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**Human rights situation in Palestine and other
occupied Arab territories****Report of the Special Rapporteur on the situation of human
rights in the Palestinian territories occupied since 1967*****Note by the Secretariat**

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, submitted pursuant to Commission on Human Rights resolution 1993/2 A and Human Rights Council resolution 5/1. In it, the Special Rapporteur examines the current human rights situation in the Occupied Palestinian Territory, with a particular emphasis on the legal status of the settlements as per the 1998 Rome Statute of the International Criminal Court.

* The present report was submitted after the deadline in order to reflect the most recent developments.

I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, pursuant to Commission on Human Rights resolution 1993/2 A and Council resolution 5/1.

2. The Special Rapporteur would like to note that he has yet to be granted access to the Occupied Palestinian Territory, nor have his requests to meet with the Permanent Representative of Israel to the United Nations been accepted. The Special Rapporteur notes again that access to the Occupied Palestinian Territory is a key element in the development of a comprehensive understanding of the human rights situation on the ground. The Special Rapporteur regrets the lack of opportunity to meet with many of the human rights groups due both to his exclusion from the territory, to travel and meeting barriers put in place by the coronavirus pandemic (COVID-19), and to the barriers that many individuals face should they seek exit permits from the Israeli authorities, particularly from Gaza.

3. The present report is based primarily on written submissions. The Special Rapporteur was unable to travel to the region for further consultations due to COVID-19.

4. In the present report, the Special Rapporteur focuses on the human rights and humanitarian law violations committed by Israel, in accordance with his mandate.¹ The mandate of the Special Rapporteur is focused on the responsibilities of the occupying Power, although the Special Rapporteur notes that human rights violations by any State or non-State actor are deplorable and only hinder the prospects for peace.

5. The Special Rapporteur wishes to express his appreciation for the full cooperation extended to his mandate by the Government of the State of Palestine. The Special Rapporteur further acknowledges the essential work of civil society organizations and human rights defenders to create an environment in which human rights are respected and violations of human rights and international humanitarian law are not committed with impunity and without witnesses.

II. Current human rights situation

6. The human rights situation of Palestinians in the West Bank, East Jerusalem and Gaza was marked by a significant deterioration towards the end of the period due to an escalation in violence in the month of May 2021. Although it is not possible to provide a comprehensive review of all human rights concerns since the last report to the Human Rights Council, submitted at its forty-fourth session,² the Rapporteur would like to highlight several issues of concern including the recent escalation of violence, the situation in Sheikh Jarrah and forced displacement, impact of forced displacement and demolitions on children and accountability by third states.

A. Recent escalation and impact on civilians

7. Over a period of two weeks in May 2021, the human rights situation in the occupied Palestinian territory significantly deteriorated and reached the highest levels of violence and civilian casualties in Gaza and across the West Bank, including East Jerusalem, in years. Tensions had escalated against the backdrop of impending forced displacement of Palestinian families from their homes in the east Jerusalem neighbourhoods of Sheikh Jarrah and Silwan. In parallel and during the last days of Ramadan, Israeli Security Forces further restricted Palestinian worshippers' access to al-Aqsa mosque/compound and limited their movement while using excessive force within the mosque itself thus further aggravating tensions. On 10 May, the situation escalated militarily between Gaza armed groups and Israel. At the same time, Palestinian demonstrations spread from East Jerusalem and the West Bank to various

¹ As specified in the mandate of the Special Rapporteur set out in Commission on Human Rights resolution 1993/2 A.

² A/HRC/44/60.

parts of Israel, particularly in mixed cities leading to violence primarily by right wing Israeli extremist groups against Palestinians.³

8. From 10- 20 May and in the aftermath of rocket fire from armed groups, Israel, with its vastly superior firepower, launched intensive airstrikes against targets in Gaza from the land and sea which resulted in the death of 256 Palestinians including 66 children and 40 women. Thousands of others have been injured and over 74,000 Palestinians have been displaced.⁴ In the West Bank, including East Jerusalem, 28 Palestinians, including five children, were killed as of 24 May. 10 Israeli citizens and residents were killed as a result of rockets fired from Gaza and damage to civilian infrastructure and houses was reported in many areas. A ceasefire was reached on 21 May, however, tensions remain high in the occupied Palestinian territory and in Israel.⁵

9. Israeli attacks on Gaza resulted in civilian deaths and injuries, as well as large-scale destruction and damage to civilian objects. Those include governmental buildings, residential homes and apartment buildings, international humanitarian organizations, medical facilities, media offices and roads connecting civilians to essential services such as hospitals. Indiscriminate and disproportionate attacks on civilians and civilian objects, may constitute war crimes”.⁶

10. This escalation is the fourth of its kind since 2008, with more yet to come if the root causes of such violence are not addressed. These latest events made it abundantly clear that the persistent discrimination against Palestinians throughout the West Bank and East Jerusalem, threats of forced displacement, forced displacement, demolitions, settlement expansion and settler violence and the 14 year blockade of Gaza – to name but a few – all contributed to and will continue to contribute to cycles of violence.

11. On 27 May, the Human Rights Council adopted resolution A/HRC/S-30/L.1: Ensuring respect for international humanitarian law and international human rights law, in which the Council requested the High Commissioner to update the Council, at its forty-eighth session on progress made on the resolution and report to the Human Rights Council and the General Assembly on an annual basis. The resolution mandates the Human Rights Council to urgently establish an ongoing, independent, international commission of inquiry to investigate in the occupied Palestinian territory and in Israel all alleged violations and abuses of international human rights law leading up and since 13 April 2021 and all underlying root causes of recurrent tensions, instability and protraction of conflict. The Special Rapporteur welcomes this creation of this commission of inquiry.

12. Human rights organisations have estimated that the recent escalation will have considerable long-term effects on the infrastructure in Gaza and in particular on water, sanitation and electricity – all of which were already in a dire state. OCHA has estimated that as a result of the escalation 400,000 people have no regular access to safe piped water, 58 education facilities were damaged, 1,165 housing and commercial units were destroyed, nine hospitals were partially damaged, and 19 clinics were damaged.⁷ The ten-day Israeli bombardment resulted in damage to numerous civilian infrastructure, including 18 sewage water pumps, and 18,734 meters of the sewage networks that were damaged in attacks. Four central sewage treatment stations were inoperable during the attacks as staff could not travel to their workplace.⁸

13. COVID-19 prevention measures as well as testing and vaccination have been severely disrupted as a result of the escalation, with OCHA reporting that as of June 2021, testing is limited to symptomatic people reporting to hospitals.⁹ In addition, reportedly, people requiring urgent medical care outside of Gaza were not allowed to leave in the period between

³ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27095&LangID=E>

⁴ <https://www.ochaopt.org/poc/24-31-may-2021#:~:text=Reports%20on%20the%2010%2D21,the%20local%20Ministry%20of%20Health.>

⁵ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27116&LangID=E>

⁶ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27116&LangID=E>

⁷ <https://www.ochaopt.org/content/gaza-strip-escalation-hostilities-3-june-2021>

⁸ <http://mezan.org/en/uploads/files/16243521581299.pdf> pages 2-3

⁹ <https://www.ochaopt.org/content/response-escalation-opt-situation-report-no-3-4-10-june-2021>

11 May and 3 June due to the closing of Erez and Kerem Shalom crossings- well beyond the date of the cease-fire agreement.¹⁰ NGOs repeatedly warned that this policy is extremely unreasonable and puts lives at risk.¹¹

B. Gaza

14. The Israeli-imposed land, sea and air blockade of Gaza is now 14 years old, and continues to trap two million people with little hope for the future or option of leaving. The situation in the Gaza Strip continued to be dire, even prior to the recent escalation of May 2021, as a result of the blockade and the impact of COVID-19.

15. A spike in COVID-19 cases in early May 2021, led the Palestinian Ministry of Health to declare almost all of the Gaza Strip a “red zone”, noting that the increase in cases has an impact on all aspects of life in Gaza.¹² Following the suspension of coordination between the Government of Palestine and Israel in May 2020 and the introduction of new criteria for the submission of exit permits requiring only urgent medical referrals to be processed, fewer Palestinians were able to benefit from access to life-saving treatment outside of Gaza.¹³ This resulted in a dramatic drop in exits from Gaza, from approximately 21,032 exits recorded in Erez Crossing in February 2020 to 5,533 exits recorded in March 2020. In May and April 2020 only 222 and 213 exits were recorded respectively.¹⁴

16. The available power supply in Gaza, continues to be dangerously low impacting all aspects of life including health care, water, water treatment and sewage. In August 2020, Israel closed the crossings with Gaza for three weeks and stopped the fuel supply following Hamas’s launches of incendiary balloons.¹⁵ Following the re-opening of the crossings on 1 September, power supply went back to eight-hour rotations.¹⁶ More recently, in June 2021, Israeli authorities continued to ban fuel shipments into Gaza, thereby fuelling the ongoing electricity crisis despite a recent increase in the supply by the Gaza Electricity Distribution Company (GEDCO). The deficit in power is estimated at 69 percent of its demand as of June 2021, resulting in approximately six-12 hours of electricity per day.¹⁷ Approximately 902,600 citizens in Gaza were left without any power at all during the 10 days of escalation.

17. Gaza humanitarian aid worker, Mohammad el-Halabi, continues to be detained by Israeli authorities as reports suggest that closing arguments in his case are being presented by his lawyer. He was arrested in June 2016 on allegations that he diverted millions of dollars in development to armed groups in Gaza. He denies these charges, and a financial audit by his employer, World Vision, uncovered no evidence of misappropriation of funds. Mr. el-Halabi has attended more than 150 court hearings so far during this period. The Special Rapporteur had raised serious concerns that Mr. el-Halabi was not granted a fair trial, given that the prosecution relied on secret evidence, did not initially allow him access to a lawyer and that his confessions were obtained by force.¹⁸ The Special Rapporteur reiterates his call for Israel to grant him a fair trial or immediately release him.

C. The emblematic cases of Sheikh Jarrah and Silwan

18. The situation in East Jerusalem continues to be extremely tense as many Palestinian families face the risk of imminent forced displacement by Israeli authorities. The case of the neighbourhood of Sheikh Jarrah, where eight families face forced displacement, four of them

¹⁰ <https://gisha.org/en/israel-continues-to-ban-exit-of-goods-from-gaza-cancer-patients-exit-in-first-since-may-11/>

¹¹ https://gisha.org/UserFiles/File/letters/Gisha_PHRI_HaMoked_Adalah_letter_May_26_2021.pdf

¹² [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01055-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01055-2/fulltext)

¹³ A/HRC/46/63, para.43

¹⁴ <https://features.gisha.org/gaza-up-close/>

¹⁵ https://www.btselem.org/gaza_strip/20201029_gaza_electricity_crisis_deepens_summer_2020

¹⁶ https://www.btselem.org/gaza_strip/20201029_gaza_electricity_crisis_deepens_summer_2020

¹⁷ http://mezan.org/en/uploads/files/16243521581299.pdf_p.3

¹⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26496&LangID=E>

imminent,¹⁹ has become emblematic of the threats of forced displacement facing many Palestinian families in East Jerusalem with the aim of establishing a Jewish majority in the city and creating irreversible demographic facts on the ground. It also underlines Israeli attempts to permanently change the Palestinians character of East Jerusalem and pave the way for further settler expansion, further cementing the Israeli annexation. Israeli settler organizations have particularly intensified their applications for evictions, significantly increasing the number of lawsuits facing these families and pressure by settler groups who, with the protection of Israeli police, continue to provoke and attack Palestinian inhabitants. The Special Rapporteur stresses that eviction orders if carried out would amount to a violation by Israel, the occupying power, of the prohibition against the forcible transfer of the protected population under Article 49 of the Fourth Geneva Convention.²⁰ Israel cannot apply its own laws in territory that is considered occupied under international law.

19. In May-June 2021, Palestinian families residing in the neighbourhood with the support of activists have mobilized to prevent these forced displacements from taking place including through peaceful demonstrations, sit-ins and the use of social media campaigns.²¹ Israeli police has responded to the demonstrations by fortifying the neighbourhood through the establishment of multiple road blocks thus severely limiting the movement of inhabitants. Israeli Security Forces have also arrested a number of activists and journalists covering events around the neighbourhood and have used excessive force against demonstrators.²² Other East Jerusalem neighbourhoods face the same threats of forced displacement including Batn el Hawa - a neighbourhood of Silwan. In total, more than 970 people including 424 children are facing the risk of displacement according to OCHA.²³ The latest escalation in May 2021, of which events at Sheikh Jarrah were one of the main triggers, demonstrates that the status of East Jerusalem neighbourhoods and the possible outcome of current eviction lawsuits will have a determinant impact on the overall situation in the Occupied Palestinian Territory and future escalation. On 10 May, the Israeli Supreme Court had postponed its ruling on the possible forced displacement of four of those families in Sheikh Jarrah.

D. Violations of rights of Palestinian university academic staff and students

20. Patterns of arrest and harassment of Palestinian university students and professors have recently intensified. Birzeit University in Ramallah has been particularly targeted by Israeli Security Forces with more than 74 arrests of students reported there between September 2019 and January 2020 alone.²⁴ On 21 October 2020 and in a serious escalation, Israeli military officially labelled the student bloc in Beirzeit University as “prohibited terrorist organization” thus criminalizing its work on campus and further justifying further arrests of students on these grounds.²⁵ Many of those arrested have reportedly been tortured physically and mentally.²⁶ The Special Rapporteur expresses serious concerns about patterns of targeting staff and students of Palestinians universities. He stresses that these violent arrests by the occupying power, Israel, violate the right of students to freedom of speech and association, particularly in universities which should be beacons for these freedoms. He further underlines that it is the responsibility of the occupying to ensure the right to education is respected.

¹⁹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27067&LangID=E>

²⁰ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26648&LangID=E>

²¹ <https://www.aljazeera.com/opinions/2021/6/10/why-israel-is-so-desperate-to-silence-savesheikhjarrah>

²² <https://www.aljazeera.com/gallery/2021/6/22/israeli-police-attack-palestinian-protesters-in-sheikh-jarrah>

²³ <https://www.ochaopt.org/content/palestinian-family-evicted-its-home-east-jerusalem>

²⁴ <https://www.ohchr.org/EN/Issues/Detention/Pages/Opinions90thSession.aspx>

²⁵ <https://mesana.org/advocacy/committee-on-academic-freedom/2021/04/13/protesting-ongoing-policy-of-arrests-and-detention-of-students-in-palestinian-universities>

²⁶ <https://mesana.org/advocacy/committee-on-academic-freedom/2021/04/13/protesting-ongoing-policy-of-arrests-and-detention-of-students-in-palestinian-universities>

E. Impact of Israeli policies on children: home demolitions and detention

21. Since the beginning of 2021, Israeli authorities have demolished or seized 387 Palestinian structures, resulting in the displacement of 309 children during a global pandemic.²⁷ The experience of demolitions severely impacts the livelihood and the mental state of children and their families. According to a study conducted by Save the Children, many families have lost their access to services, such as health care, water and electricity, in addition to loss of food security.²⁸

22. Children living in areas under full Israeli security control have been the most affected, given that demolitions and confiscations have markedly increased there. Consequent displacement and relocation negatively affect their education, their relationship with their parents and their connection to the community.²⁹ The traumatic experience of being expelled also changes their behaviour overall. The Special Rapporteur is extremely concerned about the impact of home demolitions on children which may also affect generations to come. It also revives trauma that parents went through already through their own experience of dispossession and displacement. He calls for an immediate halt to all demolitions which constitute a serious violation of international humanitarian law.

23. According to the Palestinian NGO Addameer, 4809 Palestinians have been detained by Israeli authorities between January 2021 and May 2021, 582 of whom were children. Israeli Security Forces detain and persecute on average 500-700 Palestinian children per year.³⁰ Palestinian children may be held in military courts, where their detention could be extended up to 10 days before referral to other courts, according to military orders 1711 and 1726. In addition, military order 1651 defines children in the occupied territories as persons under the age of 16, contradicting the first article of the convention on the rights of the child. On the other hand, Israeli children get persecuted in civil juvenile courts, where children are defined as persons below the age of 18. In contrast, Palestinian children are treated as adults in prisons and courts. The Special Rapporteur is alarmed by the number of children in detention and also conditions of their arrest while calling Israel to immediately stop this practise which is in clear contravention of international law and should be used only as a last resort.

F. Accountability Measures by Third States

24. Third states, who have their own set of responsibilities in relation to the situation in Israel and the OPT, have failed thus far to ensure that Israel complies with the international humanitarian law. Although many states have recognised the illegality of settlements under international law and have issued condemnations, few have taken any significant action. In an important development however, on 26 May 2021, the Irish Parliament passed a notion condemning the “de facto annexation” of Palestinian land by Israeli authorities. The notion passed in the Parliament after receiving cross-party support. Ireland was the first country to take such a position and recognise that Israel has de-facto already annexed large areas of the West Bank.³¹

25. The database on business enterprises’ activities in the settlements, published in February 2020 which I welcomed in my report of July 2020 to the Human Rights Council, may be seen as another step towards accountability.³² The purpose of the database is among

²⁷ OCHA

<https://app.powerbi.com/view?r=eyJrIjoieMmJkZGRhYWQtdODk0MS00MWJkLWI2NTktMDg1NGJlMGNiY2Y3IiwidCI6IjBmOWUzNWRiLlTU0NGYtNGY2MC1iZGNjLTViYTQxNmU2ZGM3MCI9ImMiOjh9>

²⁸ Save the Children, Hope under the Rubble, War on Want, “Judge, Jury, and Occupier”, report March 2021, https://waronwant.org/sites/default/files/2021-03/Judge_Jury_Occupier_report_War_on_Want.pdf

²⁹ Ibid.

³⁰ Addameer, <https://www.addameer.org/statistics>

³¹ <https://www.aljazeera.com/news/2021/5/26/ireland-recognises-israels-de-facto-annexation-of-palestine>

³² A/HRC/44/60 para.14

other things to assist states in ensuring that companies domiciled in their territory and/or under their jurisdiction respect human rights. The report submitted by OHCHR to the Human Rights Council in its 43rd session (A/HRC/43/71), was an important step in the direction of accountability and outlines 112 business enterprises that have had business activities related to the settlements. Despite the report clearly recognising that the Human Rights Council mandated the work on the database and its continuous nature, the High Commissioner for Human Rights stated in her speech to the Council's 46 session that: "Any further work in this area can only be discharged consistent with the Organization's budgetary process applicable to funding mandates of the Council."³³ Given the Report's temporal limitations (limited to the period between January 2018 and August 2019), and the fact that it only included a fraction of the business enterprises with activities in the settlements, a lack of continuity of the work on the database may result in a devastating setback to any progress made by States or companies to ensure that companies respect human rights by fulling ending their activities in the settlements.

III. Legal Status of Israeli Settlements under the Rome Statute³⁴

26. In July 1998, delegates from 120 states voted in favour of the negotiated text of the Rome Statute of the International Criminal Court.³⁵ The Rome Statute created, for the first time, a permanent international court to try alleged perpetrators of war crimes, crimes against humanity and other serious international crimes. It built upon the legacy of the Nuremberg and Tokyo military tribunals established after the Second World War, as well as the war crimes tribunals for Rwanda, the former Yugoslavia, Cambodia and Sierra Leone set up in the 1990s and 2000s. The ICC came into being in July 2002.

27. In its preamble, the Rome Statute proclaimed the international community's purposes for creating the International Criminal Court (ICC). Citing universal values and the Charter of the United Nations, the Statute recognized that the most serious of international crimes threaten the peace, security and well-being of the world, that these crimes must not go unpunished and that international cooperation is essential to combat these crimes. The final goal is to guarantee "lasting respect for, and the enforcement of, international justice." In his speech to the delegates in Rome upon the adoption of the Statute, UN General Secretary Kofi Annan remarked that this accomplishment would repudiate the bleak observation by Marcus Tullius Cicero from two thousand years ago that: "in the midst of arms, law stands mute."³⁶

28. Among the expressly listed war crimes in the Rome Statute is the transfer, directly or indirectly, by an occupying power of parts of its own population into the territory it occupies.³⁷ Its inclusion was deliberate, appropriate and linear. The prohibition against settler implantation by an occupying power was first entrenched into international law through the Fourth Geneva Convention of 1949. It was subsequently characterized as a "grave breach" and a "war crime" by the 1977 Additional Protocol 1 to the Conventions.

29. The phenomenon of settler implantation has historically involved the transfer by an empire or expansionary state of some of its own citizens or subjects into lands that it has acquired through conquest or occupation. These lands may have been already swept clean of their inhabitants, but more commonly they are still populated by some or all of the indigenous peoples. The conquering power's objectives in implanting settlers have been to solidify its political and military control, augment its economic penetration, and ultimately bolster its legal claim to permanent sovereignty over the subjugated lands. The transferred settlers are almost always willing citizens or subjects of the dominant power, motivated by government

³³ <https://www.ohchr.org/SP/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26913&LangID=S>

³⁴ The Special Rapporteur is extremely grateful for the high quality submissions for this report from academic institutions in Brazil, Colombia and Italy, from human rights defenders in Palestine, Israel and the United Kingdom, and from UNRWA. He is also appreciative of the pro bono research conducted by law students at Western University. These submissions have substantially enhanced this report.

³⁵ 2187 UNTS 90.

³⁶ <https://www.un.org/press/en/1998/19980720.12890.html>

³⁷ *Supra*, note 35, Article 8(2)(b)(viii).

inducements, enhanced economic prospects, special legal and political privileges in the subjugated lands, and, on occasion, by nationalist, religious or civilizing missions.³⁸

30. The flip side of the coin of settler implantation is the rupture of the established relationship between the indigenous population and its traditional territory and lands through demographic engineering. The common bond of any original society is the link between community and territory. Accordingly, the exercise of the right to self-determination is substantially abrogated if that link is disrupted through territorial alienation, the deliberate loss of majority status, or the inability of an occupied or subjugated people to control its political destiny. Indeed, the rupture of this link is not only the frequent consequence of settler implantation, but invariably its very purpose. Needless to say, settler implantation projects throughout history have invariably occurred regardless of, and almost always against, the wishes of the indigenous population.³⁹

31. A significant United Nations report in 1993 on populations transfers determined that the consequences of settler implantation projects are usually multifold, calamitous and long-term: military subjugation, indigenous civilian misery, environmental degradation, separate and unequal social structures, entrenched legal discrimination, segregated labour markets, the denial of political rights and the cycle of repression, resistance and instability.⁴⁰ Once the process of settler implantation has gained momentum, the UN report observed that the occupying power will often assert that:

...humanitarian concerns compel it to remain in the territory to extend its protection to the implanted population. This argument may be combined with other ideological claims concerning the occupier's 'right' to possess the territory for putative security and humanitarian reasons, or even on the basis of rights, such as 'historical rights', which have no legal basis.⁴¹

32. As Patrick Wolfe has explained, settler colonialism, which encompasses settler implantation, is not an event but an enduring structure. It is not simply a historical moment of conquest but rather becomes an unfolding process of subjugation, entrenched through the political, social, economic, military and legal institutions of the conquering or occupying power.⁴² Examples from history include the European conquest of the Americas, the British settlement of Scottish and English Protestants into Catholic Ireland; the French in Algeria; the Dutch and the British in South Africa; the British in Kenya; and the Soviet Union's infusion of Russians into the Baltic republics.⁴³

33. This section of the report will explore the question as to whether the Israeli settlements in the occupied Palestinian territory constitute a war crime under the Rome Statute. As such, the report will first review the place of the prohibition against population transfer and settler implantation in international humanitarian, human rights and criminal law. It will then examine the history and character of the Israeli settlements, the role of the Israeli government in developing and expanding the settlements, before assessing their legal status under the Rome Statute.

³⁸ C. Palley, "Population Transfers", D. Gomien, *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide* (Oslo: Scandinavian University Press, 1993).

³⁹ United Nations Economic and Social Council, E/CN.4/Sub.2/1994/18, at para.131: "International law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because the transfer of populations is subject to consent, this principle reinforces the prohibition against such transfer."

⁴⁰ E/CN.4/Sub.2/1993/17.

⁴¹ *Ibid*, at para. 35.

⁴² P. Wolfe, "Settler Colonialism and the Elimination of the Native," (2006) 8:4 *Journal of Genocide Research* 387.

⁴³ Generally: D. Brusca, "Unpopular Population Transfers: Defining Violations of and Remedies Under Geneva Convention Article 49(6)" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.

A. International Law and Settler Implantation

(i) *The Fourth Geneva Convention of 1949*

34. Prior to the creation of the Fourth Geneva Convention, The Hague Regulations of 1907 set out many of the laws and customs of war as they stood at the beginning of the 20th century.⁴⁴ The Regulations do not expressly prohibit the transfer of settler from the occupying power into the occupied territory. However, the provisions in the Regulations restrict the actions of the occupying power to such an extent that any attempt to demographically transform the subjugated territory would be effectively prohibited. Article 43 compels the occupying power to respect the laws in force in the occupied territory. Article 46 provides that private property must be respected and not confiscated. And Article 55 designates the occupying power as the administrator and usufructuary – in effect, the trustee – of public property during the period of actual control. All of these provisions emphasize the inherent temporariness of the occupation.

35. The purpose of the Fourth Geneva Convention (GCIV) is to protect civilians during situations of armed conflict. Among its many protections, the GCIV expressly prohibits an occupying power from implanting civilian settlers of its own population into the occupied territory in Article 49(6):

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

36. Its objective is to preserve the demographic and social structure of the occupied territory,⁴⁵ and to forbid attempts to change this make-up by the occupying power.⁴⁶ Article 147 of the DCIV establishes the gravity of the prohibition.

37. Three principles in particular are important to stress.

38. First, the limitation on the role of the occupying power is explicitly cited: “The Occupying Power shall not...” This provides that the occupier, and any state or private institutions that may come under its control or direction, cannot take any steps to alter the population character of the territory that it occupies.⁴⁷ Accordingly, Paragraph 6 is breached when the occupying power, whether through active recruitment, wilful passivity or benign neglect, permits civilians from its own population to re-settle in the occupied lands with the intent of altering its demographic character. This is a significant interdiction since settler implantation enterprises in an occupied territory have rarely been successful without direct state involvement or at least some significant state compliance.

39. Second, the prohibition in Article 49(6) extends to the voluntary and consensual transfer of civilians from the occupying power to the occupied lands, and is not limited merely to an involuntary re-settlement (“deport”) by the occupier of some of its civilian population. Notably, the term “forcible” does not appear in the paragraph, connoting a

⁴⁴ 36 Stat. 2277, T.S. No.539.

⁴⁵ The International Committee of the Red Cross, at a conference of the High Contracting Parties to the Fourth Geneva Convention in December 2001, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5FLDPJ>, issued a formal statement which commented on the obligations of Israel as an occupier, at Annexe 2, para.3: “Being only a temporary administrator of occupied territory, the Occupying Power must not interfere with its original economic and social structures, organization, legal system or demography.”

⁴⁶ See the commentary on Article 49(6) by the International Committee of the Red Cross, found at: <http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>: “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 claim, to colonize those territories. Such transfers worsened the situation of the native population and endangered their separate existence as a race.”

⁴⁷ The 1993 UN report, *ibid*, note 40, stated at para.15: “The State’s role in population transfer may be active or passive, but nonetheless contributes to the systematic, coercive and deliberate nature of the movement of population in or out of an area. Thus, an element of official force, coercion, or benign neglect is present in the State practice or policy. The State’s role may involve financial subsidies, planning, public information, military action, recruitment of settlers, legislation or other judicial action, and even the administration of justice.”

broad meaning than the prohibition against “forcible transfers” in Article 49(1) of the GCIV. As well, it is apparent that the terms “deport” and “transfer” in Article 49(6) have a distinct meaning from their use elsewhere in the Article.⁴⁸ The International Court of Justice has stated that Article 49(6) should be understood in a broad fashion, as it:

“...prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any transfers taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”⁴⁹

40. The third principle is that Article 49(6) permits no exceptions. The broad wording of the prohibition is not circumscribed by subsequent limitations, as with Article 49(1). As well, the negotiating history of the Convention does not contain any expressions of caution or recommended restrictions by the delegates, and the votes approving the provision both in committee and in plenary were unanimous.⁵⁰ The occupying power is permitted to send military forces and civil servants into the territory in order to administer the occupation, but the transferring of any part of a civilian population as settlers is categorically forbidden.

41. The temporariness of an occupation and the full preservation of the national rights and the territorial integrity of the ousted sovereign – the protected population – lie at the very core of international humanitarian law. In his 1958 commentary on the Fourth Geneva Convention, Jean Pictet stated that: “The occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied power of neither its statehood nor its sovereignty.”⁵¹ As for annexation, the United Nations Security Council has affirmed on at least 11 occasions since 1967 – consistent with Article 2(4) of the *Charter of the United Nations* – that the acquisition of territory by war or force is inadmissible.⁵² Neither conquest nor occupation confer title.⁵³ The occupying power must administer the occupation in good faith consistent with international law, and it must seek to fully terminate the occupation as soon as reasonably possible.⁵⁴ The very *raison d'être* of settler implantation – the creation of demographic facts on the ground to solidify a permanent presence, a consolidation of alien political control and a claim of sovereignty – tramples upon the fundamental precepts of humanitarian law.

(ii) International Human Rights Law

42. The logic and the dynamic of settler implantation – rupturing the relationship between an indigenous people and its territory – is the denial of the right to self-determination. Self-determination is both a *jus cogens* right (which means that it is a fundamental principle of international law),⁵⁵ and a right *erga omnes* (meaning that it is a right owed to all).⁵⁶ This right has been placed in the opening articles of the Charter of the United Nations and the two International Covenants of 1966 precisely to underscore the fact that the realization of all other individual and collective human rights depends upon the ability to exercise this cornerstone right.⁵⁷ Flowing from this cardinal principle, the international community has prohibited the demographic manipulation of a territory through settler implantation because

⁴⁸ <http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument>

⁴⁹ *Wall Advisory Opinion*, (2004), 43 ILM 1009, at para.120.

⁵⁰ *Final Record of the Diplomatic Conference of Geneva of 1949* (6th ed.) (Buffalo: William S. Hein & Co., 2005).

⁵¹ https://www.loc.gov/law/mlr/pdf/GC_1949-IV.pdf

⁵² Most recently in UNSC Resolution 2334 (23 December 2016).

⁵³ C. Tomuschat, “Prohibition of Settlements”, in A. Clapham et al (eds.), *The 1949 Geneva Conventions: A Commentary* (Oxford, University Press, 2015), chap.73.

⁵⁴ A/72/556, paras.32-38.

⁵⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002), at 246-7.

⁵⁶ *Wall Advisory Opinion*, *supra*, note.49, at para.155.

⁵⁷ Both the *International Covenant on Civil and Political Rights* (ICCPR), 999 UNTS 171, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 993 UNTS 3, state in Article 1(1) that: “All peoples have the right of self-determination.”

it is incompatible with the fundamental rights of a people to retain its distinct identity and to freely determine its destiny on its own territory.⁵⁸

43. In addition to self-determination, settler implantation projects frequently violate a range of protected individual and collective rights in international human rights law to which the indigenous population is entitled. As Awn Al-Khasawneh, Special Rapporteur for the United Nations Commission on Human Rights (and later a judge on the International Court of Justice), concluded in a 1997 UN report: “The range of rights violated by population transfer and the implantation of settlers places this phenomenon in the category of mass violations of human rights.”⁵⁹

44. These rights include the freedom of movement,⁶⁰ the ability to work,⁶¹ the rights to housing and to own and enjoy property,⁶² the inherent right to life,⁶³ the right to engage in political activity,⁶⁴ the right to liberty and security of the person,⁶⁵ the right to an adequate standard of living,⁶⁶ and the right to be free from arbitrary interference with one’s privacy, family and home.⁶⁷

45. Collectively, the practice of infusing citizens from the dominant power into the homeland of others commonly infringes the rights of the inhabitants to control their natural resources,⁶⁸ the right to their own culture, religious practices and heritage,⁶⁹ and their right to economic and social development.⁷⁰ A regime of special legal and political entitlements reserved only for the settler population creates a colonial or apartheid-like governing structure, infringing the right of the indigenous population to equality,⁷¹ as well as the right to be free from racial and ethnic discrimination and apartheid.⁷²

(iii) Additional Protocol 1 to the Geneva Conventions

46. The designation of settler implantation as a “grave breach” under international humanitarian law was affirmed in 1977 by the adoption of the Additional Protocols to the Geneva Conventions.⁷³ Article 85 of Additional Protocol I lists the acts of armed conflict which would be considered as “grave breaches”, including, in Article 85(4)(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.”

⁵⁸ E. Kolodner, “Population Transfer: The Effects of Settler Infusion Policies on a Host Population’s Right to Self-Determination” (1994), 27 *New York University Journal of International Law and Politics* 159.

⁵⁹ United Nations Economic and Social Council, E/CN.4/Sub.2/1997/23, at para.16.

⁶⁰ ICCPR, *supra*, note. 57, at Article 12. According to the 1993 UN report, *supra*, note.40, para.227, restrictions on the movements of the indigenous inhabitants is a common method “...employed to make way for the settlement of persons belonging to a dominant ethnic group or the occupying power, with the aim of extending control over a territory or the dispersal or effective control of the original inhabitants of the territory.”

⁶¹ ICESCR, *supra*, note.57, at Articles 6 & 7. According to the 1993 UN report, *ibid*, at para.235: “The right to work...cannot but be impaired in the process of transferring populations.”

⁶² ICESCR, *ibid*, at Articles 6 and 7. According to the 1993 UN report, *ibid*, at para.236: “...countries illegally occupying territories commonly use housing policies as a tool for favouring their own citizens at the expense of the rights of the original inhabitants, particularly through the use of planning laws and practices of population transfer.”

⁶³ ICCPR, *supra*, note 57, at Article 6.

⁶⁴ *Ibid*, at Article 25.

⁶⁵ *Ibid*, at Article 9.

⁶⁶ ICESCR, *supra*, note 57.at Article 11.

⁶⁷ ICCPR, *supra*, note 57.at Articles 12 & 23.

⁶⁸ ICESCR, *supra*, note 57.at Article 1.

⁶⁹ ICCPR, *supra*, note 57.at Article 27.

⁷⁰ ICCPR, *ibid*, at Article 1;

⁷¹ ICCPR, *ibid*, at Articles 2 & 26.

⁷² ICCPR, *ibid*, at Articles 2 & 26.

⁷³ 1125 UNTS 3.

47. Importantly, Additional Protocol I also elevated the prohibition to a “war crime.” Article 85(5) states that: “...grave breaches of these instruments shall be regarded as war crimes.” According to the ICRC commentary on the Protocol, the elevation of the gravity of this prohibition is because of the “possible consequences for the population of the territory concerned from a humanitarian point of view.”⁷⁴

(iv) Customary International Humanitarian Law

48. Customary international law is the “general practice accepted as law.”⁷⁵ It is among the primary sources of international law. A general practice becomes part of customary international law when the consistent conduct of states over a period of time is accepted by the international community as having established an obligatory rule of behaviour.⁷⁶ As well, a critical component in the creation of customary international law is the belief by states – *opinio juris* – that following a particular action has become a legal obligation. Once a general practice has been accepted as part of customary international law, it becomes binding even upon those states who have not accepted the particular practice as a legal obligation.

49. The International Committee of the Red Cross (ICRC), in its comprehensive 2005 study on customary international humanitarian law,⁷⁷ stated in Rule 130 that the prohibition against population transfers and settler implantation – “States may not deport or transfer parts of their own civilian population to a territory they occupy” – has become a part of customary international law. The ICRC study noted the widespread adoption of the prohibition through state practice and legislation, in military manuals, through resolutions of various deliberative bodies of the United Nations, through universal ratification and by statements from international organizations.

B. The Rome Statute and Settler Implantation

50. Article 8 of the Rome Statute provides the ICC with jurisdiction over an extensive list of codified war crimes “in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes”⁷⁸ during international armed conflict. The list includes all of the grave breaches expressly prohibited by GCIV and the 1977 Additional Protocol I. Among the proscribed war crimes, as detailed in Article 8(2)(b)(viii), is:

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

51. Article 8(2)(b)(viii) is very similar to the language found in Article 49(6) of the Fourth Geneva Convention, with one notable addition. The provision adds the term “directly or indirectly,” which aims to clarify the express scope of the provision to include any active or passive support by the occupying power of a settler implantation project, such as settlement protection measures and economic incentives, subsidies, tax exemptions and discriminatory permits.⁷⁹ Legal commentators have taken the view that the addition of the term “directly or indirectly” in Article 8(2)(b)(viii) confirms, and does not add any substantive change to, the already extensive scope of its Geneva antecedents.⁸⁰ Israel voted against the 1998 Statute at the Rome conference precisely because of the inclusion of Article 8(2)(b)(viii).⁸¹

⁷⁴ Treaties, States parties, and Commentaries - Additional Protocol (I) to the Geneva Conventions, 1977 - 85 - Repression of breaches of this Protocol - Commentary of 1987 (icrc.org), at para.3504.

⁷⁵ Statute of the Court | International Court of Justice (icj-cij.org), Article 38(1)(b).

⁷⁶ G. von Glahn & J. Taulbee, *Law Among Nations* (Routledge, 2017) (11th ed.), chap.3.

⁷⁷ Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Geneva: I.C.R.C.,2005),462-463.

⁷⁸ *Supra*, note.35, at Article 8(1).

⁷⁹ G. Poissonnier & E. David, “Israeli Settlements in the West Bank, a War Crime?” (2020), 17 *Revue des droits de l’homme* 1.

⁸⁰ M. Kearney, “On the Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory”, (2017), 28 *Criminal Law Forum*, 1, at 20-22.

⁸¹ http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/7/Judge+Eli+Nathan +at+UN+Diplomatic+Conference+of+Pl.htm

52. Following the Rome conference, the Assembly of State Parties to the Rome Statute directed a Preparatory Commission to create an interpretative guide to the enumerated crimes. The purpose of the text was to aid the Court in the interpretation and application of Articles 6 (Genocide), 7 (Crimes Against Humanity) and 8 (War Crimes) by establishing the material and mental elements necessary to constitute these crimes. The final text of the Elements of Crime was subsequently adopted in 2000,⁸² and the language agreed upon for Article 8(2)(b)(viii) requires three features of the crime of settler implantation are to be satisfied in order to establish a breach:

Elements

1. The perpetrator:
 - (a) Transferred,(44) directly or indirectly, parts of its own population into the territory it occupies; or
 - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

(44) The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

53. The Assembly of State Parties agreed to leave the interpretation of the term “transfer” to a future court, to be decided in accordance with the relevant provisions of international humanitarian law. This should not be a difficult task. The clarity of the actual language in the Rome Statute, together with its extensive antecedents in the development of 20th century international humanitarian law, would invite a liberal and purposive reading. Such a reading would prohibit voluntary as well as involuntary settler implantation enterprises. It would also forbid passive as well as active governmental support by the occupying power for a settlement project, while requiring as a threshold some critical mass of civilian settlers from the occupying power, although not necessarily a particularly large number.

54. The purposive application of the Rome Statute extends individual criminal liability throughout the senior governmental, administrative and military levels of command of the occupying power for those who knowingly instigated, planned, directed, facilitated, approved, participated in or carried out the settlement project. It would also include those who intentionally or negligently failed to act within the responsibilities of their position to prevent the implementation of the project.⁸³

C. Israel, the Occupation and the Settlements

55. The creation and expansion of Israel’s settlements in the occupied Palestinian territory is the state’s largest and most ambitious national project since its founding in 1948.⁸⁴ Starting

⁸² *Report of the Preparatory Commission for the International Criminal Court on the Elements of Crime* PCNICC/2000/1/Add.2.

⁸³ Article 25(3) of the *Rome Statute* lays out the broad circumstances when a person shall be criminally responsible for a crime. This includes: (a) the actual commission of the crime, (b) the ordering, soliciting or inducing of the crime, (c) the facilitating, aiding, abetting or otherwise assisting in the crime, and (d) otherwise intentionally contributing to the crime. Article 28 establishes a broad liability on the superior command. Article 33 limits, but does not entirely remove, the defence by a subordinate that he or she was obeying orders issued by a superior.

⁸⁴ M. Klein, *Ha'aretz* (15 June 2019): “Israel’s territorial expansion project and control over the Palestinian population is the largest state/national project the country has ever carried out...Almost the entire state is invested in this project. This does not refer only to the ideological investment and the transfer of settlers into the Palestinian territories. It’s also about jobs for hundreds of thousands or millions of Israelis, as well as profits from exporting technological know-how and security products that maintain Israel’s control over the Palestinian population and territory.”

with the very first Israeli settlements that were erected in the months following the June 1967 war, the full apparatus of the Israeli state – political, military, judicial and administrative – has provided the leadership, financing, planning, diplomatic cover, legal rationale, security protection and infrastructure that has been indispensable to the enterprise’s incessant growth.⁸⁵

56. Nathan Thrall has succinctly described the indispensable role of the Israeli government in fostering the settlements:⁸⁶

“...the entire map of West Bank settlements has been meticulously planned by the Israeli government. An executive branch ministerial committee approves the settlements. A legislative branch subcommittee is devoted to advancing their connections to Israel’s water, electrical, sewage, communications, and road infrastructure. The legislature passes certain bills that apply solely to the West Bank. The state comptroller supervises government policy in the West Bank, overseeing everything from wastewater pollution to road safety. The attorney general enforces guidelines that direct the Knesset to explain how every new bill passing through the legislature will apply to the settlements. The High Court of Justice – which exercises judicial review over all government bodies and agents, and is the court of last instance for every Israeli and Palestinian, whether citizen or occupied subject—issues rulings that entrench the segregated legal system in the West Bank, where, in the same territory, there is one set of laws and rights for Israeli settlers and another, inferior set for Palestinians. The Justice Ministry oversees local courts in the West Bank that apply Israeli laws to settlers but not to Palestinians. The Israel Prison Service extends its reach across the entire territory, holding both Palestinian subjects and Israeli settlers in jails within the Green Line.”

57. To incentivize Israeli and diaspora Jews to live in its settlement in the occupied territory, the Israeli government actively offers a range of financial benefits, including advantageous grants and subsidies for individuals, and favourable fiscal arrangements for settlements. These include subsidized housing benefits and premium mortgage rates, venture benefits for agricultural development, education and welfare benefits and the designation as a national priority area. It also makes available attractive business incentives for industrial zones in the settlements, such as discounted land fees, employment subsidies and reduced corporate taxes.⁸⁷ Beyond this, the settlements are treated as an integral part of Israel’s municipal and regional governance system, with budgetary funding for education, utilities, infrastructure, housing, water, transportation and other services.

58. The spatial placement of the Israeli settlements badly fragments Palestinian contiguity in East Jerusalem and the West Bank. In East Jerusalem, the 12 Jewish settlements are located primarily around the northern, eastern and southern perimeters of the city, blocking any Palestinian territorial continuity with the West Bank. In the West Bank, the settlements are organized into two main settlement blocs. South of Jerusalem is the Gush Etzoin bloc, stretching from Bethlehem to Hebron. The northern bloc is spread out from the Ramallah area to Nablus. There are also smaller settlement blocs just east of Jerusalem and in the Jordan Valley. To order to provide efficient transportation between the settlements and to Israeli urban areas, and to encourage new settlers and settlement expansion, the Israeli government has invested heavily in building a dense network of highways through the West Bank and East Jerusalem, built on confiscated Palestinian lands and which services only the settler population.⁸⁸

59. Aside from 150 officially-recognized settlements in East Jerusalem and the West Bank, there are another 150 so-called settlement outposts built without formal state authorization and which Israel does not officially recognize.⁸⁹ However, Israel has granted retroactive authorization to dozens of these outposts, and it actively supports virtually all of the other remaining outposts. The 2005 Sasson Report, commissioned by the Israeli

⁸⁵ I. Zertal & A. Eldar, *Lords of the Land* (Nation Books, 2007).

⁸⁶ N. Thrall, “A Day in the Life of Abed Salama,” *New York Review of Books* (19 March 2021).

⁸⁷ https://www.btselem.org/publications/202103_this_is_ours_and_this_too

⁸⁸ Israeli Centre for Public Affairs & Breaking the Silence, *Highway to Annexation* (December 2020).

⁸⁹ B’Tselem, *supra*, note.87.

government, determined that Israeli state bodies had been discreetly funnelling significant public funds for decades to these outposts for housing, roads, education, utilities and security. Although the Report observed that this amounted to a “bold violation of laws” and recommended criminal charges against state officials, no charges were ever initiated and virtually all of the outposts remain thriving settlements today.⁹⁰

60. Beyond the expansive support for the settlements provided by the Israeli government, several significant international private organizations play a seminal role in supporting settler implantation. The World Zionist Organization’s Settlement Division, which is substantially funded by the Israeli government, acts as a government agent in assigning land to Jewish settlers in the West Bank, including to settlement outposts.⁹¹ The Jewish National Fund has actively sought to purchase Palestinian lands in the West Bank as well as to support infrastructure development, tourism and roads in the Israeli settlements.⁹²

61. While the Israeli settlements have flourished and provide an attractive standard of living for the settlers, they have created a humanitarian desert for the Palestinians, reaching every facet of their lives under occupation.⁹³ Human rights violations against Palestinians arising from the Israeli settlements are widespread and acute.⁹⁴ Settler violence has created a coercive environment.⁹⁵ There is an apartheid-like two-tier legal system granting full citizenship rights for the Israeli settlers while subjecting the Palestinians to military rule.⁹⁶ Access to the natural resources of the occupied territory, especially to water, is disproportionately allocated to the settlements.⁹⁷ And the fragmented territory left to the Palestinians has resulted in a highly dependent and strangled economy, mounting impoverishment, daily impositions and indignities, and receding hope for a reversal of fortune in the foreseeable future.⁹⁸

62. In the immediate aftermath of the 1967 war, the Israeli political leadership engaged in an intense debate over the future of the Palestinian territories that it now occupied. Two distinct but overlapping plans emerged. The Allon Plan (named after Yigal Allon, the Israeli labour minister) proposed to settle and eventually annex specific sectors of the West Bank and Gaza, with the heavily-populated Palestinian towns and cities consigned to some future Israeli-Jordanian governance condominium. The more ambitious yet more ambiguous Dayan Plan (named after Moshe Dayan, the Israeli defense minister) proposed to retain de facto Israeli control indefinitely over the entire Palestinian territories, with a declaration of permanent *de jure* status to await some opportune moment in the future.⁹⁹

63. What these arguments shared was the desire for Israel to permanently retain significant portions of the Palestinian territories, with intensive Jewish civilian settlement as the prime method for securing its sovereignty claim. As Allon stated in 1969: “Here, we create a Greater Eretz Yisrael from a strategic point of view, and establish a Jewish state from a demographic point of view.”¹⁰⁰ Both plans recognized the constraints of international opinion, and sought to establish the “facts on the ground” discreetly. Neither plan intended to offer Israeli citizenship or even a modicum of civil and political rights to the new Palestinian subjects. Both plans disregarded explicit advice from the Israeli Foreign Ministry legal counsel in 1967 that civilian settlements in the occupied territories would contravene the Fourth Geneva Convention.¹⁰¹ Where the Allon and Dayan plans diverged was primarily on pragmatism: whether the political and demographic cost of absorbing one million

⁹⁰ D. Kurtzer, *Sleight of Hand: Israel, Settlements and Unauthorized Outposts* (October 2016).

⁹¹ World Zionist Organization Settlement Division finances illegal West Bank outposts - Israel News - Haaretz.com (7 December 2018).

⁹² KKL-JNF-Report-March-2020-converted-1.pdf (peacenow.org.il) (April 2020).

⁹³ A/HRC/22/63.

⁹⁴ A/HRC/40/42.

⁹⁵ Yesh Din, *Settler Crime and Violence inside Palestinian Communities, 2017-2020* (May 2021).

⁹⁶ Association for Civil Rights in Israel, *One Rule, Two Legal Systems* (October 2014).

⁹⁷ A/HRC/40/73.

⁹⁸ UNCTAD, *Developments in the economy of the Occupied Palestinian Territory* (5 August 2020).

⁹⁹ G. Aronson, *Israel, Palestinians and the Intifada* (Kegan Paul International, 1990).

¹⁰⁰ R. Friedman, *Zealots for Zion* (New York: Random House, 1992), at 17.

¹⁰¹ G. Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977* (Henry Holt & Co., 2006), at 99.

unwilling Palestinians was worth the acquisition of all of the newly conquered territories. These two plans, with ongoing modifications in response to the progress and challenges of the occupation, have dominated the Israeli political debate on the Palestinian territories and the Israeli settlement project ever since.¹⁰²

64. In 1978, Matityahu Drobles, a senior official with the settlement division of the World Zionist Organization re-articulated the strategy for Israeli settlement development as first proposed by Allon and Dayan: thicken the Jewish settlements through the West Bank in order to forestall the possibility of a Palestinian state and to ensure Israeli permanence:¹⁰³

“To minimize the danger of the development of an additional Arab state in this territory. Since it would be cut off by Jewish settlements, it will be hard for the minority population to create territorial contiguity and political unity. There mustn’t be even the shadow of a doubt about our intention to keep the territories of Judea and Samaria [the West Bank] for good...The best and most effective way of removing every shadow of a doubt about our intention to hold on to Judea and Samaria forever is by speeding up the settlement momentum in these territories.”

65. This strategy has been immensely successful. Three examples will suffice. First is its demographic achievement. At the end of 2019, there were approximately 300 settlements and 665,000 Jewish settlers in occupied East Jerusalem and the West Bank. The settler population increase in the West Bank in 2019 was 3.2 percent, substantially higher than the overall 1.9 percent growth rate for Israeli citizens and residents.¹⁰⁴ In 1980, two years after the Drobles plan was first announced, at a time when the UN Security Council stated in Resolution 476 that there was an “overriding necessity to end the prolonged occupation”, that the settlements were a “flagrant violation of the Fourth Geneva Convention”, that Israel was in defiance of previous United Nations resolutions and that it would undertake accountability measures against Israel should it fail to comply with the resolution,¹⁰⁵ there were 12,500 settlers in the West Bank. In 2019, there were 441,600 settlers, 35 times as many.¹⁰⁶

66. Second is its political achievement. Former UN Secretary General Ban Ki-Moon has stated that the pervasiveness of the settlements has virtually eclipsed the possibility of a genuine two state solution.¹⁰⁷ As well, Mordecai Klein, an Israeli political scientist, has observed that: “The settlements do not only create de facto annexation of the territory, they also constitute a form of control over the Palestinians.”¹⁰⁸ In order to ensure maximum security and land base for the settlements and the upmost freedom of movement for the settlers, the Israeli government has confined the 2.7 million Palestinians in the West Bank within a fragmented archipelago of 165 disparate patches of land (Areas A and B), completely surrounded by an area under full Israeli control (Area C) and hemmed in by hundreds of road-blocks, walls, checkpoints and forbidden zones.¹⁰⁹ The West Bank and East Jerusalem are increasingly demarcated from each other by intense settlement construction, and both areas are separated from Gaza by severe travel restrictions.

67. And third is the strategy’s diplomatic achievement. Among senior diplomats who have worked on the Israel-Palestine file, there has been no serious effort in recent decades to demand that Israel comply with international law and UN resolutions by fully dismantling its settlements. Aaron David Miller, a senior American foreign policy-maker, wrote in 2009: “In 25 years of working on the issue for six secretaries of state, I can’t recall one meeting where we had a serious discussion with an Israeli prime minister about the damage that settlement activity – including land confiscation, bypass roads and housing demolitions – does to the

¹⁰² S. Arieli et al, “Historical Political and Economic Impact of Jewish Settlements in the Occupied Territory” (IEPN, June 2009).

¹⁰³ Thrall, *supra*, note.86.

¹⁰⁴ https://www.btselem.org/sites/default/files/publications/202103_this_is_ours_and_this_too_eng.pdf

¹⁰⁵ Resolution 476(30 June 1980).

¹⁰⁶ [Peace Now » Population.](#)

¹⁰⁷ Ban Ki-moon, *Financial Times*, 29 June 2021: “Israel has pursued a policy of incremental *de facto* annexation...to the point where the prospect of a two-state solution has all but vanished.”

¹⁰⁸ Klein, *supra*, note.84.

¹⁰⁹ B’Tselem, *supra*, note.87. Also see Badil, *Israeli Annexation: The Case of Etzion Colonial Bloc* (July 2019).

peacemaking process.”¹¹⁰ Indeed, all of the international peace process initiatives over the past three decades, beginning with Madrid-Oslo in 1991, have accommodated the facts on the ground established by the Israeli settlements. Relying on realpolitik rather than international law, every peace proposal submitted by an American president, beginning with Bill Clinton in 2000, has assumed that Israel will retain most, if not all, of its settlement blocks in any final peace agreement.

D. The Israeli Settlements in International Law

68. The illegality of the Israeli settlements is one of the most settled issues in modern international law. Among the international community, there is a virtual wall-to-wall consensus that the settlements violate the Fourth Geneva Convention’s prohibition on settler implantation. The illegality of the settlements has been affirmed by the International Court of Justice,¹¹¹ the United Nations General Assembly,¹¹² the UN High Commissioner for Human Rights,¹¹³ the UN Human Rights Council,¹¹⁴ the European Union,¹¹⁵ Amnesty International,¹¹⁶ the International Committee of the Red Cross,¹¹⁷ the High Contracting Parties to the Fourth Geneva Convention,¹¹⁸ the International Commission of Jurists,¹¹⁹ Human Rights Watch,¹²⁰ Al-Haq,¹²¹ and B’Tselem.¹²²

69. In December 2016, the UN Security Council, building upon a number of previous resolutions confirming the illegality of the Israeli settlements and the transfer of population,¹²³ reaffirmed in Resolution 2334 that:¹²⁴

“...the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace.”

70. Yet, while the Israeli settlements are prohibited by an authoritative and well articulated body of international law, the international community has been remarkably reluctant to enforce these laws. The Security Council in Resolution 2334 reiterated its previous demands that Israel must immediately and completely cease all settlement activities. Since early 2017, the Special Coordinator for the Middle East Peace Process has reported to the Council on 18 quarterly occasions that Israel has taken no steps to comply with its obligations under Resolution 2334.¹²⁵

¹¹⁰ A.D. Miller, *Newsweek*, 12 January 2009.

¹¹¹ *Wall Advisory Opinion*, (2004), 43 ILM 1009, at para.120.

¹¹² A/Res/71/97(23 December 2016).

¹¹³ A/HRC/40/42(30 January 2019).

¹¹⁴ A/HRC/43.L37(22 June 2020).

¹¹⁵ <https://www.consilium.europa.eu/en/press/press-releases/2016/01/18/fac-conclusions-mepp/>

¹¹⁶ <https://www.amnesty.org/en/latest/campaigns/2019/01/chapter-3-israeli-settlements-and-international-law/>.

¹¹⁷ Peter Maurer, “Challenges to International Humanitarian Law: Israel’s Occupation Policy,” (2012), 888 *International Review of the Red Cross* 94,1507.

¹¹⁸ [Declaration of Conference of High Contracting Parties to Fourth Geneva Convention - Swiss FDFA document/Non-UN document \(17 December 2014\)](#)

¹¹⁹ <https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf>.

¹²⁰ <https://www.hrw.org/world-report/2019/country-chapters/israel/Palestine>.

¹²¹ <https://www.alhaq.org/advocacy/7266.html>.

¹²² <https://www.btselem.org/topic/settlements>.

¹²³ UNSC Resolution 476(30 June 1980); Resolution 471(5 June 1980); Resolution 465(1 March 1980); Resolution 452(1979); Resolution 446(1979); and Resolution 298(25 September 1971).

¹²⁴ UNSC Resolution 2334(23 December 2016).

¹²⁵ <https://reliefweb.int/report/occupied-palestinian-territory/security-council-briefing-situation-middle-east-reporting> (24 June 2021).

E. Do the Israeli Settlements Violate the Rome Statute?

71. The Rome Statute requires three elements of the war crime of transfer of a civilian population in an occupied territory to be satisfied. The first two elements constitute the material element of the crime:

- (i) The transfer by the perpetrator of parts of its own population into the occupied territory; and
- (ii) The conduct took place arising from an international armed conflict.

72. In the case of the Israel settlements, both of the material elements are met. Israel captured the West Bank, including East Jerusalem, and Gaza in June 1967 as part of an international armed conflict. Virtually the entire international community accepts the designation of the Israeli control of the Palestinian territory as an occupation,¹²⁶ to which the full scope of international humanitarian law and international human rights law continues to apply.¹²⁷

73. As well, the historical and contemporary evidence is abundantly clear that the senior political, military and administrative officials of the government of Israel, as well as important international private organizations, have actively developed and implemented a practice of transferring hundreds of thousands of Israeli citizens into the occupied Palestinian territory – through enabling large-scale housing, commercial and infrastructure construction, providing advantageous state funding and ensuring military security – in order to establish an immovable demographic presence.¹²⁸

74. The third element of the crime is the mental element that:

- (iii) the perpetrator was aware of the factual circumstances of the crime of transfer that established the existence of an armed conflict.

In other words, the perpetrator has both the intent and the knowledge of the crime.¹²⁹

75. In this case, the mental element is satisfied. The political, military and administrative leadership of Israel has directly and knowingly supported the decades-long state policy of encouraging and sustaining the growth of the settlements. Throughout these decades, this leadership has been fully aware of the clear direction from the international community that such activities violate fundamental prohibitions in international law.

76. It is the finding of the Special Rapporteur that Israel's policy of settler implantation meets the definition of "war crime" as per international humanitarian law and the Rome Statute. The Special Rapporteur also endorses the view that the Israeli settlements constitute a continuing crime, and therefore fall within the temporal jurisdiction of the ICC.¹³⁰

IV. Conclusions

77. In conclusion, the Israeli settlements are the engine of this forever occupation, and amount to a war crime. An occupying power which initiates and expands civilian settlements in defiance of international law and the Rome Statute cannot be serious about peace. And an international community which does not impose accountability measures on a defiant occupying power contrary to international law cannot be serious about its own laws.

¹²⁶ UNSC Resolution 2334(23 December 2016).

¹²⁷ *Wall Advisory Opinion*, *supra*, note 49, at paras.101,111-114.

¹²⁸ G. Poissonnier & E. David, *supra*, note 79, at paras.72-102.

¹²⁹ Diakonia, *Litigating Settlements*(December 2015).

¹³⁰ U.Aysev, "Continuing or Settled? Prosecution of Israeli Settlements under Article 8(2)(b)(viii) of the Rome Statute", (2019), 20 *Palestine Yearbook of International Law* 33.

V. Recommendations

78. **The Special Rapporteur recommends that the Government of Israel fully comply with its obligations under international law and completely dismantle its civilian settlements in the occupied Palestinian territory.**

79. **The Rapporteur recommends to the international community that it:**

(a) **Fully support the work of the Office of the Prosecutor of the ICC as it investigates the allegation that the Israeli settlements are in breach of the Rome Statute;**

(b) **Reiterate its long-standing demand upon Israel to fully dismantle the settlements in compliance with international law;**

(c) **Develop a comprehensive menu of accountability measures to be applied to Israel should it continue to defy international direction with respect to its settlements;**

(d) **Ensure full accountability of Israeli political, administrative and military officials who are responsible for grave breaches of international law in the Occupied Palestinian Territory; and**

(e) **Call upon all UN member states to implement the injunction of the Security Council in Resolution 465 (1980) not to provide Israel with any assistance to be used specifically in connexion with settlements in the occupied territories.**

80. **The Rapporteur recommends to the High Commissioner for Human Rights to regularly update the database of businesses involved in settlements, in accordance with Human Rights Council resolution 31/36;**