The Convention And The Court

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December 10 is the 51st anniversary of the Universal Declaration of Human Rights, probably the premier human rights document of the outgoing century. The declaration was not just a statement of good intentions made in response to the harrowing violations of human rights in the late 1930s and the first half of the 1940s. It was also a kind of constitutional framework for a host of further international agreements that have found their way into the collective human consciousness and conscience.

Among the first of these agreements was the Fourth Geneva Convention, which sets down clear guidelines for protecting the population of occupied territories. The 50th anniversary of this agreement was to have been commemorated last August by a special symposium. But at Israel's urgent request—and with the Palestinians' agreement—that event was postponed indefinitely. The reason: Israel's fear that it would come under bitter attack at the gathering for its failure to abide by the convention's provisions in the 32 years since the Six Day War.

The invocation of the Fourth Geneva Convention is often regarded by Israel as rude interference in its internal affairs, almost as an infringement of its sovereignty. But at the time of the convention's formulation, Israel accepted it with alacrity. In fact, the State of Israel ratified it long before most of the world's leading democracies, including the United States, the United Kingdom, and the Scandinavian countries.

So it was an ironic quirk of fate that one of the first countries to which the injunctions of the Fourth Convention became applicable was the Sate of Israel, as a result of the 1967 war. But when petitions based on the convention were made to the High Court of Justice, its activist bench found a way to minimize the document's applicability to Israeli jurisprudence. Although the government had ratified the convention, the court held that it was not automatically binding on Israel because the Knesset—which is the sovereign power in Israel—had not passed legislation specifically incorporating the Geneva Convention into Israeli law. In so ruling, the court rejected the argument that the convention's provisions are a part of "customary international law," which is automatically incorporated into national legal systems, unless a country passes legislation specifically denying its legal relevance.

Israel had never passed such legislation in regard to the Fourth Geneva Convention. On the contrary, it had affirmed the values enshrined in its articles by ratifying them. The High Court finessed its was around this awkward dilemma by declaring that, although the Fourth Geneva Convention was not formally binding on Israel, the justices would adjudicate in the spirit of the document—particularly in terms of enforcing its humanitarian provisions when addressing petitions from Palestinians.

Still, there was one particular provision that seemed to lack a classically humanitarian purpose: Article 49, which, among other things, denies the occupying power the right to transfer people into the area under occupation. Even some of the

drafters of the convention indicated that this limitation was incorporated less to protect the people under occupation than to prevent the occupying power from making a formal change in the population base.

After all, citizens of the occupying power can purchase plots of land in occupied areas as private individuals. But once it became clear that the High Court was intent on implementing only the manifestly humanitarian provisions of the convention, the way was open for Israeli officialdom to conduct a policy that allowed a population transfer—in this case of Jewish settlers into the occupied territories. Today these settlers number about 180,000—some 7 percent of the total population of the territories—and are a key factor in the calculus of the peace process.

There can be little doubt that the character and pace of the peace negotiations that have been grinding on since 1991 would have been radically different had Article 49 of the Fourth Geneva Convention been rigorously enforced by an otherwise liberal and activities court.

But there is yet another paradox in the present situation. If the High Court's 1970s decisions on the applicability of the Fourth Geneva Convention were to be reconsidered today, there is every reason to believe that they would no longer hold. For one of the ways of determining whether or not a legal norm is binding is the length of time it has been widely accepted. Given the quarter century that has passed since its landmark decisions, the High Court could well declare the Fourth Geneva Convention an integral part of "customary international law" and therefore binding on Israeli courts. Specifically, the High Court's own invocation of the convention's humanitarian provisions in more than 1,000 cases over the past 25 years attests to the adoption of these legal norms.

Of course, even a reversal of the High Court's stand on the critical Article 49 of the Fourth Geneva Convention would not, in an of itself, require or lead to the re-transfer of the settlers back over the Green Line. But it would at least highlight the fragile nature of their legal status in the occupied territories and thereby make a substantial contribution to the present course of the peace process.