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Johan D. van der Vyver
Emory University School of Law

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ISRAEL AND THE TERRITORIAL INTEGRITY OF STATES

*Johan D. van der Vyver**

ABSTRACT

The territorial integrity of States has come to be accepted as a fundamental principle of international law. The secession of a region from an existing State will be accepted in very special circumstances, but the acquisition of a territory that is included within the national borders of a State is strictly prohibited. The territorial integrity of Palestine is the central theme of this Article. The establishment of Israeli settlements in Palestine and the construction of a wall/fence by Israel within Palestinian territories has been condemned in terms of the Geneva Conventions of 12 August 1949 and by an advisory opinion of the International Court of Justice, respectively.

In January 2020, former President of the United States, Donald Trump, with Israeli President Benjamin Netanyahu by his side, announced a “peace plan” in the Israeli-Palestinian dispute that will constitute a “win-win opportunity for both sides.” The “peace plan” included Israeli control of a unified Jerusalem as its capital, the annexation of Palestinian land with the Jordan River as its Eastern border, and sovereignty of Israel over Jewish settlements in Judea and Samaria.

It is argued that the Trump/Netanyahu proposal is not a “peace plan” since Palestinian authorities were not included in its design and that the taking of Palestinian land by Israel clearly constitutes a blatant violation of the territorial integrity of Palestine. Palestine has been recognized as a State by 138 Member States of the United Nations, has been admitted as a Member State of the International Criminal Court (ICC), and although the Prosecutor of the ICC has raised certain concerns about the territorial confines of Palestine, a Pre-Trial Chamber of the ICC recently decided that its territorial jurisdiction extends over the entire Palestinian territory occupied by Israel, including Gaza, the West Bank, and East Jerusalem.

* I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law.

INTRODUCTION

In January 2020, President Donald Trump announced that he had a peace plan that would resolve the Israeli-Palestinian conflict; on January 28, with Prime Minister of Israel Benjamin Netanyahu at his side, details of what Donald Trump called a “win-win opportunity for both sides” were made public at a White House ceremony.¹ It appeared from the briefing that the “peace plan” was not one which Donald Trump had designed but was one that simply endorsed what Netanyahu had in mind; and though it was presented as a “peace plan,” Palestine was not present or even consulted.²

The substance of what Prime Minister Netanyahu proposed, and President Donald Trump endorsed lock, stock, and barrel, included Israeli control of a unified Jerusalem as its capital and the annexation of vast stretches of Palestinian land.³ Israel will establish the Jordan River as its eastern border and claim sovereignty over Jewish settlements in the West Bank, referred to in Israel as Judea and Samaria.⁴

The Netanyahu resolve presented to the world as Donald Trump’s “peace plan” violates the territorial integrity of Palestine and as such constitutes a blatant violation of international law. Although the border dispute between Israel and Palestine is still ongoing, Palestine is recognized as a State by 138 Member States of the United Nations⁵ and was admitted on April 1, 2015 as a State Party of the International Criminal Court (ICC).⁶ Ratification of the Rome Statute of the International Criminal Court (Rome Statute) and membership of the Assembly of States Parties are confined to States and admitting Palestine as a State Party of the ICC is therefore an important step in recognizing Palestine as a member of the international community of States.⁷

¹ Michael Crowley & David M. Halbfinger, *Trump Releases Mideast Peace Plan That Strongly Favors Israel*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/01/28/world/middleeast/peace-plan.html>.

² *Id.*

³ See generally David M Halbfinger & Isabel Kershner, *Israel Plans to Claim Sovereignty Over Part of West Bank*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/28/world/middleeast/israel-west-bank-annex-sovereignty.html>.

⁴ *Id.*

⁵ Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012).

⁶ *ICC: Palestine Is Newest Member*, HUM. RTS. WATCH (Apr. 1, 2015), <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member#>.

⁷ *Rome Statute of the International Criminal Court*, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN DOC. A/CONF.183/9* (June 15–July 17, 1998) [hereinafter *Rome Statute*], preamble, reprinted in 37 I.L.M. 1002 (1998) (describing parties to the Statute as “States”).

In Part I, this Article will highlight the historical foundation of the territorial integrity of States and the importance attached to national borders in international law. Part II is focused on the manifestations of territorial integrity of States, while noting (a) that international law is not favorably disposed to secession of a territory from existing States, as evidenced by its responses to secessionist movements in Katanga, Biafara, the Turkish Republic of Northern Cyprus, the northern region of Mali known as Azawad, and the province of Catalonia in Spain; and (b) that the acquisition by State A of part of the territory of State B through military invasions, conquest, annexation, or occupation has come to be prohibited by international law in no uncertain terms. Violations of the principle of international law proclaiming the territorial integrity of States in instances such as the invasion of Manchuria in China by Japan, and the annexation of certain northern provinces of Georgia, and of the Ukrainian province of Crimea, by the Russian Federation, are dealt with in Part III.

This, then, brings us in Part IV to the occupation and taking of Palestinian territories by Israel with emphasis on the reasons submitted by Israel for establishing Jewish settlements in Palestinian territories, and the advisory opinion of the International Court of Justice (ICJ) and judgments of Israeli courts regarding the building of a security fence by the Israeli Defense Force on Palestinian land.

Dealt with in Part V is the recent question of the territorial confines of Palestine that became an issue in the ICC following a referral by Palestine of the situation in Palestine for an investigation by the Office of the Prosecutor of the ICC.⁸ Following a preliminary investigation, the Prosecutor decided that reasonable grounds do exist to proceed with a full-scale investigation but requested a Pre-Trial Chamber of the ICC to confirm the “territory” over which the ICC may exercise jurisdiction in Palestine.⁹ Since territorial confines are an essential component of statehood, the concerns of the Office of the Prosecutor have important implications relating to the statehood of Palestine.

I. HISTORICAL PERSPECTIVE

The sanctity of post-World War II national borders has come to be accepted as a fundamental principle of international law.¹⁰ It is perhaps important to note

⁸ See *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, ICC (Dec. 20, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>.

⁹ *Id.*

¹⁰ See Andrew Kent, *Evaluating the Palestinians' Claimed Right of Return*, 34 UNIV. PA. J. INT'L L. 149,

that the disposition of post-colonial African States played an important role in proclaiming what has come to be referred to in international law as the territorial integrity of States.

During the pre-World War II era, when colonialism was widely imposed on African communities, national borders were established quite irrationally by the colonizing countries of Europe, separating members of particular tribal groups into different colonized countries and including within the same colonized countries tribal groups that were particularly hostile toward one another.¹¹ Following World War II (1939–1945), when decolonization became an important focus of international law, there were important voices in Africa to redraw national borders that would be more sensitive to group alliances and rivalries between population groups on the African continent.¹² At its very first meeting, the Organization of African Unity, now the African Union, sensitive to the chaotic situation that might emerge from efforts to redraw the irrational national borders, played a leading role in emphasizing the salience of existing frontiers.¹³ Its Charter of 1963 prompted Member States to “solemnly affirm and declare” their “respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”¹⁴ A Resolution of the Assembly of Heads of State and Government adopted at its first ordinary session held in Cairo in 1964 called on all Member States “to respect the borders existing on their achievement of national independence.”¹⁵

Subsequently, the principle of upholding the territorial integrity of states has been emphatically endorsed in other international instruments, including the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, which proclaimed without exception “that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter [of the United

222 (2012) (“The decolonization of Africa, Asia, and the Middle East after World War II almost everywhere followed the rule of *uti possidetis*, a norm of territorial integrity - that is, stability of previous boundaries.”).

¹¹ See Tasew Gashaw, Wilson Ctr., *Colonial Borders in Africa: Improper Design and its Impact on African Borderland Communities*, AFRICA UP CLOSE (Nov. 17, 2017), <https://africaupclose.wilsoncenter.org/colonial-borders-in-africa-improper-design-and-its-impact-on-african-borderland-communities/#:~:text=Artificial%20borders%20split%20many%20closely,Somali%20region%20of%20northern%20Kenya>.

¹² See Alys Beverton, *Organization of African Unity (1963-2002)*, BLACKPAST (May 10, 2009), <https://www.blackpast.org/global-african-history/organization-african-unity-1963-2002>.

¹³ See *id.*

¹⁴ Org. of African Unity [OAU] Charter art. III.3 (May 25, 1963).

¹⁵ Org. of African Unity [OAU], *Border Disputes of African States*, AHG/Res. 16(I) (July 17–24, 1964).

Nations].”¹⁶ The *Helsinki Final Act*¹⁷ likewise endorsed the principle of “respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”¹⁸ It has now come to be accepted that “the principle of territorial integrity is an important part of the international legal order enshrined in the Charter of the United Nations[.]”¹⁹

II. MANIFESTATIONS OF THE TERRITORIAL INTEGRITY OF STATES

The principle proclaiming the territorial integrity of States (a) denounces, as a general rule, the secession of a territory from an existing State,²⁰ and (b) strictly prohibits the acquisition of a territory by force.²¹

A. Secession

International law is in principle not favorably disposed toward the breaking up of existing States, particularly if the purpose of disintegration of a plural community is allegedly to establish homogenous ethnic, religious, or linguistic communities. The international community of States has been quite adamant in censuring attempts at secession in instances such as Katanga, Biafra, and the Turkish Republic of Northern Cyprus,²² and more recently the northern regions of Mali known as Azawad,²³ and the province of Catalonia in the northeastern corner of Spain.²⁴ As explained by Vernon van Dyke, “the United Nations would be in an extremely difficult position if it were to interpret the right to self-

¹⁶ G.A. Res. 2625 (XXV), Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with The Charter of the United Nations (Oct. 26, 1970) (calling on States to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”) [hereinafter G.A. Res. 2625].

¹⁷ Org. for Sec. and Co-operation in Europe, *Helsinki Final Act*, at 4 (Aug. 1, 1975).

¹⁸ Org. of African Unity [OAU] Charter art. III.3 (May 25, 1963).

¹⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 80 (July 22, 2010).

²⁰ See Beverton, *supra* note 12.

²¹ G.A. Res. 2625, *supra* note 16 (“No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”).

²² See Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT’L L. REV. 321, 403–07 (1991); see also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, 235–36, 265 (1979) (discussing in greater detail); JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 84–85, 86–90, 108–111 (1987); Johan D. van der Vyver, *Statehood in International Law*, 5 EMORY INT’L L. REV. 9, 35–37, 42–44 (1991).

²³ See S.C. Res. 2100, ¶ 7 (Apr. 25, 2013).

²⁴ See generally Sam Jones, *What is the Story of Catalan Independence and What Happens Next*, GUARDIAN (Oct. 14, 2019), <https://www.theguardian.com/world/2019/oct/14/catalan-independence-what-is-the-story-what-happens-next>.

determination in such a way as to invite or justify attacks on the territorial integrity of its own members.”²⁵

It must be emphasized that the right to self-determination of ethnic, religious and linguistic communities is confined to the right of such communities within a plural society to promote their culture, practice their religion, and speak their language without undue state-imposed restrictions.²⁶ It does not include a right to secession.²⁷ The 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* expressly states that its provisions must not be taken to contradict the principles of the United Nations pertaining to, *inter alia*, “sovereign equality, territorial integrity and political independence of States.”²⁸ The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* reiterated that, in virtue of their right to self-determination, indigenous peoples are entitled to “freely determine their political status and freely pursue their economic, social and cultural development,”²⁹ and lest this provision be interpreted to denote political independence, the Declaration stipulated that “[n]othing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”³⁰ The 1995 *Framework Convention for the Protection of National Minorities* of the Council of Europe also proclaims “[n]othing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.”³¹

Secession is sanctioned by international law in two instances only: (a) if a decision to secede is “freely determined by a people”³²—that is, it is submitted

²⁵ VERNON VAN DYKE, *HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY* 102 (1970).

²⁶ See generally JD [Johan] van der Vyver, *The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa*, 14 *POTCHEFSTROOM ELEC. L.J.* 1 (2011).

²⁷ See *id.*, at 13.

²⁸ G.A. Res. 47/135, annex, art. 8(4) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (Dec. 18, 1992).

²⁹ G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, at 8 (Sept. 13, 2007).

³⁰ *Id.* at 28.

³¹ Council of Europe, *Framework Convention for the Protection of National Minorities*, Feb. 1, 1995, 34 *I.L.M.* 351.

³² G.A. Res. 2625, *supra* note 16 (proclaiming under the heading: “The Principle of Equal Rights and Self-Determination of Peoples” that “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”)

by a cross-section of the entire population of the State to be divided and not only inhabitants of the region wishing to secede;³³ and (b) if, following an armed conflict, national boundaries are redrawn as part of a peace settlement.³⁴

Following the unilateral declaration of independence of Kosovo from Serbia on February 17, 2008 by a substantial majority of the Assembly of Kosovo, the ICJ in an advisory opinion noted that it was not called upon “to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.”³⁵ Instead, the ICJ decided that the Security Council Resolution—which authorized the Secretary-General to establish an interim administration for Kosovo, *inter alia*, to oversee “the development of provisional democratic self-governing institutions”³⁶—did not preclude the declaration of independence,³⁷ and somewhat obscurely, that the declaration of independence did not violate general international law.³⁸

Special mention should perhaps be made to the Tuareg Rebellion of 2012 to 2013 in the African State of Mali.³⁹ A Jihadist group allegedly “rooted in Islam” embarked on a military campaign against the government forces of Mali for the purpose of obtaining independence for the northern region of Mali known as Azawad.⁴⁰ In response to a request of the government of Mali, the Security Council of the United Nations adopted a resolution in 2013 establishing the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), composed of 11,200 military and 1,400 police personnel to implement a peace enforcement program in Mali, and authorizing the peacekeepers to apply “all necessary means”—a phrase that has come to mean the use of military force—to execute its mandate.⁴¹ The mandate of MINUSMA was renewed for a year and expanded in 2014.⁴² The Tuareg Rebellion was eventually conquered by

³³ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 294 (Can.) (deciding that secession of Quebec from Canada will require “clear” majorities on two fronts: the population of the province of Quebec, and the population of Canada as a whole).

³⁴ ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 359–63 (1995).

³⁵ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *supra* note 19, ¶ 56.

³⁶ S.C. Res. 1244, ¶ 10 (June 10, 1999).

³⁷ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *supra* note 19, ¶¶ 114, 119.

³⁸ *Id.* ¶ 122.

³⁹ S.C. Res. 2100, ¶ 7 (April 25, 2013).

⁴⁰ *Id.* ¶ 7.

⁴¹ *Id.* ¶¶ 7, 12, 17.

⁴² S.C. Res. 2164, ¶ 11 (June 25, 2014).

military forces of France (Mali was formerly a colony of France),⁴³ and it is interesting to note for the record that the leader of the group, Ahmad al Faqi al Mahdi, was subsequently brought to trial in the ICC based on the destruction of Moslem shrines and other historic places and cultural objects in the city of Timbuktu.⁴⁴ The accused pleaded guilty, was convicted on September 27, 2016, and sentenced to nine years imprisonment.⁴⁵ The chief of Islamic police in Timbuktu has also been indicted to stand trial in the ICC, and his challenge to the admissibility of the charges against him was rejected by a Pre-Trial Chamber of the ICC.⁴⁶

There are indeed compelling reasons why the disjunction of territorially defined frontiers should be avoided at all costs:

- A multiplicity of economically non-viable states will further contribute to a decline of the living standards in the world community[;]
- The perception that people who share a common language, culture or religion would necessarily also be politically compatible is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict[;]
- Movement of people within plural societies across territorial divides has greatly destroyed ethnic, cultural, or religious homogeneity in regions where it might have existed in earlier times, and consequently, the demarcation of borders which would include the sectional demography that secessionists seek to establish is in most cases quite impossible[;]
- Affording political relevance to ethnic, cultural, or religious affiliation not only carries within itself the potential for repressing minority groups within the nation, but also affords no political standing whatsoever to persons who, on account of mixed parentage or marriage, cannot be identified with any particular faction of the group-conscious community, or to those who, for whatever reason, do not wish to be identified under any particular ethnic, religious, or cultural label[;]

⁴³ *Mali Country Profile*, BBC NEWS (Sept. 22, 2020), <https://www.bbc.com/news/world-africa-13881370>.

⁴⁴ *Prosecutor v. Ahmad al Faqi al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 10 (Sept. 27, 2016), https://www.icc-cpi.int/courtrecords/cr2016_07244.pdf.

⁴⁵ *Id.* ¶¶ 30, 82, 106.

⁴⁶ *Prosecutor v. Al-Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-459-tENG, Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case, ¶ 17 (Oct. 31, 2019).

- In consequence of the above, an ethnically, culturally, or religiously defined State will more often than not create its own “minorities problem”, which—because of the ethnic, cultural, or religious incentive for the establishment of the secession state—would almost invariably result in profound discrimination against those who do not belong, or worse still, a strategy of “ethnic cleansing.”⁴⁷

B. *The Acquisition of a Territory*

There was a time in the history of mankind when national borders were established and modified, almost at random, through military invasions, conquest, annexation, or occupation. Today, the acquisition of a territory by force is prohibited by international law as a matter of *jus cogens*.⁴⁸ This is fully borne out by the U.N. Charter’s predominant emphasis on the maintenance of international peace and security,⁴⁹ peaceful settlement of disputes,⁵⁰ and obligation of Member States to refrain from the threat or use of force.⁵¹ These provisions, which constitute the central theme of international relations and co-existence, were endorsed and further specified in the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States*.⁵²

The unconditional proscription of the acquisition of a territory by force is also confirmed by the General Assembly’s definition of aggression.⁵³ Aggression includes “[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof[.]”⁵⁴ The Resolution further provides: “No consideration of whatever nature, whether political, economic,

⁴⁷ Johan D. van der Vyver, *The Right to Self-Determination and Its Enforcement*, 10.2 ILSA J. INT’L & COMP. L. 421, 429 (2004).

⁴⁸ See, e.g., JAMES FAWCETT, *LAW AND POWER IN INTERNATIONAL RELATIONS* 91 (1982); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 222 (2d ed. 1984); Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, in 159 *ACADÉMIE DE DROIT INT’L, RECUEIL DES COURS* 1, 64 (1978); Jochen Frowein, *Jus Cogens*, in 7 *ENCYCLOPEDIA OF INT’L L.* 327, 329 (R. Bernhardt ed., 1984); Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, in 172 *ACADÉMIE DE DROIT INT’L, RECUEIL DES COURS* 271, 287–88 (1981).

⁴⁹ U.N. Charter art. 1, ¶ 1.

⁵⁰ *Id.* art. 2, ¶ 3.

⁵¹ See *id.* art. 4.

⁵² See G.A. Res. 2625, *supra* note 16.

⁵³ See G.A. Res. 3314 (XXIX), art. 3, ¶ 1.

⁵⁴ *Id.*

military or otherwise, may serve as a justification for aggression;”⁵⁵ and: “No territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.”⁵⁶ The definition of aggression was intended to serve as a guide for the Security Council of the United Nations for purposes of executing its Chapter VII powers with regard to acts of aggression.⁵⁷ The definition was endorsed by general agreement by the Review Conference of the ICC that was held in Kampala, Uganda on May 31 through June 11, 2010 as the basis for identifying the crime of aggression,⁵⁸ and was in this context inserted in the Rome Statute.⁵⁹ This amendment of the Rome Statute was activated by the Assembly of States Parties of the ICC as of July 17, 2018.⁶⁰

The Netanyahu/Trump “peace plan” indisputably violates these instructions of international law relating to the acquisition of land that constitutes part of a foreign country.

III. VIOLATIONS OF THE TERRITORIAL INTEGRITY OF STATES

Violation of the territorial integrity of States can consist of (a) colonialism, (b) secession of a territory within the borders of a State; and (c) annexation of land by a foreign State.⁶¹ The Netanyahu/Trump “peace plan” to allegedly resolve the conflict between Israel and Palestine clearly amounts to the annexation of land currently within the borders of Palestine. As noted above, international law clearly denounces annexation in no uncertain terms. *De facto* annexation attempts occurred in several instances. The Japanese annexation of Manchuria, a region of mainland China, and the violation of the territorial integrity of Georgia and Ukraine by the Russian Federation are singled out here for special reference because of their historical importance and current significance.

⁵⁵ *Id.* art. 5, ¶ 1.

⁵⁶ *Id.* art. 5, ¶ 3; *see also* G.A. Res. 2131 (XX), ¶ 3, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and The Protection of Their Independence and Sovereignty (Dec. 21, 1965).

⁵⁷ *Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/actions>.

⁵⁸ *See* ICC-ASP/RC/Res.6*, annex 1, The Crime of Aggression, ¶ 2 (June 11, 2010).

⁵⁹ *Rome Statute*, *supra* note 7, art. 8.

⁶⁰ *Activation of the Jurisdiction of the Court Over the Crime of Aggression*, U.N. DOC. ICC-ASP/16/Res. 5 (Dec. 14, 2017); *see also* Claus Kreß, *On the Activation of Jurisdiction over the Crime of Aggression*, 16 J. INT’L CR. JUST. 1 (2018).

⁶¹ *See generally* *Territorial Integrity*, COMM. ON SEC. & COOP. IN EUR.: BY ISSUE, <https://www.csce.gov/issue/territorial-integrity>.

A. *Manchuria*

Manchuria, a region on the mainland of China, was invaded by the Kwantung Army of the Empire of Japan on September 19, 1931 and proclaimed by Japan to be part of its territory and subject to its sovereignty.⁶² Japan called this region on mainland China, now under Japanese control, Manchukua.⁶³ The annexation of Manchuria was allegedly sparked by the so-called Mukden Incident.⁶⁴

The Mukden Incident occurred in northern Manchuria when the Japanese blew up a section of their country's own railroad near Mukden (currently Shenyang) and blamed it on Chinese dissidents.⁶⁵ This in turn provided an excuse for the annexation of Manchuria by Japan, which was forcefully resisted for some years by anti-Japanese voluntary armies.⁶⁶ Toward the end of the Second World War in the Far East, military forces of the Soviet Union invaded Manchuria in what has come to be known as the Manchurian Strategic Offensive Operation and which lasted from August 2 to 9, 1945.⁶⁷ The Japanese claim to sovereignty over Manchuria thereby came to an end.⁶⁸

In the International Military Tribunal for the Far East, Japan described its military operations against the resistance armies in Manchuria as “police operations” which therefore⁶⁹—according to Japanese authorities—were not subjects to the laws and customs of armed conflict. The Tribunal noted in this regard that—

[f]rom the outbreak of the Mukden Incident till the end of the war the successive Japanese Governments refused to acknowledge that the hostilities in China constituted a war. They persistently called it an “Incident”. With this as an excuse the military authorities persistently

⁶² See International Military Tribunal for the Far East Judgement of 4 November 1948, *reprinted in* 22 THE TOKYO WAR CRIMES TRIAL: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, JUDGMENT OF 12 NOVEMBER 1948 (I.M.T.F.E.) 483 (John Pritchard & Sonia M. Zaide eds.), https://crimeofaggression.info/documents/6/1948_Tokyo_Judgment.pdf.

⁶³ R. P. Anand, *Family of Civilized States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 J. HIST. INT'L L. 1, 48 (2003).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 49.

⁶⁷ See generally DAVID M. GLANTZ, THE SOVIET STRATEGIC OFFENSIVE IN MANCHURIA, 1945 ‘AUGUST STORM’ (2003).

⁶⁸ See generally *id.*

⁶⁹ See E.W. Esselstrom, *Japanese Police and Korean Resistance in Prewar China: The Problem of Legal Legitimacy and Local Collaboration*, 21 INTEL. & NAT'L SEC. 1 (2006).

asserted that the rules of war did not apply in the conduct of hostilities.⁷⁰

The Tribunal rejected the Japanese argument and, applying international humanitarian law, convicted numerous Japanese accused of war crimes and other offenses.⁷¹ This again goes to show that international law does not accept annexation of a territory under any pretenses.

B. Georgia

The dissolution of the Soviet Union in the early 1990's left Member States with the choice to remain part of the newly established Russian Federation or to opt for national sovereignty as independent States.⁷² Georgia submitted its future status to a referendum on independence held in March 1991, and based on its outcome, Georgia on May 26, 1991 declared itself independent.⁷³ Included in the newly established independent State were the northern provinces of Abkhazia and South Ossetia (North Ossetia opted to remain part of the Russian Federation).⁷⁴ A referendum was held in South Ossetia on January 19, 1992 in which a substantial majority of the population supported the secession of South Ossetia from Georgia to become part of the Russian Federation.⁷⁵ However, when Georgia became a Member State of the United Nations on July 31, 1992, South Ossetia was considered to be part of the new Member State.⁷⁶ In 1991 and early 1992, military forces of Georgia were deployed in South Ossetia to counteract the secession of the region from Georgia.⁷⁷ The intervention of Russian armed forces in support of the secessionists prevented the Georgian military forces from achieving their objective.⁷⁸ In 2004, local militants were once again successful in preventing Georgian military forces from reconquering South Ossetia.⁷⁹

⁷⁰ International Military Tribunal for the Far East Judgement *supra* note 62, at 594.

⁷¹ See LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 87–88 (2d ed. 2019).

⁷² See *Dissolution of the USSR and the Establishment of Independent Republics, 1991*, U.S. DEP'T OF STATE: ARCHIVE. <https://www.state.gov> [<https://2001-2009.state.gov/r/pa/ho/time/pcw/108229.htm>].

⁷³ *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict* (Mar. 1995), <https://www.hrw.org/reports/1995/Georgia2.htm>.

⁷⁴ *Id.*

⁷⁵ DENNIS SAMMUT & NIKOLA CVETKOVSKI, VERTIC, THE GEORGIA-SOUTH OSSETIA CONFLICT, CONFIDENCE-BUILDING MATTERS No. 6, 28 (1996).

⁷⁶ *The United Nations in Georgia*, UNITED NATIONS, <https://georgia.un.org/en/about/about-the-un>.

⁷⁷ SAMMUT & CVETKOVSKI, *supra* note 75, at 10, 12.

⁷⁸ *Id.*

⁷⁹ Marietta Konig, *The Georgian-South Ossetian Conflict*, 2004 OSCE Y.B. 237, 246–47 (2004).

Similar tensions prevailed in the province of Abkhazia between the local Georgian population and the Abkhazian people who considered themselves to be of Russian extraction. Violence against the inhabitants of Abkhazia loyal to Georgia soon took on the format of “ethnic cleansing,”⁸⁰ which in turn provoked the intervention of Georgian military forces, with Russian military forces affording support to the separatists.⁸¹ The conflict ended in defeat of the Georgian armed forces.⁸² In 1993, the Russian Federation took effective control of this part of Georgia.⁸³ Russian troops remained in Abkhazia and South Ossetia as peacekeepers under the terms of a ceasefire agreement negotiated by the warring parties.⁸⁴

Georgia thus lost effective political control of both provinces, and the Russian Federation soon became more than merely preservers of the peace. Among other things, the Russian Federation afforded Russian nationality to residents of the two provinces by issuing Russian passports to residents of Abkhazia and South Ossetia.⁸⁵ A Human Rights Assessment Mission (HRAM) of the Organization for Security and Co-operation in Europe (OSCE) established that in order to obtain Abkhaz citizenship, a person applying for a passport was required to proclaim: “I voluntarily renounce my Georgian citizenship.”⁸⁶ The Office for Democratic Institutions and Human Rights of the OSCE in 2008 expressed grave concerns regarding the passport requirements imposed by the Russian Federation in Abkhazia:

There are now growing pressures on residents of the Gali district to obtain Abkhaz passports, which may be significant enough to constitute coercion. . . . [C]onditions are being created that will make it impossible for many of the residents of Gali to live normally without an Abkhaz passport. For example, according to two interlocutors, beginning next year an Abkhaz passport will be required for all employees of the local administration, including doctors and teachers; a passport will also be needed to transact business or for other legal activities. Another NGO told the HRAM that it feared that without Abkhaz passports, ethnic Georgians will not be able to send their

⁸⁰ Erin D. Mooney, *Internal Displacement and the Conflict in Abkhazia: International Responses and Their Protective Effect*, 3 INT’L J. ON GRP. RTS. 197, 202 (1996).

⁸¹ Tornike Sharashendize & Ivan Sukhob, *North Caucasus from the Standpoint of Russian-Georgian Relations*, in RUSSIA AND GEORGIA: SEARCHING THE WAY OUT 23, 44 (2011).

⁸² *Id.*

⁸³ Mooney, *supra* note 80, at 201.

⁸⁴ *See id.* at 126.

⁸⁵ *See id.* at 129.

⁸⁶ Office for Democratic Institutions and Human Rights [ODIHR], *Human Rights in the War-Affected Areas Following the Conflict in Georgia*, 15 (2008), <https://www.osce.org/files/f/documents/d/6/35578.pdf>.

children to school, effect a contract, or even draw up a will. . . . Many members of the population already feel they will have no choice but to obtain Abkhaz citizenship or to leave Gali.⁸⁷

The passport requirement is in clear violation of a Resolution of the Security Council, adopted unanimously on April 15, 2008, which extended the mandate of the U.N. Observer Mission in Georgia (mainly composed of Russian peacekeepers) and in which the Security Council reaffirmed “the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders[.]”⁸⁸

In August 2008, Georgian armed forces again went on the offensive in South Ossetia to counteract ongoing acts of violence against residents of the territory who remained loyal to Georgia and the shelling of villages in Georgia.⁸⁹ The Russian Federation responded with a full-scale military invasion on August 8, sending aircraft and armored columns into South Ossetia and launching attacks against military and transport centers in Georgia beyond the borders of South Ossetia.⁹⁰ This attack came to be recorded as the Five-Day War.⁹¹ Hundreds of people were killed and thousands of refugees were displaced in temporary shelters.⁹² A ceasefire agreement, brokered by the European Union, was adopted on August 12, and Georgia, for all intents and purposes, lost administrative control of the two provinces.⁹³ On August 26, 2008, Russia recognized Abkhazia and South Ossetia as independent States.⁹⁴

Although the Russian intervention in the two former provinces of Georgia resulted in secession and did not amount to annexation, it is worth mentioning the intervention in the context of this survey as a prelude to subsequent Russian interventions in Ukraine, to be discussed in the next subsection. The critical question is whether the Russian offensive in Abkhazia and South Ossetia was authorized by *jus ad bellum*; the answer to this question is clearly in the negative. Not only did Russia violate its commitment as a Member of the international community of States to observe the territorial integrity of Georgia, it also violated a fundamental rule of international humanitarian law by supporting a

⁸⁷ *Id.* at 68–69.

⁸⁸ S.C. Res. 1808, ¶ 1 (Apr. 15, 2008).

⁸⁹ Office for Democratic Institutions and Human Rights [ODIHR], *supra* note 86.

⁹⁰ Charles King, *The Five-Day War: Managing Moscow After the Georgia Crisis*, 87 FOREIGN AFFS. 2, 2 (2008).

⁹¹ *Id.*

⁹² *Id.*

⁹³ U.N. DEP'T OF POL. AFFS., REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL SUPPLEMENT 2008–2009, at 130, 131, U.N. Doc. ST/PSCA/1/Add.16, U.N. Sales No. E.14.VII.1 (2014).

⁹⁴ King, *supra* note 90, at 6.

rebel group within a sovereign State attempting to secede. The judgment of the International Court of Justice in the case of *Nicaragua v. The United States of America* is clear authority for the proposition that a government may seek military assistance from other governments to repress a militant uprising within its borders,⁹⁵ but military support by a foreign government of the insurgent forces constitutes an infringement of state sovereignty and a violation of international law.⁹⁶ It must be emphasized that the uprising in Georgia was not a war of liberation because the peoples of Abkhazia and South Ossetia were not subject to colonial rule, foreign occupation, or a racist regime.

C. *Ukraine*

Following disintegration of the Soviet Union, Ukraine became an independent State and, with the blessing of the Russian Federation, included the province of Crimea even though a majority of the inhabitants of Crimea happened to be Russian speaking.⁹⁷

Political unrest in Ukraine was sparked by the Presidential elections of 2004 and the rivalries between the two primary candidates, Viktor Yanukovych and Viktor Yushenko.⁹⁸ While Yanukovych was in favor of alliances with the Russian Federation,⁹⁹ Yushenko advocated closer ties with the European Union.¹⁰⁰ Yanukovych was declared the winner in the elections,¹⁰¹ but it soon emerged that his election was blemished by massive corruption, voter intimidation, and electoral fraud.¹⁰² This culminated in the Orange Revolution that lasted from November 2004 to January 2005.¹⁰³ The Supreme Court of Ukraine on December 26, 2004, confirmed the impeachment of President-elect Yanukovych and ordered that new elections be held.¹⁰⁴ In the subsequent run-off elections, which were generally regarded as “free and fair[,]” Yushenko received 51.99% and Yanukovych 44.2% of the votes.¹⁰⁵ Following the

⁹⁵ Mooney, *supra* note 80, at 201.

⁹⁶ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 13, ¶¶ 195–98 (June 27).

⁹⁷ Doris Wydra, *The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination*, 10 INT’L J. ON MINORITY & GRP. RTS. 111, 111, 114, 127 (2003).

⁹⁸ Adrian Karatnycky, *Ukraine’s Orange Revolution*, 84 FOREIGN AFFS. 35, 35–36, 42 (2005).

⁹⁹ Nathaniel Copsey, *Popular Politics and the Ukrainian Presidential Election of 2004*, 25 POL. 99, 100–01 (2005).

¹⁰⁰ *Id.*

¹⁰¹ Karatnycky, *supra* note 98, at 36.

¹⁰² *Id.* at 35–37.

¹⁰³ *Id.*

¹⁰⁴ Copsey, *supra* note 99, at 104.

¹⁰⁵ *Id.* at 103.

impeachment of President Yanukovich and the formation of a new interim Government, the previous Constitution, which had a more European focus, was reinstated.¹⁰⁶ Yanukovich eventually fled the country to the Russian Federation.¹⁰⁷

The Russian-speaking Ukrainians in the eastern regions of the country did not take kindly to these constitutional developments. The repression of protesters in Kiev, the capital of Ukraine, sparked the Ukrainian Revolution of February 2014.¹⁰⁸ On February 27, 2014, the Parliament of Crimea was seized by armed men and the Russian flag was raised over the province's capital.¹⁰⁹ A referendum was held in Crimea on March 16, 2014, in which 95.5% of the voters supported the secession of Crimea from Ukraine and its incorporation in the Russian Federation.¹¹⁰ On March 21, 2014, President Vladimir Putin of the Russian Federation signed a Bill authorizing the annexation of Crimea and signed a constitutional amendment sanctioning the annexation of Crimea and the federal city of Sevastopol.¹¹¹

The referendum of March 16, 2014 was clearly unlawful. It was not authorized by the legislature of Ukraine and included only residents of Crimea.¹¹² The rule of customary international law that applies in this regard was clearly stated by the Supreme Court of Canada in an advisory opinion relating to the attempted secession of the province of Quebec from Canada.¹¹³ The advisory opinion stated that a referendum must not be confined to the residents of Quebec since Quebec is part of the country of all Canadians,¹¹⁴ and if a substantial majority of all Canadians support the secession of Quebec, then the legislature must give it serious consideration.¹¹⁵

¹⁰⁶ Alexei Trochev, *A Constitution of Convenience in Ukraine*, JURIST (Jan. 26, 2011), <https://www.jurist.org/commentary/2011/01/jurist-guest-columnist-alexei-trochev>.

¹⁰⁷ *Putin: Russia Helped Yanukovich to Flee Ukraine*, BBC (Oct. 24, 2014), <https://www.bbc.com/news/world-europe-29761799>.

¹⁰⁸ *Understanding Ukraine's Euromaidan Protests*, Open Society Foundations (last updated May 2019), <https://www.opensocietyfoundations.org/explainers/understanding-ukraines-euromaidan-protests>.

¹⁰⁹ Marie-Louise Gumuchian, Laura Smith-Spark, & Ingrid Formanek, *Gunmen Seize Government Buildings in Ukraine's Crimea, Raise Russian Flag*, CNN (Feb. 27, 2014), <https://www.cnn.com/2014/02/27/world/europe/ukraine-politics/index.html>.

¹¹⁰ *Crimea Referendum: Voters 'Back Russia Union'*, BBC (Mar. 16, 2014), <https://www.bbc.com/news/world-europe-26606097>.

¹¹¹ *Laws on Admitting Crimea and Sevastopol to the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 21, 2014), <http://en.kremlin.ru/events/president/news/20625>.

¹¹² *Id.*

¹¹³ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.); see Johan D. van der Vyver, *Self-Determination and the People of Quebec Under International Law*, 10 J. TRANSNAT'L L. & POL'Y 1, 3 (2000).

¹¹⁴ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 at ¶ 151 (Can.).

¹¹⁵ *Id.*

The Russian annexation of Crimea recently attracted the attention of the European Union. On June 27, 2019, the Committee on Rules of Procedure, Immunities and Institutional Affairs of the Parliamentary Committee of the European Union requested the European Commission for Democracy Through Law to examine whether inclusion of persons, who are not citizens of a particular State, in the parliamentary elections of that State is in compliance with the standards of the Council of Europe and other international standards.¹¹⁶ This inquiry was sparked by a decision of the Russian Federation to include residents of Crimea to vote in the Russian parliamentary elections. The Commission noted that a State can include its own citizens living abroad in its elections but cannot allow non-citizens to vote in its parliamentary elections.¹¹⁷ The opinion was clearly based on the premise that if the European Union were to approve the inclusion of residents of Crimea to vote in the Russian parliamentary elections, this could be seen as approval of the annexation of Crimea by the Russian Federation. The European Union was not prepared to approve of the Crimea annexation because the annexation of a foreign territory is clearly prohibited by international law under the rubric of the territorial integrity of States.

IV. THE TAKING BY ISRAEL OF PALESTINIAN TERRITORIES

Following the Six Day War between Israel, Egypt, Jordan and Syria, which lasted from June 5 to 10, 1967, Israel occupied Palestinian territories and established Jewish settlements in the Gaza Strip, the West Bank, and East Jerusalem.¹¹⁸ Article 49 of the Fourth Geneva Conventions of 12 August 1949 provides in part: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”¹¹⁹ Protocol I to the Geneva Conventions of 12 August 1949 designates as one of its grave breaches: “The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies . . . in violation of Article 49 of the Fourth Convention.”¹²⁰ The International Law Commission also included this proscription in its *Draft Code of Crimes against the Peace and Security of*

¹¹⁶ See *European Commission for Democracy Through Law (Venice Commission) Report on the Compliance with Council of Europe and Other International Standards of the Inclusion of a Not Internationally Recognised Territory into a Nationwide Constituency for Parliamentary Elections*, Opinion No. 955/2019, Doc. CDL-AD(2019)030 (Dec. 9, 2019).

¹¹⁷ See generally *id.*

¹¹⁸ U.N. Secretary-General, *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and in the Occupied Syrian Golan*, U.N. Doc. A/HRC/28/44 (March 9, 2015).

¹¹⁹ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

¹²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 85(4)(a), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

Mankind,¹²¹ and the Rome Conference endorsed this provision as one reflecting the current state of customary international law.¹²²

Based on Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”),¹²³ drafters of the Rome Statute included in the list of war crimes within the jurisdiction of the ICC:

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory[.]¹²⁴

Based on a proposal of Egypt and Syria,¹²⁵ the provision in the Rome Statute deviates somewhat from the wording of Article 49 by adding the phrase “directly or indirectly.”¹²⁶ The phrase “transfer . . . indirectly” was intended to include cases where the Occupying Power induces, encourages and facilitates parts of its civilian population to settle in the occupied territory.¹²⁷ According to Mauro Politi, indirect transfers of populations denote those “effected by private agencies or organizations with the tacit consent of the . . . Occupying Power.”¹²⁸ According to Michael Cottier,

Confiscation laws, governmental settlement plans, protection of unlawful settlements and other economic and financial measures such as incentives, subsidies, exonerations of taxes and permits issued on a discriminatory basis and inducing the migration and settlement of the Occupying Power’s own population in the occupied territory might thus amount to indirect transfer[.]¹²⁹

¹²¹ Int’l L. Comm’n, Rep. on the Work of Its Forty-Eighth Session, U.N. Doc. A/51/10, at 104 (1996) (proclaiming as a war crime, “[t]he transfer by the Occupying Power of parts of its own civilian population into the territory it occupies[.]” if committed “willfully in violation of international humanitarian law”).

¹²² See *Rome Statute*, *supra* note 7, art. 8(2)(b)(viii).

¹²³ Mauro Politi, *Elements of Crimes*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 443, 472 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, eds., 2002).

¹²⁴ See *Rome Statute*, *supra* note 7, art. 8(2)(b)(viii).

¹²⁵ See Ruth Wedgwood, *The International Criminal Court: An American View*, 10 *EUR. J. INT’L L.* 93, 99 (1999).

¹²⁶ *Id.*

¹²⁷ See Hermann von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 79, 113 (Roy S. Lee ed., 1999).

¹²⁸ Mauro Politi, *Elements of Crimes*, *supra* note 123, at 472.

¹²⁹ Michael Cottier, *Other Serious Violations of the Laws and Customs Applicable in International Armed Conflicts*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* Article 8, 214 (Otto Triffterer ed., 1999); see also GERHARD WERLE, *VÖLKERSTRAFRECHT* 364 (2003).

In the Working Group on Elements of Crimes a number of Arab States explained direct or indirect transfers along those lines.¹³⁰ According to the proposal, a person can be held criminally liable under this heading if he or she “induced, facilitated, participated or helped in any manner in the transfer of civilian population of the Occupying Power into the territory it occupies.”¹³¹ Israel has provided incentives to encourage Israeli civilians to establish settlements within the occupied territory, including “mortgage and housing subsidies, tax incentives, business grants, free schooling, infrastructure projects, and defense—to the tune of about \$146 million in 2002.”¹³² Prior to the Rome Conference, the Israeli Foreign Ministry maintained that Article 49 only prohibited the Occupying Power from compelling its own nationals to settle in the occupied territory, and Article 49 therefore did not apply to voluntary settlements.¹³³

Israel objected strongly to the inclusion of this provision in the Rome Statute, claiming—with the support of the United States¹³⁴—that the principle that the provision entailed had not become part of customary international law.¹³⁵ Because of its inclusion, Israel voted against adoption of the Rome Statute.¹³⁶

The Israeli Supreme Court also maintained that the substance of Article 49 was not intended to apply generally to transfers and deportations, but to be confined

to prevent the perpetration of acts such as the atrocities committed by Germans during the Second World War, when millions of people were deported from their homes for various purposes, usually to Germany to work as forced labour for the enemy and Jews and other nationalities

¹³⁰ See generally Working Group on Elements of Crimes, Preparatory Comm’n for the ICC, U.N. Doc. PCNICC/1999/WGEC/DP.25 (Aug. 10, 1999).

¹³¹ *Id.*; see Eve La Haye, *The Elaboration of the Elements of Crimes*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 305, 320 n.51 (Flavia Lattanzi & William A. Schabas eds., 2004).

¹³² Michael Galchinsky, *The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence*, 9 *ISR. STUD.* 115, 117 (2004).

¹³³ *Id.* at 117, 120 (stating that Article 49 reads: “The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”).

¹³⁴ See Theodor Meron, *Crimes under the Jurisdiction of the International Criminal Court*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS* 47, 52 (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds., 1999).

¹³⁵ Working Group on Elements of Crimes, Preparatory Comm’n for the ICC, U.N. Doc. PCNICC/1999/DP.4/Add.2, at 11 (Feb. 4, 1999). At the February 1999 session of the Preparatory Commission, the United States proposed that a condition be added in the elements of this crime requiring that “the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory” and that “the transfer worsened the economic situation of the local population and endanger their separate identity.” *Id.*

¹³⁶ La Haye, *supra* note 131, at 320 n.52.

were deported to concentration camps for torturing and extermination.¹³⁷

It has also been argued that the Fourth Geneva Conventions does not apply to the occupied territories “because the convention applies only to territories that the occupier removed from the control of their legal sovereign.”¹³⁸

Over time, different arguments have been advanced by apologists for the Israeli position to justify these settlements. For example, Michael Galchinsky, based on a 1968 article of Yehuda Blum, referred to the “missing reversioner” theory, in terms of which Jordan through its defeat in the Six Day War forfeited its title to the West Bank, thereby causing a “sovereignty vacuum” which Israel stepped in to fill.¹³⁹ According to Blum’s reversioner theory, the traditional rules of international law governing belligerent occupation are based on two assumptions, namely (a) that the regime ousted from the territory under occupation was a legitimate sovereign in respect of that territory; and (b) that the Occupying Power qualified as a belligerent occupant of the territory in question.¹⁴⁰ Blum argued that Jordan was never in lawful control of the West Bank and could therefore not show a better title to that territory; or, alternatively, if Israel is to be regarded as a belligerent occupant of the West Bank, then Jordan would still not be entitled to the reversionary rights of a legitimate sovereign.¹⁴¹ Blum thus concluded that the legal status of Israel in the West Bank “is . . . that of a State which is lawfully in control of territory in respect of which no other State can show a better title”; or, if one were to define Israel’s position in terms of belligerent occupation, “then the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is *not* entitled to the reversionary rights of a legitimate sovereign.”¹⁴²

¹³⁷ Fania Domb, *Judicial Review of the Acts of the Military Government in the Administered Territories*, 9 ISR. Y.B. HUM. RTS. 339 (1979) (summarizing HCJ 97/79 Abu Awad v. Commander of the Judea and Samaria Region, Isr. S.C. 33(3) 309)); See Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 11 ISR. Y.B. HUM. RTS. 350 (1981) (summarizing HCJ 698/80 Kawasme & Others v. Minister of Defence & Others, Isr. S.C. 35(1) 617)); Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 23 ISR. Y.B. HUM. RTS. 277–86 (1993) (summarizing HCJ 785/87, 845/87 27/88 Abd el Afu et & Others v. Commander of the IDF Forces in the West Bank & Others, Isr. S.C. 42(2) 4); *contra* Abd el Afu & Others at 284-85 (per Bach, J., concurring) (1993).

¹³⁸ Daphne Barak-Erez, *Israel: The Security Barrier—Between International Law, Constitutional Law, and Domestic Judicial Review*, 4 INT’L J. CON. L. 540, at 543 n.10 (2006).

¹³⁹ See Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Sumaria*, 3 ISR. L. REV. 279 (1968) (referencing Galchinsky, *supra* note 132, at 120).

¹⁴⁰ Blum, *supra* note 139, at 293.

¹⁴¹ *Id.* at 294; see also Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. INT’L L. 262, 265 (1971).

¹⁴² Blum, *supra* note 139, at 294.

The Likud Government of Menachem Begin, which assumed power in Israel in 1977, added a religious and historical dimension to the above reasoning.¹⁴³ In the absence of a sovereign, Israel could rightfully take control of a territory to which the Jews can lay claim on historical and biblical grounds. Since the West Bank, being part of the ancient Hebrew Kingdom of Palestine, belongs to Israel, it can establish Jewish settlements anywhere in that region.¹⁴⁴ Menachem Begin has been quoted as saying: “You can annex foreign land. You cannot annex your own country. Judea and Samaria . . . are part of the land of Israel, where the nation was born.”¹⁴⁵

Since there is no sovereign to whom the West Bank or Gaza Strip could be returned, the Geneva Conventions, according to the above constructions of the prevailing state of affairs, do not apply.¹⁴⁶ It has also been noted that since Common Article 2 of the Geneva Conventions of 12 August 1949 confines the application of those Conventions to armed conflicts “which may arise between two or more High Contracting Parties,”¹⁴⁷ and since Palestine is not a State, let alone a High Contracting Party, Israel cannot be held accountable under Article 49 of the Fourth Geneva Convention. Nor can the provisions of Common Article 3 be applied to the Israeli/Palestinian conflict, because its provisions apply to armed conflicts not of an international character “occurring in the territory of one of the High Contracting Parties.”¹⁴⁸

According to the above line of reasoning Geneva law, and in particular Article 49 of the Fourth Geneva Convention, can therefore not be relied upon to contest the legality of Jewish settlements in the occupied territories.¹⁴⁹ However, at the Rome Conference, this interpretation of Geneva law was generally perceived as quite indefensible as far as the settlement policy of Israel in the

¹⁴³ *Menachem Begin*, ISRAEL MINISTRY OF FOREIGN AFFAIRS: MFA: ABOUT ISRAEL: STATE: MENACHEM BEGIN, <https://mfa.gov.il/mfa/aboutisrael/state/pages/menachem%20begin.aspx>.

¹⁴⁴ See John Quigley, *Loan Guarantees, Israeli Settlements, and Middle East Peace*, 25 VAND. J. TRANSNAT'L L. 547, 561 (1992–1993).

¹⁴⁵ *Id.*

¹⁴⁶ See also Arie Pacht, *Human Rights in West Bank Military Courts*, 7 ISR. Y.B. INT'L L. 222, 229 (1977) (noting that since Israel never recognized the title of Jordan to the West Bank, the Geneva Conventions did not apply); Yoram Dinstein, *The International Legal Status of the West Bank and the Gaza Strip—1998*, 28 ISR. Y.B. HUM. RTS. 37, 38 (1998) (noting that Israel does not concede the applicability of the Geneva Conventions since it had never recognized the right of Jordan or Egypt to any part of Palestine); Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. INT'L L. 106, 108 (1979) (noting that the Fourth Geneva Convention is regarded by Israel as not being applicable since Jordan's standing in the West Bank was that of “a belligerent occupant following an unlawful invasion”).

¹⁴⁷ Fourth Geneva Convention, *supra* note 119, art. 2.

¹⁴⁸ *Id.* art. 3.

¹⁴⁹ See Galchinsky, *supra* note 132, at 120.

West Bank is concerned.¹⁵⁰ According to Andreas Zimmermann, the customary-law nature of the norm prohibiting an occupying power to transfer, directly or indirectly, parts of its own civilian population into the territory it occupies “can no longer be seriously doubted.”¹⁵¹

In more recent times, Israel has come to justify the Jewish settlements in Palestine more readily on national security considerations. In *The Beth El Case*, for example, the Israeli Supreme Court upheld the legality of Jewish civilian settlements on private Arab land previously requisitioned in Judea and Samaria by the Israeli Military Government for military and security needs, basing its decision on Article 43 of the 1907 Hague Regulations.¹⁵² The Court noted that:

the prevailing situation is one of belligerency, and the responsibility for maintaining order and security in the occupied territory is imposed upon the Occupying Power. It must also forestall the dangers arising out of such territory to the occupied territory itself and to the Occupying Power. These days warfare takes the form of acts of sabotage, and even those who regard such acts (which injure innocent citizens) as a form of guerilla war, will admit that the Occupying Power is authorized and even obliged to take all steps necessary for their prevention.¹⁵³

The acts of the Military Commander in requisitioning the land was therefore lawful on the grounds of strict military needs or general security considerations,

¹⁵⁰ Quigley, *supra* note 144, at 560–66; *see, e.g.*, S.C. Res. 465 ¶ 5 (Mar. 1, 1980), U.N. SCOR, 35th Sess. at 5, ¶ 5, U.N. Doc. S/INF/36 (Mar. 1, 1980). A summary statement by the Secretary-General noted that:

all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel’s policy of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War . . .”

U.N. Secretary-General, Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized And on the Stage Reached in Their Consideration (Apr. 2, 2008), <https://www.un.org/unispal/document/auto-insert-180291>.

¹⁵¹ Andreas Zimmermann, *Israel and the International Criminal Court—An Outsider’s Perspective*, 36 ISR. Y.B. HUM. RTS. 231, 241 (2006). Zimmermann noted that provisions that mimic the one in the Rome Statute were inserted into the Statute of the Iraqi Special Tribunal that prosecuted Saddam Hussein, as well as the one implemented by the (hybrid) Special Court in East-Timor. *See The Statute of the Iraqi Special Tribunal*, art. 13(b) No. 9 (Dec. 10, 2003), available at <https://www.refworld.org/docid/404c7d8c3.html>; UNTAET Regulation No. 2000/15, § 6(1)(b)(viii) (June 6, 2000), *reprinted in* NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA 9–19 (Kai Ambos & Mohamed Othman eds., 2003).

¹⁵² HCJ 606/78 Ayoob & Others v. Minister of the Defence & Others, 32(2) PD 113 (1978) (Isr.) (The Beth El Case); *see* Fania Domb, *Judicial Review of the Acts of the Military Government in the Administered Territories*, 9 ISR. Y.B. HUM. RTS. 339 (1979).

¹⁵³ Domb, *supra* note 152, at 339.

or both; and the fact that requisitioning of the land was intended for Jewish settlements does not deprive the requisition of its security character:

[I]t is indisputable that in occupied areas the existence of settlements—albeit “civilian”—of citizens of the Occupying Power contributes greatly to the security in that area and assists the army in fulfilling its task. One need not be a military and defence expert to understand that terrorist elements operate with greater ease in an area solely inhabited by a population that is indifferent or sympathizes with the enemy, than in an area in which one also finds people likely to observe the latter and report any suspicious movement to the authorities. Terrorists will not be granted a hideout, assistance or supplies by such people.¹⁵⁴

However, only nine months after this judgment was handed down in 1978, the Court, in *The Elon Moreh Case*, declined to uphold the legality of a settlement on security grounds because security measures are essentially temporary while the Elon Moreh settlement was intended from the outset to be a permanent one.¹⁵⁵ This confirms, according to the judgment delivered by Landau D.P., that the settlement was not established for military needs. He explained:

the decision to establish a permanent settlement intended from the outset to remain in its place forever—even beyond the duration of the military government which was established in Judea and Samaria—encounters a legal obstacle which is insurmountable, because the military government cannot create in its area facts for its military needs which are designed *ab initio* to exist even after the end of the military rule in that area, when the fate of the area after the termination of military rule is still not known.¹⁵⁶

The Court unanimously declared the requisition order null and void with regard to the land owned by the petitioners.¹⁵⁷

Following *The Elon Moreh Case*, the Begin Government discontinued the requisition of private lands, but set on a new course by reclassifying all unregistered land as “state land” unless persons claiming a title to the land could produce title deeds.¹⁵⁸ Since the Ottoman and Jordanian law, which had previously applied in the territory under consideration, did not make provision

¹⁵⁴ *Id.* at 340.

¹⁵⁵ HCJ 370/79, Mustafa Dweikat & Others v. Gov’t of Israel & Others, 34(1) PD 1 (1980) (Isr.) (The Elon Moreh Case); see Domb, *supra* note 152, at 345.

¹⁵⁶ Domb, *supra* note 152, at 350.

¹⁵⁷ *Id.*

¹⁵⁸ Galchinsky, *supra* note 132, at 123.

for a system of land registration, Palestinians could not produce the documentary evidence of their legitimate title to the land. Approximately forty percent of the West Bank thus became “state land”; and according to Galchinsky’s 2004 Article “[s]ince 1979, 90% of all new settlements have been built on [the proclaimed] state land[.]”¹⁵⁹ According to former Israeli Supreme Court Judge Daphne Barak-Erez,¹⁶⁰ Israeli courts never addressed the legality of the settlements as such.¹⁶¹ In 1992, for example, the Supreme Court dismissed petitions that contested the legality of settlements in general on the grounds that the petitions were “blatantly political” and did not relate to the legality of specific settlements or the infringement of the rights of any particular resident in the area.¹⁶²

Through a series of cases, the Israeli Supreme Court has noted:

- That the Judea and Samaria areas (and earlier also the Gaza Strip) are (or were) held by the State of Israel in belligerent occupation;¹⁶³
- That the occupied territories are under control of the Military Commander of the Israeli Defence Force in those territories, described in one of the judgments as “the long arm of the State”;¹⁶⁴
- That occupation is essentially a temporary state of affairs,¹⁶⁵ and military or security precautionary measures must therefore also be limited in time;¹⁶⁶
- That action taken by the Military Commander to promote the military demands of the Occupying Power and for security reasons

¹⁵⁹ *Id.*

¹⁶⁰ Judge Barak-Erez was born in the United States but subsequently became a law professor in Israel and since 2012 served as a judge in the Supreme Court of Israel. *See Israeli Law and Society: Judicial Reflections with Daphne Barak-Erez, Justice of the Supreme Court of Israel*, HARV. L. SCH., <https://hls.harvard.edu/event/israeli-law-and-society-judicial-reflections-with-daphne-barak-erez-justice-of-the-supreme-court-of-israel/#:~:text=Justice%20Daphne%20Barak%2DErez%20was,Dean%20of%20the%20Law%20School>.

¹⁶¹ Barak-Erez, *supra* note 138, at 548.

¹⁶² HCJ 4481/91, *Bargil v. Gov’t of Isr.*, 47(4) PD 210, 5 (1992) (Isr.).

¹⁶³ *See* HCJ 2056/04 *Beit Sourik Village Council v. Gov’t of Isr.*, 58(5) PD 1, ¶¶ 1, 15, 27 (2004); HCJ 7957/04 *Mara’abe v. Prime Minister of Isr.*, 60(2) PD 477, ¶ 14, (2005). For a summary of the case, see Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 37 ISR. Y.B. HUM. RTS. 305 (2007).

¹⁶⁴ *Beit Sourik Village Council*, 58(5) PD, ¶ 27; *Mara’abe*, 60(2) PD, ¶ 14.

¹⁶⁵ *Mara’abe*, 60(2) PD, ¶ 22.

¹⁶⁶ Domb, *supra* note 163, at 350.

cannot be motivated by a desire to annex land within the occupied territory.¹⁶⁷

The exact status of Israel in the West Bank and the Gaza Strip has remained a matter of dispute. Yoram Dinstein, for example, noted in 1998 that a distinction must be made between the nature of the occupation by Israel of the Golan Heights on the one hand, and of the West Bank and the Gaza Strip on the other.¹⁶⁸ Israel was indeed still in belligerent occupation¹⁶⁹ of the Golan Heights, since the war between Israel and Syria, which commenced in 1967, has not been terminated.¹⁷⁰ However, given various peace agreements that have been concluded between Israel and Egypt (in regard to the Gaza Strip) and between Israel and Jordan (in regard to the West Bank), belligerent occupation by Israel has come to an end and Israel can at best be said to maintain a special regime of post-belligerent occupation in those territories.¹⁷¹

The question concerning the annexation of Palestinian land became a central theme in litigation concerning the legality of the building of a wall, referred to by Israel as a “fence,”¹⁷² to protect Israel from terrorist attacks by Palestinian perpetrators. The problem is that the barrier was not constructed on the “Green Line,” which is accepted internationally as the legitimate territorial divide between Israel and Palestine.¹⁷³ In June 1967, the Security Council of the United Nations emphasized the principle of respect for the territorial integrity and political independence of States,¹⁷⁴ and called for the withdrawal of Israeli armed forces from territories occupied during the Six Day War.¹⁷⁵ Israel has always argued that the Green Line is a cease-fire divide rather than a permanent

¹⁶⁷ Domb, *supra* note 163, at 122; *Beit Sourik Village Council*, ¶ 27; *Mara'abe*, 58(5) PD, ¶¶ 15, 16; see Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, art. 46, 36, Oct. 18, 1907, Stat 2277, U.S.T. 539 [hereinafter Hague Convention No. IV].

¹⁶⁸ Dinstein, *supra* note 146.

¹⁶⁹ A “belligerent occupation” is also known as military occupation. “It refers to a situation where the forces of one or more States exercise effective control over a territory of another State without the latter State’s volition.” Eyal Benvenisti, *Occupation, Belligerent*, OXFORD PUB. INT’L L., <https://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359#:~:text=1%20The%20regime%20known%20as,without%20the%20latter%20State's%20volition>.

¹⁷⁰ Dinstein, *supra* note 146, at 41.

¹⁷¹ *Id.* at 42–49.

¹⁷² See Barak-Erez, *supra* note 138, at 541 (noting that “fence” reflects the Israeli “position that the barrier is a temporary measure not intended to delimit the country’s borders”).

¹⁷³ U.N. Office for the Coordination of Humanitarian Affairs, Five Years after the International Court of Justice Advisory Opinion: A Summary of the Humanitarian Impact of the Barrier (July 1, 2009), <https://unispal.un.org/UNISPAL.NSF/0/28D7DCBF88FAB7228525760E0062F46D>.

¹⁷⁴ S.C. Res. 242, ¶ 1(ii) (Nov. 22, 1967).

¹⁷⁵ *Id.* ¶ 1(i).

national border, and in any event, that the route chosen for the barrier was dictated by security concerns and not by political directives.¹⁷⁶

In 2004, the ICJ delivered an advisory opinion on the legal consequences of the construction of a wall by Israel in the occupied Palestinian territories.¹⁷⁷ It was not convinced that the route selected for the wall was necessary to attain the security objectives which Israel held out as justification for constructing the wall,¹⁷⁸ and indeed found that building of the wall, “and its associated régime,” are contrary to international law.¹⁷⁹ The ICJ addressed the possibility that the route selected for the wall could result in a land grab by Israel of territories earmarked for the future independent State of Palestine.¹⁸⁰ The ICJ assumed that construction of the barrier could be justified under Security Council Resolutions if it followed, or at least remains close to, the Green Line.¹⁸¹ The Court specifically noted that the wall included within its “Closed Area” (bordering on Israeli territory) contained approximately eighty percent of Israeli settlers living in the occupied Palestinian Territory, and that the establishment of those settlements constitutes a breach of international law.¹⁸² The Court further noted that it cannot remain insensitive to fears that the route of the wall will prejudice the future frontier between Israel and Palestine and that Israel may in due course incorporate settlements and the means of access to those settlements into the State of Israel;

The Court considers that the construction of the wall and its associated régime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.¹⁸³

At almost the same time, the matter was also considered by the Supreme Court of Israel, sitting as the High Court of Justice.¹⁸⁴ The Court rejected the Petitioners’ submission that construction of the barrier was *per se* illegal,

¹⁷⁶ Galehinsky, *supra* note 132, at 125, 127.

¹⁷⁷ LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN OCCUPIED PALESTINIAN TERRITORY, 2004 I.C.J. (9 July 2004), *reprinted in* 43 I.L.M. 1009 (2004); *See* Barak-Erez, *supra* note 138, at 544–45.

¹⁷⁸ LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN OCCUPIED PALESTINIAN TERRITORY, *supra* note 177, ¶ 137.

¹⁷⁹ *Id.* ¶¶ 142, 162.

¹⁸⁰ *See id.* ¶ 59.

¹⁸¹ *Id.* ¶ 74.

¹⁸² *Id.* ¶¶ 119, 120.

¹⁸³ *Id.* ¶ 121.

¹⁸⁴ HCJ 2056/04 Beit Sourik Village Council v. Gov’t of Isr., PD 58(5) 1 (2004); *see also* Barak-Erez, *supra* note 138, at 542–44.

holding that it could be justified on security grounds.¹⁸⁵ The Court in particular rejected the submission that if the fence had been motivated by security concerns, the route chosen would have followed the Green Line.¹⁸⁶ The Court could also not accept the argument that its construction was “in large part” based on “the seizure of land privately owned by local inhabitants,” holding in essence that “[t]o the extent that construction of the Fence is a military necessity, it is permitted . . . by international law.”¹⁸⁷ Legality of the route chosen is therefore to be determined by the security perspective and not the political one, i.e., the Green Line perspective which informed the ICJ opinion.¹⁸⁸

In *Mara’abe & Others*, the Israeli High Court conducted an in-depth analysis of the ICJ’s Advisory Opinion on the legality of the wall/fence/barrier,¹⁸⁹ and of the grounds upon which the Advisory Opinion came to a conclusion that differed from the Israeli High Court’s own judgment in the *Beit Sourik Case*.¹⁹⁰ Essentially, the distinct conclusions in the two cases stemmed from “the difference in the factual basis upon which each court made its decision.”¹⁹¹ In this context, the Israeli Court noted “the simple truth” that “the facts lie at the foundation of the law, and the law arises from the facts (*ex facto jus oritur*).”¹⁹²

While the ICJ considered the legality of the wall in general, taking as its point of departure the political divide dictated by the Green Line, the Israeli High Court considered the legality of distinct sections of the fence on a portion-by-portion basis and considered each portion from a security perspective that emphasized the security demands of Israel and the Israeli people living in the West Bank.¹⁹³ The ICJ based its decision on three reports: (a) a report of the Secretary-General of the United Nations; (b) the report of Special Rapporteur John Dugard of September 8, 2003 on human rights violations in occupied Arab territories (proclaiming categorically that construction of the wall was a matter of territorial annexation under the guise of security); and (c) a report of October 31, 2003 of the Special Rapporteur on the Right to Food, Jean Ziegler (speaking of an “apartheid fence”);¹⁹⁴ The Israeli High Court, on the contrary, heard live

¹⁸⁵ *Beit Sourik Village Council*, PD 58(5), ¶ 30.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 32.

¹⁸⁸ *Id.* at 30.

¹⁸⁹ HCJ 7957/04 *Mara’abe v. Prime Minister of Isr.*, 60(2) PD 477, ¶¶ 37–55, (2005) (Isr.).

¹⁹⁰ *Id.* ¶ 56–74.

¹⁹¹ *Id.* ¶ 61.

¹⁹² *Id.*

¹⁹³ See generally LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN OCCUPIED PALESTINIAN TERRITORY, *supra* note 177.

¹⁹⁴ See *Mara’abe*, 60(2), ¶¶ 38–42 for the Secretary General Report and ¶¶ 43–45 for the Dugard Report

evidence of government officials on the security needs of Israel as an Occupying Power and of members of the Palestinian civilian population on disruptions caused by the fence, and based its judgment on a proportionality assessment of the values at stake on both sides.¹⁹⁵

It is fair to conclude that the Israeli decisions were “more nuanced and better founded” than the advisory opinion of the ICJ.¹⁹⁶ The Israeli High Court noted that since the judgment of the ICJ was merely an advisory opinion, it is not bound by it, but that “[t]he ICJ’s interpretation of international law should be given its full appropriate weight.”¹⁹⁷

V. TERRITORIAL CONFINES OF PALESTINE

A vital dimension of the territorial confines of Palestine emerged from a recent decision of the Office of the Prosecutor of the ICC.

Palestine was admitted as a Member State of the ICC on January 2, 2015, in spite of the fact that membership of the Assembly of States Parties of the ICC is confined to States only, and even though the statehood of Palestine is questionable because its territorial confines are in dispute.¹⁹⁸ According to the *Montevideo Convention on Rights and Duties of States*, “a defined territory” is a constituent requirement of statehood.¹⁹⁹ However as of April 2021, 138 Member States of the General Assembly of the United Nations and two non-member States have recognized Palestine as a State.²⁰⁰ Membership of the ICC constituted an important step toward the recognition of Palestine as a State.

On May 22, 2018, Palestine as a State Party referred the situation in Palestine to the ICC relating to offences committed in the territory since 13 June 2014.²⁰¹ Reference of the situation in Palestine to the ICC placed an obligation on the Office of the Prosecutor to establish “whether one or more specific persons

and the Ziegler Report.

¹⁹⁵ *Id.*

¹⁹⁶ Barak-Erez, *supra* note 138, at 547.

¹⁹⁷ *Mara'abe*, 60(2), ¶¶ 56, 74.

¹⁹⁸ Press Release, International Criminal Court, ICC Prosecutor Opens Preliminary Examination of Situation in Palestine, U.N. (Jan. 16, 2015), <https://www.un.org/unispal/document/auto-insert-195455/>.

¹⁹⁹ *Montevideo Convention on Rights and Duties of States*, art. 1, 165 L.N.T.S. 19 (1933).

²⁰⁰ Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012), <https://www.un.org/press/en/2012/ga11317.doc.htm>; *Countries That Recognize Palestine 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/countries-that-recognize-palestine>.

²⁰¹ Referral of a situation by a State Party for investigation by the Office of the Prosecutor is authorized by *Rome Statute*, *supra* note 7, art. 13(a).

should be charged with the commission of such crimes.”²⁰² Since some of the alleged offences committed preceded ratification of the Rome Statute by Palestine, Palestine was required to submit to the ICC a declaration under Article 12(3) of the Rome Statute under which it accepted the exercise of jurisdiction by the ICC with respect to crimes committed while it was not a State Party.²⁰³ It did so on January 1, 2015.²⁰⁴

Prosecutor of the ICC Fatou Bensouda conducted a preliminary investigation to establish “whether there is a reasonable basis to proceed with an investigation,”²⁰⁵ and decided that she is satisfied that such a reasonable basis does exist as required by Article 53(1) of the Rome Statute.²⁰⁶ However, given the uncertainties that still prevailed with regard to the territorial confines of Palestine, Prosecutor Fatou Bensouda requested a ruling by a Pre-Trial Chamber of the ICC “to confirm that the ‘territory’ over which the Court may exercise jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.”²⁰⁷ On February 5, 2021, the Pre-Trial Chamber decided that the ICC does have territorial jurisdiction in the situation in Palestine that extends over the entire territory occupied by Israel, including Gaza, the West Bank, and including East Jerusalem.²⁰⁸

CONCLUSION: FINAL OBSERVATIONS

It is generally conceded that Jewish settlements in the West Bank “does not seem to satisfy the relevant provisions of international law.”²⁰⁹ However, finding a solution to the Israeli-Palestinian dispute currently seems quite impossible.

On the one hand, one is reminded that the Jewish population had been the victims of persecution in many parts of the world, which culminated in the

²⁰² *Id.* art. 14 (1) (instructing the Prosecutor “to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes”).

²⁰³ *Id.* art. 12(3).

²⁰⁴ Press Release, International Criminal Court, Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014, ICC-OTP-20150116-PR1083 (Jan. 5, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>.

²⁰⁵ Press Release, International Criminal Court, The Prosecutor of the International Criminal Court Fatou Bensouda Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 12, 2015), <https://www.icc-cpi.int/pages/item.aspx?name=pr1083>.

²⁰⁶ Situation in the State of Palestine, ICC-01/18-12 22-01-2020 2/112 RH PT, ¶ 93 (Jan. 22, 2020) (describing a prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine).

²⁰⁷ *Id.* at ¶ 220.

²⁰⁸ Situation in the State of Palestine, ICC-01/18-143 05-02-2021, Decision on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, (Feb. 5, 2021).

²⁰⁹ Barak-Erez, *supra* note 138, at 548.

Holocaust in Nazi Germany prior to and during World War II (1939–1945).²¹⁰ When on May 14, 1948, the Jewish Agency Chairman in Tel Aviv, David Ben-Gurion (1886–1973), proclaimed the establishment of the State of Israel, it was seen as a territorial refuge for Jews from all over the world.²¹¹ Migration of Jews to what was perceived as the first Jewish State in 2000 years occurred on a very large scale.²¹² Jews from all over the world were invited to emigrate to Israel and to become citizens of that State.²¹³ Large numbers of Jews availed themselves of this opportunity. In the first five years (1948–1952) the number of immigrants amounted to 712,234.²¹⁴ According to an estimate, the total population of Israel at the eve of 2020 has grown to 9,136,000.²¹⁵ The Central Bureau of Statistics estimated that seventy-four percent of the population are Jewish (6,772,000) and twenty-one percent (1,916,000) are of Arab extraction.²¹⁶ Being residents of Israel who do not belong to the privileged community of a Jewish State is ample reason for profound discontent by those residents and of members of their population group in neighboring Palestine.

However, the State of Israel finds itself within the midst of a particularly hostile environment in which its neighboring States are seemingly committed to wipe it off the face of the earth.²¹⁷ Its civilian population has become the target of almost endless attacks of terror violence, and it is clearly a fundamental duty of the Government to protect its people against such attacks.²¹⁸

At the other end of the spectrum, though, one is reminded that in the 401 years in which the territory that was to become the State of Israel was ruled by the Ottoman Empire, and thereafter, its inhabitants were not confined to Jewish people.²¹⁹ Following the establishment of the State of Israel in 1948, its non-

²¹⁰ The Holocaust, HISTORY.COM, <https://www.history.com/topics/world-war-ii/the-holocaust>; John Graham Royde-Smith, *World War II*, BRITANNICA, <https://www.britannica.com/event/World-War-II>.

²¹¹ Office of the Historian, Foreign Service Institute, *Creation of Israel, 1948*, <https://history.state.gov/milestones/1945-1952/creation-israel>.

²¹² *State of Israel Proclaimed*, HISTORY.COM, <https://www.history.com/this-day-in-history/state-of-israel-proclaimed>.

²¹³ *Israel Profile—Timeline*, BBC (Apr. 9, 2019), <https://www.bbc.com/news/world-middle-east-29123668>.

²¹⁴ *Total Immigration to Israel by Year*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/total-immigration-to-israel-by-year>.

²¹⁵ Eytan Halon & Jeremy Sharon, *Israel's Population Reaches 9.2 Million Citizens*, JERUSALEM POST (Sept. 17, 2020), <https://www.jpost.com/israel-news/study-israels-population-to-soar-to-128-million-by-2040-625933>.

²¹⁶ *Id.*

²¹⁷ See Glenn Kessler, *Did Ahmadinejad Really Say Israel Should Be 'Wiped off the Map'?*, WASH. POST (Oct. 5, 2011), https://www.washingtonpost.com/blogs/fact-checker/post/did-ahmadinejad-really-say-israel-should-be-wiped-off-the-map/2011/10/04/gIQABJIKML_blog.html.

²¹⁸ *Israel*, HISTORY.COM, https://www.history.com/topics/middle-east/history-of-israel#section_3.

²¹⁹ *Id.*

Jewish population clearly became second-class citizens, and to add injury to insult, Israel has not observed the territorial integrity of the State of Palestine.²²⁰ This has been intensified by the “peace plan” to which former United States President Donald Trump attributed to himself but which clearly stemmed from the political mindset of Israeli President Benjamin Netanyahu.²²¹

It requires no stretch of the imagination to conclude that confiscation of Palestinian territories in violation of clear and indisputable dictates of international law will not resolve the conflict but will, on the contrary, lead to further resentment and violence.

²²⁰ *Id.*; Asad Ghanem, *Israel's Second-Class Citizens*, FOREIGN AFFS. (Jul. 2016).

²²¹ Kali Robinson, *What is U.S. Policy on the Israeli-Palestine Conflict?*, COUNCIL ON FOREIGN RELS.