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VIA OVERNIGHT DELIVERY SERVICE
& FIRST CLASS MAIL

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Prosecutor, International Criminal Court
Post Office Box 19519
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The Netherlands

RE: THE LEGALITY OF JEWISH SETTLEMENTS IN THE "WEST BANK"

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the Rule of Law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007[1]. As you will recall, the ECLJ has filed numerous documents with the Office of the Prosecutor (OTP) in the past.

Like the International Criminal Court (ICC), the ECLJ is committed to the principle of bringing to justice those who commit the world's most serious crimes. At the same time, the ECLJ seeks to ensure that this is accomplished wholly in accordance with the Rule of Law. These same goals are echoed within the Preamble of the Rome Statute. In international legal proceedings, this means all decisions must be in line with existing international law. To this end and in light of the OTP's 5 December 2018 *Report on Preliminary Examination Activities*[2], the ECLJ submits this letter with the aim of assisting the Prosecutor to reach a correct determination regarding the allegation that Jewish settlement activity in the area often called the "West Bank" constitutes a war crime under the Rome Statute.

At the outset, we wish to reiterate our position, as expressed in previous submissions, that the ICC lacks jurisdiction in this matter and that any prosecution would therefore be unlawful. Since no ruling has yet been announced on whether the ICC will pursue the issue of Jewish settlements in the West Bank, we are aware that the present submission may be premature and, hopefully, redundant. However, we have decided to make this submission on the understanding that substantive issues may impact the Prosecutor's decision whether or not to initiate an investigation.

[1]Consultative Status for the European Centre for Law and Justice, U.N. DEP'T ECON. & SOC. AFF., http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010 (last visited 25 July 2019).
[2]The Office of the Prosecutor, *Report on Preliminary Activities*, ICC (5 Dec. 2018), https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

CENTRE EUROPÉEN POUR LA JUSTICE ET LES DROITS DE L'HOMME

Article 8, Section 2(b)(viii) of the Rome Statute defines as a war crime: "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies. . ."[3]. While there is much to debate on the subject, not least concerning the extent to which this provision reflects actual international law[4], this letter focuses on three primary points. *First*, pursuant to the customary international law principle, *uti possidetis juris*, upon Britain's departure from Palestine in May 1948, the State of Israel became the sole legitimate title holder and sovereign over all territory of the former Mandate for Palestine lying between the Mediterranean Sea and the Jordan Rift Valley. As sole title holder and sovereign, Israel may lawfully permit settlements anywhere within the borders of the Mandate for Palestine as they existed in May 1948. *Second*, under an alternate legal argument, absent a final determination of the borders, there is no basis to deem settlements illegal. In this regard, it should be noted that the agreed upon armistice lines following the 1948-49 Arab-Israeli war were not (and were never intended to be) international borders. This is reflected in United Nations Security Council (UNSC) Resolutions 242 and 338, which set forth the need for secure and recognised boundaries on the understanding that the 1949 armistice lines did not constitute "secure and recognised" boundaries. Hence, absent delineated borders, it is impossible to determine whether settlements are improperly located. And *third*, Israel is not an "occupying power" in the "West Bank" and thus is not subject to the prohibition on transferring one's population into occupied territories.

For the above reasons, the State of Israel is legally entitled to allow and facilitate the establishment, development, and expansion of settlements in the "West Bank" as it sees fit.

I. PURSUANT TO *UTI POSSIDETIS JURIS*, UPON BRITAIN'S DEPARTURE FROM PALESTINE IN MAY 1948, THE STATE OF ISRAEL BECAME THE SOLE LEGITIMATE TITLE HOLDER AND SOVEREIGN OVER ALL TERRITORY OF THE FORMER MANDATE FOR PALESTINE LYING BETWEEN THE MEDITERRANEAN SEA AND THE JORDAN RIFT VALLEY

As you may recall, on or about 7 February 2018, we submitted a legal brief to you which focused, in part, on *uti possidetis juris* as applied to the State of Israel. Parts of that submission are repeated here for the sake of convenience.

A. *Uti Possidetis Juris* is the Customary International Law Rule That Determines Who Accedes to Sovereignty Over Territory Previously Ruled by a Colonial or Mandatory Power

Uti possidetis juris is the customary international law principle that serves to determine the borders of newly emerging states. The principle evolved during the period of decolonisation

[3]Rome Statute of the International Criminal Court art. 8(2)(b)(viii) (1998), https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf. Note that, by adding the term "indirectly" to the language of the offence, the offence, as set forth in the Fourth Geneva Convention, has been substantively amended. Accordingly, it is doubtful whether the amended language could be applied to Israeli nationals (assuming *arguendo* that Israel were an "occupying power", which it is not, *see infra* Section III of this paper), since Israel is not a party to the Rome Statute and, therefore, has not agreed to the revised definition of the offence. Further, as a non-party to the Statute, Israel can only be subject to ICC jurisdiction if the court violates the customary international law principle that a State is not bound by the terms of a treaty to which it has not acceded. *See* Vienna Convention on the Law of Treaties, art. 34, 23 May 1969, 1155 U.N.T.S. 331, 341, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf ("A treaty does not create either obligations or rights for a third State without its consent".).

[4]For a full discussion of the legal issues regarding occupation, *see infra* Section III.

in Latin America and is generally accepted today as the customary international law rule that applies in determining the borders of newly emerging states[5]. "Stated simply, *uti possidetis* [*juris*] provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence"[6]. The principle is no longer limited to situations of decolonisation. *Uti possidetis juris* now applies "to all cases where the borders of new states have to be determined, and not just in its original context of decolonization"[7]. It has been applied, for example, to states emerging from former mandates[8] (including the Middle East Mandates created out of the former Ottoman territories) as well as to the break-up of previously existing states, like Yugoslavia[9], Czechoslovakia[10], and the Soviet Union[11]. As the International Court of Justice (ICJ) noted in the *Case Concerning the Frontier Dispute* (*Burkina Faso/Republic of Mali*),

> "the principle of *uti possidetis* [*juris*] seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs*"[12].

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[5]*See* Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (22 Dec. 1986). Note the following:

> "Although there is no need . . . to show that this is a firmly established principle of international law where decolonization is concerned, *the Chamber nonetheless wishes to emphasize its general scope*, in view of its exceptional importance for the African continent and for the two Parties. . . .
>
> [T]he principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. . . .*
>
> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, *but as the application in Africa of a rule of general scope. . . .*
>
> *Hence, the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle*, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent".

Id. at 565–66 (emphasis added).

[6]Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 A.J.I.L. 590, 590 (1996).

[7]Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidentis Juris, and the Borders of Israel*, 58 Ariz. L. Rev. 633, 635 (2016); *see also*, ANNE PETERS, THE PRINCIPLE OF UTI POSSIDENTIS JURIS: HOW RELEVANT IS IT FOR ISSUES OF SECESSION? *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95–137 (Christian Walter et al. eds., 2014).

[8]Bell & Kontorovich, *supra* note 7, at 646–48.

[9]PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 5–6 (2002).

[10]Ratner, *supra* note 6, at 597–98.

[11]*See* Justin A. Evison, *MIGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 Mil. L. Rev. 90, 95–96 (2014).

[12]Frontier Dispute, *supra* note 5, at 565, para. 20 (emphasis added).

Accordingly, as a long-standing, well-established "general principle" of international law, which was applied to each of the States that emerged from the Middle East mandates prior to the emergence of Israel as a State in 1948, *uti possidetis juris* is the international law principle which also applied to the emergence of the State of Israel in May 1948.

As noted above, *uti possidetis juris* establishes the borders and sovereign rights of the State that emerges from a previously non-independent condition, whether by decolonisation, the termination of a Mandate, or the break-up of a previously-existing State into new States. Sometimes—*as was the case with Israel vis-à-vis the so-called "West Bank" and the Gaza Strip*—the emerging State is unable at the onset of its independence to exercise full, sovereign control over all portions of the territory to which it had attained lawful sovereignty upon its coming into being. For example, for 18 years, from 1949 to 1967, the West Bank and the Gaza Strip were under the unlawful belligerent military occupation of Jordanian and Egyptian armed forces, respectively. Notwithstanding the 18-year belligerent military occupation of Israeli territory by foreign armies, pursuant to *uti possidetis juris*, the occupied territories remained the continuing sovereign possession of the State of Israel, the only State that emerged from the Mandate for Palestine upon the departure of the British in 1948[13]. In other words,

> "where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state even where the new state did not actually possess the territory. Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory"[14].

B. *Uti Possidetis Juris* Has Been Applied to the Emergence of States from the Former Ottoman Territories That Had Been Designated as Mandates by the League of Nations

Not only was *uti possidetis juris* the guiding principle that was applied as the States in Latin America emerged as independent States in the 19th Century, it was also applied to the numerous States in Africa which emerged from decolonisation in the 20th Century and to the States that emerged from the break-up of the former Yugoslavia, the former Czechoslovakia,

[13] *Id.* at 566, para. 23 ("The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved".). Israel declared its independence on 14 May 1948. The following day, Israel was attacked by its Arab neighbours. On 15 November 1988, the Palestine Liberation Organization (the PLO) proclaimed its independence in Algiers, despite the fact that the PLO did not control any sovereign territory whatsoever. Moreover, Israel and the Palestinian Authority have yet to reach any type of settlement with respect to the Gaza Strip and the West Bank. As such, Israel remains the only State to emerge upon the British departure in 1948.

[14] Bell & Kontorovich, *supra* note 7, at 642; *see also* Frontier Dispute, *supra* note 5, at 565–66 ("Its [i.e., *uti possidetis juris*] obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power". *Id.* at 565, para. 20). Further,

> "[t]he essence of the [*uti possidetis juris*] principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term".

Id. at 566, para. 23.

and the former Soviet Union[15]. Further, it was applied to the States in the Middle East that emerged from the former Mandates carved out of the former Ottoman Empire—the Mandates for Mesopotamia (Iraq), Syria (including Lebanon), and Palestine[16].

The Mandate for Mesopotamia (Iraq), for example, was the first of the three Middle East Mandates to achieve its independence. In 1932, Iraq obtained its independence from Great Britain, the Mandatory for Mesopotamia. At the time Iraq became independent, there was an ongoing border dispute between the British Mandatory and Turkey over the oil-rich region around Mosul[17]. There were also self-determination claims raised by the Kurds for the same region[18]. Although disagreements over the border led to periodic hostilities with both Kurds and Turks while the border was being negotiated, upon Iraq's independence, pursuant to *uti possidetis juris*, the Mandatory borders *as they existed at the time Iraq emerged as an independent State* (borders which included Mosul as part of Iraq) became the internationally recognised border between Iraq and Turkey[19]. They remain so today. Additionally and importantly, *uti possidetis juris* took precedence over Kurdish self-determination claims[20].

There were a number of border disputes regarding the Syrian Mandate as well. Some focused internally on where to draw the line to delineate Lebanon from Syria[21] while another key area of dispute concerned the Hatay/Alexandretta region (Hatay region), an area lying along the eastern Mediterranean Sea adjacent to Turkey and of great interest to Turkey because of the large number of ethnic Turks living there[22]. The Hatay region dispute provides considerable insight into how *uti possidetis juris* functions *vis-à-vis* determination of an emerging State's borders. In 1936, France, the Mandatory for Syria, had announced that it would be giving Syria (which, at the time, included the Hatay region) independence in a few years[23]. Then, as French concerns about Hitler and the rise of the Nazis grew, France became more accommodating to Turkey *vis-à-vis* its concerns about the Hatay region and decided to cede the Hatay region to Turkey in an attempt to diminish rising German influence in Turkey and the Middle East.

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[15]*See* Frontier Dispute, *supra* note 5; RADAN, *supra* note 9, at 5–6; Ratner, *supra* note 6, at 597–98; Evison, *supra* note 11, at 95–96.
[16]Bell & Kontorovich, *supra* note 7, at 647–57.
[17]PETER SLUGLETT, BRITAIN IN IRAQ: CONTRIVING KING AND COUNTRY 75–76, 83–84, 155–56 (2007) (noting that, prior to the British Mandate ending in 1932, border disputes with Turkey had been occurring since the end of World War I and continued into the 1930s).
[18]*Id.* at 77.
[19]Bell & Kontorovich, *supra* note 7, at 650.
[20]*Uti possidetis juris* was, likewise, given precedence over the principle of self-determination in the *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*. *See* Frontier Dispute, *supra* note 5, at 566–67, paras. 25–26 (noting the following:

> "At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples . . . . Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact".).

[21]Bell & Kontorovich, *supra* note 7, at 653–54.
[22]*Id.* at 654.
[23]*Id.* at 655.

France's formal transfer of the region to Turkey was completed in June 1939 in clear violation of Article 4 of the Syrian Mandate that explicitly forbade placing territory from the Mandate under the control of a foreign power without the approval of the League of Nations[24]. France's decision to transfer the Hatay region to Turkey was criticised by the League's Mandates Commission, but the outbreak of World War II prevented the League from taking any action[25]. Following the war, in April 1946, the Syrian Mandate was terminated, and Syria emerged as an independent State. Pursuant to *uti possidetis juris*, the borders of the newly independent State of Syria excluded the Hatay region, since that region was—*albeit in violation of the express terms of the Syrian Mandate*—no longer part of the Mandate at the emergence of the newly independent State of Syria[26]. The Hatay region episode is significant because, pursuant to *uti possidetis juris* and despite Syrian complaints about the illegality of the land transfer, the international community has recognised the finality of *uti possidetis juris* in determining an emerging State's borders (despite the illegality of the land transfer in question) and, hence, does not dispute Turkish sovereignty over the Hatay region[27].

The case of the Mandate for Palestine likewise confirms the role played by *uti possidetis juris* in establishing an emerging State's borders. When one speaks of the "Mandate for Palestine" today, one often thinks only of the territory lying generally between the Mediterranean Sea and the Jordan Rift Valley. Yet, the original Mandate for Palestine also included what we know today as the Hashemite Kingdom of Jordan. Although the primary purpose of the Mandate for Palestine was to implement the terms of the Balfour Declaration in Palestine, Article 25 of the Mandate gave Great Britain the authority to limit Jewish settlement in the area of the Mandate to the east of the Jordan Rift Valley[28]. Britain exercised that authority in September 1922[29]. Although there was no formal split of the Mandate at that time into two separate Mandates, Britain nonetheless renamed the eastern portion Transjordan and retained the name Palestine for the smaller, western portion[30]. Britain was not authorised to divide the Mandate in two. Nonetheless, in 1946, Britain recognised the independence of Jordan and terminated the Mandate in the east[31]. Pursuant to *uti possidetis juris* and despite the fact that Britain had no authority to divide the Mandate into two parts, the prior administrative boundary between the two parts of the Mandate for Palestine, generally running north to south along the Jordan Rift Valley, became the recognised western international boundary of the emerging State of Jordan.

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[24]*French Mandate for Syria and the Lebanon*, LEAGUE OF NATIONS OFFICIAL J. 1013, 1014, art. 4 (Aug. 1922) ("The Mandatory shall be responsible for seeing that no part of the territory of Syria and the Lebanon is ceded or leased or in any way placed under the control of a foreign Power".).

[25]Bell & Kontorovich, *supra* note 7, at 656.

[26]Emma Lundgren Jorum, *Syria's Lost Province: The Hatay Question Returns*, CARNEGIE MIDDLE EAST CTR. (28 Jan. 2014), http://carnegieendowment.org/syriaincrisis/?fa=54340 (last visited 25 July 2019).

[27]*Id.*

[28]Mandate for Palestine art. 25, 24 July 1922, C.529.M.314.1922.VI., https://unispal.un.org/DPA/DPR/unispal.nsf/0/2FCA2C68106F11AB05256BCF007BF3CB, stating:

> "In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18".

[29]Mandate for Palestine, Together With a Note by the Secretary-General Relating to its Application to the Territory Known as Trans-Jordan, League of Nations Doc. Cmd. 1785 (Dec. 1922).

[30]MARTIN GILBERT, THE ROUTLEDGE ATLAS OF THE ARAB-ISRAEL CONFLICT 7 (9th ed. 2008).

[31]Bell & Kontorovich, *supra* note 7, at 674.

From 1946 to 1948, the Mandate for Palestine was limited to the smaller, western portion of the original Mandate stretching from the Jordan Rift Valley to the Mediterranean Sea. When Britain withdrew its forces in May 1948, *only one State emerged from the remaining portion of the Mandate for Palestine*—the State of Israel[32]. The nascent State of Israel was immediately attacked by its Arab neighbours. The fighting raged into 1949, when it was ended by a series of armistice agreements between Israel and various Arab neighbours (to be discussed *infra* in Section II.B.)[33]. Although Israel's Arab enemies controlled the Gaza Strip and the so-called "West Bank" from 1949 to 1967,

> "[t]he doctrine of *uti possidetis juris* . . . rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate. . . . Israel was the only state that emerged from Mandatory Palestine, and it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories. There was therefore no rival state that could lay claim to using internal Palestinian district lines as the basis for borders. . . . Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948"[34].

Accordingly, applying the customary international law principle *uti possidetis juris* to the Mandate for Palestine means that Israel, as the sole State to emerge from the Mandate for Palestine upon the departure of the British Mandatory, attained sovereignty over the entirety of the territory of the Mandate within the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan Rift Valley, including the so-called "West Bank" (with east Jerusalem) and the Gaza Strip). As such, claims by other parties over any territory within the borders of the Mandate as they existed on 15 May 1948 are baseless.

Nevertheless, having established the legal basis for Israeli sovereignty over the entirety of the Mandate's territory pursuant to *uti possidetis juris* does not prevent Israel from treating some of that territory as being potentially subject to a change of status for the sake of achieving peace with its neighbours. *What it does mean, however, is that Israel, as the current sovereign over all such territory, may not be compelled to yield territory for such a purpose or be prevented from exercising sovereign rights throughout the territory.*

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[32]*See* Joel Beinin & Lisa Hajjar, *Palestine, Israel and the Arab-Israeli Conflict: A Primer*, MIDDLE EAST RESEARCH & INFO. PROJECT, https://web.stanford.edu/group/sper/images/Palestine-Israel_Primer_MERIP.pdf.

[33]*See* General Armistice Agreement, Isr.-Syria, 20 Jul. 1949, 42 U.N.T.S. 327 [hereinafter Isr.-Syria Armistice]; General Armistice Agreement, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 [hereinafter Isr.-Jordan Armistice]; General Armistice Agreement, Isr.-Leb., 23 Mar. 1949, 42 U.N.T.S. 287 [hereinafter Isr.-Leb. Armistice]; General Armistice Agreement, Egypt-Isr., 24 Feb. 1949, 42 U.N.T.S. 251 [hereinafter Egypt-Isr. Armistice].

[34]Bell & Kontorovich, *supra* note 7, at 681–82. Note that UNGA attempts to divide Palestine into three parts—a Jewish State, an Arab State, and an area around Jerusalem under international control—were rejected outright by the Arab States and Arab Palestinians, thereby torpedoing the agreement altogether. As such, the proposed borders never enjoyed political legitimacy and have no validity today, despite some attempts by the Palestinians to resurrect them.

II. ABSENT A FINAL DETERMINATION OF BORDERS, THERE IS NO BASIS TO DEEM JEWISH SETTLEMENTS ILLEGAL

A. At Best, the "West Bank" is Territory in Dispute

Even if, for the sake of argument, one disregards the applicability of the well-established *uti possidetis juris* principle, then, *at best*, one might argue that the "West Bank" belongs to those who inhabited the territory of the Mandate for Palestine prior to its dissolution. Yet, that would merely establish that ownership of the territory is disputed since the prior inhabitants of Palestine—collectively called "Palestinians"—included both Jewish Palestinians (who call themselves "Israelis" today) and Arab Palestinians (who call themselves "Palestinians" today). Accordingly, both Jews and Arabs would have colourable claims to the territory, thereby establishing the dispute referred to above. This being the case, one cannot claim that Jewish settlements are unlawfully situated since there has been no valid determination as to which territory of the "West Bank" belongs to Israel and which belongs to a future Arab Palestinian State. At this juncture, it is also unclear whether the final solution to the conflict will even include a separate Palestinian State. Other possible solutions to the conflict have been proposed, including the possibility of a single State or a bi-national State[35].

Another approach leading to a similar conclusion holds that the Mandate for Palestine continued to apply over those portions of the Mandate illegally occupied by Egypt and Jordan from 1949-67. This is confirmed by Article 80[36] of the UN Charter which had the effect of preserving the rights granted to Jews and Arabs under the Mandate, even after the British departed, in those portions under unlawful military occupation by Egyptian and Jordanian armed forces, respectively[37]. This will remain the case until such time as an alternative

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[35]*See, e.g.*, Judy Maltz, *Explained: Two States, One and Other Solutions to the Israeli-Palestinian Conflict* (10 June 2019, 12:33 p.m.), https://www.haaretz.com/israel-news/israeli-palestinian-conflict-solutions/.premium-explained-two-states-one-and-other-solutions-to-the-israeli-palestinian-conflict-1.7044468.

[36]U.N. Charter art. 80 (stating that "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties".). Note that, under the League of Nations Covenant, the various Mandates were declared to be "sacred trusts". League of Nations Covenant, art. XXII, para. 1. Yet, since a trust does not cease to exist merely because the trustee departs, its terms remain in effect today, and article 6 of the Mandate calls for Jewish settlement within the territory known as Palestine. Mandate for Palestine, *supra* note 28, art. 6. Further, after Britain severed Transjordan from the Mandate for Palestine and forbade Jewish settlement there, the terms of the Mandate regarding Jewish immigration and settlement were confined to the remaining portion of the Mandate, i.e., the portion between the Jordan River and the Mediterranean Sea, which includes the West Bank. Accordingly, Jewish settlement of the West Bank remains lawful. Only a bilateral agreement between Jewish Palestinians (i.e., Israelis) and Arab Palestinians can change that.

[37]In issuing several decisions and advisory opinions on Namibia, the International Court of Justice declared that a League of Nations Mandate "is a binding international instrument like a Treaty, which continues as a fiduciary obligation of the international community until its terms are fulfilled". Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORDER 147, 157 (1979). Specifically, the Court opined:

> "[T]he League of Nations was the international organization entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution".

authoritative instrument supersedes it. Accordingly, the terms of the Mandate are still in effect *mutatis mutandis* until a binding final status arrangement is reached. Notably, Jewish settlements in the entire area of the British Mandate for Palestine, including the West Bank and Gaza Strip, *had not only been permitted, but encouraged and sanctioned* under the terms of the Mandate[38]. In fact, only since Israel gained control of the West Bank and Gaza Strip following 18 years of belligerent military occupation by the Jordanians and the Egyptians, respectively, have Jewish settlers been able to return and resettle areas from which they had been unlawfully evicted by Arab armies in 1948-1949. Under this approach, the successors to the Jewish Palestinian population of the former Mandate for Palestine (present-day Israelis) have at least as much claim to the disputed territories as do its Arab residents.

B. Following the 1948-49 Arab-Israeli War, the Parties' Armistice Agreements Made Clear that Permanent Territory Questions Were Separate and Distinct from the Agreed Upon Armistice Lines

Armistice lines are not concrete boundaries. In fact, armistice lines simply reflect the relative position of opposing forces when an armistice agreement is concluded. As such, the following historical record following World War II is key to understanding these issues specifically with respect to Israel's Jewish settlements.

In 1947, Great Britain informed the UN that it was going to withdraw its forces from Palestine in 1948. In response, the UN General Assembly (UNGA) crafted a plan which proposed to partition Palestine into an Arab state, a Jewish state, and an area under international control[39]. Note in this regard that, under the UN Charter, the UNGA's authority is limited to doing the following: "discuss[ing] any questions or any matters within the scope of the present Charter" as well as "mak[ing] recommendations . . . on any such questions or matters"[40].

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 para. 55 (21 June 1971). Similarly, "the Palestine Mandate survived the termination of the Mandate administration as a trust under Article 80" of the U.N. Charter. Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORDER 147, 158–59 (1979).

[38] *See, e.g.*, Mandate for Palestine, *supra* note 28, art. 6 ("The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes".).

[39] G.A. Res. 181 (II) (29 Nov. 1947).

[40] U.N. Charter (noting, for example, the following UNGA responsibilities: U.N. Charter art. 10 ("The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and . . . *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters.") (emphasis added); U.N. Charter art. 11, para. 1 ("The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security . . . and *may make recommendations* with regard to such principles to the Members or to the Security Council or to both".) (emphasis added); U.N. Charter art. 12, para. 1 ("While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests".); U.N. Charter art. 13, para. 1 ("The General Assembly shall initiate studies and *make recommendations* for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification; b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights".) (emphasis added); U.N. Charter art. 14 ("Subject to the provisions of Article 12, the General Assembly *may recommend* measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations".) (emphasis added); U.N. Charter art. 96, para. 1 ("The General Assembly or the Security Council may request the International Court of Justice *to give an advisory opinion* on any legal question".) (emphasis added)).

Determining borders and creating States is not one of the UNGA's powers. Hence, the only way that the proposed partition plan would enjoy any legitimacy among the parties was if each party agreed to its terms. That did not happen. Although Jewish Palestinians accepted the plan, Arab Palestinians rejected it. Once the Arabs rejected the treaty, it was dead. Without a meeting of the minds among the parties, the partition plan failed.

When the British withdrew in 1948, the newly proclaimed Jewish State, the State of Israel, was immediately attacked by its Arab neighbours. The war continued into 1949, when a series of armistice agreements was signed[41]. The specific language in these armistice agreements is significant because the language illustrates that border and territorial issues were to be determined at some future date. In fact, *it was at Arab insistence* that the lines be simply armistice lines, not internationally recognised borders[42].

The Egyptian-Israeli General Armistice Agreement of 24 February 1949, for example, stated the following:

> "It is further recognized that rights, claims or interests of a nonmilitary character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement. . . . *The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice*"[43].

The agreement further stated: "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question"[44]. And the purpose of the lines was to "delineate the line beyond which the armed forces of the respective Parties shall not move . . ."[45]. Similar language was used in the following armistice agreements.

The Israel-Jordan Armistice Agreement of 3 April 1949, for example, stated the following: "It is also recognised that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the

[41] Isr.-Syria Armistice, *supra* note 33, art. V, para. 1 (noting that the armistice line does not enshrine an "ultimate territorial arrangement"); Isr.-Jordan Armistice, *supra* note 33, art. VI, para. 9 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); Isr.-Leb. Armistice, *supra* note 33, art. IV, para. 2 (noting that the "basic purpose" of the armistice line is to "delineate the line beyond which the armed forces of the respective Parties shall not move"); Egypt-Isr. Armistice, *supra* note 33, art. V, para. 2 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

[42] *See, e.g.*, Proceedings of the 64th Annual Meeting of the American Society of International Law 894–96 (1970) (noting that language used in 1949 armistice agreements with Israel regarding armistice lines was "at Arab insistence").

[43] Egypt-Isr. Armistice, *supra* note 33, art. IV (emphasis added).

[44] *Id.* art. V.

[45] *Id.* (The Israel-Lebanon 23 March 1949 Armistice Agreement used essentially the same language: "The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move". Isr.-Leb. Armistice, *supra* note 33, art. IV, para. 2.).

Palestine question, the provisions of this Agreement being dictated exclusively by military considerations"[46]. Similar to the 1949 Egyptian-Israeli General Armistice Agreement, the purpose of the Israel-Jordan armistice lines was to "delineate the lines beyond which the armed forces of the respective Parties shall not move"[47]. The agreement further explained that the armistice lines were "agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines* or to claims of either Party relating thereto"[48]. Clearly, these armistice agreements were not intended to (and did not) establish national borders. The Israel-Syria Armistice Agreement to follow further illustrates this.

The Israel–Syria Armistice Agreement of 20 July 1949 set forth the following: "[N]o provision of 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, the provisions of this Agreement being dictated exclusively by military, and not by political, considerations"[49]. It further set forth that "the following arrangements for the Armistice Demarcation Line between the Israeli and Syrian armed forces and for the Demilitarized Zone *are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties* to this Agreement"[50].

Based on the language in these armistice agreements, border and territorial issues were separate and distinct from the temporary armistice lines established in 1949. Moreover, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines*, not international boundaries, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel.

C. The Text of UN Security Council Resolution 242[51], Adopted Following the 1967 Arab-Israeli War, Was Intentionally Vague Regarding Territorial Questions

In November 1967, the UN Security Council adopted Resolution 242[52]. The Resolution was entirely consistent with the stipulation contained in the 1949 Armistice Agreement between Israel and Jordan that the ceasefire lines were not to be considered international borders. Note, *first*, that the language in that Resolution requires that Israel withdraw "from territories"[53] it

[46]Isr.-Jordan Armistice, *supra* note 33, art. II, para. 2.
[47]*Id.* art. IV, para. 2.
[48]*Id.* art. VI, para. 9 (emphasis added).
[49]Isr.-Syria Armistice, *supra* note 33, art. II, para. 2, 20 July 1949, 42 U.N.T.S. 327.
[50]*Id.* art. V, para. 1 (emphasis added). It should also be mentioned that, prior to this armistice agreement, in a 26 June 1949 letter to Foreign Minister Sharett, Dr. Bunche (Acting Mediator) wrote the following:

> "The provision for the demilitarised zone in the light of all circumstances is the most that can be reasonably expected in an armistice agreement by either party. *Questions of permanent boundaries, territorial sovereignty, customs, trade relations and the like must be dealt with in the ultimate peace settlement and not in the armistice agreement*".

Israel War of Independence: Israel-Syria Armistice Agreement, JEWISH VIRTUAL LIBR. (20 July 1949), https://www.jewishvirtuallibrary.org/israel-syria-armistice-agreement-1949 (emphasis added).
[51]S.C. Res. 242, (22 Nov. 1967). It is worth noting that the countries most often invited by the UNSC President to participate in the discussions leading up to the adoption of UNSC Resolution 242 were Israel, the United Arab Republic, Jordan, Syria, Lebanon, and at times, Iraq. U.N. SCOR, 1346th mtg. at 1, U.N. Doc. S/PV.1346 (3 June 1967). *See*, for example, the 1346th meeting on 3 June 1967. *Id.* These discussions lasted from 24 May 1967 through 22 November 1967. U.N. SCOR, 1341st mtg., U.N. Doc. S/PV.1341 (24 May, 1967); U.N. SCOR, 1382th mtg., U.N. Doc. S/PV.1382 (22 Nov. 1967). There is no indication that representatives from "Palestine" were invited to or included in these discussions.
[52]S.C. Res. 242, *supra* note 51.
[53]*Id.* at 1(i).

captured—not from "the" territories or "all the" territories it captured. Recall that Israel captured the Golan Heights, the so-called "West Bank", the Gaza Strip, and the entire Sinai Peninsula east of the Suez Canal[54]. We know from historical record that the precise wording of the Resolution was deliberate. Lord Caradon, then Permanent Representative of the United Kingdom to the United Nations and chief drafter of Resolution 242, noted the following:

> "Much play has been made of the fact that we didn't say 'the' territories or 'all the' territories. *But that was deliberate.* I myself knew very well the 1967 boundaries and if we had put in the 'the' or 'all the' that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend"[55].

Note, *second*, that the Resolution requires "secure . . . boundaries"[56]—which clearly did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from Arab-controlled territory and would not exist today if the *status quo ante* were reinstated (i.e., if the former 1949 armistice lines were to serve as actual borders).

Note, *third*, that the Resolution calls for the termination of all "states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area . . ."[57]. This has occurred with Egypt in 1979 and with Jordan in 1994 (to be discussed in the following section); however, resolution of the conflict *vis-à-vis* Arab Palestinians remains to be achieved. A further reinforcement of the UN position came in the wake of the 1973 Arab-Israeli war, when the UN Security Council adopted Resolution 338[58] which reiterates the call to implement the terms of Resolution 242.

In light of Resolutions 242 and 338, which leave the issue of final borders unresolved and implicitly recognise the legitimacy of Israel retaining parts, if not all, of the "West Bank", there is no room to conclude that the Jewish settlements are illegal. Such a conclusion could only be reached had *actual borders* been established.

D. Following the 1973 Arab-Israeli War, Israel, Egypt, and Jordan Ultimately Made Peace, Establishing New Borders and Demonstrating that Armistice Lines are Not Actual Legal Borders but Temporary Lines of Separation

On 18 January 1974, Israel and Egypt signed a Disengagement of Forces Agreement[59]. The agreement stated, in part, that it was "not regarded by Egypt and Israel as a final peace agreement. It constitutes a first step toward a final, just and durable peace according to the

[54] *Six Day War*, BRITANNICA, https://www.britannica.com/event/Six-Day-War (last visited 25 July 2019).
[55] Yoram Meital, EGYPT'S STRUGGLE FOR PEACE: CONTINUITY AND CHANGE, 1967–1977 49 (1997) (emphasis added).
[56] S.C. Res. 242, *supra* note 51, at 1(ii).
[57] *Id.* Note also that the language does not refer at all to the Palestinians, since there was no Palestinian "state" at the time, and no Palestinian "state" currently exists.
[58] S.C. Res. 338 (22 Oct. 1973).
[59] Egyptian-Israeli Agreement on Disengagement of Forces in Pursuance of the Geneva Peace Conference, Egypt-Isr., 18 Jan. 1974, https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_740118_AgreementOnDisengagementofForces.pdf. As an aside, on 31 May 1974, Israel and Syria signed a Separation of Forces Agreement. Israel-Syria Separation of Forces Agreement, Isr.-Syria, 31 May 1974. Notably, the agreement was not a peace agreement but a "step toward a just and durable peace on the basis of Security Council Resolution 338. . .". *Id.*

provisions of Security Council Resolution 338 . . ."[60]. Then, on 4 September 1975, Israel and Egypt signed an Interim Agreement[61]. Article I of this agreement stated that Israel and Egypt were "determined to reach a final and just peace settlement by means of negotiations called for by Security Council Resolution 338 . . ."[62]. Article IV(B) of the Interim Agreement, moreover, made reference to "*the new lines*"[63].

On 26 March 1979, Israel and Egypt signed yet another agreement[64], this one an actual peace agreement. This agreement is significant for several reasons. *First*, the Preamble cites UN Security Council Resolutions 242 and 338[65]. As discussed herein, those resolutions are significant because they emphasize the importance of "secure and recognized boundaries"[66]. *Second*, the 1979 agreement declared the following: "This Treaty *supersedes* the Agreement between Egypt and Israel of September, 1975"[67]. This is important because it demonstrates once more that prior agreements, including armistice agreements—and armistice lines recognised therein—are subject to change. Moreover, Article II set forth the following: "The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . ."[68]. *Finally*, the agreement is significant because Israel agreed to "withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine" such that Egypt would "*resume the exercise of its full sovereignty over the Sinai*"[69].

Israel and Jordan also resolved their differences as evidenced by the following agreements. On 14 September 1993, Israel and Jordan set forth their Common Agenda, the purpose of which was to achieve "just, lasting and comprehensive peace between the Arab States, the Palestinians and Israel . . ."[70]. In addition to looking to UN Security Council Resolutions 242 and 338, another important component was the settlement of "territorial matters and agreed definitive delimitation and demarcation of the international boundary between Israel and Jordan with reference to the boundary definition under the Mandate . . ."[71]. Notably, that former administrative boundary was recognised in 1946 as the western boundary of Jordan pursuant to *uti possidetis juris*.

Following the Common Agenda, on 25 July 1994, Israel, Jordan, and the United States signed on to the Washington Declaration. The key text is as follows: the "two countries recognise their right and obligation to live in peace with each other as well as with all states within secure and recognised boundaries. The two states affirmed their respect for and acknowledgement of the sovereignty, territorial integrity[,] and political independence of every state in the area"[72].

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[60]Egyptian-Israeli Agreement on Disengagement of Forces in Pursuance of the Geneva Peace Conference, *supra* note 59.
[61]Interim Agreement between Israel and Egypt, Egypt-Isr., 4 Sept. 1975, https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_750904_Interim%20Agreement%20between%20Israel%20and%20Egypt.pdf.
[62]*Id.* art. I.
[63]*Id.* art. IV(B) (emphasis added).
[64]Treaty of Peace, Egypt-Isr., 26 Mar. 1979, 1136 U.N.T.S. 116, https://www.mfa.gov.eg/Lists/Treaties/Attachments/2278/Peace%20Treaty_en.pdf.
[65]*Id.* pmbl., para. 1.
[66]*Id.* art. III(1)(b).
[67]*Id.* art. IX(2) (emphasis added).
[68]*Id.* art. II.
[69]*Id.* art. I(2) (emphasis added).
[70]Israel-Jordan Common Agenda, Isr.-Jordan, 14 Sept. 1993, https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20common%20agenda.aspx.
[71]*Id.* art. 5.
[72]Washington Declaration, Isr.-Jordan, art. B(4), 25 July 1994, U.N.T.S. A/49/300, https://unispal.un.org/UNIS

The Common Agenda and the Washington Declaration are both important because they emphasise the need for defined, secure, and recognised boundaries. Moreover, these agreements set the stage for the 26 October 1994 Israel-Jordan Peace Treaty[73].

The Israel-Jordan Peace Treaty first and foremost established peace between the two states[74]. Israel and Jordan also agreed to recognise and respect "each other's sovereignty, territorial integrity[,] and political independence"[75] as well as to respect "each other's right to live in peace within secure and recognised boundaries"[76]. Moreover, the international boundary was delimited "with reference to the boundary definition under the Mandate"[77] and was the "permanent, secure[,] and recognised international boundary between Israel and Jordan, without prejudice to the status of any territory that came under Israeli military government control in 1967"[78].

The peace treaties with Egypt and Jordan exemplify the process envisaged by Resolutions 242 and 338 since both treaties implement the requirements set out in these resolutions. Until such time as a final arrangement for the "West Bank" is concluded, providing for "secure and recognized boundaries", the default status of the territory is "Israeli sovereign territory" (under *uti possidetis juris*), or, at the very least, "territory under dispute". In either case, there are no grounds for deeming Jewish settlements in this area to be illegal.

III. ISRAEL IS NOT AN OCCUPYING POWER IN THE SENSE OF THE FOURTH GENEVA CONVENTION

The term "occupying power" as used in Article 8 of the Rome Statute is taken from the Fourth Geneva Convention of 1949, which deals primarily with the protection of civilians in occupied territories. The legal assertion enlisted in opposition to Jewish settlements in the so-called "West Bank" (including eastern Jerusalem) is that Israel has violated the law of occupation by moving its own population into occupied territory. Such an argument is based on a flawed application of the Fourth Convention.

A. Since the "West Bank" Has Never Belonged to Another State, the Israeli Presence There Does Not and Cannot Constitute "Occupation"

The argument repeatedly raised against Jewish "settlements" is that they supposedly violate Article 49(6) of the Fourth Geneva Convention of 1949 (the normative basis for Article 8, Section 2(b)(viii) of the Rome Statute). Article 49(6) reads: "The occupying power shall not deport or transfer parts of its own civilian population into territories it occupies"[79]. This claim

PAL.NSF/2f86ce183126001f85256cef0073ccce/cbceef698a7f310e85256c4f004d61b0?OpenDocument.

[73]Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, 26 Oct. 1994, 2042 U.N.T.S. I-35325, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO_941026_PeaceTreaty IsraelJordan.pdf.

[74]*Id.*

[75]*Id.* art. 2(1).

[76]*Id.* art. 2(2).

[77]*Id.* art. 3(1). That boundary was established pursuant to *uti possidetis juris* and was the then administrative boundary between the eastern portion of the Mandate for Palestine which had been renamed Transjordan and the western portion of the Mandate which had retained the name Palestine.

[78]*Id.* art. 3(2).

[79]Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, para. 6, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33 _GC-IV-EN.pdf. It is also questionable whether Article 49 applies when a government takes no action to move its population, but the population moves itself based on individual choices. The words "deport" and "transfer" imply

as applied to Jewish settlements has several fatal flaws. The most fundamental of these is that Article 49(6) presupposes the existence of an occupation of the territory of a High Contracting Party (a State Party to the Convention)[80] since, except for Common Article 3, the Convention applies solely to High Contracting Parties, i.e., States. Yet, the territory in question (i.e., the so-called "West Bank"[81]) belongs to the State of Israel pursuant to *uti possidetis juris* and, therefore, cannot be considered "occupied". Moreover, even if, for argument's sake, one rejects Israel's claim to sovereignty over the area, it is a matter of historical fact that the "West Bank" has never belonged to any other State, because the belligerent occupations by Egypt and Jordan, respectively, were unlawful under international law and since no Arab Palestinian "state" or other Arab Palestinian entity has ever exercised sovereign control over the territory (or any portion of it) up until today. In the absence of a prior sovereign State, to wit, another High Contracting Party, the Fourth Convention does not apply to the Israeli presence in the West Bank[82].

To this we wish to add a note of clarification: It is perhaps a source of confusion that, in spite of the fact that the Fourth Geneva Convention does not apply *de jure* to the Israeli presence in the "West Bank", the Israeli authorities hold themselves, *as a matter of government policy*, to the humanitarian provisions of the Convention with respect to the areas under their administration[83]. This policy should most certainly not be taken as an indication of the Convention's *de jure* application to the territory in question.

B. To This Day, No Palestinian State Has Ever Existed

Although in our view, the point is trite, nonetheless, through an abundance of caution, we wish to expand on the assertion that no Arab Palestinian "State" exists today—*nor has ever existed*. This is illustrated, *inter alia*, by the saga of the Palestinian Authority's accession to the ICC.

In 2009, the Palestinian Authority (PA) attempted to accede to the Rome Statute. In January 2009, the PA lodged its first Article 12(3) Declaration. To be successful, such an attempt had to presuppose that the PA was then a "State". In response to that attempt, the first ICC Prosecutor correctly determined that, according to the Rome Statute's clear terms, accession to the Rome Statute was restricted to "States" and that the PA did not then constitute a "State"[84]. He erroneously opined, however, that confirmation of Palestinian statehood by the

coercive governmental action, not passive acquiescence or private choices. The definition as found in the Rome Statute has substantively changed the wording found in Article 49(6) of the Fourth Geneva Convention as well as the meaning of the original offence. Hence, the newly worded offence does not constitute custom and cannot lawfully be applied to Israel, since Israel is not a party to the Rome Statute and has not acceded to the new definition of the offence.

[80]*See id.* art. 2.

[81]Note that the issue of Jewish settlements in the Gaza Strip is now moot because all Israeli armed forces and settlers were removed from the Gaza Strip in 2005. *See Settlers Protest at Gaza Pullout*, BBC (15 Aug. 2005), http://news.bbc.co.uk/2/hi/middle_east/4150028.stm (discussing the removal of people living in Gaza settlements and the West Bank by Israeli troops).

[82]It should be noted, however, that as a matter of domestic legal policy, Israel applies the humanitarian provisions of the Fourth Geneva Convention *de facto* despite the fact that they do not apply *de jure*.

[83]HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, paras. 61, 70 (2004), http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Beit%20Sourik%20Village%20Council%20v.%20Government%20of%20Israel_0.pdf.

[84]The Office of the Prosecutor, *Situation in Palestine*, INT'L CRIM. CT., (3 Apr. 2012), https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

UN would suffice to establish Palestinian statehood for purposes of acceding to ICC jurisdiction[85].

In 2011, following the first Prosecutor's opinion that UN recognition would suffice for purposes of Article 12(3) accession, the PA turned to the UN Security Council[86] in a bid to achieve statehood recognition and admission to the United Nations. That effort failed. After failing to achieve its desired ends at the Security Council, the PA adopted a different approach and sought to achieve a change in its status designation at the UN via the UN General Assembly. That attempt succeeded. In November 2012, the General Assembly overwhelmingly agreed to change the PA's designation *at the UN* from an "Entity" enjoying Observer status to that of a "Non-member State" with Observer status[87]. Yet, what exactly did the change in designation achieve?

The General Assembly is an organ of the United Nations whose authority to act is specified in the UN Charter, Section IV. Article 10 of the UN Charter, for example, gives the General Assembly the following powers: to "discuss any questions or any matters within the scope of the present Charter" as well as the right to "make recommendations . . . on any such questions or matters"[88]. Such functions primarily involve *discussions of policy*. Thus, according to the Charter's explicit terms, the General Assembly is not a policy-*making* body. Its authority is severely curtailed. Although it often debates and adopts resolutions on hot issues of the day, General Assembly resolutions are not legally binding, and they seldom, if ever, include detailed legal analysis or particular attention to the requirements of international law. Critically, the UNGA does not have the authority to make determinations on questions of international law and statehood (including designating borders and determining a State's capital city).

Despite the General Assembly vote which purported to change the PA's status at the UN from "Entity" with Observer status to "Non-Member State" with Observer status, no *legal* change (or change on the ground for that matter) actually occurred with respect to the creation or existence of a Palestinian "State" for the following reasons:

First, under the UN Charter, the General Assembly has no lawful authority to create or recognise a "State". *The UN does not officially recognise states or declare statehood*; such actions are the responsibility of individual governments:

> "The recognition of a new State or Government is an act that *only other States and Governments may grant or withhold*. It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government"[89].

[85] *Id.*
[86] U.N. Secretary-General, *Application of Palestine for Admission to Membership in the United Nations: Note by the Secretary-General*, U.N. Doc. A/66/371-S/2011/592 (23 Sept. 2011), https://unispal.un.org/DPA/DPR/unispal.nsf/0/F6CF1ED25A5D8FE9852579170050C37F.
[87] Meetings Coverage, U.N. Gen. Assembly, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Meetings Coverage GA/11317 (29 Nov. 2012) [hereinafter Meetings Coverage, U.N. Gen. Assembly], https://www.un.org/press/en/2012/ga11317.doc.htm.
[88] U.N. Charter art. 10.
[89] *About UN Membership*, UNITED NATIONS, (emphasis added), https://www.un.org/en/sections/member-states/about-un-membership/index.html (last visited 25 July, 2019).

Further, when the States of the world gather together to make decisions as members of the UN General Assembly, they are bound by the explicit terms of the UN Charter as to what they may do. Hence, were the General Assembly to attempt to either create or recognise a "State", its actions would exceed its authority under the Charter and would be *ultra vires*. As a consequence, *to have any legal meaning at all*, the General Assembly decision to change the PA's status at the UN could be, *at most*, simply an internal, administrative decision whose reach is limited to how the PA will henceforth be dealt with *at the UN*—and nothing more—*else it would have been an unlawful act on the part of the General Assembly.*

As U.S. Permanent Representative Susan Rice correctly noted at the time of the status change vote, in response to those asserting that the General Assembly resolution did in fact confer statehood on the Palestinians, "[n]o [General Assembly] resolution can create a state where none exists"[90]. Even States that voted for the resolution stated at the time that they were not formally recognising a "State of Palestine" *per se*. For example, the Permanent Representative from Georgia stated: "*The resolution adopted today could be understood as conferring privileges and rights in line with those of Non-Member Observer States; it did not imply an automatic right for Palestine to join international organizations as a State*"[91]. Similarly, the Finnish Permanent Representative noted that "the Assembly's vote did not entail formal recognition of a Palestinian State. Finland's national position on the matter would be considered at a later date"[92]. Moreover, States that abstained also raised clear concerns. The United Kingdom's representative, for example, expressed grave concern "about the action the Assembly had taken, saying that 'the window for a negotiated solution was rapidly closing'. Israel and Palestine must return to credible negotiations to save a two-State solution. The Palestinian leadership should, without precondition, return to the table"[93]. Germany's representative expressed similar concern by stating that Palestinian *statehood* could only be achieved through "direct negotiations"[94]. Hence, to conclude that the GA resolution recognised Palestinian statehood *per se* is simply incorrect as a matter of both law and fact. *Yet, the OTP is acting as if the UNGA resolution did, in fact, establish a Palestinian "State". That makes the OTP action political, not legal.*

In reality, the adopted resolution merely gave the Palestinians the *rights and privileges* accorded to a Non-Member Observer State at the UN (like the Holy See) without actually conferring or recognising Palestinian statehood *per se*.

Second, the General Assembly has no lawful authority to determine the borders, the territorial extent, or the capital city of *any* State, much less those of an entity whose very existence as a "State" has no basis in international law. Despite a clear lack of lawful authority to do so, the status change resolution adopted by the General Assembly nevertheless explicitly incorporated the PA's view concerning borders, territory, and national capital of a future Palestinian "State"[95] while disregarding not only Israel's well-established claims but also the

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[90]Joe Lauria et al., *U.N. Gives Palestinians 'State' Status: Member Nations Upgrade Territories' Standing, in Diplomatic Defeat for U.S., Israel; Abbas Issues Warning on Settlements*, WALL ST. J. (29 Nov. 2012, 11:13 p.m.), http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html.
[91]Meetings Coverage, U.N. Gen. Assembly, *supra* note 87 (emphasis added).
[92]*Id.*
[93]*Id.*
[94]*Id.*
[95]We say "future" state for a number of reasons: first, because even PA President Mahmoud Abbas described what occurred at the General Assembly as being the "birth certificate" of Palestine, *id.*; and second, because the entity known as Palestine utterly fails to meet the four indicia of statehood recognised and required under customary

explicit means—*to wit, bilateral negotiations*—previously agreed to by both Palestinians and Israelis (under the auspices of the international community) for resolving such disputes as well as explicit language in relevant Security Council resolutions.

Moreover, the UNGA failed to apply the four *indicia* of statehood set forth in the Montevideo Convention[96] which are universally considered to reflect the *requirements for statehood* under customary international law[97], requirements that the PA has *never* met (i.e., neither *before* nor *after* adoption of the status change resolution by the General Assembly). In light of the fact that the PA fails to meet the legal requirements set forth in the Montevideo Convention[98], "Palestine" is not—*and cannot be*—a "State", *no matter how many UN Member States assert that it is or would like it to be and notwithstanding the UN Secretary-General's contrary position when he forwarded the Palestinian document of accession to the ICC Registrar*. In order to be a "State", certain facts on the ground must exist; such facts are lacking in the case of Palestine. Consequently, under customary international law, no Palestinian "State" currently exists. This obvious fact has been repeatedly confirmed by Palestinian leaders themselves. For example, former PA spokesman Ghassan Khatib has noted: "[w]e have too many symbols of a state, what we lack is attributes of a state"[99]. This sentiment was echoed by former PA Prime Minister Fayyad's assertion that the General Assembly resolution constituted "powerful *symbolism*"[100] as opposed to actual statehood.

Third, the General Assembly has no authority to set aside or supersede the terms of existing treaties, other international agreements and documents, or Security Council resolutions. Because the PA had freely entered into a series of agreements with Israel[101] whose terms explicitly ruled out "unilateral" actions, determining when a Palestinian "State" will come into existence and what territories it will encompass continues to depend on the results of direct,

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international law. Montevideo Convention on the Rights and Duties of States, art. 1, 26 Dec. 1933, https://avalon.law.yale.edu/20th_century/intam03.asp#art1.

[96]Under the Montevideo Convention, a state "should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". *Id.*

[97]*See, e.g.*, JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 77 (2000) (Citing D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 102 (5th ed. 1997)) ("The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law".); Pamela Epstein, *Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era—The Case for Western Sahara*, 15 Ann. Surv. Int'l & Comp. L. 107, 119 (2009) (internal citation omitted) ("Although the Montevideo Convention was created as a regional treaty, it has developed into customary international law and the criteria have become a touchstone for the definition of a state . . ."); Tzu-Wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. Int'l L. & Foreign Aff. 351, 387 n.70 (1997) ("[The Montevideo] Convention is regarded as representing in general terms the criteria of statehood under customary international law".).

[98]Palestine fails to meet the criteria of the Montevideo Convention for a variety of reasons. For instance, three political bodies claim the right to control Palestine—Israel, Hamas, and the PA. In addition, the PA "is subject to the Oslo Accords, which explicitly stipulated that this body is not independent and that its actual control of the area and ability to enter into relations with other states are not absolute, but rather subject to various limitations". Amichai Cohen, *U.N. Recognition of a Palestinian State: A Legal Analysis*, THE ISRAEL DEMOCRACY INST. (29 Nov. 2012), http://en.idi.org.il/analysis/articles/un-recognition-of-a-palestinian-state-a-legal-analysis-updated/. Moreover, Palestine lacks a defined territory and a permanent population because "the location of the borders and the size of the population of the [potential] Palestinian state are at the center of a controversy that has been the subject of negotiations . . . for years". *Id.*

[99]Joshua Mitnik, *Palestinians Adopt Name to Show Off New 'State' Status*, WALL STREET J. (6 Jan. 2013), http://online.wsj.com/article/SB10001424127887323482504578225523760483386.html.

[100]*Now What? The State of Palestinian Statehood*, NPR (1 Dec. 2012), https://www.npr.org/programs/all-things-considered/2012/12/01/166261876/ (interviewing PA Prime Minister Salam Fayyad). "Symbolism", no matter how "powerful", is not the same as actual statehood.

[101]*See, e.g.*, Israel-Palestinian Interim Agreement, Isr.-Palestine, 28 Sept. 1995, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_950928_InterimAgreementWestBankGazaStrip%28OsloII%29.pdf.

bilateral negotiations between Palestinian and Israeli officials (*negotiations which have not yet occurred*), as called for in the prior agreements between them. The terms of such agreements continue to bind the Palestinians.

Further, as discussed above, Security Council Resolution 242 (1967) anticipated territorial adjustments as part of the peace process, adjustments which were to be negotiated between the parties[102]. As Lord Caradon, the chief architect of Resolution 242, aptly noted,

> "[i]t would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial. After all, they were just the places where the soldiers of each side happened to be on the day the fighting stopped in 1948. They were just armistice lines. That's why we didn't demand that the Israelis return to them"[103].

One must also recognise that UN Security Council Resolution 242 did not mention a Palestinian entity of any description. Moreover, no Palestinian representative was invited to address the Security Council at the time. The reason for this was that the Palestinians were not considered as actual actors in the ongoing events. They had no State and no one was claiming that the areas of the former Mandate for Palestine which had been under Egyptian and Jordanian belligerent military occupation for the previous 18 years belonged to the Palestinians. Current Palestinian territorial claims are of relatively recent vintage. Only in 1988 did the Palestinians even "declare" their independence[104]. That was 40 years after the State of Israel had come into existence and occurred while the PLO leadership was in exile in Tunisia. At the time, the PLO did not control a single square centimetre of territory in the former Mandate for Palestine—*and never had.*

Finally, following the 1973 Arab-Israeli War, Security Council Resolution 338 (1973) reaffirmed that Resolution 242 was to serve as the basis for achieving a lasting peace between Israel and its Arab neighbours[105]. Accordingly, final resolution of the issues between Palestinians and Israelis, including the question of Palestinian statehood (and all that it entails), awaits final determination through bilateral negotiations.

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[102]S.C. Res. 242 *supra* note 51.

[103]BEIRUT DAILY STAR, 12 June 1974, excerpt *reprinted in* LEONARD J. DAVIS, MYTHS AND FACTS 1985: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT 44 (Near East Research 1984); *see also* MacNeil/Lehrer Report: Israeli Politics, (NewsHour Prods. 3 Mar. 1978), https://americanarchive.org/catalog/cpb-aacip_507-kk94747m5g. (Lord Caradon: "***We didn't say there should be a withdrawal to the '67 line; we did not put the 'the' in, we did not say 'all the territories' deliberately***. . . . [W]e all knew that the boundaries of '67 were not drawn as permanent frontiers, they were a cease-fire line of a couple of decades earlier. . . . [W]e did not say that the '67 boundaries must be forever". (emphasis added)); Eugene V. Rostow, *Legal Aspects of the Search for Peace in the Middle East*, 64 Am. Soc'y of Int'l L. Proc. 64, 67 (1970).

> "[T]he question remained, 'To what boundaries should Israel withdraw'? On this issue, the American position was sharply drawn, and rested on a critical provision of the Armistice Agreements of 1949. Those agreements provided in each case that the Armistice Demarcation Line 'is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims or positions of either party to the Armistice as regards ultimate settlement of the Palestine question'. . . . These paragraphs, *which were put into the agreements at Arab insistence*, were the legal foundation for the controversies over the wording of paragraphs 1 and 3 of Security Council Resolution 242, of November 22, 1967".

Id. (internal citations omitted) (emphasis added).

[104]Permanent Rep. of Jordan to the U.N., Letter dated 18 Nov. 1988 from the Permanent Rep. of Jordan to the U.N. addressed to the Secretary-General, U.N. Doc. A/43/827 (18 Nov. 1988), https://unispal.un.org/DPA/DPR/unispal.nsf/0/6EB54A389E2DA6C6852560DE0070E392.

[105]S.C. Res. 338 *supra* note 58.

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We remain very concerned that, despite the foregoing, the OTP—composed as it is of lawyers charged *inter alia* with determining, applying, and complying with the law—was willing to accept ***as binding*** the political determinations of the UN General Assembly regarding statehood for Palestine that run counter to the UNGA's authority and to otherwise unambiguous customary law indicia of statehood. Having said this, we are confident that the OTP views its position as relevant only to the issue of ICC jurisdiction *vis-à-vis* Jewish settlements, while having no bearing whatsoever on the substantive question on whether a "State" of Palestine actually exists.

CONCLUSION

In the above submission, we have drawn attention to Israel's claims over "West Bank" territory and presented several reasons why Israel cannot be considered an "occupying power" in that area. The OTP is entrusted with a mandate from the States Parties to the Rome Statute to investigate and prosecute genuine war crimes and crimes against humanity. This mandate does not include the adjudication of territorial disputes. A finding by the OTP concerning the legality of Jewish settlements would unavoidably require taking sides in a longstanding territorial dispute. Needless to say, this would be an unacceptable overreach on the Prosecutor's part. The OTP is neither authorised nor equipped for such an undertaking. We submit therefore that the Prosecutor has no alternative but to halt any and all actions by her office concerning Jewish settlements in the "West Bank" (including in east Jerusalem).

If the Prosecutor should nonetheless decide to delve into the territorial dispute, we submit that any consideration of the merits will lead to the inescapable conclusion that Israel is not an "occupying power" in the "West Bank" because (1) pursuant to *uti possidetis juris*, Israel is the sole sovereign over and title holder of the entirety of the territory of the Mandate for Palestine as it existed upon Britain's departure in May 1948 and, hence, cannot "occupy" its own territory within the meaning of the Fourth Convention; (2) alternatively, territorial claims to the "West Bank" are disputed between Jewish Palestinians and Arab Palestinians, making it impossible for the Prosecutor to determine which territory, if any, is improperly occupied by Jewish settlements until the dispute has been resolved between the parties, as both sides have agreed will be done through bilateral negotiations (which, to date, have not begun); and (3) because no High Contracting Party has owned the "West Bank" (at least since the Ottomans renounced their claims following World War I), there can be no "occupation" as envisioned in the Fourth Geneva Convention.

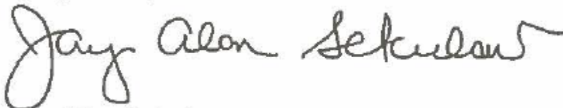
Finally, given that the State of Israel is not a party to the Rome Statute, pursuant to article 34 of the Vienna Convention on Treaties[106], Israel is not bound by or subject to the terms of a treaty to which it has not acceded, much less to be subject to a crime listed in such treaty whose customary definition has been amended to include language to which Israel objects[107].

[106]Vienna Convention on the Law of Treaties, art. 34, 23 May 1969, 1155 U.N.T.S. 331 ("A treaty does not create either obligations or rights for a third State without its consent".).

[107]*See, e.g.*, Ted Belman, *The Truth About 'The Occupation' and 'The Settlements'*, AmericanThinker.com (29 Aug. 2010), https://www.americanthinker.com/articles/2010/08/the_truth_about_the_occupation.html (noting "[t]here is all the difference in the world between forcible transfer, the offence of the Geneva Convention, and voluntary settlement, even where the settlement is encouraged . . . . Transfer is something that is done by people. Settlement is something people do"). In this regard, the Rome Statute "made it an offence to 'directly or indirectly' transfer populations. The ICRC has attempted to interpret 'indirect transfers' as 'inducements,' thereby making them a crime. But the GC certainly does not, *and that currently is the prevailing opinion*". *Id.* (emphasis added).

Accordingly, not only is Israel not an "occupying power" as understood in the Fourth Geneva Convention of 1949, but it is also not an "occupying power" under Article 8, Section 2(b)(viii) of the Rome Statute. Hence, the matter of Jewish settlements in the "West Bank" is not ripe for judicial action, and the Prosecutor should cease any and all actions in that regard at this time.

Respectfully submitted,



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