are given a status similar to that of combatants by customary international law. Indeed, the terrorists and the organizations that send them are unlawful combatants. They do not enjoy the status of prisoners of war. It is permitted to bring them to trial for their participation in the hostilities, to try them and sentence them.<sup>102</sup>

During the 2014 war on Gaza, for example, Israeli forces captured thirteen persons who were held “under temporary detention instructions issued pursuant to the Incarceration of Unlawful Combatants Law”.<sup>103</sup> This typical Israeli standing runs counter to established foundations of international legal rules. IHL does not recognize the categories of “terrorist” or “unlawful combatant”. Such a classification has been described as a tool expressly designed to exclude groups from the scope of international law, tailoring it to meet political interest for one side of a conflict.<sup>104</sup>

With the view that the State of Palestine has become a party to Conventions III and IV, besides Protocol I, this section will explore the changes in status of the four categories of Palestinians held by Israel in accordance with IHL in the light of Palestine’s accession to said Convention. The four categories of confined Palestinians are: (A) members of security forces, (B) affiliates of organized resistance movements, (C) *levée en masse*, and (D) civilians who politically oppose occupation without taking part in hostilities.

### A. Security officers

Israeli authorities frequently arrest individuals affiliated with Palestinian security forces under various pretexts, such as possessing “illegal” weapons or carrying out acts of resistance. Currently, there are reportedly about 450 affiliates of Palestinian security agencies held behind Israeli bars.<sup>105</sup> Article 4(A)(1) of Geneva Convention III considers POWs “[m]embers of the armed forces of a Party to the conflict”. Israel did not treat such persons as

100. “Incarceration of Unlawful Combatants Law, 5762-2002” (2002) 32 *Israel Yearbook on Human Rights* 389.

101. Pulido, *supra* note 62 at 270.

102. *Targeted Killings case*, *supra* note 55 at 486.

103. State of Israel, “The 2014 Gaza Conflict (7 July–26 August): Factual and Legal Aspects” *Israel Ministry of Foreign Affairs* (May 2015), online: Israel MFA <<https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>> at 195, para. 365.

104. Valentina AZAROVA, “Exploiting a ‘Dynamic’ Interpretation? The Israeli High Court of Justice Accepts the Legality of Israel’s Quarrying Activities in the Occupied Palestinian Territory” *EJIL:Talk!* (7 February 2012), online: *EJIL:Talk!* <<https://www.ejiltalk.org/exploiting-a-dynamic-interpretation-the-israeli-high-court-of-justice-accepts-the-legality-of-israels-quarrying-activities-in-the-occupied-palestinian-territory/>>.

105. Interview with Mr Hasan ABEDRABOUH, Spokesperson of the Commission of Detainees and Ex-Detainees Affairs in Jerusalem. Interview was conducted by Ms Najlaa SHRITEH as part of her graduation research project at Hebron University Law School (Hebron, Palestine, 19 April 2021). There were 723 Palestinian security officers held by Israel as of 2012. Issa QARAQE, *Prisoners of National Security Forces: Israeli Flagrant Violation of International Law and Signed Treaties* (29 January 2012), online: *Alwatanvoice*. See also “Israel Arrests 2 PA Intel[ligence] Officers, 2 Others for Illegal Arms Production, Dealing” *The Jerusalem Post* (11 July 2016), online: *The Jerusalem*

POWs before Palestine's accession to Convention III as they, in Israel's eyes, did not belong to "a Party to the conflict". However, two months after the Convention entered into force for Palestine,<sup>106</sup> former Legal Adviser of Israeli Ministry of Foreign Affairs Robbie Sabel stated that Palestine's accession could support a claim, against Israel's desire, that any Palestinian officer captured by the Israeli army would be entitled to POW status.<sup>107</sup> Hence, a new status of incarcerated security personnel can be legally reaffirmed.

Under IHL, members of regular armed forces possess POW status upon capture. This status continues regardless of whether the occupier recognizes the government to which the officers are affiliated. Article 4(A)(3) of Convention III prescribes that captives benefit from POW status if they are "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power". More explicitly, Article 43(1) of Protocol I acknowledges as POWs:

[A]rmed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Thus, Convention III does not embrace precise requirements on members of a state's armed forces to be considered as POWs. According to the ICRC Commentary on Geneva Convention III, the drafters of the Convention contemplated that each state should take steps "so that members of its armed forces can be immediately recognized".<sup>108</sup> The captured members of a state's armed forces can prove their status just by presenting the military identification provided to them by their state.<sup>109</sup>

To give clarity to Convention III requirements, as protocols of international treaties are meant to do, Article 43 of Protocol I provides that armed forces must be subjected to an internal system that ensures commitment to international law during armed conflicts. Article 44(3) of the Protocol adds that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". To benefit from POW treatment, therefore, captured security officers should meet four conditions: be part of regular forces, be under a responsible command, be subject to an internal disciplinary system, and be distinguished from the civilian population. Such stipulations are normally found in the domestic laws of various states. Hence, it is imperative to look at the applicable law in Palestine pertaining to security agencies to assess the existence of the aforesaid terms for officers captured by Israeli military.<sup>110</sup>

The current formation of security agencies in Palestine (the West Bank and the Gaza Strip) commenced with the emergence of the Palestinian Authority [PA] in 1994–95 as

Post <<https://www.jpost.com/arab-israeli-conflict/israel-arrests-2-pa-intel-officers-2-others-for-illegal-arms-production-dealing-460055>>.

106. The Convention took effect in Palestine on 2 November 2014 (art. 140).

107. Yonah J. BOB, "Legal Impact of Geneva Panel on Settlements, ICC Likely Only Symbolic" *The Jerusalem Post* (17 December 2014), online: *The Jerusalem Post* <<https://www.jpost.com/israel-news/politics-and-diplomacy/analysis-legal-impact-of-geneva-panel-on-settlements-icc-likely-only-symbolic-384894>>.

108. Jean PICTET, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960) at 52.

109. *Ibid.*

110. Mu'in BARGHOUTH and Rashad TWAM, *The Palestine Liberation Organization's Legal System: The Legislation of the Security and Revolutionary Judiciary* (Birzeit: Institute of Law, 2010).

part of the PLO-Israel interim self-rule peace agreement, commonly known as the “Oslo Accords”.<sup>111</sup> Annex 1 of the Oslo Accords provided the basis for the police forces to act towards maintenance of law and order in the PA areas. Article II(1.a) states that “[t]he Palestinian Police is the only Palestinian security authority”.

The PA incorporated in the scope of “police” enshrined in the Oslo Accords various security agencies as the PA inherited the PLO security legacy. After Oslo, thousands of former PLO fighters returned home.<sup>112</sup> They belonged to diverse factions, with different banners and command chains, such as “Palestinian Liberation Army”, “Special Forces”, “Intelligence”, and “Presidential Guards”. Facing the reality of running the daily lives of Palestinians under its self-rule, the PA at the same time started building state institutions: administrating courts, ministries, prisons, and confronting crimes, while simultaneously absorbing the civilians who were part of resistance movements. That led to the creation of fresh security structures, including “Civil Defence”, “Prison Police”, and “Preventive Security”. Those who were operating from Arab states as part of the Palestinian Liberation Army were reorganized under the agency of “National Security”, which was envisaged to function as the state’s army. In reality, multiple security agencies were founded.<sup>113</sup>

With the outbreak of the second Palestinian uprising (*Intifada*) that led to lawlessness and chaos, a reformation process had begun afresh to rebuild state security institutions.<sup>114</sup> The PA adopted a Basic Law in 2002, which was modified in the Amended Basic Law of 18 March 2003.<sup>115</sup> This law functioned as the constitution of Palestine in the transitional period. With regard to the security establishment, Article 84 of the 2003 Basic Law stipulates:

1. The Security Forces and the Police are regular forces. They are the armed forces in the country. Their functions are confined to defending the country, serving the people, protecting society and maintaining public order, security and public morals. They shall perform their duties within the limits prescribed by law, with complete respect for rights and freedoms.
2. The law shall regulate the status of Security Forces and the Police.

The PA then enacted a series of legislative acts pertinent to the security forces. Examples of such pieces of legislation include: the Law of Insurance and Pensions of the Palestinian Security Forces No. 16 of 28 December 2004,<sup>116</sup> the Law of Service in the Palestinian Security Forces No. 8 of 4 June 2005,<sup>117</sup> the General Intelligence Law No. 17 of 26 October 2005,<sup>118</sup> and the Decree-Law Concerning the Preventive Security of 20 November 2007.<sup>119</sup> A number of executive orders were simultaneously endorsed to further regulate and strengthen the system, such as the Decision of the Council of Ministers No.

111. Roland FRIEDRICH, Arnold LUETHOLD, and Firas MILHEM, eds., *The Security Sector Legislation of the Palestinian National Authority* (Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2008) at 17–27.

112. Mutaz M. QAFISHEH, “Citizens of the State of Palestine and the Future of Palestinian Refugees: Legal and Political Scenarios” in Mutaz M. QAFISHEH, ed., *Palestine Membership in the United Nations: Legal and Practical Implications* (Newcastle: Cambridge Scholars Publishing, 2013), 45 at 56.

113. Mutaz M. QAFISHEH, “Human Rights at the Time of Transition: How Security Forces Can be Held Accountable in a Divided Community?” (2020) 25 *Journal of Conflict and Security Law* 171.

114. Alaa TARTIR, “The Evolution and Reform of Palestinian Security Forces 1993–2013” (2015) 4 *Stability: International Journal of Security and Development* 46.

115. P.G. Extraordinary Issue (19 March 2003) at 5.

116. P.G. No. 53 (28 February 2005) at 94.

117. P.G. No. 56 (28 June 2005) at 4.

118. P.G. No. 60 (9 November 2005) at 84.

119. P.G. No. 74 (9 June 2007) at 6.

100 of 3 August 2004 Concerning the Formation of Permanent Ministerial Committee on Security Affairs,<sup>120</sup> and the Presidential Decree No. 26 of 28 October 2005 Concerning the Re-Formation of the National Security Council.<sup>121</sup>

These enactments, particularly the aforementioned 2005 Law of Service in Security Forces, unified security agencies under three major bodies: “Internal Security”, “General Intelligence”, and “National Security”. Other agencies had to be placed, legally or administratively, under one of these three agencies. The “Internal Security” agency, for instance, incorporated three bodies: “the Police”, “Preventive Security”, and “Civil Defence”. “Presidential Guards” and “Customs Police” became part of “National Security”. The “Naval Force” was annexed to “General Intelligence”. The Minister of Interior was designated to command all agencies. In effect, however, separate ministerial portfolios were created for each of the three major agencies. A number of sub-agencies maintained reporting ties with President Abbas, particularly the Police Commander and the Head of Preventive Security.<sup>122</sup> It appears that this direct reporting line derived its basis from Article 39 of the Amended Basic Law: “The President of the National Authority is the Commander-in-Chief of the Palestinian Forces.”

In the Gaza Strip, months after the political wing of Hamas won the legislative elections in January 2006, the then Palestinian Minister of Interior, affiliated with Hamas, announced the formation of an “Executive Force” as a new security agency composed of 3,000 recruits from various armed groups,<sup>123</sup> invoking a constitutional power to do so.<sup>124</sup> In June 2007, Hamas took over control of Gaza and set up its own *de facto* government.<sup>125</sup> Over 30,000 PA security officers were instructed by the Fatah-led PA in Ramallah not to co-operate with Gaza’s authorities and to stay home. In October 2007, the Executive Force was merged with the previous PA’s police.<sup>126</sup> Hamas maintained the same structure of security forces as functioned before 2007, while renaming “Preventive Security” as “Internal Security”. Hamas ceased to apply post-takeover law promulgated by the PA. Rather, it crafted its own legislation by its leaders or through the Gaza branch of parliament.<sup>127</sup> In the reconciliation agreements that took place in subsequent years between Fatah and Hamas, it was in principle agreed to reunify the security services in both the West Bank and Gaza.<sup>128</sup> In its final report in 2019, the UN Commission of inquiry on the protests in the Occupied Palestinian Territory considered Hamas “to be obliged to respect, protect and fulfill human rights in light of its government-like functions in Gaza”.<sup>129</sup>

120. P.G. No. 52 (18 January 2005) at 234.

121. P.G. No. 63 (27 April 2006) at 110.

122. Roland FRIEDRICH and Arnold LUETHOLD, eds., *Entry-Points to Palestinian Security Sector Reform* (Geneva: DCAF, 2007).

123. Adam HOROWITZ, Lizzy RATNER, and Philip WEISS, eds., *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict* (New York: Nation Books, 2011) at 77.

124. Francesco CAVATORTA and Robert ELGIE, “The Impact of Semi-Presidentialism on Governance in the Palestinian Authority” (2010) 63 *Parliamentary Affairs* 22 at 35.

125. Daniel BYMAN, “How to Handle Hamas: The Perils of Ignoring Gaza’s Leadership” (2010) 89 *Foreign Affairs* 45.

126. Horowitz et al., *supra* note 123 at 77.

127. Adnan HAJJAR, “Legislation Adopted by the Palestinian Legislative Council in Gaza 2006–2014”, in Muwatin (The Palestinian Institute for the Study of Democracy), ed., *Legislation at the Time of Internal Division: Studies on the Legislation Enacted Since 2007* (Ramallah: Muwatin, 2016), at 114–91.

128. See e.g. “National Accord Agreement” (Cairo, 4 May 2011), Item III, in: The Palestinian National Liberation Movement (Fatah)—the National Relations Commission, online: [fatehwatan](http://fatehwatan.com). This clause has been affirmed in subsequent agreements, the last of which was in October 2017. See Full-text of the Fatah-Hamas Agreement to end the division (2017), Palestinian Information Centre, online: [palinfo](http://palinfo.com).

129. *Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, Human Rights Council, UN Doc. A/HRC/40/CRP.2, 18 March 2019 at 224.

Under IHL, for regular armed forces, “membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment”.<sup>130</sup> According to an ICRC commentary: “[t]he requirements for membership in the armed forces are not prescribed in international law. Rather, it is a matter of domestic regulation.”<sup>131</sup> This examination reveals that the term “members of the security forces” comprises security personnel in the West Bank and Gaza, as long as officers are recruited according to the local law. If any *de jure* or *de facto* authority forms a governmental apparatus, then officers of its forces should be treated as POWs in the event of arrest. It is not for the detaining power to determine who belongs to Palestinian security forces, but it is for domestic law to provide such determination, regardless of Israel’s position.

Palestinian security forces have developed a hierarchy, chain of command, and internal disciplinary system. Palestine repeatedly reaffirmed its respect for IHL as reflected in the 2003 Amended Basic Law,<sup>132</sup> formal instructions to security forces,<sup>133</sup> and its recent accession to the 1907 Hague Regulations,<sup>134</sup> the Geneva Conventions, and Protocol I. Members of Palestinian security agencies wear uniforms.<sup>135</sup> Judicial and administrative accountability mechanisms to ensure respect for human rights law and humanitarian law have been set up.<sup>136</sup> Even so, strict adherence to such rules is not required for confined persons to qualify as POWs. Article 44(2) of Protocol I indicates that, even if combatants do not follow the rules of international law applicable in armed conflict, “violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war”. This provision is meant to prevent “any attempt to deny prisoner of war status to members of independent or regular armed forces on the allegation that their force does not enforce some provision of customary or conventional law of armed conflict”.<sup>137</sup>

According to Article 4(4) of the Protocol, a combatant who fails to meet the requirement of distinction “shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war”. Israeli non-recognition of certain individuals’ affiliation with security forces and the method of their operations should not deny such individuals POW status,<sup>138</sup> or, at the very least, such individuals should be given protection equivalent to POWs, as the case may be. In *State of Israel v. Marwan Barghouti* (2002), the District Court of Tel Aviv and Jaffa decided that:

130. Nils MELZER, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2010) at 25.

131. “Updated Commentary on the Third Geneva Convention of 1949” ICRC (2020), online: ICRC <<https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>> at para. 977 [Updated Commentary on Convention III].

132. Arts. 10–16.

133. Qafisheh, *supra* note 113 at 189–90.

134. Palestine acceded to the Hague Regulations on 2 April 2014; “Treaties, State Parties and Commentaries—Palestine” ICRC, online: ICRC <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=PS](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS)>.

135. Uniforms of security forces are regulated in various pieces of legislation, for example: Law of Service in the Palestinian Security Forces of 2005, *supra* note 117, art. 120; Decree Law No. 23 of 26 December 2017 Concerning Police, P.G. Extraordinary Issue No. 15 (31 December 2017) at 4, art. 43; Decree-Law No. 2 of 15 January 2018 Concerning the Judicial Structure of Security Forces, P.G. No. 140 (13 February 2018) at 7, art. 36.

136. Qafisheh, *supra* note 113 at 185–9.

137. Michael BOTHE, Karl J. PARTSCH, and Waldemar A. SOLF, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982) at 272.

138. Baker and Matar, *supra* note 56 at 156–7.



[T]he Defendant's method of combat is, in the clearest possible manner, contrary to the most basic rules of law, and accordingly he is not entitled to enjoy the protections afforded under international law to combatants who act in accordance with the rules of war.<sup>139</sup>

Such Israeli determination manifestly contradicts established rules of IHL.<sup>140</sup>

Thus, Palestinian officers confined by the Israeli army meet POW status under IHL and the detaining power is bound to treat them as such.

### **B. Resistance organizations**

Four decades prior to the Geneva Conventions, Article 1 of the 1907 Hague Regulations recognized that the "laws, rights, and duties of war apply ... to militia and volunteer corps". Affiliates of such units may legitimately resist the occupant as combatants.<sup>141</sup> Thus, when captured, members of such groups are considered as POWs whose rights are regulated in Articles 4–20 of the Regulations. Geneva Convention III embraced a similar provision in Article 4(A)(2), where it confers POW status on "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict" who have fallen into the hands of an adverse party. Similar to the Hague Regulations, this provision sets out four conditions for such corps to acquire a belligerent status and, therefore, be treated as POWs: having a leadership commanded by a person responsible for his subordinate; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. We will first review the definition of "organized resistance movements, belonging to a party to the conflict". Then we will analyze the conditions under which a member of resistance corps may qualify as POWs in accordance with Convention III and Protocol I.<sup>142</sup> Against this backdrop, we will assess whether these conditions apply to Palestinian fighters.

The word "other" in Article 4(A)(2) of Convention III distinguishes resistance movements from corps affiliated with armed forces. Such groups operate independently and are said to:

[R]ecruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.<sup>143</sup>

For its members to be considered POWs, a liberation movement must belong to a party of the conflict. According to an ICRC interpretation:

[I]n order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct[s] hostilities on behalf and with the agreement

139. Criminal Case No. 092134/02 (12 December 2002).

140. Awol ALLO, "Marwan Barghouti in Tel Aviv: Occupation, Terrorism, and Resistance in the Courtroom" (2017) 26 *Social and Legal Studies* 47.

141. George H. ALDRICH, "Guerrilla Combatants and Prisoner of War Status" (1982) 31 *American University Law Review* 871.

142. Maria J. STEPHAN, "Fighting for Statehood: The Role of Civilian-Based Resistance in the East Timorese, Palestinian, and Kosovo Albanian Self-Determination Movements" (2006) 30 *The Fletcher Forum of World Affairs* 57.

143. Melzer, *supra* note 130 at 32.

of that party. Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict.<sup>144</sup>

This *de facto* relationship can be visualized by tacit agreement, “if the operations are such as to indicate clearly for which side the resistance organization is fighting”.<sup>145</sup>

It is possible to deduce from the foregoing that the vast majority of affiliates of Palestinian resistance organizations, while formally separate from security forces, fight on behalf of a party to the conflict against the occupation. This includes the Al-Aqsa Martyrs Brigades, which is a military offshoot of Fatah, and the Al-Qassam Martyr Brigades, the military wing of Hamas, along with other factions. Fatah and Hamas constitute the main parties of the PA branches operating in Ramallah and Gaza, respectively, as elaborated above. It is believed that most Palestinian prisoners in Israeli jails belong to resistance groups.<sup>146</sup>

Resistance movements form part of the State of Palestine, or a party to the conflict under Convention III, for the purpose of POW status determination. Articles 10 and 11 of the rules of attribution to a new state developed by the International Law Commission establish the norm whereby insurgents’ conduct is attributable to a state, in accordance with the principle of continuity between the national liberation movement and the new state, and acknowledgment of the movement by the state.<sup>147</sup> Thus, “it may become difficult to continue to deny combatant status to such forces, or to refuse to treat captured members thereof as prisoners of war”.<sup>148</sup> Particularly after the 2012 recognition of Palestine as a state by the United Nations and Palestine’s accession to the Geneva Conventions in 2014, as Dugard aptly put it: “the situation [of those incarcerated by Israel will] change, and Palestinian resistance fighters [will] be entitled to POW status under the 1949 Convention [III].”<sup>149</sup>

However, in 2006 the Israeli High Court of Justice ruled that

[A] civilian who joins a terrorist organization ... and within the framework of his position in that organization he carries out a series of hostilities, with short interruptions between them for resting, loses his immunity against being attacked.<sup>150</sup>

The Court did not consider the civilian “who joins a terrorist organization” as a combatant, which means he will not be granted POW status in the case where he falls into enemy hands. This position runs counter to the IHL rules. According to the ICRC, members of an organized armed groups are civilians who are involved with the organization and assume a “continuous combat function”.<sup>151</sup> This concept of a “continuous combat function” has

144. *Ibid.*, at 23.

145. Pictet, *supra* note 108 at 67.

146. Precise statistics on this category are lacking; Abedrabouh, *supra* note 105. Shadi ALSHDAIFAT and Sanford R. SILVERBURG, “Islamic Hamas and Secular Fatah: How Does the Governing Process Work?” (2015) 2 Indonesian Journal of International and Comparative Law 583.

147. International Law Commission, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Report of the International Law Commission on the Work of Its 53rd Session* (2001).

148. Leslie C. GREEN, “Terrorism and Armed Conflict: The Plea and the Verdict” (1989) 19 Israel Yearbook on Human Rights 131 at 135.

149. Dugard, *supra* note 52 at 3.

150. *Targeted Killings case*, *supra* note 55 at 499–500.

151. Melzer, *supra* note 130 at 33–4.

been confirmed in the discussions of expert groups.<sup>152</sup> In any case, the above Israeli court decision, which represents the official position of Israel, was expressed before the accession of Palestine to Convention III, and should be altered thereafter.

Let us turn to the Convention's four requirements for members of organized movements to gain POW status and assess who these requirements apply to Palestinians.

### *1. Possessing leadership*

The condition for a resistance movement "being commanded by a person responsible for his subordinates" presupposes the existence of structured leadership for such a group. Indeed:

Only when such a structure exists can the leaders train the members of the group, give clear orders and instructions, be informed of the actions of subordinates and react promptly to them. A chain of command and a reporting system are thus necessary if the leadership is to be informed about violations, trace the role played by individuals in committing a crime and take appropriate measures.<sup>153</sup>

In the context of Palestine, armed resistance factions have their own known leadership. Group commanders discipline subordinate individuals. As indicated by the former UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory: "many combatants meet the requirements ... that they be members of an organized force, under a responsible command structure."<sup>154</sup> In particular, leaders of the largest factions, Fatah and Hamas, function publicly. Fatah forms an essential part of the PLO and has a hierarchy system, so it is subject to a person responsible for his members.<sup>155</sup> Hamas, on the other hand, possesses a political bureau and an announced commander of its military wing.<sup>156</sup>

Since at least 11 July 1979, various PLO factions have been subjected to a set of laws developed in the diaspora which has been brought to Palestine after the formation of the PA in 1994 and is still enforced.<sup>157</sup> These laws, often called "military law" or "revolutionary legislation", consist of: (1) Penal Law, (2) Penal Procedures Law, (3) Formation of Military Courts Law, and (4) Correction Centers (Prisons) Law.<sup>158</sup> The laws sanction any operative who commits a range of crimes that might occur during armed resistance. These laws have become part of the law of the West Bank and Gaza legal system that applies to groups who take part in acts of resistance, along with members of security

152. Kenneth WATKIN, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance" (2010) 42 *New York University Journal of International Law and Politics* 641 at 655.

153. Anne-Marie LA ROSA and Carolin WUERZNER, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law" (2008) 90 *International Review of the Red Cross* 327 at 329.

154. Dugard, *supra* note 52 at 3.

155. "General Political Program of Fatah Movement" (2009) 20 *Journal of Palestine Studies* 108 (in Arabic).

156. Sudarsan RAGHAVAN, "Mohammed Deif, the Shadowy Figure Who Heads Hamas's Military Wing" *The Washington Post* (2 August 2014), online: [https://www.washingtonpost.com/world/middle-east/mohammed-deif-the-shadowy-figure-who-heads-hamass-military-wing/2014/08/02/ed68c46e-1a85-11e4-85b6-c1451e622637\\_story.html](https://www.washingtonpost.com/world/middle-east/mohammed-deif-the-shadowy-figure-who-heads-hamass-military-wing/2014/08/02/ed68c46e-1a85-11e4-85b6-c1451e622637_story.html).

157. Palestinian Supreme Constitutional Court, Decision No. 2 of 12 September 2018; P.G. No. 148 (23 October 2018) at 132.

158. Abdelhameed EILA, *Commentary on Criminal Procedures Law of the Palestine Liberation Organization of 1979* (Gaza: Mansour Press, 1995).

agencies.<sup>159</sup> Similarly, Hamas and its military wing pursue their leaders' orders.<sup>160</sup> As Horovitz indicated, Hamas has reached a "high level of organization, with a structured military force, political and social components".<sup>161</sup>

Thus, the possession of known leadership, as a requirement for captured operatives of armed resistance groups to qualify as POWs under IHL, is adhered to by Palestinian factions.

## 2. Possessing fixed distinctive sign

The requirement of the adoption of "a fixed distinctive sign recognizable at a distance" by resistance militia aims to distinguish a group's members from civilians and from other militants. As the ICRC interpretation of Article 4(2) of Convention III illustrates, a distinct emblem "must be the same for all the members of any one resistance organization, and must be used only by that organization".<sup>162</sup> Article 44(3) of Protocol I adds that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". The latter proviso, according to the authoritative work of Henckaerts and Doswald-Beck, amounts to a customary rule.<sup>163</sup>

Although there is no agreed-upon form of a "fixed distinctive sign", the ICRC has suggested that "[s]uch a sign need not necessarily be an arm-band. It may be a cap ... a coat, a shirt, an emblem or a coloured sign worn on the chest".<sup>164</sup> The booklet of the US Air Force provides that a part of military uniform suffices if it clearly distinguishes combatants from civilians.<sup>165</sup> Protocol I was explicit in this regard by acknowledging that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant provided that, in such situations, he carries his arms openly" (Article 44(3)). Likewise, "the term 'recognizable at a distance' is open to interpretation".<sup>166</sup> It is "widely agreed that the requirement is met by an armband, an insignia, or, for example, a distinctive headgear or coat".<sup>167</sup>

Palestinian resistance groups do distinguish themselves from civilians and from each other by coloured signs, including flags and emblems. Each flies a different flag colour: yellow for Fatah, green for Hamas, black for Islamic Jihad, and Red for the Popular Front for the Liberation of Palestine [PFLP]. Various organizations have embraced a separate emblem with symbols and statements, worn by individuals, carried in marches and other gatherings, and used to mark a group's premises. In the *Kassem* case, an Israeli

159. Isam ABDEEN, *A Legal Treatise on the Explanatory Judgment of the Supreme Constitutional Court on Military Affairs, the Legal Status of the Police, and on Competent Courts to Prosecute Police Personnel* (Ramallah: Al-Haq, 2018).

160. O.J. ATAKE, "The Actualization of Independent State of Palestine: Palestine Liberation Organization's Contribution and the Emergence of HAMAS" (2018) 7 *International Journal of Advanced Legal Studies and Governance* 47.

161. Sigall HOROVITZ, "Accountability of Hamas under International Humanitarian Law" in Mark AMI-EL, ed., *Hamas, the Gaza War and Accountability, under International Law* (Jerusalem: Jerusalem Center for Public Affairs, 2011), 29 at 31.

162. Pictet, *supra* note 108 at 60.

163. Jean-Marie HENCKAERTS and Louise DOSWALD-BECK, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2009) at 384.

164. "Commentary of 1960 on the Third Geneva Convention of 1949" ICRC, online: ICRC <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=ECA76FA4DAE5B32EC12563CD00425040>> at 44.

165. Toni PFANNER, "Military Uniforms and the Law of War" (2004) 86 *International Review of the Red Cross* 93.

166. Pictet, *supra* note 108 at 60.

167. W. Thomas MALLISON and Sally V. MALLISON, "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict" (1977) 9 *Case Western Reserve Journal of International Law* 39 at 56.

military tribunal found out that the defendants had already fulfilled the need to distinguish themselves from the civilians adequately by wearing camouflage hats and green clothes, as such clothes were not regularly worn by the population.<sup>168</sup> As a United Nations probe discovered, there is “no evidence that members of Palestinian armed groups engaged in combat in civilian dress”.<sup>169</sup>

In short, as far as the requirement of a fixed distinctive sign is concerned, captured operatives of Palestinian armed factions would be considered, and should be legally treated, as POWs.

### 3. Carrying arms openly

According to Article 43(4) of Protocol I, a combatant who cannot distinguish himself shall carry his arms openly: “(a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”. The forms of “carrying arms openly” have been for long debated by states as a means to distinguish militants from civilians. Most states require a minimum distinction without a clear-cut formality.<sup>170</sup> The booklet of the US Air Force indicates that “this requirement is not satisfied if the armed group makes a practice of carrying only concealed weapons or of hiding weapons on the approach of enemy forces to avoid identification as fighters”.<sup>171</sup> In the *Kassem* case, an Israeli military tribunal ruled that the requirement of carrying arms openly is not complied with where weapons cannot be seen, nor in the case of carrying weapons during a hostile clash.<sup>172</sup> However, the British military manual hinted that the government statement with other states on the ratification of Protocol I indicates that the exception mentioned in Article 44(3) of Protocol I regarding “carrying arms openly” is applicable only in the case of the occupied territories.<sup>173</sup>

In practice, there are events in which fighters cannot strictly fulfil the rule of being distinguished and, at the same time, not lose the status of being POWs.<sup>174</sup> Article 44(4) of Protocol I states in this connection that:

[A] combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 [on carrying arms openly] shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third [Geneva] Convention and by this Protocol.

Hence, “[e]ven in this situation he shall ‘be given protections equivalent in all respects to those accorded to prisoners of war’”.<sup>175</sup>

168. *Kassem case*, *supra* note 37 at 806–11.

169. *Goldstone Report*, *supra* note 34 at 420.

170. Pfanner, *supra* note 165 at 103.

171. Office of General Counsel, Department of Defense, “Department of Defense Law of War Manual” *US Department of Defense* (June 2015, updated December 2016), online: DOD <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>> at 123–4.

172. *Kassem case*, *supra* note 37 at 778–9.

173. UK Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict* (Swindon: JDCC, 2004) at 42–3.

174. *Kassem case*, *supra* note 37 at 779.

175. W. Thomas MALLISON and Sally V. MALLISON, “The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts” (1978) 42 *Law and Contemporary Problems* 4 at 25.

Most Palestinian factions carry weapons openly. They do so, in particular, during military parades. Marching with machine guns and missile mortars have become the norm after the 2005 Israeli withdrawal from Gaza. Al-Qassam Brigades do so frequently. Even in the West Bank, resistance fighters often bear weapons publicly in refugee camps and sometimes in villages and towns. Affiliates of Fatah, whose operations are tolerated by the PA, walk with arms on a daily basis. Appearing with guns in the West Bank has frequently triggered attacks by Israeli troops. On 12 March 2008, for instance, an Israeli undercover force killed four armed men in a raid in Bethlehem.<sup>176</sup> In Gaza, likewise, the Israeli army often targets operatives while carrying guns openly.<sup>177</sup> According to an Israeli NGO, fifty-five militants were killed while carrying arms openly by the Israeli military from 2009 to 2019 in Gaza.<sup>178</sup> As noted above, Fatah in the West Bank and Hamas in Gaza run premises in which activists enter with weapons.<sup>179</sup> Faction commanders stationed in certain locations sometimes intercept Israeli forces operating in Palestinian territory. On 11 November 2018, eight Israeli agents disguised as local civilians were stopped and questioned by a Hamas patrol in Khan Yunis city in the southern Gaza Strip. The firefight that erupted as a result of uncovering the Israeli infiltration resulted in casualties on both sides and control over the Israeli soldiers' equipment.<sup>180</sup> From such instances one may conclude that the condition of carrying weapons openly is largely observed by Palestinian resistance fighters, albeit in diverse fashions.

In sum, where Palestinian resistance fighters meet the condition of "carrying arms openly", they, as such, should be treated as POWs in the case of capture.

#### 4. Respecting laws and customs of war

The PLO, in which the Fatah movement forms the leading faction along with the PFLP, announced its commitment to respect and implement IHL in its actions to liberate Palestine. As indicated in Part I above, on 21 June 1989 the Permanent Observer of Palestine to the United Nations Office at Geneva informed the Swiss Federal Council that the PLO had decided to accede to Geneva Conventions of 1949 and their two 1977 Protocols.<sup>181</sup> As the Swiss government then refused to take a decision on the matter, the State of Palestine acceded to these instruments on 2 April 2014. Such accession implies that all factions that take part in the Palestinian authorities, including the Fatah-led internationally recognized government in Ramallah and the Hamas-run *de facto* government of Gaza, are bound by Geneva Conventions III and IV as well as Protocol I.<sup>182</sup> For its part, the Hamas authorities "made a series of unilateral declarations of respect for human

176. "Israeli Forces Kill Four Militants in Bethlehem Raid" *ABC News* (13 March 2008), online: [ABC News <https://www.abc.net.au/news/2008-03-13/israel-forces-kill-four-militants-in-bethlehem-raid/1070754>](https://www.abc.net.au/news/2008-03-13/israel-forces-kill-four-militants-in-bethlehem-raid/1070754).

177. David M. HALBFINGER, "Israel Strikes Militants in Syria and Gaza After Clash Over Body at Border" *The New York Times* (23 February 2020), online: [The New York Times <https://www.nytimes.com/2020/02/23/world/middleeast/israel-gaza-bulldozer-body-palestinian.html>](https://www.nytimes.com/2020/02/23/world/middleeast/israel-gaza-bulldozer-body-palestinian.html).

178. "Palestinians Who Were the Object of a Targeted Killing in the Gaza Strip, since Operation Cast Lead" *B'Tselem: The Israeli Information Center for Human Rights in the Occupied Territories*, online: [B'Tselem <https://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/gaza/palestinians-who-were-the-object-of-a-targeted-killing>](https://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event/gaza/palestinians-who-were-the-object-of-a-targeted-killing).

179. Adnan ABU AMER, "Some Palestinians up in arms over weapons proliferation" *Al-Monitor* (3 June 2019), online: [Al-Monitor <https://www.al-monitor.com/originals/2019/06/west-bank-weapons-proliferation-murder-rates-hamas-abbas.html>](https://www.al-monitor.com/originals/2019/06/west-bank-weapons-proliferation-murder-rates-hamas-abbas.html).

180. "'Operation Failed': Details Emerge on Israeli Covert Op Gone Awry" *Al Jazeera* (4 December 2019), online: [Al Jazeera <https://www.aljazeera.com/news/2019/12/4/operation-failed-details-emerge-on-israeli-covert-op-gone-awry>](https://www.aljazeera.com/news/2019/12/4/operation-failed-details-emerge-on-israeli-covert-op-gone-awry).

181. Al-Zoughbi, *supra* note 29 at 177.

182. Nathan J. BROWN, "The Hamas-Fatah Conflict: Shallow but Wide" (2010) 34 *The Fletcher Forum of World Affairs* 35.



rights”,<sup>183</sup> and it seems that the commitment to “human rights” is used here broadly, and may encompass IHL.<sup>184</sup>

As in any armed conflict, violating part of IHL norms by Palestinian resistance groups might well occur.<sup>185</sup> However, breaches by certain individuals of an armed group do not deprive all armed organizations or each member of a given group of their eligibility for POW status. An Israeli judge stated that Palestinian factions “include groups that are not necessarily identical to one another from the viewpoint of their willingness to accept the basic legal and humanitarian norms”.<sup>186</sup> Although the Israeli Supreme Court acknowledged “the existence of groups who ‘fight the army’ as opposed to those who act against civilians ... it fails in practice to allow benefits to those fighting solely against the army”.<sup>187</sup> It was correctly observed in this respect that “violations of IHL have not been treated as a key ground for refusing POW status”.<sup>188</sup> At any rate, a violation committed by a member of an armed group in the context of overall compliance by the group does not mean that all its members should lose their qualification as POWs, and that implication should only affect the member who commits the violation.<sup>189</sup> This means that every individual who falls into enemy hands should be subject to a separate investigation regarding his status on case-by-case basis.<sup>190</sup> In the Goldstone Report, the detained Israeli soldier Gilad Shalit was considered by the UN Fact Finding Mission as a POW in spite of the Mission’s position that the Israeli army had breached a set of IHL rules.<sup>191</sup> Likewise, the European Parliament, while denouncing Israeli IHL abuses, called upon those holding Shalit to treat him as POW.<sup>192</sup>

This discussion shows that members of Palestinian resistance movements are largely affiliated with organized forces that comply with the laws and customs of war and, in the event of capture, should be treated as POWs by the Israeli authorities.<sup>193</sup>

### 5. Final remarks

The foregoing demonstrates that the four conditions enumerated in Article 4 of Geneva Convention III for captives of resistance movements apply to militants who fight occupying forces in the territory of Palestine. Therefore, in the case of arrest, such individuals should be treated as POWs, particularly after Palestine’s accession to Convention III in 2014. But “[s]hould any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4”, by virtue of Article 5 of Convention III, “such persons shall enjoy the protection of [Convention III] until such time as their status has been determined by a competent tribunal”. Neither Israel, nor any occupying power, should “be able to

183. Goldstone Report, *supra* note 34 at 80.

184. Sandesh SIVAKUMARAN, “Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War” (2011) 93 *International Review of the Red Cross* 463 at 468.

185. Goldstone Report, *supra* note 34 at 79–81.

186. Targeted Killings case, *supra* note 55 at 522.

187. Pulido, *supra* note 62 at 273.

188. Marco SASSOLI, “La ‘Guerre contre le terrorisme’, le droit international humanitaire et le statut de prisonnier de guerre” (2001) 39 *Canadian Yearbook of International Law* 211.

189. *Updated Commentary on Convention III*, *supra* note 131 at para. 1026.

190. Stephen C. NEFF, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005) at 392.

191. Goldstone Report, *supra* note 34 at 285.

192. European Parliament, *Resolution on the Case of Gilad Shalit* (B7-0171/2010).

193. Dugard, *supra* note 52 at 3.

unilaterally decide that no doubt has arisen for an entire group of captured persons who have taken part in hostilities".<sup>194</sup> In this regard, the competent tribunal "should be 'impartial and effective'",<sup>195</sup> while Israeli courts are widely viewed as partial and acting as "the judicial arm of the occupation".<sup>196</sup> Such courts, which tailor the interpretation of international law "exclusively to meet the needs of the State",<sup>197</sup> cannot determine the fate of captive Palestinian citizens under international law.<sup>198</sup>

Even if Israeli military tribunals, assuming *arguendo*, are entitled to adjudicate on incarcerated Palestinians, "the procedure followed ... in the first instance should, as a minimum, be in accordance with the corresponding rules of the Fourth [Geneva] Convention".<sup>199</sup> In any event, the protections in Article 75 of Protocol I apply as a minimum. Indeed, "[t]hese protections are today considered part of customary international law".<sup>200</sup>

Against this background, POW status determination may be referred to an impartial body, for example, the ICRC,<sup>201</sup> a court established by a neutral state, or to an international tribunal, such as the ICC.<sup>202</sup> The latter option has become plausible after Palestine's accession to the Rome Statute in 2015.<sup>203</sup> Indeed, Palestinians may not remain under their captor's mercy, and "where doubts exist, international protection, i.e. POW status, should prevail over domestic punishment ... and this is a clear example of a case in which pressure should be applied by third States to secure compliance".<sup>204</sup>

### C. Mass rising

Geneva Convention III considers as a POW, in the event of capture:

[I]nhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect laws and customs of war.<sup>205</sup>

This provision pertains to civilians who fight invading troops before the control of a given land.<sup>206</sup> As the ICRC commented: "This refers to a mass rising. The enemy is obliged to recognize the belligerent status ... even though they may not have had time to form themselves into regular armed units."<sup>207</sup> Acknowledged as customary law, the rule was codified

194. Yasmin NAQVI, "Doubtful Prisoner-of-War Status" (2002) 84 *International Review of the Red Cross* 571 at 574–5.

195. *Ibid.*, at 579, referring to a US practice in Vietnam.

196. Sharon WEILL, "The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories" (2007) 89 *International Review of the Red Cross* 395.

197. Pulido, *supra* note 62 at 288; also Azarova, *supra* note 104.

198. Nery RAMATI, "The Rulings of the Israeli Military Courts and International Law" (2020) 25 *Journal of Conflict and Security Law* 149.

199. Naqvi, *supra* note 194 at 581.

200. *Updated Commentary on Convention III*, *supra* note 131 at para. 1048.

201. Howard S. LEVIE, "Compliance by State with the 1949 Geneva Prisoner of War Convention" (1974) 6 *Army Lawyer* 1 at 4, citing the ICRC's intervention in Syrian and Israeli prisoners captured during the 1973 war.

202. Pulido, *supra* note 62 at 287.

203. Mutaz M. QAFISHEH, "Nationalizing International Criminal Law in Palestine: The Challenge of Complementarity" (2016) 27 *Hague Yearbook of International Law* 165.

204. Pulido, *supra* note 62 at 284.

205. Art. 4(a)(6).

206. UK Joint Doctrine and Concepts Centre, *supra* note 173 at 45.

207. Pictet, *supra* note 108 at 48.

in Article 2 of the 1907 Hague Regulations: “Inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops ... shall be regarded as belligerents”. Although such a category of persons (named *levée en masse*) forms part of the civilian population, they must be treated as POWs in the event of an arrest by the invading enemy troops.

Emily Crawford’s paper “Tracing the Historical and Legal Development of the *Levée En Masse* in the Law of Armed Conflict” is probably the most comprehensive work on *levée en masse*.<sup>208</sup> Denying the contemporary status of mass risers as POWs, Crawford has traced the topic from post French Revolution conflicts as early as 1793, through the concept’s codification in the Lieber Code of 1863, Brussels Declaration of 1874, Oxford Manual on the Laws of War on Land of 1888, Hague Regulations of 1899 and 1907, and Geneva Conventions of 1929 and 1949, until recently. However, the paper includes multiple contradictions and its findings are rather misleading.

While Crawford concludes that the notion of *levée en masse* no longer applies, she cites ample sources that affirm the very notion: domestic military manuals of twenty-nine states, ICRC commentary, *travaux préparatoires* of diverse humanitarian law texts, and court cases and literature (Greenspan, Rebus, and Solis). Crawford asserts her argument against the overwhelming counter-evidence, and virtually calls upon occupied people to capitulate to their occupier, owing to, as she claims, the massive power of the adversary. Yet the evidence proves the ongoing relevance of *levée en masse*.

Having said that, what could be a point of interpretation is the exact meaning of the terms encompassing the definition of *levée en masse*, viz: “non-occupied”, “territory”, “spontaneously”, “arms”, “invading forces”, “time”, “carry arms”, “openly”, “respect the laws and customs of war”, “rise”, “*levée*”, and “*en masse*”. Every word underlying the concept as defined in Article 4(a)(6) of Convention III requires further research. The notion and its corresponding legal implications are far from being settled. The *levée en masse* needs to be analyzed in the light of the wider principles of public international law rules, not least the right to self-defence (individually and collectively),<sup>209</sup> the right to self-determination, the right of resistance against colonial domination and alien occupation, guerrilla fighting, legitimacy, or illegality of occupation (e.g. whether an occupation is permitted under the United Nations Charter, particularly based on the Security Council’s authorization), human rights standards, relevant state practice, and subsequent jurisprudence of domestic and global tribunals. These rules should be understood in the context of each micro-case, not only the overall case of a given conflict or an occupied location, but also that of every incident and even each individual captured in a single attack. This is what we are trying to touch upon in this brief study by bringing up the issue of Palestinian uprisers.

It is worth noting here the dozens of UN General Assembly resolutions regarding the right of the Palestinian people to self-determination and the legality of their struggle “by all available means consistent with the Charter of the United Nations”,<sup>210</sup> including armed struggle.<sup>211</sup> It is unreasonable that the General Assembly confirms the legality of the

208. Emily CRAWFORD, “Tracing the Historical and Legal Development of the *Levée En Masse* in the Law of Armed Conflict” (2017) 19 *Journal of the History of International Law* 329.

209. Themis TZIMAS, “Self-Defense by Non-State Actors in States of Fragmented Authority” (2019) 24 *Journal of Conflict and Security Law* 175.

210. *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, UN General Assembly, UN Doc. A/RES/2787 (1971), at para. 1.

211. *Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights*, UN General Assembly, UN Doc. A/RES/3070 (1973), at paras. 2, 5.

people's struggle, and then considers that those who resist the invading forces are criminals who should be prosecuted for such acts. International law permits civilians to fight "colonial domination and alien occupation ... in the exercise of their right of self-determination", as stated by Article 1(4) of Protocol I. It has been remarked on in this particular context that "[t]he phrase 'alien occupation' was introduced with the intention of extending the scope of application of the Protocol [I] to the conflict between Israel and the Palestine Arab people".<sup>212</sup> Israel not only cannot, under international law, treat such individuals as criminals, but also its commanders and "judges" who confine Palestinian civilians can be held accountable for carrying out illicit acts punishable under the Rome Statute of the ICC.<sup>213</sup>

Under the Oslo Accords, Israeli occupation forces withdrew from certain Palestinian areas (particularly from Area "A") in the West Bank and handed over its administration to the PA over the period 1994–97. In 2005, Israel pulled out of Gaza.<sup>214</sup> Although those areas (especially Area "A") were reoccupied in the so-called "Operation Defensive Shield" in 2002, the areas do not witness a permanent Israeli military presence. Rather, the areas are placed under the PA's control. However, Israeli forces frequently invade those areas either to arrest individuals, carry out military operations, or regain control of certain areas to protect Israeli settlers. During these incursions, occupiers often encounter popular resistance, particularly in refugee camps and densely populated neighbourhoods that rise up against occupying forces sporadically. Many have been caught by occupation authorities. Persons captured while resisting invading troops of any city, village, or refugee camp should be regarded as POWs,<sup>215</sup> as long as they carry arms openly and respect the laws and customs of war.

It is clear that *levée en masse* is confined to territories that are not occupied. Article 2 of the 1907 Hague Regulations has two main criteria for "mass rising": it should be in "a territory which has not been occupied", and the inhabitants should not have "had time to organize themselves in accordance with Article 1".<sup>216</sup> These conditions are also incorporated into Geneva Convention III. In the ICRC Commentary, it is emphasized that:

[A] mass levy can only be considered to exist during a very short period, i.e. during the actual invasion period. If resistance continues, the authority commanding the inhabitants who have taken up arms, or the authority to which they profess allegiance, must either replace them by sending regular units, or must incorporate them in its regular forces.<sup>217</sup>

Otherwise, those civilians who spontaneously take up arms after the enemy has established itself cannot qualify as POWs for the purposes of Article 4A(6).<sup>218</sup>

However, it appears that the term "occupation" is used in Article 4(a)(6) of Geneva Convention III in a non-technical sense. It may mean "invading" or "entering" certain sections within a *portion* of an occupied location, not exclusively the initial or total

212. Nissim BAR-YAACOV, "Some Aspects of Prisoner-of-War Status According to the Geneva Protocol I of 1977" (1985) 20 *Israel Law Review* 243 at 247.

213. Mutaz M. QAFISHEH, "Palestinian Prisoners in Israel versus Namibian Prisoners under the Apartheid: A Potential Role for the International Criminal Court" (2016) 20 *International Journal of Human Rights* 798.

214. Sylvain VITE, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91 *International Review of the Red Cross* 69 at 83–5.

215. W.G. RABUS, "A New Definition of the 'Levée en Masse'?" (1977) 24 *Netherlands International Law Review* 232.

216. Art. 1 refers to armies and volunteer corps, covered by other rules.

217. Pictet, *supra* note 108 at 68.

218. *Updated Commentary on Convention III*, *supra* note 131 at para. 1064.

occupation of a state or region.<sup>219</sup> Such an interpretation can be deduced from Article 51 of the Lieber Code of 23 April 1863 which stated that:

[I]f the people of that *portion* of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.<sup>220</sup>

The concept of *levée en masse* as codified by Article 10 of the Brussels Declaration of 27 August 1874,<sup>221</sup> which influenced Article 4(a)(6) of Convention III, did not specify whether “occupation” or “invasion” indicates an initial invasion or an established occupation. That said, delegates who deliberated the aforesaid draft of Article 10 were of two views. One side confined the definition to the initial occupation, while the others wanted the concept to be sufficiently wide as to incorporate “any inhabitant who, as a result of patriotism, took up arms against the enemy”.<sup>222</sup> The clause “respect the laws and customs of war”, as a requisite for a levy to enjoy POW status, was inserted to distinguish those who fight to defend their land from ordinary offenders who carry arms “as a brigand or bandit”.<sup>223</sup> As Naqvi elegantly put it, Convention III “has been interpreted ... as creating a presumption that individuals apprehended in the war zone are prisoners of war”.<sup>224</sup> In its 2020 commentary on Convention III, the ICRC summed up the discussion on the concept by pointing out that a *levée en masse* “can occur in any part of a territory that is not yet occupied, or in an area where the previous Occupying Power has lost control over the administration of the territory and is attempting to regain it”.<sup>225</sup>

Palestine has witnessed mass risings against invaders since 1917 and Palestinians have risen up from the outset of the Israeli occupation through the present.<sup>226</sup> In June 1967, the streets of Jerusalem witnessed dozens of inhabitants who spontaneously carried personal weapons to resist the Israeli invasion.<sup>227</sup> While many were killed,<sup>228</sup> others were captured.<sup>229</sup> This triggered, in 1969, an Israeli court to perceive the accused persons as POWs based on *levée en masse* status. It found out that the area where the accused had been apprehended was under Israeli control. The court stated that the troops “were certainly not invading new areas, and there cannot be the least doubt that, in the period from June 5, 1967, to October, 1968, that ‘population’ had time to ‘form itself into regular armed

219. Morris GREENSPAN, *The Modern Law of Land Warfare* (Los Angeles, CA: University of California Press, 1959).

220. Francis LIEBER, *Instructions for the Government of Armies of the United States in the Field* (New York: D. Van Nostrand, 1863) at 16 (emphasis added).

221. *Project of an International Declaration Concerning the Laws and Customs of War*, Adopted by the Conference of Brussels (27 August 1874) at art. 10.

222. Tracey DOWDESWELL, “The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification” (2017) 54 *Osgoode Hall Law Journal* 805 at 835.

223. Lieber, *supra* note 220, art. 52.

224. Naqvi, *supra* note 194 at 575, referring to the New Zealand and Australia military manuals.

225. *Updated Commentary on Convention III*, *supra* note 131, at para. 1065 (emphasis added).

226. Rashid KHALIDI, *The Hundred Years’ War on Palestine: A History of Settler Colonialism and Resistance, 1917–2017* (New York: Metropolitan Books, 2020).

227. Jamal R. NASSAR, “The Culture of Resistance: The 1967 War in the Context of the Palestinian Struggle” (1997) 19 *Arab Studies Quarterly* 77 at 83–5.

228. Kathleen CAVANAUGH, “The Israeli Military Court System in the West Bank and Gaza” (2007) 12 *Journal of Conflict and Security Law* 197 at 221, reporting that in 2000–05, 3,185 Palestinian civilians, including 645 minors, were killed by Israeli security forces via lethal force; 132 investigations took place at the same period, with only 7 solid convictions.

229. Naseer H. ARURI, “Resistance and Repression: Political Prisoners in Israeli Occupied Territories” (1978) 7 *Journal of Palestine Studies* 48.

units”<sup>230</sup>. The court was, therefore, ready at the time to describe those involved in random resistance as POWs.

Tens of thousands of Palestinians have been arrested while resisting Israeli troops, notably during the first (1987–93) and second (2000–05) uprisings. Thousands are being kept in Israeli custody, and estimates of those incarcerated by Israel since 1967 top 800,000 Palestinians.<sup>231</sup> In 2002, for example, the “[Israeli] assaults on Palestinian towns ... in Operation Defensive Shield and subsequent military operations in the West Bank resulted in widespread arrests and detentions. In the period between 29 March and 5 May alone, some 7,000 Palestinians were arrested”.<sup>232</sup> From 12 June through mid-August 2014, to give another example, “between 1,100 and 1,500 Palestinians were detained ... Generally they were arrested either during clashes or for alleged participation in clashes”.<sup>233</sup>

Dozens of those captured were civilians who carried weapons openly to resist invading forces using machine guns, Molotov cocktails, grenades, knives, or stones. Thus the issue of *levée en masse* is likely to arise “in a built-up area where even rudimentary methods are of some value”.<sup>234</sup> As a case in point, on 26 May 2018, Israeli soldier Ronen Lubarsky died after being attacked by a marble slab thrown on his head during an invasion of the Amari Refugee Camp in Ramallah.<sup>235</sup> On 13 June 2018, the Israeli army arrested Islam Abu-Humaid who was charged for the attack.<sup>236</sup> A military court sentenced the man to life imprisonment on 21 July 2019.<sup>237</sup> A similar case occurred on 12 May 2020, when an Israeli soldier was struck in the head by a rock and died in the West Bank village of Yaabed, west of Jenin, during a military invasion of the village to arrest a group of activists.<sup>238</sup> An arrest campaign followed in an attempt to find the attackers, and Israeli intelligence accused a forty-nine-year-old man named Nazmi Abu Baker of the stone-throwing that claimed the life of the officer.<sup>239</sup> These instances prove that the occupation

230. *Kassem case*, *supra* note 37 at 776.

231. Addameer Prisoner Support and Human Rights Association, “General Briefing: Palestinian Political Prisoners in Israeli Prisons” *Addameer Prisoner Support and Human Rights Association* (2014), online: Addameer <[https://www.addameer.org/advocacy/briefings\\_papers/general-briefing-palestinian-political-prisoners-israeli-prisons-0](https://www.addameer.org/advocacy/briefings_papers/general-briefing-palestinian-political-prisoners-israeli-prisons-0)>.

232. *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, Report of the Special Rapporteur of the Commission on Human Rights, Mr John DUGARD, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, Submitted in Accordance with Commission Resolutions 1993/2 A and 2002/8, UN Doc. E/CN.4/2003/30 (2002), at 12.

233. *Human Rights Situation in Palestine and Other Occupied Arab Territories*, Report of the United Nations High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/1, UN Doc. A/HRC/28/80/Add.1 (2014), at 5–6.

234. Pictet, *supra* note 108 at 68.

235. Stuart WINER, “IDF Raids Palestinian Refugee Camp Where Soldier Was Killed” *The Times of Israel* (28 May 2018), online: The Times of Israel: <<https://www.timesofisrael.com/idf-raids-palestinian-refugee-camp-where-soldier-was-killed/>>.

236. Anna AHRONHEIM and Herb KEINON, “Palestinian Who Killed Soldier with Marble Slab Arrested by Shin Bet”, *The Jerusalem Post* (13 June 2018), online: The Jerusalem Post: <<https://www.jpost.com/arab-israeli-conflict/shin-bet-army-arrest-palestinian-who-killed-20-year-old-elite-idf-soldier-559826>>.

237. Michael BACHNER, “Palestinian Gets Life Sentence for Killing IDF Soldier with Stone Slab Last Year”, *Times of Israel* (22 July 2019), online: Times of Israel <<https://www.timesofisrael.com/idf-raids-palestinian-refugee-camp-where-soldier-was-killed/>>.

238. David HALBFINGER, “Israeli Soldier Is Killed in West Bank as Tensions Rise Over Annexation Push” *The New York Times* (12 May 2020), online: The New York Times <<https://www.nytimes.com/2020/05/12/world/middleeast/israel-soldier-killed-west-bank.html>>.

239. Hagar SHEZAF, “Shin Bet Arrests Palestinian Suspected of Killing Israeli Soldier in West Bank” *Haaretz* (7 June 2020), online: Haaretz <<https://www.haaretz.com/israel-news/.premium-shin-bet-announces-arrest-of-palestinian-suspected-of-killing-of-israeli-soldier-1.8903694>>.



authorities do not confer POW status on those who spontaneously resist invasions, in an evident contradiction to Article 4(a)(6) of Geneva Convention III.

Be that as it may, the concept of *levée en masse* has attracted several interpretations that may be stretched to anyone who “as a result of patriotism, took up arms against the enemy”.<sup>240</sup> After all, those who resist the occupier cannot be seen as criminals who use force for personal gains like ordinary offenders. It is for captured criminals to which Geneva Convention IV applies; Article 76 allocates the status of “internees” to “persons accused of offences”, while Article 77 mentions “persons who have been accused of offences or convicted by the courts in the occupied territory”. “Offences” imply “crimes” that are committed against the society of the occupied locations, not against the occupant. For this reason, the occupying power should hand over those charged or convicted, “at the close of occupation, with the relevant records, to the authorities of the liberated territory”.<sup>241</sup> The purpose of handing over those in pre-trial detention and prisoners is, as it is obvious based on conventional logic, to complete the investigation of the former and administer the sentence for the latter.<sup>242</sup>

At any rate, civilian fighters cannot be classified as “unlawful combatants”. Such treatment violates rules of IHL that, as indicated above, run short of such a typology.<sup>243</sup> Martin Scheinin, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, observed that the definition of “unlawful combatant” in the 2002 Israeli law, which followed the US model in the treatment of Taliban and Al-Qaeda captives in the wake of the September 11, 2001 attacks,<sup>244</sup> “includes persons who have ‘indirectly’ participated in hostile acts against the State of Israel”.<sup>245</sup> This term “remains undefined and is therefore open to abuse and inconsistent with the principle of legality”.<sup>246</sup> Israeli legislative acts, as well as court rulings, that treat Palestinians who target troops as “terrorists” or “unlawful combatants” lack any international legal foundation.

To conclude, individual Palestinians who participate in armed resistance as part of non-organized groups to confront military invasions or who are involved in fighting based on an individual initiative out of patriotism to defend their unoccupied or liberated land fall under the definition of *levée en masse* according to international humanitarian law and should be treated as POWs as long as they carry arms openly and respect the laws and customs of war.

240. Dowdeswell, *supra* note 222 at 835.

241. *Geneva Convention IV*, *supra* note 5 at art. 77.

242. Jean PICTET, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) at 366.

243. Knut DORMANN, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’” (2003) 85 *International Review of the Red Cross* 45; Manooher MOFIDI and Amy E. ECKERT, “Unlawful Combatants or Prisoners of War: The Law and Politics of Labels” (2004) 36 *Cornell International Law Journal* 59; Terry GIL and Elies VAN SLIEDREGT, “Guantanamo Bay: A Reflection on the Legal Status and Rights of Unlawful Enemy Combatants” (2005) 1 *Utrecht Law Review* 28.

244. Rosemary RAYFUSE and Kara ILAND, “Undoing the Done: Implications of the Denial of Prisoner of War Status to Guantanamo Bay Detainees” (2002) 2 *ISIL Year Book of International Humanitarian and Refugee Law* 99; Neil MCDONALD and Scott SULLIVAN, “Rational Interpretation in Irrational Times: The Third Geneva Convention and the ‘War on Terror’” (2003) 44 *Harvard International Law Journal* 301; Derek JINKS, “The Declining Significance of POW Status” (2004) 45 *Harvard International Law Journal* 367; Robert J. DELAHUNTY and John YOO, “Statehood and the Third Geneva Convention” (2006) 46 *Virginia Journal of International Law* 131; Curtis BRADLEY, “The United States, Israel & Unlawful Combatants” (2009) 12 *Green Bag* 397.

245. *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin SCHEININ, UN Doc. A/HRC/6/17/Add.4 (2007), at 13, para. 26.

246. *Ibid.*

#### D. Political activists

Israeli Occupation authorities frequently arrest activists not involved in hostilities, such as journalists, human rights defenders, affiliates of factions, elected parliamentarians, academics, and ministers. In a report submitted to the United Nations General Assembly in November 2007, a leading UN expert on the subject pointed out that “45 of 132 members of the Palestinian Legislative Council have been charged with affiliation with, or membership in, a proscribed organization and are currently detained by Israel”.<sup>247</sup> He urged caution “to ensure that counter-terrorism is never used as a means of obfuscating the existence or development of democracy”.<sup>248</sup> When capturing these persons, Israeli forces rely on military orders that permit the incarceration of anyone who holds anti-occupation views or belongs to a party, political, or social association.<sup>249</sup> Article 68 of Military Order No. 378 of 20 April 1970,<sup>250</sup> as a case in point, states that “[a]ny person who commits any act which disturbs or is likely to disturb the peace or public order shall be guilty of an offence”. Other military orders allow the administrative detention of individuals, including children, without charge or trial.<sup>251</sup>

Such persons are considered protected civilians according to Geneva Convention IV. Indeed, “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians”.<sup>252</sup> These individuals should not face arrest, save for perpetration of crimes in breach of the national penal legislation. In this context, Article 64 of Convention IV stipulates that the occupying power must respect the enforced penal law in the occupied territory. It is a fundamental principle underlying the law of occupation that the occupier is not sovereign over the controlled region.<sup>253</sup> According to the ICRC commentary, the legislative capacity of occupation forces may not serve as a means of oppressing local populations.<sup>254</sup> Individual politicians should be treated as civilians even if the parties to which they belong run a military branch.<sup>255</sup> In its decision regarding prosecutors incarcerated by the US during the invasion of Grenada in 1983, the Inter-American Commission for Human Rights found that, with no indication that the captives had taken part in hostilities, these activists remained civilians from the perspective of Geneva Convention IV.<sup>256</sup>

Crimes in an occupied territory are punishable based on the domestic law enforced in the land. Whereas offences in Gaza are sanctioned by the British-era Penal Code

247. *Ibid.*, at 13, para. 27.

248. *Ibid.*

249. Nadine MARROUSHI, “50 Years of Israeli Occupation: Four Outrageous Facts about Military Order 101” *Amnesty International* (25 August 2017), online: Amnesty International <<https://www.amnesty.org/en/latest/campaigns/2017/08/50-years-of-israeli-occupation-four-outrageous-facts-about-military-order-101/>>.

250. Israeli Army, *Proclamations, Orders and Appointments (West Bank)*, No. 21 (1970) at 733.

251. Catherine COOK, Adam HANIEH, and Adah KAY, “Discrimination and Denial, Israel and Palestinian Child Political Prisoners: A Case Study of Israel’s Manipulation of the U.N. Human Rights System” (2005) 13 *Palestine Yearbook of International Law* 91; Tomer EINAT, Ofer PARCHEV, and Anat LITVIN, “Who Knows Who Cares for Me: *C’est la Vie*: Abuse of Israeli and Palestinian Prisoners’ Human and Medical Rights—A Foucaultian Perspective” (2016) 96 *Prison Journal* 167; Iyad MISK, “The Current Situation and Conditions of Imprisonment of Palestinians in Israeli Prisons and Detention Facilities”, UN International Meeting on The Question of Palestine, 7–8 March 2011, at 4.

252. Melzer, *supra* note 130 at 20.

253. Shawan JABARIN, “The Occupied Palestinian Territory and International Humanitarian Law: A Response to Peter Maurer” (2013) 95 *International Review of the Red Cross* 415 at 421.

254. Pictet, *supra* note 242 at 337.

255. *Amnesty International Investigations*, *supra* note 54 at 12.

256. *Inter-American Commission on Human Rights, Coard v. United States*, Report No. 109/99, Case No. 10.951, (29 September 1999), at para. 60.

Ordinance No. 74 of 14 December 1936,<sup>257</sup> the West Bank prosecutes based on Jordanian Penal Code No. 16 of 10 April 1960.<sup>258</sup> These codes regulate standard crimes such as murder, assaults, theft, rape, and slander.<sup>259</sup> The occupant cannot legislate in an occupied soil that alters the existing law, save for narrow exceptions under Article 64 of Geneva Convention IV that by no means include the aforementioned Israeli military orders or the Unlawful Combatants Law. As commented on by the ICRC, the exceptional legislative powers of the occupier “are of a strictly limitative nature. The occupation authorities cannot abrogate or suspend the penal laws for any other reason [stated in Article 64]– and not, in particular, merely to make it accord with their own legal conceptions”.<sup>260</sup> As such, the legality of these enactments is questionable.

Israeli military orders that criminalize and remove the liberty of political or social activists are illegitimate. Captivity of such individuals constitutes, at the very least, arbitrary detention under international human rights law that aligns with humanitarian law with regard to fair trial standards for those held under the occupant’s authority.<sup>261</sup> In accordance with IHL, such incarceration by virtue of Article 147 of Convention IV forms a “grave breach” which includes, *inter alia*, “unlawful confinement of a protected person ... or willfully depriving a protected person of the rights of fair and regular trial”. In turn, such breaches qualify, under the Rome Statute, as “war crime[s]”, that include “[w]illfully depriving a prisoner of war or other protected person of the rights of fair and regular trial”<sup>262</sup> and “unlawful confinement”.<sup>263</sup> Such confinement simultaneously qualifies as a “crime against humanity” that comprises “[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”,<sup>264</sup> particularly due to the fact that such acts are carried out “as part of a widespread or systematic attack directed against ... civilian population, with knowledge of the attack”.<sup>265</sup> The ICC Pre-Trial Chamber Decision of 5 February 2021 on the Situation in Palestine,<sup>266</sup> and the subsequent Prosecutor’s announcement of 3 March 2021 to initiate an investigation into acts committed in Palestine,<sup>267</sup> render the ICC competence on the issue of Palestinian prisoners incarcerated by Israel more likely than ever.<sup>268</sup> However, tackling international criminal law in detail falls beyond the scope of this paper and may require further research.<sup>269</sup>

257. P.G. Supplement 1, No. 652 (14 December 1936) at 399.

258. Jordan Official Gazette No. 1487 (1 May 1960) at 374.

259. Mutaz M. QAFISHEH, “Human Rights Gaps in the Palestinian Criminal System: A United Nations Role?” (2012) 16 *The International Journal of Human Rights* 358.

260. Pictet, *supra* note 242 at 336.

261. Laurent MARCOUX, “Protection from Arbitrary Arrest and Detention under International Law” (1982) 5 *Boston College International and Comparative Law Review* 345.

262. Art. 8(2)(a)(vi).

263. Art. 8(2)(a)(vii).

264. Art. 7(1)(e).

265. Introductory sentence of art. 7(1) of the Rome Statute.

266. *Situation in the State of Palestine*, *supra* note 16.

267. “Statement of ICC Prosecutor, Fatou Bensouda, respecting an Investigation of the Situation in Palestine” ICC (3 March 2021), online: ICC <<https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine>>.

268. Mutaz M. QAFISHEH, “What is Palestine? The *de jure* Demarcation of Boundaries for the ICC’s *ratione loci* Jurisdiction and Beyond” (2020) 20 *International Criminal Law Review* 908.

269. William BOURDON, “Jurisdiction of the International Criminal Court over Human Rights Violations Committed by Israeli Forces in the Occupied Territories after July 1, 2002” (2003) 12 *Palestine Yearbook of International Law* 165; Valentina AZAROV and Sharon WEILL, “Israel’s Unwillingness? The Follow-up Investigations to the UN Gaza Conflict Report and International Criminal Justice” (2012) 12 *International Criminal Law Review* 905; John DUGARD, “Palestine and the International Criminal Court: Institutional Failure or Bias?” (2013) 11 *Journal of International Criminal Justice* 563.

### III. Conclusion

The United Nations General Assembly's decision to upgrade the status of Palestine to a non-member observer state encompasses a wide range of effects on the Palestinian-Israeli conflict, particularly on the legal front. This move empowered Palestine to accede to over a hundred treaties, including international human rights and humanitarian law instruments, notably the Geneva Conventions and Additional Protocol I. Such accession has brought an end to Israel's self-proclaimed controversy on Palestine's statehood. Any doubts cast on Palestine as a State Party to an international armed conflict has become a fading past.

With Palestine's accession to Geneva Convention III, Palestinian citizens who took part in belligerent acts against their occupier should be treated as POWs due to the fact that they belong to a State Party to an armed conflict. These captives fall under three categories: members of official military or security forces, affiliates of various resistance groups, and uprisers who fight the occupier spontaneously on an individual basis without prior organization. Contrary to the established rules of IHL, Israel does not make any distinction regarding the treatment of these three types. In Israel's eyes, all those who resist the occupation troops form either "criminals", "terrorists", or "unlawful combatants". Unilateral Israeli treatment of its captives does not hold water under international law and such Israeli actions may trigger accountability based on international criminal law. As Palestine has become a State Party to the Rome Statute, and particularly as the ICC decided in 2021 that it possesses jurisdiction to prosecute crimes occurring in the territory of Palestine, Israeli officials who continue to deprive Palestinians (including Israeli politicians, military commanders, prison officials, and even certain prosecutors and judges) of their liberty may well be charged with committing war crimes before the ICC. The mere fact of confining POWs after the cessation of hostilities, regardless of the incarceration conditions, may constitute a ground for international criminal liability.

The confinement of other Palestinians, particularly politicians and opinion-makers, also runs counter to international law, both human rights and humanitarian law, as the freedoms of association, assembly, and expression are guaranteed under core human rights treaties and Geneva Conventions to which the State of Palestine and the State of Israel are parties, as well as in accordance with the applicable domestic law in Palestine. Notwithstanding that such incarceration is unlawful, the detaining power is under a duty to treat captives based on Conventions III or IV. Convention IV is designated essentially to the detention and imprisonment of civilians who carry out ordinary crimes during the time of occupation to be tried by the domestic courts of the occupied territory. Perpetrators of such offences, who may be caught by the occupier, should be transferred to Palestinian courts or prison facilities for adjudication or to serve their sentences within the occupied region. With the accession of Palestine to Conventions III and IV, Israel can no longer legally justify its failure to apply either or both Conventions, as the case may be, to incarcerated Palestinians.

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