

*Canada's Rights & Obligations Under
Article 1 of the
Fourth Geneva Convention*

Dimitri Lascaris

September 9, 2018

Article 1 of the Fourth Geneva Convention

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

Article 49 of the Fourth Geneva Convention

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

[...]

“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

Articles 32 and 33 of the Fourth Geneva Convention

Art. 32: “The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.”

Art. 33: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited...”

Israel Knew All Along That Settlements, Home Demolitions Were Illegal (Haaretz: May 19, 2015)

“It was March 1968. Yaakov Herzog, director-general of the Prime Minister's Office, received a memo marked ‘Top Secret’ from the Foreign Ministry’s legal adviser, Theodor Meron. As the government's authority on international law, Meron was responding to questions put to him about the legality of demolishing the homes of terror suspects in East Jerusalem and the West Bank and of deporting residents on security grounds.

“His answer: Both measures violated the 1949 Fourth Geneva Convention on the protection of civilians in war. The government's justifications of the measures – that they were permitted under British emergency regulations still in force, or that the West Bank wasn't occupied territory – might have value for *hasbara*, public diplomacy, but were legally unconvincing.

“The legal adviser's stance in 1968 is important today precisely because it is unexceptional. It's the view of nearly all scholars of international law, including prominent Israeli experts. The memo shows that from the very start of the occupation, central figures in the Israeli government knew that deportations and demolitions violated Israel's international commitments, and not just in the eyes of outside critics.”

Theodor Meron

- Meron received his legal education at the Hebrew University (M.J.), Harvard Law School (LL.M., J.S.D.) and Cambridge University (Diploma in Public International Law).
- Following WWII, Meron became an Israeli citizen and worked for the Israeli government. In 1978 he immigrated to the U.S. Since 1977, he has been a Professor of International Law at the Geneva Graduate Institute of International Studies and, since 1994, the holder of the Charles L. Denison Chair at New York University Law School.
- In 2000-01, he served as Counselor on International Law in the U.S. Department of State.
- Meron is the current President of the International Residual Mechanism for Criminal Tribunals. He is also the former President of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Presiding Judge of the Appeals Chambers of the International Criminal Tribunal for Rwanda.

50 years later, Theodor Meron Confirms his opinion on settlements

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The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War

Theodor Meron ^(a1) 

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Extract

The West Bank and the Settlements, again? Readers may have had enough of this subject. But these are exceptional times. The adoption by the Security Council of Resolution 2334 on December 23, 2016, the unprecedented speech by Secretary Kerry delivered shortly thereafter, and the immediate rejection of both by Prime Minister Netanyahu, combined with the approach of the fiftieth anniversary of the Six-Day War in June 2017 and the continued march toward an inexorable demographic change in the West Bank, not to mention the nomination as U.S. Ambassador to Israel of a person reportedly supporting an active settlement policy and annexation: the confluence of these events demands our renewed attention. And while these developments undoubtedly have powerful political dimensions, they also call upon those of us who care about international law to speak up in support of its requirements and application.

The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War

“On September 14, 1967, I stated in an Opinion submitted to the government of Israel (and which came to light in 2006 upon its discovery in state archives by the historian Gershom Gorenberg) that the establishment of civilian settlements in the occupied West Bank and other conquered territories violates the Fourth Geneva Convention related to the protection of victims of war and, specifically, its prohibition on settlements (Article 49(6)). This prohibition, I wrote, is categorical and ‘not conditioned on the motives or purposes of the transfer, and is aimed at preventing colonization of conquered territory by citizens of the conquering state.’... With reference to the position of the government of Israel that the West Bank was disputed territory, and therefore not ‘occupied territory,’ I opined that this position had not been accepted by the international community, which regards the territory concerned as normal occupied territory.”

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Theodor Meron:

“It is a matter of history that these opinions were ignored by the government of Israel and in the years that followed, the divergence between the requirements of international law and the situation on the ground in the West Bank has become, if anything, more pronounced.”

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- Theodor Meron: “In sum, ‘Israel . . . treats the West Bank as if it were part of its sovereign territory: grabbing land . . . and building permanent settlements.’ In my opinion, these measures deny contiguity and viability to any future independent Palestinian entity, not to mention a state. Disrespect for international law is, alas, not unusual in the affairs of states. It is rare, however, that disrespect of an international convention would have such a direct impact on the elimination of any realistic prospects for reconciliation, not to mention peace. And it is rarer still that such disrespect of international law should subsist given the number of authoritative pronouncements on the matter. Even on most disputed questions, a clear pronouncement by the International Court of Justice (as has been issued on the status of the West Bank as a territory under belligerent occupation, on the applicability of the Fourth Geneva Convention, and equally clearly on the illegality of the settlements), supported by a score of Security Council resolutions, the International Committee of the Red Cross, and a rare consensus of the international community, should have rendered any controversy moot, if not settled. Furthermore, the Israeli Supreme Court itself has routinely defined the situation on the West Bank as a territory under belligerent occupation subject to the provisions on occupation in the Hague Convention No. IV.”

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Theodor Meron:

“These facts have not stopped successive Israeli governments, and many others, from denying the Convention’s applicability to the West Bank, often relying on the Blum-Shamgar theories which, despite the passage of time, are still driving the Israeli narrative concerning the West Bank. Briefly, the Blum-Shamgar thesis is that conquered territory becomes occupied territory only when it belongs to a legitimate sovereign that has been ousted.”

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Theodor Meron: “the occupation of the West Bank is governed by Article 2(1) [of the Fourth Geneva Convention], which provides in relevant part that ‘the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.’ In the Wall Advisory Opinion, the International Court of Justice made clear that under customary international law, the territory situated between the Green Line (1949 Armistice line) and the former eastern boundary of Palestine under the Mandate is occupied territory in which Israel has the status of occupying power.”

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The International Committee of the Red Cross (ICRC) 2016 commentary on Article 2 of the Fourth Geneva Convention states:

“Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory. It does not matter who the territory was taken from. The occupied population may not be denied the protection afforded to it because of disputes between belligerents regarding sovereignty over the territory concerned.”

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Theodor Meron:

“The Vienna Convention on the Law of Treaties clearly recognizes the special character of such conventions when it speaks of ‘provisions relating to the protection of the human person contained in treaties of a humanitarian character.’ The Fourth Geneva Convention not only creates a system of individual rights, it also provides for their inalienability. Throughout, it states the primacy of individual rights. Nowhere does it even hint at the subjection of such rights to questions pertaining to title to territory.”

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Theodor Meron: “the Geneva Conventions have, of course, their own robust version of the principle of *pacta sunt servanda* in common Article 1, which reads: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ The related Commentary explains that ‘the words ‘in all circumstances’ mean that as soon that one of the conditions of application for which Article 2 provides, is present, no Contracting Party can offer any valid pretext, legal or otherwise, for not respecting the Convention in its entirety.’”

The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War

Theodor Meron:

“The relevant provision of the Fourth Geneva Convention is Article 49(6), which reads: ‘The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.’ The proponents of the settlements’ legality often invoke the following statement of the legislative history of Article 49(6), contained in the 1958 ICRC Commentary, to support their position: ‘It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories.’ They argue that this text suggests a state-organized or forced transfer of population, in contrast to the Israeli settlers, who, the argument goes, have moved voluntarily, hence making the text irrelevant to the settlements.”

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Theodor Meron:

“The idea of force was quite logically used in Article 49(1), which concerns the deportation of the population of an occupied territory. However, to graft the requirement of force onto Article 49(6), which concerns the occupant’s own population, makes little sense and is anchored in no authority...

“In the Wall Advisory Opinion, the ICJ clearly rejected the argument that Article 49(6) applies only to forcible transfers or movement... The Court went on to explain: ‘In this respect, the information provided to the Court shows that . . . Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6. . . .’

“[W]hile it is true that Jewish settlers have moved voluntarily to the West Bank, this has happened only with massive state encouragement, organization, and material and budgetary incentives, not to mention heavy security protection and increasingly the construction of bypass roads—as acknowledged by the Israeli Supreme Court in the case of Gaza Coast Regional Council v. Knesset, narrowing the difference between the two situations.”

The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War

Theodor Meron:

“Richard Baxter has noted that ‘[t]he first line of defense against international humanitarian law is to deny that it applies at all.’ And George Aldrich has observed that the refusal to apply the Geneva Conventions in situations where they should be applied is ‘often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted.’ As I have set forth above, such denials or refusals with respect to the application of international humanitarian law in the West Bank cannot, in my view, be accepted. Those of us who are committed to international law, and particularly to respect for international humanitarian law and the principles embodied therein, cannot remain silent when faced with such denials or self-serving interpretations.”

The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War

Theodor Meron:

“[I]ndividual Palestinians’ human rights, as well as their rights under the Fourth Geneva Convention, are being violated and... the colonization of territories populated by other peoples can no longer be accepted in our time.”

David Matas, “Kerry is Dead Wrong When it Comes to Settlements”, January 2017

“Since the inception of the State of Israel, anti-Zionists and anti-Israel activists have engaged in various campaigns aimed at demonizing and delegitimizing the Jewish State, falsely accusing Israel of violating international law, including the prohibition on transfers of population from an occupying state to the territory of an occupied state. Israel, however, has not violated that standard because a) the West Bank is not occupied territory and b) Jewish residents of Israel are not being forcefully transferred there.

“The West Bank is not an occupied territory because there is no occupied state. Jordan, which had control of the West Bank before Israel, [renounced all claims](#) to the West Bank in 1988. The West Bank, to use neutral terminology, falls under shared control of Israel and the Palestinian Authority.”

David Matas, “Kerry is Dead Wrong When it Comes to Settlements”, January 2017

- As Theodor Meron explains, the fact that Jewish citizens are not being forced to settle in the West Bank does not alter the reality that Israel is violating Article 49 of the *Fourth Geneva Convention* – it not only allows exclusive Jewish settlements in occupied territories but it actively facilitates and encourages such settlement. That is sufficient to violate Art. 49.
- As Theodor Meron pointed out, the ICRC 2016 commentary on Article 2 of the Fourth Geneva Convention states: “Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory. It does not matter who the territory was taken from.”
- The ICJ rendered its unanimous judgment on the existence of the occupation and the illegality of the settlements 16 years after Jordan renounced its claims on the West Bank

Article 1 of the Fourth Geneva Convention

As the ICJ held in its Advisory Opinion on the Wall), “it follows from [Article 1] that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”
Therefore, “all the States parties to the Geneva Convention (...) are under an obligation (...) to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”

Article 1 of the Fourth Geneva Convention

Article 1 is generally viewed as creating a positive obligation on third parties to an armed conflict: “It is generally understood that the positive responsibility under common Article 1 (...) is to be construed as an ‘obligation of means’ on States to take all appropriate measures possible in an attempt to end violations of international humanitarian law...” High Contracting Parties should not only refrain from encouraging, aiding or assisting in violations of the Convention but they must also take positive steps to prevent and end such violations.

Article 1 of the Fourth Geneva Convention

The obligation “to respect” and “to ensure respect” for IHL encompasses broad duties, such as the obligation for all States to abide by the rules of the Conventions, as well as the duty to take all necessary measures to safeguard compliance with the Conventions by the parties to the conflict. By engaging in direct relations with a State that is breaching its international law obligations, a third State can be held accountable through secondary responsibility mechanisms. The International Law Commission (ILC), in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, has identified three major instances where a State may be held directly responsible for the acts of another: rendering aid or assistance, effective control over the perpetrator and exercising coercion.

Article 1 of the Fourth Geneva Convention

In 2016, the ICRC released an updated commentary on the First Geneva Convention. The new commentary outlines, for the first time, a wide range of concrete measures that third States can adopt toward the end of ensuring respect for IHL by other States.

The new Article 1 commentary notes that, for the purpose of Article 1, the subjective element of ‘intent’ is not required; “Article 1 does not tolerate that a State would knowingly contribute to violations of the Conventions by a Party to a conflict, whatever its intentions may be.”

Article 1 of the Fourth Geneva Convention

New ICRC commentary explains that, according to the specific circumstances of the violation, a State has the liberty to choose among a wide range of measures to ensure respect for IHL, depending on “the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach.”

Possible measures range from “soft” measures such as “addressing questions of compliance within the context of a diplomatic dialogue; exerting diplomatic pressure by means of confidential protests or public denunciations” to stronger measures, like the “halting of ongoing negotiations or refusing to ratify agreements already signed, the non-renewal of trade privileges, and the reduction or suspension of voluntary public aid”, and “adopting lawful countermeasures such as arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements; or conditioning, limiting or refusing arms transfers.”

Canada's *Geneva Conventions Act*

The Geneva Conventions not only impose on the High Contracting Parties the duty to respect and ensure respect for IHL but also require third States to ensure accountability for the commission of grave breaches of the Conventions. Article 146 of Geneva Convention IV provides that the High Contracting Parties “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” of the Convention.

Canada has incorporated the Geneva Conventions into domestic law via the federal *Geneva Conventions Act*. Under s. 3(4) of that Act, proceedings with respect to grave breaches of the Geneva Conventions may only be commenced with the personal consent in writing of the Attorney General of Canada or the Deputy Attorney General of Canada and be conducted by the Attorney General of Canada, or counsel acting on behalf thereof.

International Law Commission (ILC) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts

- In 2001, the International Law Commission (ILC) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). ARSIWA is “considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility.” Part One, Chapter IV, Article 16 refers to responsibility of a State for providing aid or assistance in the commission of an internationally wrongful act by another State. Part II, Chapter III, concerns the responsibility of third States in case of breaches of peremptory norms of international law (*jus cogens*).

International Law Commission (ILC) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts

- ARSIWA Part II, Chapter III, constitutes a regime of third party responsibility that only applies in instances of serious breaches of peremptory norms (*jus cogens*) obligations under international law.
- Article 53 of the Vienna Convention on the Law of Treaties (1969) defines peremptory norms of general international law (*jus cogens*) as norms accepted and recognized by the international community of States as a whole, from which no derogation is permitted.
- The international community has unanimously recognized a number of fundamental rights and prohibitions as *jus cogens* norms. In its commentary to the Draft Articles, the ILC offered a non-exhaustive list of these well-established peremptory norms, including: the prohibition against aggression and the illegal use of force including the acquisition of territory by force, slavery and slave trade, racial discrimination, apartheid, genocide, torture, and the right to self-determination.

International Law Commission (ILC) adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts

ARSIWA Article 41 imposes three major duties on third party observers of serious breaches of peremptory norms of international law: (1) a duty to cooperate to bring to an end the wrongful situation, (2) a duty to refrain from recognizing the wrongful situation and (3) a duty to refrain from rendering aid or assistance in maintaining the wrongful situation.

The duty to refrain from recognizing the wrongful situation

The EU has taken several measures against recognition of Israel's unlawful settlements and control of the OPT.

The European Foreign Affairs Council has concluded that “all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip.”

In 2013, the EU adopted guidelines on the eligibility of Israeli entities and, in 2015, settlement product labeling guidelines. These documents constitute important steps toward the implementation of EU non-recognition of Israel's sovereignty over the West Bank, East Jerusalem and the Syrian Golan Heights and reaffirm the EU position that the territory of Israel does not extend beyond the Green Line, including that products made in Israeli settlements are not entitled to benefit from the EU-Israel Association Agreement.

The duty to refrain from rendering aid or assistance in maintaining the wrongful situation

- ARSIWA Article 16 provides that a State aids or assists another State in the commission of an internationally wrongful act and is internationally responsible for doing so if:
 - (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
 - (b) the act would be internationally wrongful if committed by that State.
- A practical example of instances of “aid and assistance” in maintaining an unlawful situation derived from a breach of peremptory norms is economic and commercial dealings between a state that is violating peremptory norms and a third State

Is Canada rendering “aid or assistance” to Israel and/or violating its duty of non-recognition with respect to Israel’s wrongful acts?

Canada trades in arms with Israel.

Ammunition sales to Israel spiked from 2010-2013, as did bombs, grenades, torpedoes, mines, and military software and technology exports. This increase occurred just prior to Israel’s 2014 "Shock and Awe" campaign in Gaza, in which Israel killed about 2,300 Palestinians and injured 17,000.

In January 2015, the Conservative government amended its military export law to permit Canadian shipments to Israel of prohibited weapons, such as handguns and automatic weapons.

Canadian military exports to Israel in 2016 were valued at more than \$9.7 million up from \$7.8 million in 2015.

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Kattenburg v Attorney General of Canada

Under intense pressure from Canada’s pro-Israel lobby, the Trudeau government reversed a determination by the Canadian Food Inspection Agency that wines produced in Israel’s unlawful settlements could not be labelled as “product of Israel.”

For purposes of the Canada-Israel Free Trade Agreement (CIFTA), the territory of Israel is defined as the territory where its customs laws are applied.

The Canadian Government’s position seems to be that CIFTA extends preferential tariff treatment to settlement products.

Is Canada rendering “aid or assistance” to Israel and/or violating its duty of non-recognition with respect to Israel’s wrongful acts?

On August 28, 2018, the *Canadian Jewish News* published an op-ed by Liberal MP Anthony Housefather in which Housefather wrote:

“Like many in our community, there is nothing more upsetting to me than when the UN unfairly singles out Israel for condemnation. When it comes to the current government’s record on these resolutions versus previous governments, the Trudeau government’s record is by far the best. We have voted against 87% of the resolutions singling out Israel for condemnation at the General Assembly versus 61% for the Harper government, 19% for the Martin and Mulroney governments and 3% for the Chrétien government. We have also supported 0% of these resolutions, compared to 23% support under Harper, 52% under Mulroney, 71% under Martin and 79% under Chretien

“With respect to the record of the Trudeau government versus other countries, our record is almost identical to the United States. The U.S. has voted against 91% of the resolutions singling out Israel for condemnation at the General Assembly since October 2015; Canada has voted against 87%. By comparison, Australia voted against 30% of these resolutions; none of the other seven countries voted against any of these resolutions — in fact, while Canada and the U.S. voted for 0% of these sorts of resolutions, Australia voted for 33%, France, Germany, Italy, Japan, New Zealand, Russia and the U.K. voted for 80% and the Chinese for 100% of these resolutions.”

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