WRONG CONCLUSION, NO RESOLUTION: UNITED NATIONS SECURITY COUNIL RESOLUTION 2334'S ERRONEOUS CONCLUSIONS ON THE LEGALITY OF ISRAELI SETTLEMENTS IN JUDEA, SAMARIA AND JERUSALEM

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TABLE OF CONTENTS

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INTRODUCTION

The issue of Israeli settlements in Judea, Samaria and Jerusalem (the area labeled the "West Bank" in common parlance[1]), has often captured center-stage in discussions about securing an enduring peace between Israel and both the Palestinians in particular and the wider Arab world in general. Indeed, they have become so much the focus of the dispute that other, far more salient issues — including regional security, the ultimate status of Jerusalem and the ongoing, wide and abject rejection of Israel's existence in any state, of any size, in the Middle East — are often pushed aside. Moreover, the criticism of Israeli settlement policies in the Judea/Samaria region and Jerusalem's old city (often referred to as "East Jerusalem" or "Arab East Jerusalem," constructs that stem only from the illegal occupation and abortive annexation of it by Jordan) is rooted, at least in part, in the characterization of those settlements as being illegal under international law. In fact, descriptions of Israeli settlements in these territories are often couched in that language, *i.e.*, "illegal Israeli settlements."

This issue came to a head once again during the waning days of the administration of President Barack Obama. With the acquiescence (and, perhaps, tacit backing) of the Obama administration, on December 23, 2016, the United Nations Security Council (the "Security Council" or "UNSC") passed Resolution 2334, by a vote of 14 in favor and with the United States abstaining.[2] In so doing, the Security Council, *inter alia*, (i) "condemned" the "construction and expansion" of Israeli settlements in the "Palestinian territories" (which it defined as including "East Jerusalem") and the "transfer of Israeli settlers" into them; (ii) expressed "grave concern" that Israeli settlement activities are "imperilling [sic] the viability of a two-state solution based on the 1967 lines"; (iii) "reaffirmed" that all Israeli settlements in Judea, Samaria and East

1 As noted by Professor Halberstam, "Judea and Samaria are not only the Biblical names, as is frequently stated . . . but are also the historical names, which were used in League of Nations and British Mandatory documents until 1948." Malvina Halberstam, *Nationalism and the Right to Self-Determination: The Arab-Israeli Conflict*, 26 N.Y.U. J. INT'L. & POL. 573, 579 n.31 (1994) (citations omitted).

2 Press Release, Security Council, Israel's Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms, U.N. Press Release SC/12657 (Dec. 23, 2016).

Jerusalem are in "flagrant violation of international law"; (iv) demanded that Israel "cease all settlement activity" in these territories; and (v) went so far as to call for "affirmative steps" to "reverse the negative trends on the ground."[3] In essence, the resolution was a call for the uprooting of Israeli settlements in Judea, Samaria and East Jerusalem and the removal of Israeli citizens from them.

This resolution was not the first time that the Security Council has weighed in on the issue of the supposed illegality of Israeli settlements, nor the first time that an American administration allowed such a resolution to pass. Yet the stridency and extent of the language of Resolution 2334, and the fact that it had been several years since an American veto had not been exercised to block such a resolution (as well as the fact that the United States picked this particular time to abstain, *i.e.*, contemporaneously with Palestinian efforts to bring Israel before the International Criminal Court (the "ICC")), magnifies its potential impact.[4] The issue of the legality of Israeli settlement in these areas is also likely to be reignited by President Trump's December 6, 2017 recognition of Jerusalem as Israel's capital and the United States' relocation of its embassy to Jerusalem, and the likelihood that, incensed by what they perceive as a predisposition of the status of Jerusalem (notwithstanding that the President's declaration expressly left open the boundaries of and ultimate sovereignty over Jerusalem), the Palestinians will pursue their remedies before the ICC.

The weight of pronouncements on the legality of Israeli settlements, at least in number, certainly sits most heavily on the side of the scale opposite from the Israeli view that they are legal, but that balance does not mean that those pronouncements are correct; a pound of lead on one side of the scale will weigh it down more than an ounce of gold on the other, yet the side of the scale in the air remains the more valuable. As this article proposes, the oft-expressed position that Israeli settlements in Judea, Samaria and East Jerusalem are illegal fails to consider properly or weigh accurately several relevant legal and historical points and should be reconsidered.

Why is this issue important? Because, among other things, denying the long-recognized (and codified) right of Jews to settle in these areas

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3 S.C. Res. 2334, pmbl., ¶¶ 1, 2, 4 (Dec. 23, 2016).

4 Indeed, the United States previously had objected to similar language in Security Council resolutions. *See, e.g.*, Security Council Minutes, 3351st Meeting, 49th Year (S/PV.3351), statement of Madeline Albright (emphasizing, on behalf of the United States, that "[w]e simply do not support the description of the territories occupied by Israel in the 1967 war as 'occupied Palestinian territory'" and that the United States objected to the inclusion of Jerusalem within the term 'occupied Palestinian territory.'").

minimizes the position of the state of Israel *vis a vis* that right and, therefore, the value of what it is willing to concede in negotiations directed toward a genuine peace agreement, before those negotiations even begin. Indeed, "[i]n vindicating the now-'dominant' Palestinian narrative, [Resolution] 2334's legal rhetoric entrenches the PA's maximalism and widens the gap between the parties' expectations."[5] Beginning a discussion of the Middle East peace process from the predetermined conclusions of Resolution 2334 also predetermines rights on the ground, and does so in a manner that is, in fact, in direct contravention of history and a reasonable interpretation and application of international law (thus *derogating* from, rather than *promoting*, the cause of genuine peace). As set forth in greater detail below:

- The right of Jews to settle in Judea, Samaria and Jerusalem was recognized and established as a "sacred trust" in a binding international document, the League of Nations Mandate for Palestine (the "Mandate") and carried forward by the UN Charter itself (in Article 80). That right has never been superseded by any binding international agreement between the relevant parties (Israel and her Arab neighbors, including the Palestinians). To the extent that any UN resolutions or treaties purport to divest this right, they are contrary to the UN Charter and void as to this issue;
- Any divestiture of such rights of settlement that would have accompanied acceptance and realization of United Nations General Assembly (the "General Assembly" or "UNGA") Resolution 181 ("Resolution 181" or the "Partition Plan") — even assuming, *arguendo*, that Resolution 181's acceptance by all parties concerned would, in fact, have divested the right of individual Jews to live in a proposed Arab state — never came to fruition, in light of the Arabs': (i) outright rejection of Resolution 181; and (ii) aggressive, violent and illegal efforts to preclude its coming into effect;
- Jewish rights to settle in Judea, Samaria and Jerusalem were not, and could not be superseded or affected in any way by the Arab aggression in 1948, Jordanian attempts to annex these areas or other acts of Arab aggression, including, *inter alia*, hundreds of Palestinian terror attacks against Israel. To so hold would reward aggression and other illegal acts that directly contravene the UN Charter and applicable provisions of international law;

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5 *International Law – Israel's Settlement Activities – United Nations Security Council Asserts Illegality – S.C. Res. 2334 (Dec. 23, 2016)*, 130 HARV. L. REV. 2267, 2271 (2017) [hereinafter *Settlement Activities*].

- While international law renders illegal the acquisition of territory by aggressive warfare, it does not preclude the acquisition of territory through defensive force or the loss of territory on the part of an aggressor (at a minimum, it did not so prohibit such territorial acquisition at the time that Israel came into possession of Judea, Samaria and East Jerusalem in 1967). Indeed, UNSC Resolution 242 codifies this point in recognizing and accepting the fact that, in an ultimate resolution of the conflict between Israel and her Arab neighbors, Israel would be expected to keep part of the territories it obtained in the 1967 Six-Day War;
- The provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (the "Geneva Convention" or the "Convention") and the Rome Statute of the International Criminal Court (the "Rome Statute") prohibiting an occupying power from "transferring" its own citizens into occupied territory or "deporting" local residents out of such territory should not be applied to the voluntary movement of citizens of the occupying power into that territory. Moreover, the Convention and the Rome Statute do not, and could not, divest *already existing* settlement rights, such as the Jewish right to "close settlement" in Judea, Samaria and Jerusalem (which was only temporarily denied to them by Jordanian aggression); and
- Any purported customary law that is claimed to have evolved that strips away the Jewish right of settlement in Judea, Samaria and Jerusalem does not constitute *opinio juris* by which Israel is bound and, therefore, no customary international law renders Israeli settlement in these areas illegal.

I. INITIAL RECOGNITION AND CONTINUING VITALITY OF JEWISH RIGHTS OF SETTLEMENT

The right of Jews to settle throughout Palestine (including Judea, Samaria and Jerusalem) was recognized in the Mandate. That right subsequently was effectively incorporated into the UN Charter and is unaffected by subsequent developments.

A. *The Mandate's Recognition and Codification of Jewish Settlement Rights*

The Mandate directed the establishment of a "Jewish national home" in Palestine and guaranteed the right of Jews to "close settlement" within its boundaries (which then not only included Judea, Samaria and Jerusalem, but also what became Israel and Jordan, although Article 25 gave the mandatory power of discretion, subject to the consent of the

League of Nations, to suspend its terms as applicable to territory east of the Jordan river, *i.e.*, what is now Jordan).[6] Notably, the Mandate recognized the "civil and religious," but not national rights of the other inhabitants of Palestine.[7]

The Mandate also effectively had the status in international law of a treaty. As explained by the International Court of Justice (the "ICJ"), the mandates system established by Article 22 of the League of Nations Covenant "formed a sacred trust of civilization."[8] Moreover, in the Namibia decision, the ICJ remarked that, notwithstanding the dissolution of the League of Nations, "[The League's mandates'] *raison d'etre* and original object remained. Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist."[9] Furthermore, "[t]he Members of the League, upon effecting the dissolution of that organization, did not declare, or accept even by implication, that the mandates would be cancelled or lapse with the dissolution of the League."[10]

B. Incorporation of the Mandate's Settlement Rights in the UN Charter

Significantly, and perhaps dispositively, Article 80 of the UN Charter itself carries forward the viability of the Mandate's terms, decreeing that, until a "trusteeship" is set up to determine the ultimate disposition of mandatory territory, "nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international

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6 *See* British Mandate for Palestine arts. 2, 6, July 24, 1922, 3 L.N.O.J. 1007 (1922); *see also* Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465, 474-475 (1988-1989); Marilyn J. Berliner, *Palestinian Arab Self-Determination and Israeli Settlements in the West Bank*, 8 LOY. L.A. INT'L & COMP. L. REV. 551, 568 (1986) (noting that, although the mandatory power could "postpone or withhold" Jewish settlement rights in the portion of the Mandate east of the Jordan River, this proviso "did not apply to Jewish rights of immigration and close settlement in the West Bank and Gaza."). It should be noted, however, that Great Britain's severing of approximately 78% of the mandatory land area for the creation of an exclusively Arab state, Transjordan (now Jordan), as a result of which Jewish settlement in most of the mandatory area was precluded, arguably violated the terms of the Mandate, in particular Article 15, which states that "[n]o person shall be excluded from Palestine on the sole ground of his religious belief."

7 *See* British Mandate for Palestine, *supra* note 6, at art. 2.

8 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 28 (June 21) [hereinafter Namibia Decision].

9 *Id.* at 32-33.

10 *Id.* at 34.

instruments to which Members of the United Nations may respectively be parties."[11] The continuing validity of that Article has been recognized in several ICJ opinions.[12]

The predominance of the UN Charter over other sources of international law is reflected in Article 103, the UN Charter's "supremacy clause": "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[13] Thus, "the Charter is the supporting frame of all international law and, at the same time, the highest layer in a hierarchy of norms of international law" because "Article 103 of the Charter . . . can only be read to give the Charter priority over all conflicting obligations of states regardless of their formal source."[14]

Indeed, because of this hierarchical order, "[Security] Council decisions are binding only *in so far as they are in accordance with the Charter*."[15] Accordingly, no other treaty (such as the Geneva Convention or the Rome Statute), UNSC resolution, or development of customary law can contravene Article 80 itself, and any that purport to do so are invalid as a matter of law. *A fortiori*, a UNSC resolution, like Resolution 2334, passed pursuant to Article VI of the UN Charter (dealing with pacific resolution of disputes), which is only advisory in nature and has no legally binding force,[16] cannot displace UN Charter provisions (or any other law).

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11 U.N. Charter art. 80 ¶ 1.

12 *See, e.g.*, Namibia Decision, *supra* note 9; *International Status of South-West Africa,* 1950 ICJ REP. 128, 133-34, 137-38 (July 11).

13 U.N. Charter art. 103; *see also* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community,* 36 COL. J. TRANS. L. 529, 577-78 (1998) (noting that Article 103 gives voice to the UN's adoption of "a hierarchical model" of international constitutional law).

14 Fassbender, *supra* note 13, at 585-86; *see also* Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 5 (1999) ("Article 103 renders the UN Charter itself, as well as the obligations arising under it. . .a 'higher law' *vis a vis* all other treaty commitments of the UN Member States.").

15 *See* Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures,* 5 EUR. J. INT'L L. 89, 92 (1994) (emphasis added); *see also* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 95 (1950) ("[T]he meaning of Article 25 is that the Members are obliged to carry out only those decisions which the Security Council has taken *in accordance with the Charter*.") (emphasis added).

16 *See, e.g.*, ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 39-40 (Hart Publ'g 2004) ("Allowing the Security Council to adopt binding measures under Chapter VI would undermine the structural division of competencies foreseen by Chapters VI and VII, respectively. The whole aim of separating these chapters is to distinguish between voluntary and binding measures."); Bowett, *supra* note 15, at 96 ("…Chapter VI confers only powers of recommendation."); Michael A. Schaeftler, *The Legal Meaning and Implications of*

C. Subsequent Historical Developments and Continuing Jewish Settlement Rights

The importance of this hierarchy also comes into focus when analyzing the course of historical events that have — and have not — affected the legal status of the territories that once comprised the Mandate (and today encompass Israel, Jordan and the Judea/Samaria/East Jerusalem region). The terms of the Mandate no longer apply to areas that have become the territory of member states of the United Nations (Israel and Jordan). But because there has never been a trusteeship set up for the remaining part (Judea and Samaria), by the very terms of the UN Charter itself (as incorporated by Article 80), the rights set forth in the Mandate's terms — including the right to "close settlement" by Jews there — continue to exist.[17] Thus:

> From a legal point of view . . . the West Bank and Gaza are unallocated parts of the British Mandate, since the Mandate was not terminated when Great Britain resigned as the mandatory power . . . . [T]he Mandate ceased to be operative as to the territories of Israel and Jordan when those states were recognized by the international community. But its rules still apply to the West Bank and the Gaza Strip, which have not been allocated either to Israel or to Jordan, or become an independent state.[18]

In other words, "[s]ince the Security Council never accepted the recommendation of the General Assembly in 1947 to partition Palestine into an Arab and a Jewish state, the right of the Jewish people to make 'close settlement' in all of western Palestine survives, protected by

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Security Council Resolution 242, 7 COMP. INT'L L. J. S. AFR. 53, 59 (1974) (citing authorities for this proposition).

17 *See* Namibia Decision, *supra* note 8; *see also* Eugene Rostow, *The Future of Palestine*, INST. FOR NAT'L STRATEGIC STUDIES 9-11 (Nov. 1993) [hereinafter Eugene Rostow, *The Future of Palestine*]; Howard Grief, *Article 80 and the UN Recognition of a "Palestinian State,"* THE ALGEMEINER (Sept. 22, 2011), https://www.algemeiner.com/2011/09/22/article-80-and-the-un-recognition-of-a-%E2%80%9Cpalestinian-state%E2%80%9D.

18 *See* Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L. J. 457, 473 (1991) (citing Eugene Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. IN WORLD PUB. ORDER 147 (1979)). That the Mandate's terms continued (and continue) to apply to unallocated portions of the Mandate is evidenced further by the fact that Egypt itself — during its occupation of the Gaza Strip — continued to apply to that territory the laws in effect during the British Mandate. *See id*. at 465; *see also* Berliner, *supra* note 6, at 580 ("[T]he West Bank may be viewed as an integral part of the Palestine Mandate in which a Jewish national home was to be established; the territory 'must be considered today to be unallocated territory;' and the future of the West Bank . . . must be 'arranged by peaceful international agreement in ways which fulfill the policies of the Mandate.'") (citations omitted).

Article 80 of the Charter."[19] Accordingly, "[a] demand that this territory be kept *judenrein* would be a gross travesty" of the rights recognized in, and the purposes of, the Mandate, thus "turning international law on its head."[20]

D. The Non-Effect of Palestinian "Statehood"

While Palestine has been upgraded to a non-member observer state at the UN and has been granted membership in certain UN-related and other international bodies, that fact does not resolve (or override) Jewish settlement rights in Judea, Samaria and Jerusalem. Such recognition alone does not create statehood in fact, and there is, at a minimum, significant dispute over whether Palestine satisfies the criteria for statehood under international law (and how, if it did, that would affect the issues as regards Jewish settlements in disputed portions of the proposed territory of such a state).

In this regard, tensions exist between the adherents of two competing theories of the establishment of statehood, *i.e.*, the declaratory and constitutive theories. The former adheres to criteria set forth in the Convention on the Rights and Duties of States (the "Montevideo Convention"): (i) a permanent population; (ii) a defined territory; (iii) government; and (iv) "capacity to enter into relations with other states"[21] — and looks, *inter alia*, to a "purported state's assertion of its sovereignty within the territory it exclusively controls"[22] — criteria which Palestine does not satisfy. Among other things: (i) its territory is not clearly defined, as ultimate sovereignty over Judea, Samaria and East Jerusalem is widely recognized to be subject to negotiation with Israel[23]; (ii) its

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19 Eugene Rostow, *The Perils of Positivism: A Response to Professor Quigley*, 2 DUKE J. COMP. & INT'L L. 229, 239-40 (1992) [hereinafter Eugene Rostow, *The Perils of Positivism*] ("With the establishment of Jordan in 1946 and Israel in 1948, these areas of Palestine [Judea and Samaria] were allocated neither to Jordan nor to Israel, and remain parts of the Mandate; their future should be determined in accordance with its terms.").

20 JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 181 (1981).

21 Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, 49 Stat. 3097 [hereinafter Montevideo Convention].

22 *See* William Worster, *Law, Politics and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L. J. 115, 119 (2009*)*; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (AM. LAW INST. 1987) (defining a state as an "entity that has a defined territory and a permanent population, *under the control of its own government*") (emphasis added).

23 This shortcoming may not be dispositive, inasmuch as the lack of definite borders does not necessarily preclude a finding of "defined" borders. *Compare* Paul Eden, *Palestinian Statehood: Trapped Between Rhetoric and* Realpolitik, 62 INT'L & COMP. L. Q. 225 (2013) (noting that "a state does not require exactly defined or undisputed borders to exist or to become a member of the

government lacks the ability to act as an independent sovereign in several crucial areas generally associated with statehood, such as security, control of borders, and immigration into the state's territory[24]; (iii) its government in fact is not unitary, with the Palestinian Authority (the "PA") governing one portion of the territory and Hamas controlling the other; and (iv) the PA is limited by the Oslo Accords from acting in many ways as a sovereign state (the Oslo Accords state expressly that sovereignty over Judea, Samaria and East Jerusalem is unresolved).[25]

Palestine's lack of actual sovereign independence is particularly salient on this issue. The ability to function independently is one of the

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United Nations") *with* Tal Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas*, Jerusalem Center for Public Affairs, http://www.jcpa.org/art/becker1.htm ("It is generally accepted that the boundaries of a nascent state need not be accurately delimited in their entirety for an entity to satisfy [the defined territory] criterion of statehood. But the issue is a relative one. The greater the lack of definition, the more the statehood of the entity is in question … 'when the doubts as to the future frontiers [are] of a serious nature, statehood becomes in doubt.'") (citing HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 30 (Cambridge Univ. Press 1947)); *see also* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 447 (Oxford Univ. Press 2d ed. 2006) ("where serious issues remain to be resolved about the constitution and boundaries of the putative State…statehood should not be regarded as existing already, as it were, by operation of law"). Paradoxically, following Israel's 1948 War of Independence, it was Israel (and several other states) that took the position that the non-fixed nature of the 1949 armistice lines did not preclude its admission as a state in the UN, whereas the Arab world (and Great Britain) insisted that Israel could not be admitted as a member state at that time because its borders were not definitively fixed. *See, e.g.*, U.N. SCOR, 3d Sess., 385th mtg. at 3-4, U.N. Doc. S/PV.385 (Dec. 17, 1948); U.N. SCOR, 3d Sess., 386th mtg. at 23-25, U.N. Doc. S/PV.386 (Dec. 17, 1948); U.N. SCOR, 3d Sess., 383d mtg. at 15-16, 19, U.N. Doc. S/PV.383 (Dec. 2, 1948); U.N. GAOR, 3d Sess., 207th plen. mtg. at 107, 181, 220, 222, 267, 289, 294-295, 305-306, 321, U.N. Doc. A/PV.207 (May 11, 1949). The critical difference between Israel's argument in support of its own admission and the situation today with Palestine is perhaps demonstrated by the statement of the United States' representative at the time of the debate over Israel's admission: "[T]here must be some portion of the earth's surface which [a proposed state's] people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement." U.N. SCOR, 3d Sess., 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948). At the time of the debate over Israel's admission to the UN, notwithstanding that its boundaries remained in dispute, its government exercised complete authority and practical control over all aspects of domestic and foreign policy within the disputed borders, *i.e*. the 1949 armistice lines. *Id*. at 10-11. The same cannot be said of Palestine.

24 *See, e.g*., Hurst Hannum & Richard Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858, 872 (1980) ("There is an overwhelming consensus that responsibility for and authority over national defense matters rest with the central or sovereign government and that, in general, the autonomous, non-sovereign entity exercises no power in the national defense area."); United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1266 (D. Kan. 2008) ("It is an 'accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'") (quoting United States ex rel Turner v. Williams, 194 U.S. 279, 290 (1904)).

25 DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS art. V (1993).

hallmarks of statehood (particularly emerging statehood): "Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other State*, the functions of a State."[26] Dapo Akande, Professor of Public International Law at the University of Oxford, elaborates on this point:

> I suggest that the best understanding of [the fourth Montevideo criterion] is that it means *independence*. It is that independence that provides a *capacity* to enter into relations with other States, as a State. But what does independence mean and how is it acquired? There are factual and legal aspects to independence. Factually, it is about the physical ability to govern a territory without taking direction from another State. Legal independence means that there are no other valid claims by other States to govern that territory.[27]

Palestine, by any reasonable construction, does not meet this criterion. It does not have the physical ability to govern the territory it claims as its state without taking direction from Israel. Professor Eden concludes similarly that "the powers currently possessed by the Palestinian Authority fall short of the independence necessary for Palestine (as currently constituted) to be regarded as a sovereign State."[28] Indeed, in *Ungar v. Palestine Liberation Organization*, the court rejected the argument that the PA satisfied the criteria for statehood, noting that the authority that the PA exercises "was limited" and that Israel "explicitly reserved control over all matters not transferred" to the PA, a

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26 The Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) (emphasis added); *see also* Worster, *supra* note 22, at 154-56 (noting that having a government that controls all of its claimed territory is vital to statehood and listing additional proposed criteria, including, *inter alia*, democracy and civil rights, establishment in conformance with international law and *jus cogens*, feasibility of the new state, and a willingness to observe international law); 1 OPPENHEIM'S INT'L L. 120 (Robert Jennings & Arthur Watts eds., 9th ed. 2008) (sovereignty implies "independence all around, within and without the borders of the country").

27 Dapo Akande, *The Importance of Legal Criteria for Statehood: A Response to Jure Vidamar*, EJIL: *TALK!* (Aug. 7, 2013), https://www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-response-to-jure-vidmar; *see also* Robert Weston Ash, *Is Palestine a "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue,"* 36 RUTGERS L. REC. 186, 193 (2009) ("[E]ven when the PA began to exercise a modicum of governmental authority, that authority did not include external security, control of airspace, or control of Israeli civilians and settlements. This fact is crucial because the ability to govern one's territory is also an indispensable requirement to establish statehood."); James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307, 309 (1990) (explaining that as a prerequisite to statehood, independence "embodies two elements – the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power, and secondly, the absence of the exercise of another state, and of the right of another state to exercise, self-governing powers over the whole of that territory.").

28 Eden, *supra* note 23, at 9.

situation that was "incompatible with the notion that the PA had independent government control over the defined territory."[29] In light of Israeli control over, *inter alia*, territorial borders and airspace, and limitations on the PA's ability to conduct foreign relations and lawmaking, it is "transparently clear that the PA has not yet exercised sufficient governmental control over Palestine to satisfy" the requirement that a proposed state exercise control of defined territory under its own government.[30] Moreover, for the reasons set forth herein, Israel has valid claims to at least part of the territory that Palestine claims[31] and, in fact, exercises its control and jurisdiction over much of it. Thus, Palestine lacks both factual and legal independence.

The constitutive theory, in contrast, looks primarily to recognition accorded to a proposed state's existence as a state.[32] Under this theory, Palestine's claim to statehood is more compelling, inasmuch as it has received wide (but not universal, and sometimes conditional) recognition. However, while it is virtually impossible to remove purely political considerations from the establishment of statehood, one of the criticisms of the constitutive theory is that it "permits states to ignore the facts," whereas "[t]here is a need for the law to reflect facts, and any other conclusion results in the assignment of recognition to the purely political process rather than a justiciable rights-based process."[33] Considering how little the Palestinian Authority in fact controls in terms of actual territory and several of the critical duties and indicia of independent governance,

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29 Ungar v. Palestine Liberation Org., 402 F.3d 274, 291 (1st Cir. 2005).

30 *Id.* at 292; *see also* Ash, *supra* note 27, at 200 ("[G]iven the current degree of Israeli military and economic control and influence over the West Bank and the Gaza Strip, it remains highly problematic to assert that an Arab Palestinian entity (like the PLO or PA) is 'sovereign' over any Palestinian territory at all."); Daniel Benoliel, *Israel and the Palestinian State: A Reply to Quigley*, 1 UNIV. BALT. J. INT'L L. 1, 22-23 (2012) ("[M]uch to the Palestinians' dismay, the PNA is also, admittedly, lacking control over external borders. PNA does not possess control over movement and access of people, goods, and services within and between the West Bank and Gaza Strip, nor has jurisdiction over natural resources, airspace and the sea."); *Id.* at 24 ("[W]ith less than a fifth of territories over which the Palestinians practice self governance in the West Bank, including East Jerusalem . . . and with some segments over which Israel has competing titles; it is highly questionable whether the Palestinians[']' present claim to statehood withstands Israel's present territorial integrity.").

31 Benoliel, *supra* note 30, at 35-36 (noting the competing Israeli claims based on Resolution 242 and that "Israel has evidently claimed title and a possibly negotiated land swap of the Jordan Valley, and major settlement blocs bordering Israel. Israel similarly claimed title of East Jerusalem, including the holy places therein . . . .").

32 Worster, *supra* note 22, at 120.

33 *Id.*; *see also* Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 117-118 (2002) ("To reduce the international law of recognition to a pure matter of political will eviscerates its status as law.") (citations omitted).

the application of politics over facts in its recognition as a state is apparent.[34] Perhaps because of this tendency of politics to invade (or supplant) facts when it comes to establishing statehood, "[t]he majority of contemporary scholars and commentators favor [the declaratory] theory."[35]

While the conclusion that Palestine lacks state status may seem, to some, unfair or politically inexpedient, that is of no legal moment: "[r]ights could not be presumed to exist merely because it might seem desirable that they should."[36] Mere recognition of a state of "Palestine", even by a majority of UN member states, particularly in light of the fact that the borders of such a proposed state must be negotiated with Israel, taking into account Israel's own rights, claims and security needs, does not override any already existing rights established by the Mandate and codified in Article 80 of the UN Charter. The UN Charter is the ultimate arbiter of international law. *See supra* Part I Section B. Member states and the UNSC may not violate or contradict its terms and, if they do, their pronouncements — including, in this instance, pronouncements that purport to affect or undermine Jewish rights of settlement in Judea, Samaria and Jerusalem — can have no legal validity.[37]

II. RESOLUTION 181

Many proponents of Palestinian statehood and opponents of the settlements rely on the Partition Plan in support of the notion that the UN intended portions of Judea and Samaria to be part of an Arab state — Jerusalem, which the Partition Plan envisioned as a *corpus separatum*, was not intended under its abortive terms to be a sovereign part of *either*

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34 *See, e.g.*, David Davenport, *Palestinian Statehood: Who Should Decide and How*, FORBES, Jan. 9, 2015, https://www.forbes.com/sites/daviddavenport/2015/01/09/palestinian-statehood-who-should-decide-and-how/#5075535f1e04 (characterizing the UNGA vote to upgrade Palestine's status to non-member observer state as "largely political" and having "made no attempt to determine whether Palestine satisfies the legal criteria for statehood").

35 Worster, *supra* note 22, at 119; *see also id.* at 128 (the inconclusive status, rights and obligations of a state not universally recognized is a "concern [that] has preoccupied many authors, leading to the conclusion that [the constitutive theory] cannot be the rule"); Crawford, *supra* note 27, at 309 (the constitutive theory "inevitably leads to extreme subjectivity in the notion of the state" and "there are compelling reasons for rejecting the constitutive theory, and most modern authorities do so").

36 South West Africa (Ethiopia v. S. Africa, Liberia v. S. Africa), Second Phase, Judgment, 1966 ICJ Rep. 6, 48 (July 18).

37 *Uphold International Law*, UNITED NATIONS, http://www.un.org/en/sections/what-we-do/uphold-international-law (last visited October 25, 2018) (The UN Charter is "an instrument of international law, and UN Member States are bound by it.").

of the proposed states — and that, therefore, Israeli settlement in those areas is illegal. Again, they are wrong.

Resolution 181 was not a legally binding resolution, but merely a recommendation by the UNGA, as it is "well-settled that adopted General Assembly resolutions are merely recommendations" and "are not an expression of current and binding international law."[38] Its potential legal status hinged on its acceptance by the parties. Had both the Jews and the Arabs of Mandatory Palestine accepted it and settled all claims to the territories encompassed by the Mandate, the Mandate's terms would have been superseded. However, while Palestine's Jews accepted the Partition Plan (an acceptance that could, of course, only be exercised practically based on corresponding Arab acceptance), Palestine's Arabs and the broader Arab world rejected it and promised to oppose its implementation by force (which, in fact, they did).

Thus, as reported at the United Nations Palestine Commission, Moshe Shertok, the representative of the Jewish Agency for Palestine, appeared before the Commission and represented that: "[t]he Jewish Agency for Palestine, on behalf of the Jewish people, will co-operate in the implementation of the Assembly's recommendations [regarding partition]."[39] The Arabs, in contrast, refused to even attend the Commission's sessions and expressed clearly their intention to oppose partition in all ways:

> ARAB HIGH COMMITTEE IS DETERMINED [TO] PERSIST IN REJECTION [OF] PARTITION AND IN REFUSAL [TO] RECOGNIZE UNO RESOLUTION [IN] THIS RESPECT AND ANYTHING DERIVING THEREFROM. FOR THESE REASONS IT IS UNABLE TO ACCEPT [THE COMMISSION'S] INVITATION.[40]

Indeed, the United Kingdom's representative to the Commission lamented that:

> The [British] Government of Palestine fear that strife in Palestine will be greatly intensified when the Mandate is terminated, and that the international status of the United Nations Commission will mean little or nothing to the Arabs in Palestine, to whom *the killing of Jews now*

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38 Shimon Shetreet, *Negotiations and Agreements Are Better Than Legal Resolutions: A Response to Professor John Quigley*, 32 CASE W. RES. J. INT'L L. 259, 265 (2000); *see also* South-West Africa Voting Procedure Advisory Opinion, 1955 ICJ Rep. 67, 114 (Lauterpacht, J., separate concurring opinion) (noting that UNGA resolutions "are not legally binding upon the Members of the United Nations").

39 Palestine Comm'n, First Monthly Progress Rep. to the Security Council, ¶ 9, U.N. Doc. A/AC.21/7, Jan. 29, 1948.

40 *Id*. ¶ 3(d).

> *transcends all other considerations.* Thus, the Commission will be faced with the problem of how to avert certain bloodshed on a very much wider scale than prevails at present. … The Arabs have made it quite clear and have told the Palestine government that they do not propose to co-operate or to assist the Commission, and that, far from it, they *propose to attack and impede* its work in every possible way. We have no reason to suppose that they do not mean what they say.[41]

In fact, the Palestine National Charter states unequivocally that "[t]he Partition of Palestine, which took place in 1947 . . . [is] fundamentally invalid."[42] Once it was rejected by the Arab side, Resolution 181 became a dead letter.

Professor Julius Stone, one of the preeminent international jurists of his day, rejected the notion that Resolution 181 could be resurrected *ex post facto*:

> To attempt to show . . . that Resolution 181(II) "remains" in force [decades after its rejection] is thus an undertaking even more miraculous than would be the revival of the dead. It is an attempt to give life to an entity that the Arab states had themselves aborted before it came to maturity and birth. To propose that Resolution 181(II) can be treated as if it has binding force in 1981 [when Stone addressed the issue or, even more so, today], for the benefit of the same Arab states, who by their aggression destroyed it *ab initio,* also violates general principles of law, such as those requiring claimants to equity to come "with clean hands," and forbidding a party who has unlawfully repudiated a transaction from holding the other party to terms that suit the later expediencies of the repudiating party.[43]

Similarly, Professor Curtis asked (rhetorically): "After such an aggressive attempt [to prevent the vitality of the Partition Plan] has failed, can international law sanction a return to the *status quo ante bellum*? Can an offered transaction once refused still be available once the party that repudiated it now thinks it advantageous after more than [40] years?"[44] This issue was perhaps best summarized by Abba Eban, Israel's most eloquent spokesman on the international stage, who remarked famously that "[t]ime and again these [Arab] governments have rejected proposals today—and longed for them tomorrow."[45] However, as Professor Stone

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41 *Id*. ¶¶ 7(c) & (d) (emphasis added).

42 Palestine National Charter, art. 19 (July 17, 1968).

43 STONE, *supra* note 20, at 128.

44 Curtis, *supra* note 18, at 474.

45 U.N. GAOR, 23rd Sess., 1686th plen. mtg. at 13, U.N. Doc. A/PV.1686 (Oct. 8, 1968).

noted above, such longing does not resuscitate a proposal suffocated at birth by the very parties seeking to later animate it.[46]

Sir Elihu Lauterpacht, who served as a Professor of International Law and was the director of the Research Centre for International Law at Cambridge University, as well as a judge *ad hoc* of the ICJ, opined that the Partition Plan could only have derived binding force from mutual agreement of the parties intended to be bound by it, *i.e.*, the Jews and Arabs of Mandatory Palestine.[47] Absent such agreement, Israel's legal existence is independent of the Partition Plan's abortive terms: "[T]he coming into existence of Israel does not depend legally upon the Resolution. The right of a State to exist flows from its factual existence—especially when that existence is prolonged, shows every sign of continuance and is recognized by the generality of nations."[48]

Professor Stone concurred with Judge Sir Lauterpacht's position, concluding that: "The State of Israel is thus not legally derived from the partition plan, but rests (as do most other states in the world) on assertion of independence by its people and government, on the vindication of that independence by arms against assault by other states, and on the establishment of orderly government within territory under its stable control."[49] Moreover, Resolution 181's dead-letter status is reflected by the subsequent adoption by the UNSC of Resolution 242, which, by its terms and legislative history, does not anticipate or require a withdrawal by Israel even to the pre-June 1967 lines (which were themselves beyond the proposed borders reflected in the abortive Partition Plan).[50]

Thus, Resolution 181 has no legal ramifications. That is, while Resolution 181 recognized the potential benefit of creating separate

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46 *See* STONE, *supra* note 20, at 128.

47 ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 19 (1968).

48 *Id.*

49 STONE, *supra* note 20, at 61.

50 *See*, *e.g.*, Howard L. Bressler, *Israel Has to do More Than Agree to Talk: Occupied Territories*, N.Y. TIMES (Aug. 8, 1991), http://www.nytimes.com/1991/08/08/opinion/l-israel-has-to-do-more-than-agree-to-talk-occupied-territories-195791.html [hereinafter *Occupied Territories*]; *see also* Eugene Rostow, *The Future of Palestine*, *supra* note 17, at 6-7; Shetreet, *supra* note 38, at 265 (criticizing Professor Quigley for disregarding the "well established and widely supported interpretation that the language and history of Resolution 242 in 1967 does not support his position for total Israeli withdrawal and instead favors territorial compromise and partial withdrawal"); Becker, *supra* note 23 ("[I]n order to respond to the new realities that emerged in the years and decades following the Partition Resolution, the United Nations itself abandoned the proposal contained in Resolution 181. In its place, the Security Council adopted Resolutions 242 and 338, which provided a radically different formula for the settlement of the conflict"); Benoliel, *supra* note 30, at 41 (Resolutions 242 and 338 "could most probably be considered *lex specialis* and *lex posterior*, whereby overruling the former 181(II) Partition Plan Resolution, particularly in concerning both parties' competing land titles.").

Jewish and Arab states in what remained of Palestine *circa* 1947, its validity as a potentially legal and binding agreement was never consummated. It can, therefore, have no bearing on the issue of the legality of Israeli settlements in any areas to which it might have applied.

III. JORDANIAN AGGRESSION: 1948-1967

One of the reasons why Resolution 2334 is so perverted in characterizing Israeli settlements — including even Jews living in the Jewish Quarter of Jerusalem's old city — as "illegal" is because such a declaration goes directly contrary to the *sine qua non* of the UN, recognized in the very first Article of the UN Charter, *i.e.*, the promotion of friendly relations among nations, inasmuch as it lends credence to the notion that aggression brings reward. As indicated above, the right of Jews to "close settlement" in these areas was recognized in an international agreement bearing the legal status of a treaty, *i.e.*, the Mandate. There can be no dispute, even from those who contend that current settlements are illegal, that those rights remained intact, at a minimum, until 1948, when Israel declared its independence and Jordan aggressively and illegally seized those territories. Jewish communities in fact existed in these areas for centuries and Jewish towns had been built, on lawfully purchased land, within these territories in the preceding decades, including, for example, in the Gush Etzion bloc (one of the settlement blocs that all serious advocates of a two-state solution recognize will remain part of Israel).[51] As well, the Jewish community in the Old City of Jerusalem had existed for millennia and had at various times — and, of significance, in the century or so before the establishment of the modern state of Israel — generally constituted a majority or plurality of the Old City's population.[52]

Following Israel's declaration of independence, as is well known, the armies of several Arab countries invaded it, and many of the Arabs of

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51 *See, e.g.*, YOSSI KATZ, BETWEEN JERUSALEM AND HEBRON: JEWISH SETTLEMENT IN THE HEBRON MOUNTAINS AND THE ETZION BLOC IN THE PRE-STATE PERIOD 8, 265 (Bar Ilan Univ. Press 1998); Halberstam*, supra*, note 6, at 472, 485; *see also* Curtis, *supra* note 18, at 493 (arguing that the United Nations' repeated condemnation of Israeli settlement building "disregards historical and legal rights of Jews in the Etzion bloc and in Hebron, and in the incorporation into the Jerusalem area of Neve Ya'acov and Atatot, which were Jewish villages before 1948").

52 *See, e.g.*, Edwin Wallace, *The Jews in Jerusalem, in* COSMOPOLITAN 317, 324 (1980); YEHOSHUA BEN ARIEH, JERUSALEM IN THE 19TH CENTURY: THE OLD CITY 1 (Palgrave MacMillan, 1st ed. 1985) ("In the second half of the nineteenth century and at the end of that century, Jews comprised the majority of the population of the Old City."); TERRENCE PRITTIE, WHOSE JERUSALEM? 21, 23-28 (Frederick Muller Ltd. 1981) (discussing the population of the city at various historical periods).

Palestine took up arms against it, in what they described quite openly as a war of intended annihilation. Thus, for example, Secretary General of the Arab League, stated in 1947 that the coming Arab war against the nascent Jewish state would be one of "extermination and momentous massacre."[53] Iraqi Prime Minister Nuri Said proclaimed similarly that the Arab forces would "smash the country with our guns and obliterate every place the Jews seek shelter in."[54] In other words, the Arab parties embarked on an aggressive war (and intended genocide) against the Jews of Palestine. In the immediate wake of the Holocaust, one would be hard-pressed to identify a more egregious violation of international law than the Arab aggression of 1948. Indeed, Trygve Lie, who was then the Secretary General of the United Nations, described the Arab assault as "the first armed aggression which the world had seen" since World War II.[55] In the course of Jordan's participation in that aggression, the lawfully constituted and long-existing Jewish communities of Judea, Samaria and Jerusalem's old city were forcibly, ethnically cleansed of all their Jewish residents. Through that action, Jordan thus *illegally* occupied Judea, Samaria and the old city of Jerusalem and its environs. While it purported to annex those areas, that annexation was not recognized internationally.

No one could seriously argue that Jewish rights to settle in Judea, Samaria and Jerusalem were eliminated by Jordanian aggression. As Judge Stephen Schwebel, who served on the ICJ for approximately 20 years (including acting as its president from 1997-2000), has noted: "Where the prior holder of territory had seized the territory unlawfully, the state which subsequently takes that territory in the lawful exercise of

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53 David Barnett & Ephraim Karsh, *Azzam's Genocidal Threat*, MIDDLE EAST QUARTERLY 87, 87 (2011); Habib Issa, Pasha's successor as Secretary-General of the Arab League, confirmed Pasha's representations: "Azzam Pasha assured the Arab peoples that the occupation of Palestine and of Tel Aviv would be as simple as a military promenade . . . and that all the millions the Jews had spent on land and economic development would be easy booty, for it would be a simple matter to throw the Jews into the Mediterranean . . ." *Al Hoda*, June 8, 1951.

54 MYRON KAUFMAN, THE COMING DESTRUCTION OF ISRAEL 26-27 (New Am. Library, 1970); *Benny Morris – "1948 as Jihad,"* INST. FOR THE STUDY OF GLOBAL ANTISEMITISM & POL'Y, (Feb. 3, 2009), https://isgap.org/media/2009/02/benny-morris-1948-as-jihad/. Benny Morris elaborated on this point. Among other things, he recounted the comments of Matiel Murghannam, the head of the Arab Women's Organization, the female arm of the Arab Higher Committee, who stated: "The UN [Partition Plan] has united all Arabs, as they have never been united before, not even against the Crusaders . . . . [A Jewish state] has no chance to survive now that the 'holy war' has been declared. All the Jews will eventually be massacred." In that lecture, Morris also cited to several examples of calls for "jihad" against the Jews of Palestine, including a decree from the Ulama of the University of Al-Azhar that: "The liberation of Palestine [is] a religious duty for all Muslims without exception, great and small. The Islamic and Arab governments should without delay take effective and radical measures, military or otherwise" in the prosecution of that jihad.

55 *See* Curtis, *supra* note 18, at 458 (citing TRYGVE LIE, IN THE CAUSE OF PEACE 174 (1954)).

self-defense has, against that prior holder, better title."[56] Further, there is a controlling principle of international law, *ex injuria jus non oritur*, which means that unjust acts cannot create law. In the context of warfare, this means that no territorial rights can accrue from and no lawful territorial or settlement rights can be eliminated by aggressive actions, which are in direct contravention of Article 2 of the UN Charter.[57]

Similarly, since (and even before) 1967, the Palestinians have used these territories to pursue their own quest for the elimination of Israel, in repeated violation of international law, including engaging in countless acts of terrorism. Further, they continue to insist on terms of resolution that in themselves would render Israel militarily indefensible and demographically Arab, thereby eliminating it as a Jewish state (*i.e.*, by demanding a return to the 1949 Armistice lines and a "right of return" of all Palestinian refugees and their millions of descendants to live in Israel, a country to whose very existence they are hostile).[58]

Accordingly, neither Jordan nor any of the other parties engaged in that illegal warfare could obtain any legal rights to Judea, Samaria and Jerusalem and none of their acts — or, *a fortiori*, Israel's defensive actions taken in response — could undo the *already existing* rights of Jews to settle in those areas. However, by declaring these areas to be "Palestinian territory" and labeling all Jewish settlement in them illegal,

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56 Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 346 (1970).

57 *Id.* As Judge Schwebel wrote: "The facts of the 1948 hostilities between the Arab invaders of Palestine and the nascent state of Israel further demonstrate that Egypt's seizure of the Gaza strip, and Jordan's seizure and subsequent annexation of the West Bank and the old city of Jerusalem, were unlawful. Israel was proclaimed to be an independent state within the boundaries allotted to her by the General Assembly's partition resolution. The Arabs of Palestine and of neighboring Arab states rejected that resolution. But that rejection was no warrant for the invasion by those Arab states of Palestine, whether of territory allotted to Israel, to the projected stillborn Arab state or to the projected, internationalized city of Jerusalem. It was no warrant for attack by the armed forces of neighboring Arab states upon the Jews of Palestine, whether they resided within or without Israel. But that attack did justify Israeli defensive measures, both within and, as necessary, without the boundaries allotted her by the partition plan (as in the new city of Jerusalem). It follows that the Egyptian occupation of Gaza, and the Jordanian annexation of the West Bank and Jerusalem, could not vest in Egypt and Jordan lawful, indefinite control, whether as occupying power or sovereign; *ex injuria jus non oritur*."; *see also* Curtis, supra *note* 18, at 465 ("[S]ince the Arab states' use of force in 1948-1949 against Israel was illegal, Jordan's subsequent annexation of the West Bank . . . which was unacceptable to and unrecognized even by the Arab League, could not give Jordan any legal title to the territories. The principle *ex injuria jus non oritur* . . . prohibits Jordan from benefitting from its unlawful aggression.").

58 *See Settlement Activities*, *supra* note 5, at 2272, n.53. Indeed, the Palestinian demands bring to mind another of Abba Eban's famous quotes: "I think that this is the first war in history that on the morrow the victors sued for peace and the vanquished called for unconditional surrender." Abba Eban, *Israel's Dilemmas: An Opportunity Squandered*, *in* THE IMPACT OF THE SIX-DAY WAR: A TWENTY-YEAR ASSESSMENT 25 (Stephen J. Roth ed., 1988).

the UNSC, in Resolution 2334: (i) purports to strip away Jewish rights to live in these areas; (ii) turns the *ex injuria* principle on its head; and (iii) effectively rewards aggression, all in direct contravention of international law.

IV. ACQUISITION OF TERRITORY BY "FORCE"

Resolution 2334 also reiterates the inapplicability of the acquisition of territory by "force," seemingly to undermine Israeli claims to these territories. In other words, it is saying that it is illegal to acquire territory by force and therefore Israeli settlements are illegal because Israel does not have sovereignty over these territories. Again, that is a fundamental and, frankly, dangerous misapplication of the law.

Historically, there has been a recognized distinction between aggressive force, which is illegal under Article 2 of the UN Charter, and defensive force, which is endorsed by Article 51 of the UN Charter (indeed, whereas Resolution 242 refers to the inapplicability of the acquisition of territory by "war," Resolution 2334 and other resolutions water down that term, referring instead to the acquisition of territory by "force").[59] As Professor Stone explained:

> International law forbids the acquisition of territory by *unlawful* force, but not where, as in the case of Israel's self-defense in 1967, the entry on the territory was lawful. It does not so forbid it, in particular, when the force is used to stop an aggressor, for the effect of such prohibition would be to guarantee to all potential aggressors that, even if their aggression failed, all territory lost in the attempt would be automatically returned to them. Such a rule would be absurd to the point of lunacy. There is no such rule.[60]

Indeed:

> [I]t is apparent that this proposed rule [that territory may not be acquired even in countering aggression] would be disastrously undesirable. It would assure every prospective aggressor that if he fails, he will be entitled to restoration of any territory he has lost … By such a rule an international law which sets out by the *ex injuria* principle to discourage aggressors, would end with a rule encouraging

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59 The variance between these terms is not merely a distinction without a difference: "The expression 'by war' is not a legal synonym for 'as a result of armed conflict.' The principle pertains only to the conquest of territory through *military aggression*, of which Israel was manifestly not guilty [in 1967]." Michael I. Krauss, *Why Israel is Free to Set its Own Borders*, Commentary (July 1, 2006) (emphasis in original), https://www.commentarymagazine.com/articles/why-israel-is-free-to-set-its-own-borders/.

60 STONE, *supra* note 20, at 52.

> aggressors by insuring them in advance against the main risks involved in the case of defeat.[61]

Judge Sir Lauterpacht noted similarly:

> [T]erritorial change cannot properly take place as a result of the "unlawful" use of force. But to omit the word 'unlawful' is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor's charter. For if force can never be used to effect lawful territory change, then if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.[62]

Likewise, Judge Schwebel stressed the need to distinguish between aggressive conquest and defensive conquest:

> [The] principle [that the acquisition of territory by war is inadmissible] must be read in particular cases together with other general principles, among them the still more general principle of which it is an application, namely, that no legal right shall spring from a wrong, and the Charter principle that the Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. So read, the distinctions between aggressive conquest and defensive conquest, between the taking of territory legally held and the taking of territory illegally held, become no less vital and correct than the central principle itself.[63]

The fact that territorial acquisition through defensive force is acceptable under international law (or, at a minimum, was circa 1967), is evidenced by the fact that such acquisitions were undertaken and sanctioned by the very countries that created the UN and drafted its Charter. As Professor Halberstam has noted,

> This interpretation of the Charter, permitting the acquisition of territory resulting from the use of force when that use of force is in response to aggression, is consistent with the action taken following World War II by the states that drafted the Charter and established the United Nations. In fact, all of the states guilty of aggression in World War II—Germany, Japan, and Italy—were forced to give up territory

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61 Schaeftler, *supra* note 16, at 67 (citing JULIUS STONE, NO PEACE – NO WAR IN THE MIDDLE EAST 33 (1970)).

62 *LAUTERPACHT, supra note 48, at 52*.

63 Schwebel, *supra* note 56, at 345; *see also* Schaeftler, *supra* note 16, at 65 ("The Latin phrase *es injuria non oritur ius* suggests that no country should gain from the fruits of an illegal act but where the act is legal as in self defence, there is a place for such gains."); *id.* at 65-66 (citing authorities recognizing the potential for acquisition of territory through defensive force).

> which they held prior to W.W. II. For example, Germany was forced to give up land east of the Oder and Niesse Rivers to Poland and the U.S.S.R. Italy was forced to give up former Italian territory to France and to the former Yugoslavia in the modification of pre-war borders. Japan was forced to give up Korea, the islands of Quelpart, Port Hamilton and Dagelet, Formosa, the Pescadores, the Kurile Islands, part of Sakhalin and the Islands adjacent to it, and the Spratly Islands.[64]

As Judge Schwebel observed, the same principle was applied in Korea, where "substantial territory north of the 38th parallel from which the aggressor was driven" was allowed to remain in South Korean possession.[65]

In fact, the principle that territory can be acquired through lawful, defensive use of force — and lost through aggressive force — has effectively been recognized already with regard to Israel and Palestine. As a result of its defense in 1948, Israel obtained territories outside of those intended to be allotted to the Jewish State under the abortive Partition Plan. Notwithstanding that extension of Israeli territory, and the agreement that the 1949 Armistice lines were not to be considered final borders, those territories are not considered "occupied territory" and have been wholly outside the discussion of possible territorial relinquishment by Israel in exchange for a peace agreement with the Palestinians and any other Arab party. Thus, the territorial *status quo post bellum* has been accepted in practice. In other words, the 1949 Armistice lines, including the territory obtained by Israel through defensive force outside of its initially recognized borders, are almost universally recognized as the *minimum* borders of the Jewish State from which withdrawal is neither required nor expected.[66]

Further, while much is made of the expression in Resolution 242 of the inapplicability of the acquisition of territory "by war" — in the resolution's pre-ambulatory, not operative, section — by recognizing in adopting Resolution 242 that Israel would *not* be compelled, even under

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64 Malvina Halberstam, *The Myth that Israel's Presence in Judea and Samaria is Comparable to Iraq's Presence in Kuwait*, 19 SYRACUSE J. INT'L L. & COM. 1, 8-9 (1993).

65 Schwebel, *supra* note 56, at 347.

66 *See, e.g.*, Nicholas Rostow, *The Historical and Legal Contexts of Israeli Borders*, JERUSALEM CENTER FOR PUB. AFF. 75, 80 (2011), http://jcpa.org/wp-content/uploads/2012/02/Kiyum-rostow.pdf [hereinafter Nicholas Rostow, *The Historical and Legal Context of Israeli Borders*] (Resolution 242 "treated [the 1949 armistice lines] only as marking a minimum Israeli territory. Resolution 242 arguably entitled Israel to more territory than that"); Schaeftler, *supra* note 16, at 74 ("The only clear and obvious principle is that the withdrawal [referenced in Resolution 242] is to be from territories occupied in the 'recent conflict,' that is not over and beyond the armistice demarcation lines as they stood on June 4, 1967.").

a peace agreement, to retreat back to the 1949 Armistice lines, the UNSC effectively recognized the foregoing distinction between the acquisition of territory in defensive versus aggressive warfare. Indeed, if, in fact, there can be no acquisition of territory by force of *any* kind, even defensive force, then there would have been *no basis* — and moreover it would have been a *violation of the law* — to require less than a complete, unequivocal withdrawal by Israel from *all* territories it captured in 1967 *regardless* of whether Israel was acting in self-defense, yet Resolution 242 deliberately did not require such a complete withdrawal.[67] In fact, the Soviet Union and the Arab parties argued in 1967 that Israel should be labeled an aggressor state, and therefore forced back to the 1949 Armistice lines, and their arguments were rejected not only by the Security Council but the General Assembly (a notoriously anti-Israel body) as well.[68]

Professor Eugene Kontorovich addresses this issue in a similar manner. He notes — in addition to the foregoing scholarly recitation of the historical distinctions between aggressive, unlawful use of force and defensive, lawful use of force *vis a vis* the acquisition of territory, and the history of Resolution 242 itself — that a review of other United Nations resolutions pertinent to the issue of the acquisition of territory by force indicates that Resolution 242 is distinct from them linguistically, in a

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67 *See* Shetreet *supra* note 38, at 265; *see also* Schaeftler, *supra* note 16, at 64 (pointing out that a reading of Resolution 242's pre-ambulatory language as evidencing a blanket prohibition on any territorial acquisition would create a situation where "the occupying state must withdraw before peace is secured, and even if the territory was occupied in self-defence," and that it was "questionable that such a principle is well established in the rules of customary international law"); Eugene Rostow*, The Perils of Positivism*, *supra* note 19, at 244 (with regard to the pre-ambulatory admonition on the non-acquisition of territory by war, Professor Rostow noted that: "The phrase has always been treated as either a rhetorical flourish devoid of content, or as meaning that territory should not be acquired by aggressive war.").

68 *See* Schwebel, *supra* note 56, at 344 n.4, 346; Eugene Rostow, *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors,* 25 N.Y.U. J. INT'L L. & POL. 489, 501-502 (1993) ("*The Drafting of Security Council Resolution 242*"); *Occupied Territories*, *supra* note 47; Curtis, *supra* note 18, at 494. Even Richard Falk, who misses virtually no opportunity to lambast Israeli policies and actions, was forced to admit that "Israel was entitled to strike first in June of 1967, so menacing and imminent was the threat of aggression being mounted against her." Richard Falk, *Reply to Professor Julius Stone*, 64 AM. J. INT'L L. 162, 163 (1970). It should be noted as well that while both Resolution 242 and Resolution 2334 were adopted under Chapter VI of the Charter, which does not confer legally binding status, UNSC Resolution 338 made Resolution 242 *legally binding*. *See* Eugene Rostow*, The Future of Palestine*, *supra* note 17, at 5. Moreover, Resolutions 242 and 338 "are the only documents setting out principles for peacemaking on which Israel, its Arab neighbors, and the Security Council have formally agreed." *The Drafting of Security Council Resolution 242,* at 490; *see also* Becker, *supra* note 23 (the formula set forth in Resolutions 242 and 338 "is the only formula which has been accepted by both sides as the basis for permanent status negotiations"). Thus, as between Resolutions 242 and 2334, Resolution 242 should control.

manner that supports the conclusion that it does not require a complete Israeli withdrawal to the 1949 armistice lines:

> Territorial withdrawal demands occur in at least eighteen other Security Council Resolutions [besides Resolution 242], ranging from the first days of the U.N. to the present, and in a variety of geopolitical contexts. Among all the resolutions, there are certain common patterns of language and phrasing. However, Resolution 242's phrase "withdrawal . . . from territories" is entirely unique in Security Council practice. Instead, resolutions before and after demand total withdrawal either by using the definite article or by explicitly referring to the antebellum status quo (thus clearly defining a complete withdrawal). *Thus resolutions that demand full territorial withdrawal say so unambiguously, unlike Resolution 242*. Indeed, some of the other resolutions resemble the proposed Soviet draft for Resolution 242, which specified a return to the antebellum lines. Moreover, several resolutions use comprehensive modifiers like "all" or "whole" to describe the extent of the territorial withdrawal. *Those modifiers were explicitly rejected in the negotiations over the drafting of Resolution 242*. Similarly, General Assembly resolutions calling for withdrawal in other contexts clearly specify the extent of the withdrawal.[69]

Moreover, the history of scholarly debate over whether *any and all* employments of force — including lawful, defensive uses of it — are subsumed within the proscription against the acquisition of territory indicates that, at least as of the time Resolution 242 was passed, a substantial body of international legal jurists and bodies believed that exceptions to the general principle of non-acquisition could be applied to situations in which an aggressor nation was deprived of territory in the pursuit of its aggression and a defending nation acquired that territory in opposing it.[70] In light of that position, it is no surprise that the various pronouncements in international law regarding the illegality of the acquisition of territory by force express themselves in the context of the use of force "in violation of" the terms of the UN Charter (*i.e.*, Article 2

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69 Eugene Kontorovich, *Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal*, 16 CHICAGO J. INT'L L. 127, 134 (2015) (emphasis added). As Professor Kontorovich notes further, "[t]he most probative sources for interpreting Resolution 242 are the Security Council's pre-1967 resolutions, as the meaning of legal texts is fixed at the time of their adoption." *Id*.

70 *Id.* at 140-48; *see also* Schaeftler, *supra* note 16, at 67 (a construction of Resolution 242 that territory may never be obtained through force, even if defensive, "would seem to constitute a new rule of international law, which was not the draftsmen's intention").

of the UN Charter).[71] Israel's self-defense — and its acquisition of territory as a result of that self-defense — in 1967, like its acquisition of additional territory in 1948 through self-defense, was *not* in violation of the terms of the UN Charter, but rather was in fact permitted by Article 51 of the UN Charter. It was under the umbrella of the foregoing legal principle that Resolution 242 was passed. Resolution 2334 ignores these facts and legal principles and is therefore wrong as a matter of law.[72]

V. THE GENEVA CONVENTION AND THE ROME STATUTE

Among the primary international legal bases for opposing Israeli settlements and labeling them "illegal" are the terms of the Geneva Convention and Rome Statute, particularly the provisions of those treaties that state that it is illegal for an occupying power to "transfer" or "deport" its citizens into occupied territory.[73] However, application of those terms to Israeli settlements is wrong — and, from a practical standpoint, strained — for a number of reasons.

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71 *See, e.g.*, GA Res. 25/2625, ¶ 1, U.N. Doc. A/Res/25/2625 (Oct. 24, 1970) ("The territory of a State shall not be the object of military occupation resulting from the use of force *in contravention of the provisions of the Charter*.") (emphasis added). Note, as well, that the provisions of Res. 2625 that speak to the illegality of territorial acquisition resulting from the "threat or use of force" immediately follow this qualification (*id.*), *i.e.*, the ban against the acquisition of territory by force only applies to the threat or use of force in contravention of the Charter. Similarly, in its Definition of Aggression, the UNGA calls upon all states to "refrain from all acts of aggression and other uses of force contrary to the Charter [and Resolution 2625]." G.A. Res. 3314, ¶ 3, U.N. Doc. A/Res/29/3314 (Dec. 14, 1974). Resolution 3314 also reaffirms that the territory of member states shall not be the object of military occupation and that territory may not be obtained via "force taken by another State *in contravention of the Charter*." *Id.*, Annex, Definition of Aggression (emphasis added). Additionally, "no territorial acquisition or special advantage *resulting from aggression* is or shall be recognized as lawful." *Id.*, art. 5, ¶ 3 (emphasis added).

72 Resolution 2334 is also wrong in any event in its focus on the issue of acquisition of territory by force on the additional ground that Resolution 242 ultimately envisioned Israel retaining some portion of the territory it had occupied in the Six-Day War *not* solely as a result of its use of *force*, but rather also based on the ultimate conclusion of treaties of *peace* between it and its neighbors. *See* Schwebel, *supra* note 56, at 344 n.4 ("In view of the defeat in the United Nations organs of resolutions holding Israel to have been the aggressor in 1967, presumably the use of the word 'war' was not meant to indicate that Israel's action was not in exercise of self-defense. *It may be added that territory would not in any event be acquired by war, but, if at all, by the force of treaties of peace*.") (emphasis added); Shetreet, *supra* note 38, at 267 ("The fact that the preface to the Resolution emphasizes rejection of acquiring territories by force is of no meaningful consequence, for Israel's intention was to reach a settlement over the territories through mutual consent."). Still, its recognition that such treaties of peace would likely entail Israel's retention of and ultimate sovereignty over territory it acquired through defensive force validates the argument that territory can be lawfully obtained through such means (even assuming *arguendo* that it cannot be obtained *exclusively* thereby).

73 Geneva Convention art. 49, ¶ 6, Aug. 12, 1949, 75 U.N.T.S. 287; Rome Statute art. 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 90.

A. The Proper Interpretation and Application of Article 49(6) of the Geneva Convention

First, that reading of the "transfer" provision of the Geneva Convention is contrary to what even drafters of the Convention have said about it and is a perversion of the background of its passage and meaning. Professor Eugene Rostow, a former dean of Yale Law School and Under Secretary for Political Affairs during the administration of Lyndon Johnson, and one of the craftsmen behind Resolution 242, explained:

> The Jewish settlers in the West Bank are most emphatically volunteers. They have not been "deported" or "transferred" to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.[74]

Similarly, Ambassador Morris Abram, one of the drafters of the Convention, was emphatic that the Convention "was not designed to cover situations like Israeli settlements in the occupied territories, but rather the forcible transfer, deportation or resettlement of large numbers of people."[75]

Professor Stone noted as well that the very language of Article 49(6) denotes a compulsory element as a condition precedent to a finding of its violation:

> The second aim of the prohibition in Article 49(6) was . . . to protect the inhabitants of the occupant's own metropolitan territory from genocidal or other inhuman acts of the occupant's government. That this was part of, if not the main intention of Article 49(6) seems clear from the use of the term "deport," which clearly refers to a forced movement of its population. The addition of the term 'or transfer' does not alter this import. The word "deport" is usually associated with the involuntary removal by a government of aliens from its territory, and the addition of "transfer" as a synonym seems only directed to indicate that the prohibition was intended to protect the occupant state's own nationals as well as other elements of its population. . . . And *the word "transfer" in itself implies that the movement is not voluntary on the part of the persons concerned, but a magisterial act of the state concerned.*[76]

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74 Eugene Rostow, *Prolonged Military Occupations: The Israeli-Occupied Territories Since 1967,* 84 Am. J. Int'l L. 717, 719 (1990) (Correspondence in response to Adam Roberts) [hereinafter Rostow, *Prolonged Military Occupations*].

75 *See* Alan Baker, *The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords,* 23 JEWISH POL. STUD. REV. 3235 (2011).

76 STONE, *supra* note 20, at 190 (emphasis added).

That view is supported by the observations of the committee members who deliberated over and ultimately adopted Article 49, who indicated that its purpose was "to prohibit, once and for all, the abominable transfers of populations which had taken place during the last war."[77]

So too, Professor Shetreet rejects the notion that Article 49 of the Convention applies to Israeli settlements:

> The Geneva Convention was signed four years after the end of the Second World War and in light of Nazi genocide during the Holocaust. These factors strongly indicate that the intention of Article 49 was to prevent what had been experienced in two world wars—expulsion and settlement. According to rules of interpreting laws that were legislated in different times, there is an essential need to check the circumstances at that time. Thus, it is clear that the establishment of Israeli settlements [does] not involve the element of expulsion of civilian population. All settlements have been established on *unpopulated lands*.[78]

Professor Stone aptly explains the abject perversion of applying the terms of the Geneva Convention to this situation:

> Irony would . . . be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that . . . the West Bank . . . must be made judenrein and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).[79]

B. The Unsettled Applicability of Article 8(2)(b)(viii) of the Rome Statute

Indeed, it was precisely because the voluntary movement of individuals into occupied territory is *not* covered by the Geneva Convention that, toward the end of the deliberations over the text of the Rome Statute, the Arab states militated to include within its terms the expanded "war crime" of 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

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77 *Id*. at 210, n. 7.

78 Shetreet, *supra* note 38, at 267-68.

79 STONE, *supra* note 20, at 180.

of the occupied territory within or outside this territory."[80] Because of that last-minute political maneuver, Israel, which had strongly supported the creation of the ICC, like the United States, withdrew its signature from the Rome Statute and did not ratify it. As a result, Israel arguably would not be bound by any ruling of the ICC with regard to application of its terms: "Under the *pacta tertiis nec nocent prosunt* rule of customary international law, also enshrined in the Vienna Convention on the Law of Treaties, treaties such as the Rome Statute generally do not bind or give legal rights to non-parties."[81]

Nonetheless, the characterization of "direct" or "indirect" transfer of an occupying power's population into occupied territory as a war crime could conceivably except this general rule from application to Israeli personnel, depending on how those terms are ultimately defined, applied and accepted by the ICC and the international community.[82] The introduction and adoption of Article 8(2)(b)(viii) was a particularly controversial aspect of the negotiations of the text of the Rome Statute, and raised the issues of, *inter alia*, whether: (i) the crime at issue was "limited to forcible transfer" (which would make the Rome Statute consistent with the purposes of the Geneva Convention and which is a sensible construction considering the rejection of the Arab states' proposed Elements.); (ii) criminal transfer was limited to large scale transfers, versus small or individual movement (of which the first interpretation would, again, be consistent with the Geneva Convention's animating thrust); and (iii) the crime described is limited to situations

80 Rome Statute, *supra* note 73, at art. 8(2)(b)(viii) (emphasis added); *see also* Baker, *supra* note 75, at 36. A far more expansive version of the transfer prohibition, proposed by several Arab states to the Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, sought to criminalize conduct where the perpetrator "induced, facilitated, participated or helped in any manner in the transfer of civilian population of the Occupying Power into the territory it occupies." *See* Preparatory Commission for the International Criminal Court [PCICC], *Proposals in relation to elements of article 8 (2) (b) (viii) of the Rome Statute of the International Criminal Court*, at 3 (August 12, 1999). That this extremely broad expression of the elements of criminal transfer was neither accepted by the Working Group nor adopted as part of the final text suggests that unlawful "transfer" under the terms of the Rome Statute requires more than mere support, facilitation or encouragement of the voluntary movement of civilians into occupied territory.

81 Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 108 (2010); *see also* Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 447 (2000) ("As an international treaty, the Rome Statute binds the contracting States only … The general rule *pacta tertiis nec nocent nec prosunt* is supported, as the International Law Commission has observed, by 'almost universal agreement.'").

82 Danilenko, *supra* note 81, at 489.

where "the economic situation of the local population [is] worsened [or] their separate identity . . . endangered by the transfer" in question.[83]

Perhaps owing to the strong objections raised by Israel and the controversy created by the Arab states' maneuvering, the description of the "elements" of this crime includes a footnote indicating that the term "transfer" must be interpreted "in accordance with the relevant provisions of international humanitarian law."[84] There is, at a minimum, a legitimate debate as to whether the voluntary relocation of individuals, particularly those with *already existing settlement rights*, into Judea, Samaria and East Jerusalem can properly be considered violative of the provisions of international humanitarian law regarding unlawful "transfer" of populations. *See supra* Part V, Section A. Indeed, on its face, Article 8(2)(b)(viii) requires affirmative state involvement as an element of the crime, *i.e.*, transfer "by the Occupying Power." Voluntary individual movement by persons independent of such state involvement would seem to be excepted by this language. Thus, "the main points of controversy [regarding the meaning and application of the Rome Statute's "transfer" prohibition] were left open for interpretation by the future judges [of the ICC]."[85]

Another factor that may hinder the application of the Rome Statute to Israeli settlements is Israel's record of objection to the inclusion and application of this provision (and its ultimate refusal to ratify the treaty): "To the extent that [Article 8(b)(viii) of the Rome Statute's expanded definition of "transfer"] constitute[s] progressive development of substantive criminal law, they bind only State Parties. States that persistently objected to these and other provisions . . . probably may qualify for the status of persistent objector" to which the provision does not apply.[86] Israel and the United States were among the persistent

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83 *See* Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK Y.B. U.N. L. 341, 395 (2003) http://www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf; *see also* Pnina Sharvit Baruch, *Understanding the Settlements Debate*, 111 AJIL UNBOUND 36, 40 (2017) (construing the Rome Statute's prohibition on "transfer" as prohibiting "extreme situations" such as ethnic cleansing would be "in line with the . . . general context of Article 49 of the Fourth Geneva Convention, which deals with situations of deportation and forced transfer of the local population").

84 Dörmann, *supra* note 83, at 395.

85 *Id.* Moreover, to the extent that ambiguity exists on the issue of the legality of voluntary movement of citizens of an occupying power into occupied territory, under the terms of the Rome Statute such ambiguity must be resolved in favor of the accused. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

86 *See* Danilenko, *supra* note 81, at 488.

objectors to this expansion of the definition of transfer, arguing that there is no "customary international law yet that attached this kind of activity to individuals for criminal responsibility."[87] Therefore, they would not be bound by this purported progression in customary international law. *See infra* Part VI. It remains to be seen whether the ICC would choose to pursue prosecution against individual Israeli citizens under Article 12 of the Rome Statute notwithstanding Israel's non-signatory and persistent objector status.

In addition, it is worth noting that the underlying purpose of the Rome Statute is to address "atrocities that deeply shock the conscience of humanity" and the "most serious crimes of concern to the international community."[88] It is unclear how the court would view the voluntary settlement of Israelis in Judea, Samaria and Jerusalem in the context of these broader purposes, especially considering that the handful of cases it has accepted have focused on such issues as genocide, mass murder and other crimes against humanity, including the use of child soldiers (a crime for which the Palestinians may, in fact, be guilty). Indeed, the Preamble reaffirms "the Purposes and Principles of the Charter of the United Nations, and in particular that all states shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[89] It was only through an aggression by the Arab parties in direct violation of those principles and the purposes of the United Nations that Jewish rights to settle in Judea, Samaria and Jerusalem's old city were interrupted (but not superseded). *See supra* Part III. It would be a gross perversion, then, to apply the provisions of the Rome Statute to Israel's *reversal* of that aggression and *restoration* of those rights.

In any event, absent Israel's consent to submit to ICC jurisdiction—a consent highly unlikely to be given—the ICC should be precluded from determining whether Israel's allowance (or even purported facilitation) of voluntary movement by its citizens into Judea, Samaria and Jerusalem falls under the Rome Statute's "transfer" prohibitions; pursuant to the ICJ's holding in the *Monetary Gold* case,[90] "a court should not decide a case if doing so would involve adjudication of the rights and responsibilities of a third party not before the court, and which had not

87 *Id*. at 488, n.183 (citation omitted).

88 Rome Statute, *supra* note 73, at pmbl.

89 *Id.*

90 Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, 1954 I.C.J. Rep. 19 (June 15).

given its consent to the proceedings."[91] The *Monetary Gold* doctrine "applies to all international law tribunals," *i.e*., including the ICC.[92] There can be little dispute that the issue of the legality of Israeli settlements in Judea, Samaria, and Jerusalem, and whether such settlements constitute a crime under the Rome Statute, would necessarily involve a determination of the "rights and responsibilities" of Israel, a party that will almost certainly not be before the court. Indeed, in an analogous setting, the ICJ applied the *Monetary Gold* rule in refusing to rule on Portugal's claims regarding the impropriety of Australia's treaty with Indonesia affecting resources off the coast of East Timor. In reaching its decision, the court held that:

> [T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject matter of such a judgment made in the absence of that State's consent.[93]

So too, with regard to potential claims concerning Israeli settlements, a decision in the ICC as to the legality of Israeli settlements would require determinations as to Israel's claims to disputed territory, the borders of Israel (and Palestine) and the status of Jewish rights to settle in Judea, Samaria and East Jerusalem; all without Israel's consent to jurisdiction and contrary to the *Monetary Gold* principle.

C. Neither the Geneva Convention nor the Rome Statute Displace Preexisting Settlement Rights

In addition, the right of Jews to settle in these territories was recognized in the Mandate, the terms of which have never been superseded with regard to Judea, Samaria and East Jerusalem as provided for in Article 80 of the UN Charter. *See supra* Part I. The Geneva

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91 Benoliel & Perry, *supra* note 81, at 109, 110 (noting that The Hague, in *Larsen v. Kingdom of Hawaii*, 119 ILR 566 (Perm. Ct. Arb. 2001), interpreted the *Monetary Gold* cases as "setting forth a general international principle that 'an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a State which is not a party to the proceedings.'").

92 *Id.* at 110; *see also* Dapo Akande, Prosecuting Aggression: The Consent Problem and the Role of the Security Council (May 2010) (working paper) (on file with Oxford Inst. for Ethics, L. and Armed Conflict) ("The consent principle applies to the ICC as it does to other tribunals. Were the ICC to make determinations on the legal responsibilities of nonconsenting States . . . this would violate the *Monetary Gold* principle.").

93 East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 105 (June 30).

Convention and the Rome Statute do not — and could not — undo those *preexisting* rights of settlement, for while the mere fact of occupation in itself may not create sovereign rights in occupied territory, "[a]t the same time, it does not eliminate any preexisting claims or rights of the occupier, or create, in and of itself, new claims or rights over the territory to other political entities."[94] In other words, while they preclude mass, forced "transfer" or "deportation" of populations, the Geneva Convention and Rome Statute do not undo already existing settlement rights, which are exactly what the Jewish people have *vis a vis* Judea, Samaria and Jerusalem. Indeed, where there is a conflict between the UN Charter and any other agreement, including a treaty like the Convention or the Rome Statute — as exists here assuming *arguendo* the Convention's and the Statute's prohibitions against "transfer" or "deportation" of populations even apply — under Article 103 of the UN Charter, the UN Charter's provisions, including Article 80, control.[95]

Professor Rostow also recognized this fact:

> The opposition to Jewish settlements in the West Bank also relied on a legal argument—that such settlements violated the Fourth Geneva Convention forbidding the occupying power from transferring its own citizens into the occupied territories. How that Convention [or the Rome Statute] could apply to Jews who already had a legal right, protected by Article 80 of the United Nations Charter, to live in the

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94 Baruch, *supra* note 83, at 36; *see also id.* at 38 ("[W]hile residents of an area under the control of a foreign state require the protection of a legal framework, this does not infringe upon claims of sovereignty or on territorial disputes that must be decided by other (political) means.").

95 *See supra* Section I(B); That the Geneva Convention and the Rome Statute fall under the types of agreements subject to the supremacy clause of Article 103 is apparent. As the ICJ recognized in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1984 I.C.J. 392, 440 (Nov. 26): "[A]ll regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made . . . must be made always subject to the provisions of Article 103." Moreover, treaty law itself also recognizes the exceptional status of the UN Charter: "The unique position of the UN Charter in the present international legal order is recognized and reflected by many rules of positive international law, especially treaty law." Bardo Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter, in the International Legal Order*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE 141 (Jeffrey L. Dunoff & Joel P. Trachtman eds., Cambridge University Press 2009); *see id*. at 142-43 (listing examples of treaties that express their deference to the UN Charter). Indeed, the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention") indicates that its codified treaty rules are "subject to" Article 103 of the UN Charter. *Vienna Convention on the Law of Treaties (with annex)*, Jan. 27, 1980, 1155 UNTS 331, art. 30(1). The 1986 version of the Vienna Convention states similarly that the rules in question "are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail." Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *opened for signature* Mar. 21, 1986, 25 ILM 543, art 30(6).

> West Bank, East Jerusalem, and the Gaza Strip, was never explained.[96]

Moreover, construing the Geneva Convention and the Rome Statute as precluding the voluntary settlement by Jews in Judea, Samaria and Jerusalem, taken in its logical (or, perhaps, illogical) but inevitable extreme, would mean that Jews who exercised their Mandate-assured right to settle in these areas prior to the Arab aggression of 1948, and were forcibly and illegally dispossessed from them, become international criminals (potentially subject to being dragged into the dock at the Hague) by returning to their prior, lawful home areas — and that a government that assists them in reestablishing their rights is a partner in crime. That, truly, would convert international human rights law into an "aggressor's charter."[97]

That does not mean that other humanitarian provisions of the Geneva Convention or the Rome Statute may not be applicable, or that all Israeli actions undertaken with regard to Judea, Samaria and East Jerusalem are legal, but the shoehorning of voluntary relocation of individuals who already have a right to settle within these territories into the "transfer" prohibitions of the Geneva Convention or the Rome Statute (as Resolution 2334 appears to do) is untenable and flies in the face of Article 49 of the Convention's animating purpose (and the purposes of other "relevant provisions of international humanitarian law"), as well as the terms of the UN Charter itself.

VI. CUSTOMARY INTERNATIONAL LAW AND THE EMERGENCE OF THE

96 *See* Eugene Rostow, *The Future of Palestine*, *supra* note 17, at 13; *see also* Eugene Rostow, *Prolonged Military Occupations*, *supra* note 74, at 719-720 ("Assuming for the moment the general applicability of the Convention, it could well be considered a violation if the Israelis deported convicts to the area or encouraged the settlement in the territories of people who had no right to be there. But how can the convention be deemed to apply to Jews who do have a right to settle in the territories under international law? — a legal right assured by treaty and specifically protected by Article 80 of the United Nations Charter, generally known as 'the Palestine Article.' The Jewish right of settlement in the area is equivalent in every way to the right of the existing population to live there."); Moshe Arens, *A Matter We Must Solve Ourselves* (July 28, 2009), https://moshearens.com/2009/07/28/a-matter-we-must-solve-ourselves/ ("[A] reading of that convention and an acquaintance with the history of Palestine since the Balfour Declaration and the League of Nations Mandate for Palestine, as well as the circumstances of the occupation of Judea and Samaria by the Jordanian army between the years 1948 and 1967, make it clear that the Geneva Convention is not applicable to Israel's presence in these territories."), cited in Ash, *supra* note 27, at 198, n. 81.

97 LAUTERPACHT, *supra* note 48, at 52.

"STATE OF PALESTINE"

Another argument advanced to support the notion that Jewish settlement rights in Judea, Samaria and "East Jerusalem" have terminated is that customary international law has evolved out of the guise of repeated characterizations of Israeli settlements as "illegal" by international bodies. It is also argued that, by virtue of the recognition of a state of "Palestine" by many member states of the United Nations, and Palestine's participation and recognition in several international bodies, such sovereignty has become customary international law by which Israel is bound and which, accordingly, makes Jewish settlement in Judea, Samaria and Jerusalem illegal.[98] Those arguments, too, are misguided.

First, customary international law is created not merely by state pronouncements, but by states' *practice*.[99] Accordingly, what states *do* can be considered a more compelling indication of their acceptance of an international legal norm than what they merely *say* (particularly where what they say contrasts with what they do): "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . . ."[100] Furthermore, generally speaking, "customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[101] Thus, "[p]ractices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law."[102] Moreover, nations that are "persistent objectors", *i.e*., that consistently object to an emerging principle of customary international law, are not bound by it once it obtains legal status, provided that those objections are raised before the subject rule becomes settled.[103] In other words, in cases in

98 There are significant grounds for dispute over whether Palestine qualifies for statehood under international law in the first instance. *See supra* Section I(D).

99 *See*, *e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

100 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3); *see also* Russian Claim for Interest on Indemnities (Russia v. Turkey), Award of the Tribunal, 1912 P.C.A., at 3 (Nov. 11, 1912) ("[T]he fulfillment of obligations is, between States as between individuals, the surest commentary on the meaning of those obligations.").

101 Flores v. Southern Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).

102 *Id*.

103 *See, e.g.,* Fisheries Case (United Kingdom v. Norway), Judgment, 1951 I.C.J. 116, 131 (Dec. 18); *see also Overview of International Law and Institutions*, BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY: WIKI, https://cyber.harvard.edu/cybersecurity/Overview_of_International_Law_and_Institutions (last

which norms of practice have become pervasive enough internationally to form customary law, countries need not consent in order to be bound. However, countries are only bound by such laws if they have not objected to the emergent customary law pre-establishment (the exception being those customary laws that have obtained the status of *jus cogens*).[104] Further, as indicated above, for the acts constituting "states practice" to obtain the status of customary international law, they must be undertaken out of a sense of legal obligation (*opinio juris*) and not merely constitute acts "motivated only by considerations of courtesy, convenience or tradition."[105]

The repetition in international instruments of declarations of the purported illegality of Israeli settlements gives rise to the contention that, even in the absence of strictly binding decisions, customary international law proscribes Israeli settlements in Judea, Samaria and East Jerusalem. That approach, however, prioritizes pronouncements over actual practice and rings hollow. For while Israel has been subjected to inordinate focus and condemnation for her settlement policies *vis a vis* Judea, Samaria and Jerusalem, the international community has effectively turned a blind eye — as well as a mute voice and weak hand — to other, similar occupations and policies. Indonesia in East Timor, Turkey in Northern Cyprus, Armenia in Nagorno-Karabakh and Morocco in Western Sahara, among others, all have facilitated the settlement by their citizens in occupied territories, yet have received little attention, much less approbation, from the international community or its legal organs.[106] More on immediate point, very little condemnation was issued and no affirmative action was taken to address Jordan's illegal occupation of, and the free movement of its citizens into, the *very territory* (Judea, Samaria and East Jerusalem) that has produced the maelstrom of attention and condemnation for Israel. Indeed, "[t]he most striking thing about the state practice [with regard to settlement in occupied territories *other* than Israeli settlement in Judea, Samaria and Jerusalem] is the ubiquity of settlement activity and the accompanying international acquiesce."[107] The failure of the community

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modified Aug. 6, 2012) (summarizing CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (4th ed. 2011)).

104 *See, e.g.*, Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992).

105 North Sea Continental Shelf Judgment (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, 1969 I.C.J. 3, 44 (Feb. 20); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 98 (June 27).

106 *See, e.g.*, Eugene Kontorovich, *Unsettled: A Global Study of Settlement in Occupied Territories,* J. LEGAL ANALYSIS 9, 285-350 (2017).

107 *Id.* at 336.

of nations — or its institutions — to treat settlement by countries *other* than Israel, in occupied territories *other* than Judea, Samaria and East Jerusalem, as equally illegal undermines the notion that customary international law renders Israeli settlements in those territories illegal.

In addition, in this case in particular, Israel has consistently objected to: (i) the notion that the right of Jews to settle in Judea, Samaria and Jerusalem, recognized by the Mandate and sustained by Article 80 of the UN Charter, has been vitiated; (ii) Palestinian claims to superior sovereignty over most of these territories; and (iii) Palestinian assertions of statehood (and the seeming recognition of such within UN organs). Moreover, there is no clear rule of law *obligating* member states to recognize any state prior to that state having been admitted to the United Nations according to the procedures set out by the UN Charter and, therefore, widespread recognition of "Palestine" by member states of the United Nations does not form the *opinio juris* required to create binding customary international law.[108]

In fact, a cogent argument could be made that recognition of Palestine as a state is in *direct contravention* of the UN Charter. Part of the proposed State of Palestine is ruled by Hamas, an entity sworn to use military force in order to effectuate the elimination of another member state (*i.e.*, Israel), that has perpetrated numerous terrorist attacks toward that end — including bombings and rocket and mortar attacks directed at purely civilian targets — and which engages in blatant anti-Semitism.[109] While much was made of the purported 2017 "revision" of the Hamas Charter, a simple review of that statement of principles reveals that it does not abandon in any manner its fundamental opposition to the existence of Israel in any part of the land from the Jordan River to the Mediterranean, and does not foreswear violent means of effectuating that end.[110]

Further, the Palestinian Authority, among other things, encourages terrorism against Israeli civilians by, *inter alia*, paying hundreds of millions of dollars to the perpetrators of terrorist attacks and their families (as well as heaping praise and honorable recognition on the perpetrators

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108 *See, e.g.*, Crawford, *supra* note 27, at 309 ("There is no rule that majority recognition is binding on third states under international law."). Admission of a state as a full member of the United Nations requires a recommendation by the Security Council in favor of such admission, followed by a decision of the General Assembly approving such a recommendation. U.N. Charter article 4, ¶ 2; *see also Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ Rep. 4, 7-8 (Mar. 3) ("[t]he recommendation [of the Security Council] being the condition precedent to the decision [of the Assembly] by which the admission [is] effected.").

109 *See* Covenant of the Islamic Resistance Movement, Arts. 6, 11, 13-14, 22, 28, 32, 34 (1988).

110 *See* A Document of General Principles and Policies, Arts. 2, 14, 18-20, 25, 27 (May 2017).

of such attacks).[111] The conduct of both the PA and Hamas is in violation of, *inter alia*, the principles set forth in international treaties proscribing terrorist activities and support therefor.[112] The argument that such actions are undertaken in purported furtherance of a "right to self-determination" does not excuse these violations of international law:

> [T]he [International Convention for the Suppression of Terrorist Bombings], the Financing Convention and [UNSC] Resolution 1566 all expressly acknowledge that violation of the principles embodied in those documents are under no circumstances justifiable by political, philosophical, racial, ethnic, or religious considerations. Moreover, there have been no formal reservations to either of the Conventions purporting to assert that a right of self-determination justifies committing these otherwise condemned acts.[113]

Similarly, the PA's breaches of the Oslo Accords (including, for example, failing to curb incitement to terror, continued demonization of Israel in official and educational materials, and its efforts to have its statehood declared and join certain international bodies, such as the ICC) indicate further Palestine's unwillingness or inability to meet its international (including treaty) obligations, which states *in statu nascendi* must demonstrate they can and will do.

It is settled that "when an entity claims to be a state, it must satisfy the international community that it is not the product of international illegality. Put another way, the process by which the entity emerges should not have breached any international rule."[114] Moreover, the "ability and willingness" of an emerging state to "carry out international obligations" is a "criterion for admission of new members to the United

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111 *See, e.g.*, *Settlement Activities, supra* note 5, at 2273, n.54; Thane Rosenbaum, *Palestinians are Rewarding Terrorists. The U.S. Should Stop Enabling Them*, WASH. POST (April 28, 2017) https://www.washingtonpost.com/posteverything/wp/2017/04/28/palestinians-are-rewarding-terrorists-the-u-s-should-stop-enabling-them/?utm_term=.ddc433a67732; Daniel Schwammenthal, *Why is the West Financing Palestinian Terror*, NEWSWEEK (Nov. 13, 2017) http://www.newsweek.com/why-west-financing-palestinian-terrorism-700861 (in fact, the United States Congress passed, and President Trump signed into law, the Consolidated Appropriations Act of 2018, which includes a provision (known as the "Taylor Force Act," for a United States Army veteran murdered by a Palestinian in Tel Aviv in 2016), that renders the PA ineligible to receive federal funds unless it stops providing stipends to persons and the families of persons who take part in terrorist activities); *see* Pub.L. 115-141, §§ 1002(1), 1004, 132 Stat 348 (2018).

112 *See, e.g.*, G.A. Res. 54/109, art. 2, ¶¶ 1(b), 3 (Dec. 9, 1999); *Id.* at art. 6; *Id.* at art. 8, ¶ 1; *Id.* at art. 20.

113 Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 282 (E.D.N.Y. 2007).

114 NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 66 (Carlton Press 1994); *see also* Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491, 506 (1998) ("The existing states have always regarded the ability and willingness of a new state to act in accordance with international law as a precondition of its being recognized. . . .").

Nations."[115] The proposed state of Palestine fails those tests. It should not, therefore, be considered as being committed to the terms of the UN Charter, including, *inter alia*, those directed toward peaceful relations among nations, and the prohibition of threats or use of force against the territory or sovereignty of other member states.[116]

Under the principles expressed above, therefore, Israel is not bound by any "customary international law" that would purport to deprive its citizens of settlement rights in Judea, Samaria and Jerusalem or predispose sovereignty issues as they relate to those territories. Moreover, even if the foregoing were not the rule, no such customary international law could override the Mandate-established, UN Charter-incorporated rights to "close settlement" by Jews in these territories. *See supra* Part I. Thus, even broad recognition of Palestinian statehood within the Judea, Samaria and "East Jerusalem" regions by member states of the United Nations — and the attendant effect such recognition purportedly would have on Jewish rights to settle in those territories — does not create legally binding customary law restricting the right of Jews to settle in these areas.

VII. CONCLUSION

The oft-repeated contention that Israeli settlements in Judea, Samaria and Jerusalem are illegal is misguided. From both an historical and international legal perspective, the right of Jews to "close settlement" throughout these territories has long been established and has never been extinguished. No historical development or binding legal instrument has supplanted that right. The recognition of this fact and the legal status of the settlements, however, does not necessarily legalize all actions taken by the Israeli government in protecting and allowing the exercise of that right by its citizens, nor does it relieve Israel of its obligations to the other local populace — the Palestinians — in carrying out its duties and ensuring the protection of human rights (of both Israelis and Palestinians) under international law; issues beyond the scope of this article. Nonetheless, if the negotiation of an ultimate peace agreement, settling

115 Hillgruber, *supra* note 114, at 499.

116 *See, e.g.*, U.N. Charter, art. 2, ¶ 4 (requiring that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"); U.N. Charter, art. 4, ¶1 ("Membership in the United Nations is open to all other peace-loving states which accept the obligations contained the present Charter …"); *see also* Schaeftler, *supra* note 16, at 70 ("the desire to destroy the State of Israel is contrary to Article 2(4)" of the Charter).

all claims to territory that once was part of the Palestine Mandate, is to be successful, the rights of all of the inhabitants of these areas must be recognized and taken into account when analyzing what rights each side is willing to compromise, and thus the price being paid by each, in order to achieve that ultimate resolution; including the long-standing right of Jews to settle in them.