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The Hague Statement of jurists on the Israel-Palestine conflict

Discussion Paper

An initiative to study the relationship between Israel and the nations to promote international peace and security, friendly relations amongst nations, and peaceful resolution of conflicts based on the principles of justice and international law.

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INTRODUCTION

On 23rd December 2016, the United Nations Security Council (UNSC) adopted Resolution 2334 which contains a number of statements of law and fact concerning Israel, the "two-State solution" and "the Palestinian territory occupied since 1967". In particular, the Security Council -

- referred to "the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949";
- condemned "all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, *inter alia*, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions";
- reaffirmed "that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law", and demanded that Israel "immediately and completely cease all settlement activities" in these territories and "fully respect all of its legal obligations in this regard";
- denied any "recogni[tion to] changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiation";
- affirmed that Israel's establishment of settlements is "a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace", stressed that "cessation of all settlement activity is essential for salvaging the two-State solution", and called upon the parties to demonstrate "through policies and actions a genuine commitment to the two-State solution"; and
- called upon all States "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".

The Security Council referred specifically to the 2004 Advisory Opinion of the International Court of Justice (ICJ) on "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" ("the Advisory Opinion") as support for these assertions.

On 28th and 29th June 2017, twenty-four (24) international lawyers and experts in the field of international law from twelve nations convened in the Peace Palace in The Hague at the invitation of The Hague Initiative for International Cooperation (*thinc.*) and the International Conference for Truth, Justice and Peace (ICTIP) to discuss the legal implications of UNSC Resolution 2334 ("the Meeting"). They examined the extent to which this resolution and the Advisory Opinion should be considered to have resolved the long-standing dispute about sovereignty in these territories, and whether extant legal doctrine and practice support the conclusions of the Security Council and ICJ in the event their pronouncements could not be considered to have resolved these issues. During the Meeting, the participating jurists and other participants in the discussion investigated the interpretation and use of

international law by the UNSC and ICJ, and examined the role that international law plays and should play in facilitating a peaceful resolution of the Israel-Palestine dispute.

The Meeting was conducted under Chatham House Rules. The participants agreed to the issuance of a statement by the conveners of the meeting which summarized the conversation and the conclusions reached (the "Statement"). They agreed that the summary would represent the sense of the Meeting, while not binding any participant to the Statement.

The jurists whose names are listed in the appendix have all participated in the Meeting. Other experts in international law, who did not participate in the discussion, have since endorsed this Statement.

The participating jurists strongly urge a review of the legal issues raised by the ICJ Advisory Opinion and Security Council Resolution 2334. They found that - for various reasons - the processes leading to the 2004 Opinion and Resolution 2334 fell short of an open, balanced and thorough consideration of all the relevant factual and legal issues. This resulted in legal findings that did not adequately take into account the legal, historical, political and military complexities of these territories and peoples. This is reflected, for example, in the remark of Judge Higgins in her Separate Opinion, that "the law, history and politics of the Israel-Palestine dispute is immensely complex … Context is usually important in legal determinations … I find the 'history' as recounted by the Court … as neither balanced nor satisfactory".

It is the firm view of the participating jurists that such a review is necessary in order to achieve, in accordance with the UN Charter, a peaceful settlement of the Israel-Palestine conflict based on the principles of international law.

The Hague, 31st October 2017
A.E.L. Tucker, Director
P.J. Hoogendoorn, Secretary

GUIDING PRINCIPLES AND LEGAL PROPOSITIONS

Guiding Principles

The analysis of the status of Jerusalem and the territories captured by Israel in 1967, and any legal pronouncements on the status of those territories, should be guided by the following principles of international law:

1. The international law principle of the sovereign equality of states requires (a) that all states be treated equally, and (b) that legal rules be formulated and applied equally to all equivalent states and conflicts.
2. The rule of law requires a clear distinction to be made between international law and policy. Resolutions of the UN General Assembly or Security Council do not necessarily reflect a true and accurate statement of the law.
3. UN institutions (including the General Assembly, the Security Council and the International Court of Justice) do not have the jurisdiction or authority to resolve disputes between states *inter se* or between a state and another international actor without their consent.

Legal Propositions

In the view of the participating jurists, applying these Guiding Principles and other principles of international law to the Israel-Palestine dispute, there is *prima facie* evidence for the validity of the following propositions regarding the status of the territories mentioned above under international law:

1. The 1949 Armistice Lines (often referred to as the "the 1967 lines", "the 1967 borders," "the 4 June lines," or "the Green Line") have never acquired the status of international borders under international law. They therefore should not be, directly or indirectly, referred to as the borders of the State of Israel or any prospective "State of Palestine".
2. Pursuant to the Mandate for Palestine, which was created further to the decision of the Principal Allied Powers in April 1920 and approved by the League of Nations in 1922, in order to reconstitute "a Jewish homeland in Palestine", the Jewish people obtained certain legal rights to settle in Palestine - which included the Gaza Strip and what has later become known as the "West Bank", including Jerusalem.
3. International law establishes the borders of new states emerging from Mandates or colonies on the basis of territorial frontiers at the time of independence. Application of this doctrine (known as *uti possidetis juris*) to the Mandate for Palestine means that the State of Israel has a legitimate claim of sovereignty up to the territorial frontiers of the Palestine Mandate as of May 1948 when Israel became an independent state, inclusive of Jerusalem, the Gaza Strip and the "West Bank".
4. Although Israel has, since June 1967, chosen voluntarily to apply the terms of the international humanitarian law of belligerent occupation in the "West Bank" and the Gaza Strip, it is arguably not obliged to do so, as it is far from certain that the "West Bank", including East Jerusalem, and

the Gaza Strip qualify as “occupied” territories under the international law of belligerent occupation.

5. As international law forbids discrimination against persons on the basis of race or ethnicity, it forbids the exclusion of Jews from the “West Bank”, the Gaza Strip and Jerusalem on the basis of their Jewish identity.
6. There are many examples of territories in the world that could be regarded as “occupied” (in the meaning of international law), and where movements of population from without have taken place, such as Turkey’s practices in Northern Cyprus, Russia’s in Crimea, or Morocco’s in Western Sahara. The principle of sovereign equality requires Israeli settlement policies to be treated no differently than equivalent settlement practices in other allegedly occupied territories.
7. International law arguably supports a Palestinian right of self-determination but it leaves to the affected parties the choice of agreed-upon means to fulfill that right. The means of fulfilling the Palestinian right of self-determination are, therefore, ultimately a matter of policy rather than law.
8. The Oslo Accords, negotiated between Israel and the PLO between 1993 and 2000, remain the only agreed-upon framework for the negotiation of Palestinian self-determination. The witnessing parties are legally bound to refrain from encouraging breach of the Oslo agreements, and not to take other steps that may prejudice the permanent status negotiations.
9. Pending *inter alia* the achievement of a Palestinian entity that can effectively and independently govern the relevant territory, “Palestine” does not yet satisfy the criteria of statehood under international law.

CLARIFICATIONS

Guiding Principles

<u>Guiding Principle 1</u>: The international law principle of the sovereign equality of states requires (a) that all states be treated equally, and (b) that legal rules be formulated and applied equally to all equivalent states and conflicts.

The principle of the sovereign equality of states finds expression in article 2(1) of the UN Charter. It has been described by the International Court of Justice as "one of the fundamental principles of the international legal order" which is "to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory"[1]. Respect for sovereign equality requires not only uniformity in the <u>statement</u> of rules, but also uniformity in the <u>application</u> of rules.

A number of statements in Resolution 2334 and in the 2004 Advisory Opinion on the application of international law to the Israel-Palestine dispute appear to stem from an understanding of the rules of international law that is at variance with the common understanding of those rules in other contexts. In particular, the statements that all Israeli settlements infringe international law, that the "4 June 1967 lines" are the *de facto* borders of Israel, and that the "two-State solution" is mandated by international law, are types of statements that are not made in relation to other territories that qualify as "occupied" under international law, such as Russia/Crimea, Morocco/Western Sahara and Turkey/Northern Cyprus. Israel has the right to be treated in the same way as other states, and therefore care needs to be taken to formulate as objectively as possible the rules and principles of international law, and also to apply them in a uniform fashion, rather than adopting and applying rules and interpretations solely in relation to Israel/Palestine.

<u>Guiding Principle 2</u>: The rule of law requires a clear distinction to be made between international law and policy. Resolutions of the UN General Assembly or Security Council do not necessarily reflect a true and accurate statement of the law.

It is a foundational principle of international law that not all international expressions of norms take on the character of binding law. For instance, legal opinions articulated by the UN General Assembly or the Security Council do not in and of themselves constitute international law, and only constitute evidence of customary international law to the extent to which they reflect the common practice of states, as well as the universal opinion of states that such practice is dictated by the norms of international law (the technical term for this is "opinio juris"). The international legal system recognizes the possibility of policy statements which are not legally binding, and this is an important tool for diplomats, who can make pronouncements of commitment without being thought to have created legal obligations. Statements of policy, some of which may be called "soft law", include "normative

[1] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, Feb. 3, 2012, para 57.

provisions contained in non-binding texts"[2] and may be found in a wide range of instruments[3]. Although such statements may have some political consequences, they are by their very nature not legally binding or enforceable. Although statements of policy may express noble aspirations, and may, over time, become recognized as reflecting customary international law, or even stimulate sovereign states to promulgate or negotiate legislation or conventions, by definition 'soft law' lacks authority to bind states[4].

Many UN General Assembly and Security Council Resolutions referring to the Israel-Palestine conflict are examples of soft law. UN Security Council Resolution 242 is a good example. This Resolution was a non-binding recommendation by the Security Council issued in response to the Israel-Arab Six Day War in June 1967. This Resolution emphasized the necessity of negotiations and suggested guidelines for the parties to consider during their negotiations. Another example is UN General Assembly Resolution 194 (1948), which is relied on for the assertion that Palestinian refugees have a "right of return." Rather than being a binding instrument, this resolution was no more than an expression of policy in relation to refugees resulting from the 1947-1949 Israel-Palestine conflict.

The statement or inference that the "two-State solution" is mandatory or necessary in order to achieve a just, lasting and comprehensive peace, is a statement of policy, not law.

Guiding Principle 3: UN institutions (including the General Assembly, the Security Council and the International Court of Justice) do not have the jurisdiction or authority to resolve disputes between states *inter se* or between a state and another international actor without their consent.

International law provides a number of ways to reach binding resolutions of legal disputes. First, and foremost, parties in conflict may determine a resolution, and then encapsulate that agreement in a binding legal form, such as a treaty. Second, the parties may refer the dispute to a binding judicial resolution, or a binding legal arbitration. None of the UN institutions (including the General Assembly, the Security Council and the International Court of Justice) has the jurisdiction or authority to definitively resolve disputes between states or between a state and another international actor without their consent.

The UN Security Council has been entrusted with the primary responsibility, on behalf of the UN member States, for the maintenance of international peace and security. The Council has power under Chapter VII of the UN Charter to make resolutions binding on other states. Resolution 2334 was a recommendation of the Council adopted under Chapter VI, not Chapter VII, of the Charter. It is not binding on the parties to the dispute and other UN Member States, except to the extent that it repeats obligations that are otherwise binding.

[2] D. Shelton, Commitment and Compliance: The Role of Non-binding Norms in the International Legal System 292, Oxford University Press (ed. 2000).
[3] A.T. Guzman, T.L. Meyer, *International Soft Law*, Journal of Legal Analysis, p.173, Volume 2, Number 1: Spring 2010.
[4] Justus Reid Weiner, "The NGOs, demolition of illegal building in Jerusalem, and international law", 2005, published by Jerusalem Centre for Public Affairs (JCPA) www.jcpa.org. See further on the distinction between soft law and hard law the references cited by Weiner: Book review and note, Commitment and compliance: the role of non-binding norms in the international legal system, Dinah Shelton (ed), (2000), American Journal of International Law, Vol.95 (2001), 709; Judgment of the Permanent Court of International Justice in S.S. Lotus (France v. Turkey), 1927 PCIJ (ser A) No. 10 p. 18; H.L.A. Hart, Positivism and the separation of laws and morals, Harvard Law Review 71 (1958), 593, 606-615; Hans Kelsen, Pure Theory of Law, transl. Max Knight (Berkeley, University of California Press, 1967); Ian Brownlie, The Rights of Peoples in Modern International Law, in James Crawford (ed); The Rights of peoples, Vol.1 (London, Oxford University Press, 1988).

The International Court of Justice, being the "principal judicial organ" of the United Nations, plays an extremely important role in the maintenance of international peace and security. Under the UN Charter and the Statute of the International Court of Justice, the ICJ has two roles. First, it has jurisdiction to settle disputes of a legal nature that are submitted by states ("contentious cases"). Second, it has jurisdiction to issue Advisory Opinions on legal questions at the request of organs of the United Nations ("advisory jurisdiction"). The 2004 "Wall" Advisory Opinion was given at the specific request of the General Assembly as set out in Resolution 10/14 of 8th December 2003. The 2004 Advisory Opinion is not binding on UN Member States because Advisory Opinions are by their nature advisory only.

Legal Propositions

Legal Proposition 1: The 1949 Armistice Lines (often referred to as the "the 1967 lines", "the 1967 borders," "the 4 June lines," or "the Green Line") have never acquired the status of international borders under international law. They therefore should not be, directly or indirectly, referred to as the borders of the State of Israel or any prospective "State of Palestine".

The 1949 Armistice Lines were the lines separating territory governed by Israel from the territory controlled by its neighbors (Egypt, Jordan, Lebanon and Syria) following the 1948-1949 Arab-Israeli war (also known as Israel's War of Independence). The armistice lines were established in four agreements (the separate armistice agreements signed between Israel and each of its four neighbors) and reflected, with minor variations, the position of forces at the end of fighting. The Arab states, insisted that these lines would not establish legally binding borders. Specifically, Article II.2 of the Armistice Agreement between Israel and Transjordan states that "no provision in this agreement shall in any way prejudice the rights, claims and positions of either party hereto in the ultimate peaceful settlement of the Palestine question" and Article VI.9 provides that "[t]he Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto."

Further, to give these lines the status of borders would be to approve the use of aggressive force by foreign states against the Jewish people and (after 14th May 1948) the territorial integrity of the State of Israel by Israel's Arab neighbors in the first Arab-Israeli war (1948-1949), and therefore conflicts with the prohibition under international law of the use of force to acquire territory. In the course of the first Arab-Israeli war, Egypt took control of the Gaza Strip, while Jordanian and Iraqi forces occupied Judea, Samaria and East Jerusalem (including the Old City). Jordan subsequently annexed Judea and Samaria illegally. This purported annexation was only officially recognized by three other states (the UK, Iraq and Pakistan – and the latter did not recognize Jordan's annexation of East Jerusalem), and was rejected by the Arab League. Jordan's occupation and subsequent annexation of the "West Bank" was clearly in breach of international law, its control of the area having been obtained by force following an act of aggression, and therefore having no effect on the entitlement to sovereignty of the State of Israel over these territories upon its independence in 1948 (the issue of Israeli sovereignty over the "West Bank", including Jerusalem, and the Gaza Strip is discussed more fully in Legal Proposition 3 below).

The prohibition on the acquisition of territory through the use of force is linked to the principle of "territorial integrity", which in turn is part of the foundation of the Westphalian State system, and has long been established in the contemporary system of international law on the use of force. The concept

of territorial integrity is expounded upon in a number of declarations of the UN General Assembly, including the Friendly Relations Declaration[5] and the Definition of Aggression[6].

Israel's right as a sovereign state to territorial integrity is reflected in Security Council Resolutions 242 and 338, which encouraged the parties to negotiate a peace agreement based on "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."

Legal Proposition 2: Pursuant to the Mandate for Palestine, which was created further to the decision of the Principal Allied Powers in April 1920 and approved by the League of Nations in 1922, in order to reconstitute "a Jewish homeland in Palestine", the Jewish people obtained certain legal rights to settle in Palestine - which included the Gaza Strip and what has later become known as the "West Bank", including Jerusalem.

The Mandate system was a creation of the Supreme Allied Powers following World War I that intended to create a new kind of "trust" governance for territories of the defeated Central powers. The Mandate system was formally defined in the Covenant of the League of Nations, and first implemented with respect to certain German Colonies in the Treaty of Versailles in 1919. The allocation of Mandates for territories of the Ottoman Turkish empire was agreed upon by the Supreme Allied Powers in the San Remo resolution in 1920, and the individual Mandates were then approved by the Assembly of the League of Nations in the following years.

Clearly, certain territorial rights and obligations were created and recognized by the Mandate instruments. While the exact nature of the rights conferred under the Mandate for Palestine has been the subject of much discussion, the language of the Mandate shows that, with respect to the territory then known as "Palestine", the Jewish people were the main beneficiaries of those rights. By incorporating the Balfour Declaration in the Preamble to the Mandate (in which "His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country"), the Mandate clearly confirmed the right of the Jewish people to self-determination in the territory then known as Palestine.

The rights and interests recognized and/or granted under these instruments have never been waived or abrogated. Specifically, Article 80 of the UN Charter ensured that the rights granted by the Mandate for Palestine continued, notwithstanding the withdrawal of Great Britain (the Mandatory) and the replacement of the League of Nations by the United Nations.

Legal Proposition 3: International law establishes the borders of new states emerging from Mandates or colonies on the basis of territorial frontiers at the time of independence. Application

[5] See UN General Assembly Resolution 2625 (XXV) 24th October 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" A/res/25/2625.
[6] See UN General Assembly Resolution 3314 (XXIX) 14th December 1974 "Definition of Aggression" A/res/29/3314.

of this doctrine (known as *uti possidetis juris*) to the Mandate for Palestine means that the State of Israel has a legitimate claim of sovereignty up to the territorial frontiers of the Palestine Mandate in May 1948 when Israel became an independent state, inclusive of Jerusalem, the Gaza Strip and the "West Bank".

International law contains several principles upon which legally enforceable borders can come into existence. These include: effective control; historical title; and treaties. In recent years, many legal judgments, including the rulings of the International Court of Justice regarding border disputes in Asia and Africa, and examinations by lawyers regarding issues such as the borders of the new states emerging from Yugoslavia and the former Soviet Union, have emphasized that the most persuasive principle for determining the borders of new states is the doctrine known as *uti possidetis juris*. The borders of the state of Israel, no less than those of other states, are subject to this doctrine.

Uti possidetis juris is one of the main principles of customary international law intended to ensure stability, certainty and continuity in the demarcation of boundaries. The principle acts to clarify and determine the territorial boundaries of newly emerging states by providing that states emerging from decolonization or mandates shall presumptively inherit the colonial administrative borders that existed at the time of independence. In effect, the principle of *uti possidetis juris* transforms the colonial and administrative lines existing at the moment of the birth of the new State into national borders. The principle applies to the State as it is [at the moment of independence], i.e. to the 'photograph' of the territorial situation then existing.

In 1947 Britain decided to terminate her stewardship of the Mandate for Palestine and notified the United Nations accordingly. It should be noted that *the Mandate itself was not terminated* but only Britain's stewardship of it. Applying the principle of *uti possidetis juris* to the borders of the State of Israel (the only state to emerge in Palestine upon the withdrawal of Great Britain), the administrative boundaries of the Mandate for Palestine on 14th May 1948 became the borders of the State of Israel that came into existence upon the proclamation of its independence on that date. On 15th May 1948, Great Britain, the Mandatory for Palestine, officially departed. The eastern boundary of the Mandate on 14th May 1948 was the Jordan River, and a line extending south from the Dead Sea (into which the Jordan River empties) to the Red Sea near Aqaba. (The Mandate had originally included the territory of Transjordan, but Transjordan was administratively separated from Palestine in 1922, with the approval of the League of Nations, and granted its independence by Britain in 1946.)

It is generally understood that the principle of *uti possidetis juris* operates retrospectively to the moment of independence, without reference to the territories actually controlled by the new state. Thus, even though the State of Israel, upon its creation, did not have effective control over all of the area previously covered by the Mandate for Palestine, it acquired the borders of the Mandate.

The administrative boundaries of the Mandate for Palestine remained effective right up to the proclamation of the State of Israel on 14th May, 1948. It is important to note that the November 1947 UN "Partition Plan", recommended by General Assembly Resolution 181, never went into effect. Its primary objective was to partition the remaining Israel territory (already reduced - as a result of the separation of Transjordan in 1922 - by approximately 78% of the originally mandated territory) to create independent Jewish and Arab states, which were to work together in an economic union. The principal

reason the Plan was never implemented was that the Arabs rejected it in its entirety[7] and chose instead to engage in war, thereby destroying any possibility of the cooperation necessary to realize the economic union and precluding any subsequent attempt to revive the resolution. Owing to the Arab rejection and subsequent military aggression, counter to the UN Charter, the Security Council, even though asked by the General Assembly, took no action to implement the resolution. Likewise, Britain took no action to implement the resolution and it refused to facilitate the Palestine Commission's attempts to do so.

Finally, it is strongly arguable that nothing that has happened since May 1948 has altered the legal status of those borders. Specifically, neither the 1949 Armistice Agreements, the 1994 Israel-Jordan Peace Treaty, the PLO's claims since 1988 to the existence of a "State of Palestine", nor the Oslo Agreements, have been legally effective to alter the borders of the State of Israel as they existed in May 1948. Moreover, Article 3.1 of the peace treaty between Israel and Jordan recognized that the "international boundary between Israel and Jordan is delimited with reference to the boundary definition under the Mandate" which is significant since it comports fully with the application of *uti possidetis juris.*

<u>Legal Proposition 4</u>: Although Israel has, since June 1967, chosen voluntarily to apply the terms of the international humanitarian law of belligerent occupation in the "West Bank" and the Gaza Strip, it is arguably not obliged to do so, as it is far from certain that the "West Bank", including East Jerusalem, and the Gaza Strip qualify as "occupied" territories under the international law of belligerent occupation.

Israel has, since 1967, referred to these territories (with the exception of East Jerusalem) as "occupied", and (although it has consistently denied that the law of belligerent occupation applies *de jure*) has voluntarily undertaken, as a matter of Government policy, to comply with the provisions of international humanitarian law applicable to occupied territories, in particular the Fourth Geneva Convention. There are, however, strong arguments (supported by leading international lawyers) that the territories over which Israel (re)gained control in June 1967 do not fall under the classic definition of military (belligerent) occupation at all since there was no prior sovereign other than Israel over those territories (see discussion of *uti possidetis juris* in prior section); thus, the Fourth Geneva Convention is not obligatory on Israel as a matter of law.

Jordan illegally controlled the "West Bank" between 1949 and 1967, having acquired control as a result of an illegal act of aggression. Its subsequent purported annexation of this territory was not sufficient to give it rights over this territory. In other words, Jordan had no territorial sovereignty over the "West Bank" between 1948 and 1967. As a result, when Israel defeated the Jordanian forces and regained control of this territory in June 1967, it was not a question of Israel taking control of "the territory of a High Contracting Party" [i.e. another State] within the meaning of the Fourth Geneva Convention. Professor Julius Stone, a foremost authority on the Geneva Conventions and the obligations of States in times of war, expressed the following:

> "[B]ut the Convention itself does not by its terms apply to these territories. For, under Article 2, the Convention applies 'to cases of . . . occupation of the territory of a High Contracting Party, by another such Party.' Insofar as the West Bank at

[7] A July 1949 working paper of the UN Secretariat entitled "The Future of Arab Palestine and the Question of Partition" notes that: "The Arabs rejected the United Nations Partition Plan so that any comments of theirs did not specifically concern the status of the Arab section of Palestine under partition but rather rejected the scheme in its entirety." UN document A/AC.25/W.19.

> present held by Israel does not belong to any other State, the Convention would not seem to apply to it at all. This is a technical, though rather decisive, legal point."[8]

Professor Stone's argument applies with equal measure to the Gaza Strip as well.

The Fourth Geneva Convention in 1949 changed the focus of the international law of belligerent occupation by giving greater attention to the rights of the population of the occupied territory; however, it did not change the notion of "occupation" itself. Notwithstanding the opinion of the ICJ expressed in the 2004 Advisory Opinion, there is support for the view that the law of occupation is not intended to apply in situations where there is no sovereign power that has been "ousted" from the territory. As Benvenisti has stated, "The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force . . . . From the principle of inalienability of sovereignty over a territory spring the constraints that international law imposes on the occupant."[9] The purpose of the law of belligerent occupation is not only to protect civilians from the occupying army, but it is also (and perhaps primarily) to "safeguard the reversionary rights of the ousted sovereign." In situations (like the "West Bank" and the Gaza Strip) where there was no "ousted sovereign," there can accordingly be no question of "occupation" within the meaning of international humanitarian law. In fact, to the extent that there was anyone who could claim legal sovereignty, it was Israel, as a result of the Mandate. Pursuant to *uti possidetis juris*, Israel, the rightful sovereign, was merely reasserting its legitimate sovereign rights over its own territories. (As discussed under Legal Proposition 3, the Israel-Jordan Peace Treaty contained a binding determination as between those parties of the territorial status of the territories which had been occupied by Jordan from 1949 to 1967, with this effect.)

Further, it is worth noting that, as former President of the ICJ Professor Rosalyn Higgins has stated, "[t]here is nothing in either the Charter or general international law which leads one to suppose that military occupation pending a peace treaty is illegal"[10]. The law of belligerent occupation simply means that any State that, as a result of war or conflict, takes control of neighboring territory belonging to (or claimed by) another State is required to administer that territory temporarily until the conflict has been terminated and a peace treaty has been negotiated. In the meantime, the "occupier" is subject to certain strict obligations that are primarily directed at protecting the civil population in that territory. But the occupation itself is not illegal, nor does it impose a mandatory obligation to withdraw all citizens of the occupying power from those territories.

Another argument against there being a *de jure* state of occupation in the "West Bank" is the fact that there is a peace treaty between Israel and Jordan. As Professor Higgins' remarks suggest, there can be no belligerent occupation following a peace treaty.

<u>Legal Proposition 5</u>: As international law forbids discrimination against persons on the basis of race or ethnicity, it forbids the exclusion of Jews from the "West Bank", the Gaza Strip and Jerusalem on the basis of their Jewish identity.

[8] Lacey, I. (ed), International Law and the Arab-Israel Conflict—extracts from Israel and Palestine—Assault on the law of nations by Julius Stone, second edition, with additional material and commentary updated to 2003.
[9] Eyal Benvenisti, The International Law of Occupation (1993), pages 5-6. Cited by Avinoam Sharon, "Why is Israel's Presence in the Territories still called "Occupation"?", Jerusalem Centre for Public Affairs.
[10] Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council," 64 Am.J.Int'l.L. (1970) 1-18, at 8.

The statement in Resolution 2334 that Israel's establishment of settlements is "illegal", together with the insistence on the "June 1967 lines", suggests that a condition of the proposed "two-State solution" will be the removal of Israeli settlements from the "occupied Palestinian territories". This is in accord with the terms of the Palestinian National Charter, and the demands of the Palestinian Authority, to the effect that Jews will not be allowed to live in a "State of Palestine".

The requirement that all Israelis must be evacuated out of East Jerusalem and the "West Bank" discriminates against Jews. Supporting the exclusion of Jews from any part of the world is illegal and breaches UN Charter principles. Moreover, exclusion of Jews from parts of the "West Bank" and Jerusalem also conflicts with the obligations entered into by the member states of the League of Nations that approved the establishment of the Mandate for Palestine in 1922.

The right of Jews to live in the "West Bank" and Jerusalem stems not only from the Mandate, but from the right of persons to acquire and maintain their home under international human rights law as found in, for example, the International Covenant on Civil and Political Rights.

It is often argued that the removal of "settlers" from the Territories is justified because the existence of Israeli citizens in these territories "threatens to make a two-State solution impossible."[11] It is difficult to see how the mere *existence* of Jewish persons or enterprises in the Territories can - in and of itself - threaten the creation of a Palestinian state. Just as the existence of Arabs in the territory of Israel does not make a Jewish State of Israel impossible, in the same way, the existence of Jews in the "Occupied Territories" does not threaten or prevent the existence of a Palestinian Arab state on those territories.

Moreover, apart from the fact that such a policy would breach the rights of settlement of the Jewish people deriving from the Mandate for Palestine, any policy that directly or indirectly requires Jews to be removed from "Palestine" conflicts with UN Charter principles, in particular:

- respect for human rights '(…) for all without distinction as to race (…) or religion.'[12]
- the dignity and worth of the human person, in the equal rights of men and women and of nations large and small;
- the establishment of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained;
- to practice tolerance and live together in peace with one another as good neighbors; and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest.

<u>Legal Proposition 6</u>: There are many examples of territories in the world that could be regarded as "occupied" (in the meaning of international law), and where movements of population from without have taken place, such as Turkey's practices in Northern Cyprus, Russia's in Crimea, or Morocco's in Western Sahara. The principle of sovereign equality requires Israeli settlement policies to be treated no differently than equivalent settlement practices in other allegedly occupied territories.

[11] See "Statement on the publication of tenders to expand Israeli settlements in Ramot and Pisgat Ze'ev" by the High Representative of the EU for Foreign Affairs and Security Policy on 8th November 2012 (A 497/12).
[12] See UN Charter Article 1 (3) on the Purposes of the UN.

There are many cases of occupation that fall within the scope of the Fourth Geneva Convention. These include: East Timor, Western Sahara, Northern Cyprus, Nagorno-Karabakh (Armenia/Azerbaijan), Abkhazia, and Crimea. Israeli settlement activity has been criticized by UN bodies for violating article 49(6) of the Fourth Geneva Convention, while similar critique is applied by *no* international actor or body to these other settlement contexts where there is *prima facie* evidence of (state-sponsored) migration of persons into the occupied territory.

The claim that Israel's "establishment of settlements" is illegal rests entirely on Article 49(6) of the Fourth Geneva Convention, which provides that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[13] With the possible exception of military outposts, all Israelis who have moved into these areas since 1967 have done so voluntarily - they have not been coerced or forced to do so by the Israeli Government.

Labelling all settlements in East Jerusalem and the "West Bank" as "illegal" both misinterprets and grossly oversimplifies the spirit and letter of Article 49(6) of the Fourth Geneva Convention.[14] Moreover, it contradicts Article 6 of the Mandate for Palestine which encouraged Jewish settlement throughout Palestine, and it is wholly inapplicable based on Israel's claim to sovereignty pursuant to *uti possidetis juris*.

The international community imposes a standard under Article 49(6) on Israel which it does not apply to other alleged cases of occupation. The participating jurists noted the remarks of Professor Kontorovich in a recently published article[15] on State practice concerning occupation:

> "Clear patterns emerge from this systematic study of state practice. Strikingly, the state practice paints a picture that is significantly inconsistent with the prior conventional wisdom concerning Art. 49(6). First, the migration of people into occupied territory is a near-ubiquitous feature of extended belligerent occupations. Second, no occupying power has ever taken any measures to discourage or prevent such settlement activity, nor has any occupying power ever expressed opinio juris suggesting that it is bound to do so. Third, and perhaps most strikingly, in none of these situations have the international community or international organizations described the migration of persons into the occupied territory as a violation of Art. 49(6). Even in the rare cases in which such policies have met with international criticism, it has not been in legal terms. This suggests that the level of direct state involvement in "transfer" required to constitute an Art. 49(6) violation may be significantly greater than previously thought. Finally, neither international political bodies nor the new governments of previously occupied territories have ever embraced the removal of illegally transferred civilian settlers as an appropriate remedy."

[13] Article 49 of the Fourth Geneva Convention.
[14] See e.g. Professor James Crawford SC in his Opinion on Third Party Obligations with respect to Israeli Settlements in Palestinian Occupied Territories, January 24, 2012, available at: http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.
[15] Kontorovich, Eugene, Unsettled: A Global Study of Settlements in Occupied Territories (September 7, 2016). Northwestern Public Law Research Paper No. 16-20. Available at SSRN: https://ssrn.com/abstract=2835908 or http://dx.doi.org/10.2139/ssrn.2835908

<u>Legal Proposition 7</u>: International law arguably supports a Palestinian right of self-determination but it leaves to the affected parties the choice of agreed-upon means to fulfill that right. The means of fulfilling the Palestinian right of self-determination are, therefore, ultimately a matter of policy rather than law.

The right of peoples to self-determination under international law is notoriously complex and uncertain. In the context of a people seeking self-determination in relation to a territory to which an existing state claims sovereignty, the nature of the autonomy to which that people is entitled is to be determined by means of negotiation with the state concerned. That autonomy may be expressed in a variety of ways, which could include, for example, a federation of autonomous entities such as in Switzerland or Bosnia. But that is to be sorted out by the people claiming self-determination in negotiation with the state from which they desire to attain autonomous control of territory. This is basically a political question; beyond ensuring that the right to self-determination may not conflict with the legitimate territorial and political rights of existing states, international law does not mandate any particular form of autonomy.

Despite the suggestion in Resolution 2334 and many General Assembly resolutions to the contrary, the right to self-determination, even if it does apply here, does not confer an automatic right to statehood. Whether or not it leads to statehood will depend on a variety of factors.

As is reflected in UNSC Resolutions 242 and 338, for example, international law does not allow the self-determination of a people to conflict with the sovereign rights of an existing state, including its rights to territorial integrity, political independence and secure and defensible borders. In this context, assuming the "Palestinians" are a people for the purposes of international law, the scope of their right to self-determination depends on the scope of Israel's legitimate claims to territorial sovereignty. If, pursuant to *uti possidetis juris*, all of the territory covered by the Mandate for Palestine in May 1948 became the sovereign territory of the State of Israel, then Palestinian self-determination will necessarily be limited to a form of autonomy that does not conflict with that sovereignty.

Further, in determining the nature and scope of implementation of the Palestinian Arab right to self-determination, it is important to note that the international community has already significantly accommodated Arab self-determination desires by creating the wholly Arab state of Jordan out of approximately 78% of the territory of the original Mandate for Palestine. Further, Israel has recognized the desire of the Arabs living in territory west of the Jordan rift valley for a state of their own and has acted in good faith to determine whether the Arabs seriously desire peace with Israel by withdrawing their armed forces from the Gaza Strip and by granting a significant amount of self-rule in Areas A and B of the "West Bank". Nonetheless, with respect to Israeli sovereignty over the "West Bank", including east Jerusalem, and the Gaza Strip, Israel has yet to cede its sovereign rights over any portion of those territories. Formal relinquishment of Israeli sovereignty, if it occurs, will take place pursuant to good faith, bilateral negotiations between the parties.

Finally, the means of fulfilling the Palestinian right of self-determination are to be determined through negotiations between the State of Israel and the Palestinian Arab people - unless the parties decide otherwise.

<u>Legal Proposition 8</u>: The Oslo Accords, negotiated between Israel and the PLO between 1993 and 2000, remain the only agreed-upon framework for the negotiation of Palestinian self-determination. The witnessing parties are legally bound to refrain from encouraging breach of

the Oslo agreements, and not to take other steps that may prejudice the permanent status negotiations.

Israel and the PLO have chosen to negotiate the terms of Palestinian self-determination under the terms and conditions set out in the Oslo agreements. Those agreements remain in force, and therefore provide the agreed framework within which the self-determination of the Palestinian people is to be determined. "Jerusalem" and "settlements" are amongst the issues which Israel and the PLO have agreed will be resolved in permanent status negotiations. Seeking "unilateral" recognition of Palestinian statehood arguably breaches the terms of the Oslo Agreements. Although the interim period has expired and no final status agreement has been reached, the Oslo Agreements are still valid and binding on the parties involved.

The complex arrangements made under the Oslo Agreements, dividing the territories into Areas A, B and C, have arguably resulted in a special legal regime (*lex specialis)* in relation to the "post-1967" territories. As instruments of international law, they impose a complex matrix of mutual rights and obligations, limiting the application of general principles of law. Given that Israel retains all "residual" powers not transferred to the Palestinian Council, it is arguable that - pending final agreement - the Oslo Agreements do not affect Israel's underlying claims to territorial sovereignty with respect to the "West Bank", including East Jerusalem, and the Gaza Strip.

The Interim Agreement (1995) prohibits both parties from initiating "any step that will change the status of the "West Bank" and the Gaza Strip pending the outcome of the permanent status negotiations." The future status of these territories and the nature of an independent Palestinian entity can only be settled through negotiations reflecting a balance of competing interests. Provided the parties act in good faith, no specific solution to these issues can be imposed without the mutual consent of both Israel and the Palestinian Arab people, and any attempts to have such a solution imposed would be in breach of the Oslo Accords. For this reason, the actions of the PLO to seek recognition of Palestine within the UN - based on the so-called "pre-1967 borders" are arguably in breach of the Oslo Accords. The "pre-1967 borders" were not borders at all, they were simply - *at Arab insistence at the time* - armistice lines and never to be construed as, or even to "prejudice", future national boundaries. Equally, recognition of "Palestine" by the EU (or its Member States), Russia, the USA, Egypt, Jordan, or Norway - all witnesses to the Oslo Accords - in such a way as to compromise Israel's claims to territorial sovereignty with respect to the "West Bank" and the Gaza Strip, would arguably breach their obligations under the Oslo Accords.

It is often argued that construction in Jerusalem or other parts of the "West Bank" constitutes a "step" that will "change the status of the "West Bank" pending the outcome of permanent status negotiations." However, it is difficult to see how construction or expansion of physical buildings in these territories could change the status of the "West Bank". The question of the settlements is an issue explicitly reserved for permanent status negotiations, together with "Jerusalem, refugees, security arrangements, borders, relations and cooperation with other neighbors and other issues of common interest." Pending successful negotiation on those issues, Israel retains full power and responsibility within Area C (including Jerusalem). This includes zoning and planning responsibilities. As demonstrated in the Camp David negotiations in 2000, Israel has repeatedly indicated that it is willing, as part of a final agreement, to give up control over large parts of the "West Bank" that include Israeli settlements.

Finally, it is noteworthy that, by explicitly incorporating Resolutions 242 and 338 into the Declaration Of Principles (DOP) and the Interim Agreement, Israel and the Palestinians recognize that any outcome

of the negotiations must comply with the criteria set out in those resolutions. Specifically, they recognize that Israel is not required to withdraw from all of the "post-1967" territories.

<u>Legal Proposition 9</u>: Pending *inter alia* the achievement of a Palestinian entity that can effectively and independently govern the relevant territory, "Palestine" does not yet satisfy the criteria of statehood under international law.

Under international law, an entity only constitutes a state if it satisfies a number of well-known and accepted criteria. One of those criteria is the existence of a governing authority capable of exercising authority over a defined territory. At this time, the Palestine Liberation Organization (PLO - which claims to be the "sole legitimate representative of the Palestinian people") does not exercise effective authority over the territories it claims constitute the "State of Palestine". The fact that many states have officially "recognized" the "State of Palestine" does not mean that this state exists. Recognition is not a criterion for statehood.

Under the Oslo Accords, in the "West Bank" the Palestinian Authority only has rights approaching independent authority in Areas A, and even there Israel retains ultimate responsibility for security and external relations, residual power, and authority over Israelis, and in Areas B and C Israel retains responsibility for security and external relations. The Palestinian Authority has a right to deploy its police force in area A, but in area B it may only do so in coordination with Israel, and in area C it may not deploy the police force at all. In areas A and B, the Palestinian Authority has authority over legal matters concerning territory (such as land use) but Israel retains such powers in area C. For these reasons the current regime in the "West Bank", as far as it has been implemented under the Oslo agreements, can best be described as a form of incipient Palestinian autonomy under the supreme authority of the State of Israel. The fact that the Gaza Strip is controlled by Hamas limits the capacity of the Palestinian Authority to govern there.

There is another reason why the alleged "State of Palestine" also does not and cannot exercise sufficient sovereign control over a territory as required under international law. Much - perhaps even all - of the "West Bank" (including Jerusalem) and the Gaza Strip are - on the basis of the arguments discussed earlier - part of Israel's inviolable territory, the integrity of which must be respected under the doctrine of territorial sovereignty. In other words, it is not possible for a state to come into existence on the territory to which an existing state legitimately claims territorial sovereignty, without the latter's consent, as that would fundamentally infringe the territorial inviolability of the latter state - a fundamental right as reflected in the UN Charter.

APPENDIX

Participants in the Hague Seminar on 28th and 29th June 2017

Dr. Bernie Arauz Cantón - Former lecturer at Bradford University

Mr. Robert W. Ash - Senior Counsel, American Center for Law and Justice (ACLJ)

Prof. Avi Bell - Professor, Faculty of Law, Bar Ilan University and University of San Diego School of Law

Mr. Keath Blatt - In-house Counsel, The American Israel Public Affairs Committee (AIPAC)

Dr. Matthijs de Blois - Assistant Professor, Faculty of Law, University of Utrecht; Senior Fellow, The Hague Initiative for International Cooperation (*thinc*.)

Prof. Wolfgang Bock – Associate Professor, Justus Liebig University, Giessen, Germany

Mr. Mario Bramnick - National Hispanic Advisory Counsel for President Trump

Mrs. Mikayla Brier-Mills - Law student, Bond University, Australia

Mr. Diederik van Dijk – Senator, Dutch Reformed Political Party (SGP)

Mr. Jorge E. Garcia Velez – Lawyer, Paris, France

Dr. Mark Goldfeder - Special Counsel for International Affairs at the American Center for Law and Justice, Senior Lecturer at Emory Law School and Senior Fellow at the Center for the Study of Law and Religion

Ms. Natasha Hausdorff - Barrister, Director UK Lawyers for Israel

Mr. Fabian B. Pascoal - International lawyer, Jakarta

Prof. Jeremy Rabkin - Professor of International and Constitutional Law, Antonin Scalia Law School, George Mason University

Ms. Yifa Segal - Director, International Law Forum, Jerusalem

Mr. Kees van der Staaij - Member of Dutch Parliament; Leader of the Dutch Reformed Political Party (SGP)

Mrs. Karen Stahl-Don - Lawyer, Legal Grounds Campaign, Jerusalem

Mr. Alan Stephens - Former Publishing Director, Kluwer Law International; Director of Research, Clemens Nathan Research Centre, London; Counsellor, The Hague Initiative for International Cooperation (*thinc*.)

Prof. Li-ann Thio - Professor of International Law, National University of Singapore

Mr. Andrew Tucker - Founding director, The Hague Initiative for International Cooperation (*thinc.)* and Legal Counsel, European Coalition for Israel

Mr. Jonathan Turner - Barrister, Chairman UK Lawyers for Israel

Dr. Cynthia Day Wallace – International lawyer and author; former Senior Adviser to the Executive Secretary of the United Nations Economic Commission for Europe (UNECE); Senior Fellow, The Hague Initiative for International Cooperation (*thinc*.)

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