PLENARY II

Settlement building as the main obstacle to the two-State solution

Paper presented by

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The illegality of settlements in international law:
General Assembly, Security Council, Human Rights Council,
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The participation of Palestine in the work of United Nations political organs:

Palestine is not a member of the United Nations but, since 1974, it has had observer status in the General Assembly. Although the Palestine Liberation Organisation was created in 1964, it was only granted official status by the United Nations in General Assembly resolution 3210 (XXIX) (14 October 1974) *Invitation to the Palestine Liberation Organization*. This provided:

*The General Assembly,*

*Considering* that the Palestinian people is the principal party to the question of Palestine. *Invites* the Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings.

On 28 October 1974, the seventh Arab League Summit Conference, meeting in Rabat, adopted a resolution on Palestine which affirmed “the right of the Palestinian people to establish an independent national authority under the command of the Palestine Liberation Organization”, which was recognised for the first time as “the sole legitimate representative of the Palestinian people”.¹ Observer status in the General Assembly was subsequently granted to the Palestine Liberation Organisation by UN General Assembly resolution 3237 (XXIX) (22 November 1974). By UNGA resolution 43/177 (15 December 1988), the designation of the delegation was changed to “Palestine” as a consequence of the 15 November 1988 Tunis meeting where the Palestine National Council declared the existence of the State of Palestine.² In resolution 43/177 (15 December 1988), the General Assembly acknowledged that it was “aware” of this, and affirmed “the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967”.³ In operative para.3, the General Assembly “decided” to re-

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³ UN Doc.A/RES/43/177 (15 December 1988), operative para.2.
designate the PLO observer mission to the UN as “Palestine” without, however, changing its status or admitting “Palestine” to full UN membership.

By UNGA resolution 52/250 (13 July 1998), Palestine was accorded additional rights and privileges of participation in plenary meetings of the General Assembly. Further, since 1976, in Security Council meetings which bear upon a dispute to which it is a party, Palestine has participated with the same rights which are conferred on a member State which has been invited to participate in the meeting under Rule 37 of the Security Council’s Provisional Rules of Procedure.4 This provides:

Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35(1) of the Charter.

Palestine and the Middle East Peace Process:

Operative paragraph 2 of UNGA resolution 3375 (XXX) (10 November 1975), Invitation to the Palestine Liberation Organization to participate in the efforts for peace in the Middle East, provided that the General Assembly:

Calls for the invitation of the Palestine Liberation Organization, the representative of the Palestinian people, to participate in all efforts, deliberations and conferences on the Middle East which are held under the auspices of the United Nations, on an equal footing with other parties, on the basis of resolution 3236 (XXIX).

This constituted a rather a late admission by the UN that the Palestinians were a principal player in the Middle East Peace Process in their own right. Only after the 1967 Six-Day War were the “inalienable rights” of “the people of Palestine” first recognised in General Assembly resolution 2535 (1969),5 but this resolution focussed on refugees and the United Nations Relief and Works Agency for Palestine Refugees. The General Assembly recalled this resolution in resolution 2672 (1970), which again was principally concerned with refugees and UNRWA, but amplified its earlier statement on inalienable rights in its recognition that “the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations”.6

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4 For the debate on terms of the PLO/Palestine’s participation, see UNSC 1870th meeting (12 January 1976), S/PV.1870, paras.14-120.


Indeed, in the aftermath of the Six-Day War in 1967, Israel sought to conclude a peace treaty with Jordan which would have returned the West Bank to it, albeit with modified borders. Jordanian repossession of the West Bank was the premise of the diplomatic negotiations and exchanges which preceded the adoption of Security Council resolution 242 (22 November 1967). This resolution re-affirmed the fundamental principle of international law that it is inadmissible to acquire territory as the result of the use of armed force, and which stated in its first operative paragraph that:

the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
(ii) Termination 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;…

Israel was adamant that changes in the armistice line agreed with Jordan in the 1949 Israel-Jordan General Armistice Agreement were necessary in order that it could possess secure frontiers. In relation to the West Bank, an early formulation of how these might be achieved was the Allon Plan, which called for a series of settlements along the River Jordan and the demilitarization of those areas which would be returned to Jordan. Although some members of the Israeli Cabinet thought that this did not go far enough in incorporating the occupied territories into Israel and threatened to resign, variants of the Allon Plan formed the basis of the peace terms Israel offered to Jordan in their bilateral negotiations. Israel laid claim to “certain unpopulated areas of [the] West Bank” which the US Embassy in Jordan identified could only lie along the ceasefire line between Israel and Jordan, namely, along the River Jordan. King Hussein of Jordan reported that Israel’s specific territorial demands were that it wanted:


8 XX FRUS 1964-68, Doc. 329, Information memorandum from the President’s Special Assistant (Rostow) to President Johnson, 22 November 1968, 655 at 655 n.2.

9 See XX FRUS 1964-68, Doc. 268, Telegram from Secretary of State Rusk to the Department of State, 1 October 1968, 529 at 529 and 531-532; Doc. 326, Telegram from the Embassy in Israel to the Department of State, 19 November 1968, 644 at 648 n.2; Doc. 328, Telegram from the Embassy in Jordan to the Department of State, 20 November 1968, 653 at 654; and Doc. 353, Telegram from the Embassy in Jordan to the Department of State, 19 December 1968, 697 at 699.

10 XX FRUS 1964-68, Doc. 328, Telegram from the Embassy in Jordan to the Department of State, 20 November 1968, 653 at 654.
a 12-kilometer-wide strip running along the Jordan River from the north (Tiberias) to a point a few miles north of Jericho. Jordan would be allowed to have corridors across this strip. The Israelis have noted also that they expect boundary changes in the west...the Israelis insist upon the new western frontier being completely opened for all Israelis. The Israelis also want a strip of territory running to the Hebron area.¹¹

He was convinced that Israel was not serious about negotiating a settlement with Jordan but intended to annex significant parts of the West Bank.¹² Israel’s stance was to ignore calls by West Bank Arabs for a separate existence, preferring instead to deal with Jordan.¹³ Israel simply did not view with favour the creation of a “buffer State” on the West Bank which it thought would be “only a temporary problem child.” It claimed that most Palestinians wanted to be associated with whoever was in charge of the East Bank, namely Jordan.¹⁴

This reflected the Jordanian policy, adopted in December 1948, which aimed to incorporate the West Bank, which Jordan then occupied, into its own territory. On 24 April 1950, the Jordanian House of Assembly promulgated a resolution which provided in part:

in accordance with the right of self-determination...the Jordan Parliament, representing both banks, decides...

1. Approval is granted to complete unity between the two banks of the Jordan, the Eastern and the Western, and their amalgamation in one single State...

2. Arab rights in Palestine shall be protected. These rights shall be defended with all possible legal means and this unity shall in no way be connected with the final settlement of Palestine’s just case within the limits of national hopes, Arab cooperation and international justice.

¹¹ XX FRUS 1964-68, Doc.373, Telegram from the Embassy in Jordan to the Department of State, 30 December 1968, 736 at 738.

¹² XX FRUS 1964-68, Doc.344, Telegram from the Embassy in Jordan to the Department of State, 9 December 1968, 682 at 682 n.2; and Doc.373, Telegram from the Embassy in Jordan to the Department of State, 30 December 1968, 736 at 737.


¹⁴ XX FRUS 1964-68, Doc.346, Telegram from the Embassy in Jordan to the Department of State, 11 December 1968, 685 at 686.
This decision was to become effective on its approval by the King of Jordan, which was given later that same day. Subsequently the Political Committee of the Arab League, of which Jordan was a founding member, declared that Jordan’s annexation of Arab Palestine violated its resolution of 12 April 1950 which had prohibited the annexation of any part of Palestine. A compromise was reached between the League and Jordan, and on 31 May 1950 Jordan declared that the annexation was without prejudice to the final settlement of the Palestine issue. Only the United Kingdom and Pakistan formally recognised Jordan’s annexation of the West Bank. The Jordanian claim to sovereignty over the West Bank was finally renounced in 1988, and in the 1994 Israel-Jordan Peace Treaty, the land boundary employed was the Mandate boundary, as amended in 1922 when Palestine and Transjordan were constituted as separate administrative units. Article 3 provided, in part:

1. The international boundary between Jordan and Israel is delimited with reference to the boundary definition under the Mandate as is shown in Annex I (a), on the mapping materials attached thereto and coordinates specified therein.

2. The boundary, as set out in Annex I (a), is the permanent, secure and recognized international boundary between Jordan and Israel, without prejudice to the status of any territories that came under Israeli military government control in 1967.

Apart from the incorporation of the West Bank into Jordan until 1967, and the perception that Palestinians displaced from the territory of Mandate Palestine primarily constituted a refugee problem, it has been claimed that the lack of a representative Palestinian body was a major reason why the question of Palestinian self-determination disappeared from the United Nations’ agenda during the 1950s and 1960s.

The illegality of settlements in international law:

As a result of the experiences of the Second World War, it became apparent that a new treaty should be adopted to protect civilians from the effects of armed conflicts. Under the

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15 For a dossier of the relevant documents, see Whiteman M (Ed), 2 Digest of International Law (Dept of State: Washington DC: 1963) 1163-1168.

16 This was announced by King Hussein in his 31 July 1988 Address to the Nation: reproduced <www.kinghussein.gov.jo/88_july31.html>.


18 See XX FRUS 1964-68, Doc.256, Memorandum of conversation, 504—during this conversation Rabin, then Israeli ambassador to Washington, stated “The refugee problem is the Palestine problem” in response to United States Secretary of State Rusk’s observation that the Palestine question was a large and complex package (at 504-505).

The ICRC specifically proposed that this treaty should regulate deportations, transfers, and evacuations in occupied territory. Its proposals on these issues were adopted in all their essential points in the Fourth Geneva Convention. Article 49(6) provides:

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

This was an innovation in the law of armed conflict, and the authoritative ICRC commentary on this provision states:

> It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.\(^{20}\)

The Commentary further emphasises that the meaning of the terms “transfer” and “deport” in this paragraph differs from that employed in the rest of the Article which refers only to the forcible or compulsory movement of people. The implication must be that Article 49(6) prohibits both the compulsory and voluntary movement of nationals of the occupying power into territory it occupies.

Although Article 49(6) was an innovation when it was adopted in 1949, the prohibition it contains has been consolidated in the international law of armed conflict. In 1977 Additional Protocol I, which supplements the 1949 Geneva Conventions, violation of Article 49(6) was designated as a “grave breach”, that is, a particularly serious violation of the Convention which all States parties are under a duty to prosecute. Article 85(4)(a) of Additional Protocol I provides:

> In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

| (a) | The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;… |

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Further, in its 2005 study on customary international humanitarian law, the ICRC concluded that the settlement of occupied territory constituted a breach of customary law. Rule 130 of this ICRC study provides:

States may not deport or transfer parts of their own civilian population into a territory they occupy.21

The customary rules formulated in this study were based on an extensive examination of the practice of States, as exemplified in their military manuals and legislation, relevant case law, and the views expressed by inter-governmental organisations, as well as by the Red Cross Movement itself.22

In the Legal consequences of the construction of a wall in the occupied Palestinian territory advisory opinion, the International Court of Justice addressed the applicability of the Fourth Geneva Convention in the occupied territories and also the legality of settlements. Israel, “contrary to the great majority of the other participants” in the proceedings, had argued that because Jordan and Egypt did not possess sovereignty over the West Bank and Gaza when Israel seized them in 1967, they were not territories of a High Contracting Party for the purposes of the application of the Fourth Convention.23

The International Court of justice rejected this claim. It ruled that the Fourth Geneva Convention applies to any armed conflict between High Contracting Parties, and that it was irrelevant whether territory occupied during that conflict was under the sovereignty of one or other of the combatants. This interpretation was based on textual exegesis, the drafting history of Geneva Convention IV, the practice of parties to the Convention, the views of the International Committee of the Red Cross, General Assembly and Security Council, and also that of the Israel Supreme Court.24 This was a unanimous finding by the Court, as the sole dissenting judge, Judge Buergenthal, expressly concurred in this ruling.25

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22 This practice may be found at <http://www.icrc.org/customey-ihl/eng/docs/v2_rul_rule130>.

23 Legal consequences of the construction of a wall in the occupied Palestinian territory advisory opinion, ICJ Reps, 2004, 136 at 173, para.90. In academic legal writings, this argument is known as the “missing reversioner” argument---see Blum YZ, The missing reversioner: reflections on the status of Judea and Samaria, 3 Israel Law Review 279 (1968); Gerson A, Israel, the West Bank and international law (Cass: London: 1978) 76-82; and Shargam M, The observance of international law in the administered territories, 1 Israel Yearbook on Human Rights 262 (1971) 263-266.


The International Court then proceeded to find that Israel’s settlement policy was in breach of Article 49(6) of the Fourth Geneva Convention. It ruled that:

That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.26

Once again, this was a unanimous ruling in which Judge Buergenthal expressly concurred, stating:

Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that these segments of the wall being built by Israel to protect the settlements are ipso facto in violation of international humanitarian law.27

It is well-established that the settlement of occupied territory by the nationals of the occupying power is unlawful. This is clearly reflected, not only in the jurisprudence of the International Court, but also in the resolutions and practice of various UN bodies concerning Israeli settlements in occupied Palestinian territory. Settlement activity started, initially in the West Bank, soon after the conclusion of the Six-Day War in 1967.28

The United Nations’ response to Israeli settlements in occupied Palestinian territory:

(a) The General Assembly:

On 19 December 1968 in resolution 2443, the General Assembly made its first reference to the Fourth Geneva Convention in relation to the Israel-Palestine conflict. In this resolution, which was primarily concerned with the right of those displaced by the Six-Day War to return to their homes, and which called upon Israel to respect human rights in the occupied territories, the General Assembly simply took note of the Fourth Geneva Convention, but did not expressly state that it was applicable. A year later, on 11 December 1969, in resolution 2546, the General Assembly first expressly called upon Israel to comply with its obligations under the Fourth Geneva Convention, and thus indicated that this provided the legal framework for the conduct of the occupation. This has been the constant view of the General Assembly since then---for

26 Legal consequences of the construction of a wall advisory opinion, ICJ Rep, 2004, 183, para.120: see 183-184, paras.120-122 generally.

27 Legal consequences of the construction of a wall advisory opinion, declaration of Judge Buergenthal, ICJ Rep, 2004, 244, para.9.

example, on 24 March 1997, the General Assembly adopted resolution 51/132 which was entitled *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the occupied Palestinian territory, including Jerusalem, and the other occupied Arab territories* in which it:

1. **Reaffirms** that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the occupied Palestinian territory, including Jerusalem, and other Arab territories occupied by Israel since 1967;

2. **Demands** that Israel accept the de jure applicability of the Convention in the occupied Palestinian territory, including Jerusalem, and other Arab territories occupied by Israel since 1967, and that it comply scrupulously with the provisions of the Convention;

3. **Calls upon** all States parties to the Convention, in accordance with article 1 common to the four Geneva Conventions, to exert all efforts in order to ensure respect for its provisions by Israel, the occupying Power, in the occupied Palestinian territory, including Jerusalem, and other Arab territories occupied by Israel since 1967;…

The General Assembly first mentioned settlements expressly in resolution 2851 which was adopted on 20 December 1971. Noting that the Israeli authorities were not complying with the provisions of the Fourth Geneva Convention, in operative paragraph 2 of this resolution, the General Assembly:

*Strongly calls upon* Israel to rescind forthwith all measures and to desist from all policies and practices such as:

(a) The annexation of any part of the occupied Arab territories;
(b) The establishment of Israeli settlements on those territories and the transfer of parts of its civilian population into the occupied territory;
(c) The destruction and demolition of villages, quarters and houses and the confiscation and expropriation of property;
(d) The evacuation, transfer, deportation and expulsion of the inhabitants of the occupied Arab territories;
(e) The denial of the right of the refugees and displaced persons to return to their homes;
(f) The ill-treatment and torture of prisoners and detainees;
(g) Collective punishment;…

This was reinforced in resolution 2949 (8 December 1972), in which the General Assembly noted that “changes in the physical character or demographic composition of occupied territories are contrary to the purposes and principles of the Charter of the United Nations, as well as to the provisions of the relevant applicable international conventions”, and declared that “that changes carried out by Israel in the occupied Arab territories in contravention of the Geneva Conventions of 12 August 1949 are null and void, and calls upon Israel to rescind forthwith all such measures and to desist from all policies and practices affecting the physical character of demographic composition of the occupied Arab territories”. This was reiterated in resolution 3089 (7 December 1973) in which the General Assembly also stated that population transfer, which may be seen as a reference to Israel’s settlement policy, was a violation of the
Fourth Geneva Convention. This was first expressly stated by the General Assembly in resolution 3092, also adopted on 7 December 1973, where “the establishment of Israeli settlements in the occupied territories and the transfer of an alien population thereto” was identified as a breach of the Fourth Geneva Convention. This has been the constant position of the General Assembly since then, being reiterated in subsequent resolutions such as resolution 3240 (29 November 1974), 3525 (15 December 1975), 36/266 (17 December 1981), 39/146 (14 December 1984), 47/172 (22 December 1992), with the most recent being resolution 66/225 which was adopted on 22 December 2011.

Resolution 66/225 reaffirmed “the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967”, and stated that the General Assembly was “Aware of the detrimental impact of the Israeli settlements on Palestinian and other Arab natural resources, especially as a result of the confiscation of land and the forced diversion of water resources, and of the dire socioeconomic consequences in this regard”. In operative paragraph 4, the General Assembly stressed:

that the wall and settlements being constructed by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem, are contrary to international law and are seriously depriving the Palestinian people of their natural resources, and calls in this regard for full compliance with the legal obligations affirmed in the 9 July 2004 advisory opinion of the International Court of Justice and in relevant United Nations resolutions…

As is characteristic of these annual General Assembly resolutions on the situation in the Middle East, resolution 66/225 was adopted by an overwhelming majority of 167 in favour to 7 against (Canada, Israel, Marshall Islands, Federated States of Micronesia, Nauru, Palau, United States), with 6 abstentions (Australia, Cameroon, El Salvador, Côte d’Ivoire, Panama, Tonga). Further, as the result of the Security Council’s failure to adopt resolutions condemning settlements because of the use of the veto by the United States, in March 1997 the General Assembly convened its Tenth Emergency Special Session to examine “Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory”. This has been adjourned and reconvened on a number of occasions, most recently in January 2009 to consider Israel’s Operation cast lead in Gaza, and has adopted various resolutions affirming the applicability of the Fourth Geneva Convention to the occupied Palestinian territory in general, and the illegality of settlements in particular (see, eg, resolution ES-10/2 (5 May 1997), ES-10/6 (24 February 1999), ES-10/13 (27 October 2003), ES-10/16 (4 April 2007), and ES-10/18 (23 January 2009).

(b) The Security Council:

The Security Council has been less assiduous than the General Assembly in taking action regarding settlements. This probably results from two factors. In the first place, the nature of the Security Council’s business, and its agenda, is very different from that of the General Assembly. The Security Council essentially deals with international crises, incidents which affect international peace and security, rather than the more comprehensive approach which the General Assembly takes to international affairs. Therefore, while the General Assembly is able to schedule annual debates on matters such as settlements, issues only appear on the Security
Council’s agenda if there is a pressing reason why they should be discussed. The second factor is the veto power possessed by permanent members of the Security Council which can result in matters not being put to a formal vote or in the Council’s failure to adopt a resolution. Soon after the close of hostilities in the Six-Day War, however, on 14 June 1967 the Security Council unanimously adopted resolution 237 which recommended that the governments involved respect the humanitarian principles contained in the Third Geneva Convention, which deals with the treatment of prisoners of war, as well as the Fourth Convention on the protection of civilians. Only in resolution 271 (15 September 1969) did the Security Council call upon Israel to observe the provisions of the Geneva Conventions and the international law governing military occupation.

The Security Council really only started to engage with the question of settlements in resolution 446 (22 March 1979), in which it affirmed “that the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem”, and determined:

that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.

The Council concluded by calling upon “Israel, as the occupying Power, to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories”. This was the first resolution adopted by the Security Council which emphasised both the applicability of the Fourth Geneva Convention to the occupied Palestinian territory and the illegality of settlements under international law. Although the Council has only intermittently adopted similar resolutions since then, it has not rescinded the views it expressed in resolution 446. In fact, it has strengthened its condemnations. Later in 1979, in resolution 452 (20 July 1979), the Security Council expressly stated that Israel’s settlement policy violated the Fourth Geneva Convention and called for its cessation. These points were reiterated in resolution 465 (1 March 1980), which not only was adopted unanimously but which went further as it called also for the dismantling of existing settlements and called on all States “not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories”. The Council was of the view that:

all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and the Israel’s policy and practices of settling parts of its population and new immigrants in these territories constitute a flagrant violation of the Fourth Geneva Convention…and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;…
This assessment was expressly reaffirmed in Security Council resolution 471 (5 June 1980).

The applicability of the Fourth Geneva Convention to the occupied Palestinian territory has been reaffirmed by the Security Council in various resolutions (for example, resolution 681 (20 December 1990), 694 (24 May 1991), 799 (18 December 1992), 904 (18 March 1994), 1322 (7 October 2000), 1435 (24 September 2002), and 1544 (19 May 2004)). Further, in resolution 681, the Security Council also called on all High Contracting Parties to the Geneva Conventions to ensure that Israel respected its obligations under the Fourth Convention, in accordance with their obligation under Article 1 of the Convention.

The last condemnation of settlements by the Security Council appears to have been in resolution 471 (5 June 1980), as the United States vetoed two resolutions condemning settlements as illegal in March 1997. In February 2011, the United States once again vetoed a resolution supported by all other Security Council members which condemned settlements as illegal and demanded that all settlement activity cease immediately. This resolution had been sponsored by nearly two-thirds of UN member States. In explaining the United States’ veto, its representative, Susan Rice, stated that this should not be seen as support for settlement construction as the United States “rejects in the strongest terms the legitimacy of continued Israeli settlement activity”. This categorisation of settlements as “illegitimate”, as opposed to “illegal”, is the terminology adopted by the United States. Thus, for example, in his 4 June 2009 speech at Cairo University, President Obama stated:

The United States does not accept the legitimacy of continued Israeli settlements. This construction violates previous agreements and undermines efforts to achieve peace. It is time for these settlements to stop.

The United States veto was predicated on the policy, shared with Israel, that the conflict should be resolved by Israel and Palestine alone, and that “even the best intentioned outsiders cannot solve it for them”. Both Israel and the United States have repeatedly asserted that, despite their lack of success, bilateral negotiations remain the only way to achieve a peace settlement.

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32 For recent examples, see, Israeli PM Netanyahu’s speech at the UN General Assembly (23 September 2011), “The truth is that we cannot achieve peace through UN resolutions, but only through direct negotiations between the parties”; and US President Obama’s Address to the UN General Assembly (21 September 2011), “a genuine peace can only be realized between the Israelis and the Palestinians themselves... Peace will not come through statements and resolutions at the United Nations... Ultimately, it is the Israelis and the Palestinians - not
Given the opinion shared by the vast majority of UN member States who sponsored the vetoed resolution that Security Council engagement was necessary, as well as the activities of other UN bodies, this claim is disingenuous, not only because of the UN’s special responsibility for the peaceful settlement of the question of Palestine, but also given the persistent failure of the bilateral process. Indeed, it contradicts the view expressed by the International Court of Justice which emphasised “the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion”. This call was recently echoed by the UN Special Coordinator for the Middle East Peace Process who observed, when briefing the Security Council, that “[t]he parties are unlikely to overcome the deficit of trust without a credible and effective international intervention in the peace process...it is becoming increasingly clear that a more concrete and substantive basis would have to be laid out for the parties to engage”.

(c) The Human Rights Council:

Despite the inability of the Security Council to engage with the issue of settlements as a result of the United States’ attitude, other UN bodies are doing so. Perhaps the most prominent contemporary example is the Human Rights Council which, like its predecessor the Commission on Human Rights, has affirmed the applicability of the Fourth Geneva Convention to the occupied Palestinian territories and condemned settlements as illegal. Since 2007, the Human rights situation in Palestine and other occupied Arab territories has been a permanent agenda item for the Human Rights Council.

Its most significant recent activity was the adoption of resolution 19/17 (10 April 2012), entitled Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan. Resolution 19/17 notes that Israel is a party to the Fourth Geneva Convention which is applicable as a matter of law to all Arab territories occupied by Israel since 1967, including Easy Jerusalem and the Syrian Golan, and repeatedly reaffirms that the construction of settlements in occupied territory is unlawful, is an obstacle to peace, and to

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us - who must reach agreement on the issues that divide them... that is and will be the path to a Palestinian state - negotiations between the parties”—see 41 Journal of Palestine Studies (2012) 216 and 226.


34 Briefing by Robert Serry, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General, to the UNSC in its 6488th meeting (24 February 2011).


36 This resolution was adopted by a vote of 36 – 1 (the United States), with 10 abstentions (Cameroon, Costa Rica, Czech Republic, Guatemala, Hungary, Italy, Poland, Republic of Moldova, Romania, Spain). The States voting in favour of the resolution were: Angola, Austria, Bangladesh, Belgium, Benin, Botswana, Burkina Faso, Chile, China, Congo, Cuba, Djibouti, Ecuador, India, Indonesia, Jordan, Kuwait, Kyrgyzstan, Libya, Malaysia, Maldives, Mauritania, Mauritius, Mexico, Nigeria, Norway, Peru, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, Switzerland, Thailand, Uganda, and Uruguay.
the creation of an independent, viable, sovereign, and democratic Palestinian State. It specifically urges Israel, as occupying power:

(a) To reverse the settlement policy in the occupied territories, including East Jerusalem and the Syrian Golan, and, as a first step towards their dismantlement, to stop immediately the expansion of the existing settlements, including “natural growth” and related activities, including in East Jerusalem;
(b) To prevent any new installation of settlers in the occupied territories, including in East Jerusalem;…

The Human Rights Council also took two practical steps in resolution 19/17. It asked the Secretary-General to report on the implementation of resolution 19/17 during the Council’s twentieth session, and decided to “to dispatch an independent international fact-finding mission, to be appointed by the President of the Human Rights Council, to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem”. It also called on Israel not to obstruct the process of this investigation and to co-operate fully with the mission.37

The Secretary-General submitted his report on 29 June 2012, which covers implementation during the period 22 March–12 June 2012.38 It catalogues Israeli settlement activity during this period, and also notes that, despite the request that Israel should co-operate with the fact-finding mission, “by letter dated 14 May 2012, the Government of Israel informed the President of the Human Rights Council of its decision to suspend its relationship with the Council, as well as with the Office of the High Commissioner for Human Rights”.39 It has been reported in the Israeli press that Israel will not allow the members of the mission to enter either Israel or Palestine.40

Israel in denial:

Despite unanimous rulings by the International Court of Justice that the Fourth Geneva Convention applies as a matter of law to the occupied Palestinian territory and that, consequently, Israel’s settlement activity breaches its obligations under Article 49(6) of the Fourth Convention, and despite support being expressed for these views by the overwhelming majority of States in the debates of UN organs and in their votes in favour of resolutions condemning Israel’s settlement policy, Israel continues to build new and expand existing settlements. The Government of Israel continues to deny that the Fourth Geneva Convention

37 See Human Rights Council resolution 19/17 (10 April 2012), operative paragraphs 9 and 11.
38 See UN Doc. A/HRC/20/13 (29 June 2012).
39 A/HRC/20/13 (29 June 2012) 5, para.9. Press reports state that the mission will comprise Christine Chanet (France), Unity Dow (Botswana), and Asma Jahangir (Pakistan).
applies as a matter of law to the occupied Palestinian territory, despite rulings by its own Supreme Court that “Since 1967, Israel has been holding the areas of Judea and Samaria [hereinafter – the area] in belligerent occupation”.  

The Government of Israel has consistently challenged the status of the Palestinian territories as occupied, referring to them instead as “administered” or “disputed” territories or, in the case of the West Bank, as “Judea and Samaria”. For example, in response to the *Consequences of a the construction of a wall advisory opinion*, a former legal adviser to the Israeli Foreign Ministry has stated:

Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has essentially been disputed land with the claimants being Israel, Jordan, and the Palestinians. Its ultimate status and boundaries will require negotiation between the parties, according to Security Council Resolutions 242 and 338.

Further, it has recently been reported in the Israeli press that Israel is to begin recording settler claims to land in the West Bank.

In adopting its views on the applicability of the Fourth Geneva Convention and the legitimacy of its settlement programme, Israel is not only denying the legal assessment of the overwhelming majority of the international community, but also those of its own officials. In the immediate aftermath of the Six-Day War, a 14 September 1967 memorandum entitled *Settlement in the administered territories* prepared by the then legal advisor to the Israeli Foreign Ministry, Theodor Meron, for Israel’s Foreign Minister concluded that “civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention.” He noted that the international community had rejected Israel’s claim that the territories were not occupied:

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41 *Beit Sourik Village Council v the Government of Israel and Commander of the IDF Forces in the West Bank, HCJ 2056/04 (30 June 2004), opinion of President Barak, para.1: see also Legal consequences of the construction of a wall in the occupied Palestinian territory advisory opinion, ICJ Rep, 2004, 176-177, para.100.

42 Sabel R, *The ICJ opinion on the separation barrier: designating the entire West Bank as “Palestinian territory”* (Jerusalem Center for Public Affairs: October 2005).


We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not “normal” occupied territory and that certain countries (such as Britain in its speeches at the UN) have expressly stated that our status in the [West] Bank is that of an occupying State. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory.\footnote{45}

Meron cited the authoritative official International Committee of the Red Cross commentary on Article 49(6) of the Fourth Geneva Convention, and stated that this prohibition was “categorical and is not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state,” therefore if Israeli citizens were to settle in the occupied territory it was “vital, therefore, that settlement is carried out by military and not civilian entities” within temporary camps.\footnote{46}

\footnote{45} 14 September 1967 Meron memorandum entitled \textit{Settlement in the administered territories}, original in Hebrew, Israel State Archives, 153.8/7921/3A, legal opinion numbered as document 289-291, with unnumbered cover notes.

\footnote{46} Meron memorandum, 2.
Appendix I:

Settlement in the administered territories
Memorandum prepared by Thedor Meron, 14 September 1967

Hebrew facsimile, available at:

משרדי ההון

ירושלים, יום ראשון באלול תשכ"ז
18 בספטמבר 1967

שר כי בדרת

אל : מר אדי יפה, המועצה המרכזית של ראש הממשלת

מת : ידיעת המשפתי, מ Wander הורן

הנהורון : ראש המשפתי הפרטיים והחרנkıים

בהחתמה לבושחת רכששת פר רביבי, הריבי בedly
לבר הנותק מתוכנני בנייה מירון 567, מצרת הנחתי
לשר הורון. מסהוא של יז חלקה של אדרת בשתייה
המאחוזים מתן החרנkıים ומסירות של מרכז בין ומ. 6.4.

ג. בר כה',

הנהורון : המ. אח. סעדוב, מנחה לשבית הנשים

19
דרישתיים,UFF, בועז ברוקוב
1967 בפסח 21

שאלה

הŊור

גבעת שבavern	תימנייה המוחלטית

דרישתיים הועלו עכשומם ברובם, אשר בשום סבר, הם גורמים לנהיגה בטוחה.

שאלה זאת נוגעת לuster עתה שהודגמה, ובייחוד לuster של לין לברוע הדומה

מה ['/] המוחלטית, בפורים ננושה בברועה, וברועה התורה, וברועה מ这款 ומ这款.

וywać

רמות המוחלטיהpared על יזהר דניאל

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ופitsu יוהל

מ怎能יל,(ל)הדרוע

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ודז ק"ט

נתן רזניק

ודז ק"ט

ודז ק"ט

ודז ק"ט
"The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".

This clause was adopted after some hesitation, by the XVIIIth International Red Cross Conference. It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words "transfer" and "deport" is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.
 hoax
Appendix II:

Settlement in the administered territories
Memorandum prepared by ThedorMeron, 14 September 1967

English translation, available at:

<www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>
Ministry of Foreign Affairs

Jerusalem, 13 Elul 5727
18 September 1967

TOP SECRET

To : Mr Adi Yafeh, Political Secretary to the Prime Minister
From : Legal Adviser, Ministry of Foreign Affairs

Subject: Settlement in the Administered Territories

At your and Mr Raviv’s request, I am enclosing herewith a copy of my memorandum of 14.9.67 on the above subject, which I submitted to the Minister of Foreign Affairs. My conclusion is that civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention.

Regards,

[signed]

T. Meron

Copy: Mr A. Shimoni, Director of the Minister’s Office
Jerusalem, 16 Elul 5727
21 September 1967

TOP SECRET

Minister of Justice

Dear Minister,

Subject: Settlement in the Administered Territories

Please find enclosed a copy of a memorandum on the above subject, which was written by the Legal Adviser to the Ministry of Foreign Affairs after a conversation with me.

The Prime Minister has asked that your attention be drawn to the enclosed with a view to the establishment of outposts, army bases and settlement points and the settlement of refugees in the administered territories.

The Prime Minister will be grateful for your opinion.

Regards,

Aviad Yafeh
Head of the Prime Minister’s Office

Copy: Dr Y. Herzog
14.9.67

Minister of Foreign Affairs
Legal Adviser

Most Urgent

Subject: Settlement in the Administered Territories

Mr Raviv wrote to me to say you had asked for my opinion on restrictions and dispensations under international law for occupying states where it concerns the cultivation of lands.

The above question is very general and difficult to answer but I understand it in the context of what I have heard from Mr Adi Yafeh, that is to say, in relation to the possibility of Jewish settlement in the [West] Bank and the [Golan] Heights as well as the settlement of Arab refugees from Gaza in El-Arish or the [West] Bank. In this opinion, I will deal only with the first question, which, from a political and legal point of view, seems to me to be the most delicate. I am afraid there is in the world very great sensitivity to the whole question of Jewish settlement in the administered territories and any legal arguments that we shall try to find will not counteract the heavy international pressure that will be exerted upon us even by friendly countries which will base themselves on the Fourth Geneva Convention. These countries may claim that, while they expect for Israel to settle Arab refugees, Israel is busy settling the administered territories with its citizens.

From the point of view of international law, the key provision is the one that appears in the last paragraph of Article 49 of the Fourth Geneva Convention. Israel, of course, is a party to this Convention. The paragraph stipulates as follows:

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

The Commentary on the Fourth Geneva Convention prepared by the International Committee of the Red Cross in 1958 states:

This clause was adopted after some hesitation, by the XVIIIth International Red Cross Conference. It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

The paragraph provides protected persons with a valuable safeguard. It should be noted, however, that in this paragraph the meaning of the words “transfer” and “deport” is rather different from that in which they are used in the other paragraphs of Article 49, since they do not refer to the movement of protected persons but to that of nationals of the occupying Power.
The prohibition therefore is categorical and not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state. If it is decided to go ahead with Jewish settlement in the administered territories, it seems to me vital, therefore, that settlement is carried out by military and not civilian entities. It is also important, in my view, that such settlement is in the framework of camps and is, on the face of it, of a temporary rather than permanent nature.

Even if we settle an army and not civilians, we must, from the point of view of international law, have regard to the question of ownership of the land that we are settling. Article 46 of the Hague Regulations concerning the Laws and Customs of War on Land (Annexes to the Hague Convention (IV) of 1907), regulations that are regarded as a true expression of customary international law that is binding on all countries, states in relation to occupied territory that:

"private property ... must be respected. Private property cannot be confiscated".

As regards state lands, Article 55 of the Hague Regulations stipulates that an occupying state is permitted to administer the property and enjoy the fruits of the property of the occupied state. Even here there are certain limitations on the occupying state's freedom of action, which derive from the occupying state not being the owner of the property but having merely enjoyment of it.

In relation to the property of charitable, religious or educational institutions or municipalities, they are treated under Article 56 of the Hague Regulations as private property.

It will be noted that an order concerning abandoned property (private property) (Order No. 58), issued by Brigadier Narkiss as IDF Commander in the West Bank region (and Order No. 59) concerning state property are in fact in keeping with the provisions of the Hague Regulations on the observance of property rights.

I will now go on to discuss a number of concrete issues pointed out by Mr Yafch.

A. Regarding the possibility of engaging in any kind of agricultural activity and settlement on the Golan Heights, it has to be pointed out that the Golan Heights, which lie outside the area of the mandated Land of Israel, are unequivocally "occupied territory" and are subject to the prohibition on settlement. If it is decided to establish any settlements, it is essential that this be done by the army in the form of camps and that it does not point to the establishment of permanent settlements.

B. In terms of settlement on the [West] Bank, we are trying not to admit that here too it is a matter of "occupied territory". We argue that this area of the Mandate on the Land of Israel was divided in 1949 only according to Armistice Lines, which, under the Armistice agreements themselves, had merely military, not political, significance and were not determinative until the
final settlement. We go on to say that the agreements themselves were achieved as a temporary measure according to Security Council action based on Article 40 of the United Nations Charter. We also argue that Jordan itself unilaterally annexed the West Bank to the Kingdom of Jordan in 1950 and that the Armistice Lines no longer exist because the agreements expired due to the war and Arab aggression. We must nevertheless be aware that the international community has not accepted our argument that the [West] Bank is not ‘normal’ occupied territory and that certain countries (such as Britain in its speeches at the UN) have expressly stated that our status in the [West] Bank is that of an occupying state. In truth, even certain actions by Israel are inconsistent with the claim that the [West] Bank is not occupied territory. For example, Proclamation No. 3 of the IDF Forces Commander in the West Bank of 7.6.67, which brings into force the order concerning security regulations (in Section 35), states that:

“A military court and the administration of a military court will observe the provisions of the Geneva Convention for the Protection of Civilians in Time of War in everything relating to legal proceedings and where there is conflict between this order and the aforementioned Convention, the provisions of the Convention will prevail”.

With regard to Gush Etzion, settlement there could to a certain extent be helped by claiming that this is a return to the settlers’ homes. I assume that there are no difficulties here with the question of property although the matter requires close examination. With regard to Gush Etzion too, we have to expect, in my view, negative international reaction on the basis of Article 49 of the Geneva Convention. Furthermore, in our settlement in Gush Etzion, evidence of intent to annex the [West] Bank to Israel can be seen.

On the possibility of settlement in the Jordan Valley, the legal situation is even more complicated because we cannot claim to be dealing with people returning to their homes and we have to consider that problems of property will arise in the context of the Hague Regulations. I cannot go further into this question without having a lot more detail.

On the issue of the settlement of Arab refugees, which is, in my opinion, a less complex issue from both a political and a legal point of view, I will write separately.

Regards,

[signed]

T. Meron

Copy: Director-General
Mr S. Hill-J
Translator's Note

1. Square brackets indicate where the original was unclear or illegible or where the translator has inserted an explanatory comment of his own.

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