

## Legality of Israeli Settlements

### 1. Introduction

This contribution looks past the politicised statements on Israeli settlement activity and seeks to drill down to establish the position in international law. For this purpose, it deals briefly with the controversy surrounding the status of the relevant territory before looking in more detail at the application of the relevant Geneva Convention provisions. It then looks at the wider treatment of settlement activity, outside of the Israeli context, and considers the positions of the International Court of Justice and the Israeli Supreme Court on issues pertaining to the ‘settlement debate’. In 2017, no discussion can ignore the recent Security Council Resolution 2334. The political, as opposed to legal nature of this resolution is dealt with as a preliminary matter. This contribution establishes that in the arena of applicable international law, there are no specifically legal grounds for declaring the building of settlements to be illegal.

### 2. Applicable law

The first issue to consider in relation to the legality of Israeli settlements in the ‘West Bank’ is the applicable law. This is influenced by the definition of the territory, and the corresponding legal regime, in which settlements are built. There is no straight forward answer to this issue, as the status of the disputed territory on which much of the settlement activity occurs is unsettled. It is therefore prudent to look both at the international legal framework under which settlement building is most often criticised and the domestic legal framework under which the Supreme Court of Israel has assessed settlement building in a number of high profile cases.

#### **UNSCR 2334**

It is important to maintain a distinction between the legal status of settlements and the political discussion concerning their legitimacy. The distinction was recently drawn by State Department Spokesman John Kirby in a clarificatory tweet in the run up to the UN Security Council vote on Resolution 2334 in December 2016, which explained that he “*intended to repeat US position re: illegitimacy*” rather than the legality of settlements.<sup>1</sup> The controversial Resolution 2334<sup>2</sup> problematically straddles this politics-law divide. However, the premise of the Resolution, that settlements are built on “*Palestinian territory*”, is problematic and its position in respect of the application of the Geneva Convention is doubtful. In order to concretely determine the legal position, we have to look past the Israeli-Palestinian conflict and consider the general approach of international law, which this contribution will do below.

The legal status of a UN Security Council Resolution depends on which Chapter of the UN Charter it is made under and whether it is classed as a “*decision*” or a “*recommendation*”. Resolutions made under Chapter VII of the UN Charter are the strongest legal tool in the UN legislative box, immediately binding on all member states and often requiring military intervention, and as such a Resolution will explicitly state that it is made under Chapter VII. If a Resolution does not explicitly

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<sup>1</sup> John Kirby Twitter, 20 December 2016;

[https://twitter.com/statedeptspox?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](https://twitter.com/statedeptspox?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor)

<sup>2</sup> S/RES/2334 (2016); <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>

state that it is made under Chapter VII, it is made under Chapter VI of the UN Charter. Resolutions made under Chapter VI are only binding if they are “*decisions*”, rather than “*recommendations*”.

It is clear that under Article 25 of the Charter, Member States agree in general to carry out “*decisions*” of the Security Council in accordance with the Charter. In the *Namibia Advisory Opinion*,<sup>3</sup> at paragraph 113, the International Court of Justice (ICJ) found that this Article applies to “*the decisions of the Security Council*,” in effect limiting this to “*decisions*” and “*resolutions*” under Chapter VII and “*decisions*” under Chapter VI. As a result, the Court held that the language of a resolution of the Security Council “*should be reviewed carefully*” in order to determine its binding effect.

As Resolution 2334 is not explicitly made under Chapter VII, whether it has binding effect will depend on whether it can be considered to be a “*decision*”, according to the Court’s criteria in *Namibia*. Unlike in *Namibia*, where the intention of the Resolution was to create a legal framework, Resolution 2334 is inherently vague and the only “*decides*” language at the very end of the resolution relates to the Council remaining “*seized of the matter*”. There is no indication from the language of the Resolution that it was intended to be legally binding. Further analysis indicates that the content of the Resolution is focused on general principles, seeking to promote further negotiation and agreement between the parties. The general lack of specificity, the permissive language, absence of a definition on boundaries or a suggested settlement and the focus on the importance of the parties negotiating makes it impossible to determine the Resolution as binding based on the criteria articulated by the ICJ. As the resolution concerns the political as opposed to the legal perspective on settlements, it is important to look to the status of settlements under international law.

### ***International legal framework***

The international legal framework comprises a combination of treaties and customary law. Political condemnation from the international community does not make something illegal. Where that political condemnation is targeted at a specific group or only one particular instance of an activity, it is still less convincing. Although international law is said to be influenced by the pronouncements of international agents, the theory goes that these positions embody objective international legal standards.

The first problem highlighted above is that it is not clear what legal regime is applicable to the Israeli presence in the ‘West Bank’. Certainly the State of Israel has not accepted its presence there to be as an “*occupier*” in the traditional sense under international law.<sup>4</sup> In this context the term “*disputed territory*” is more appropriate than “*occupied territory*”. Professor Julius Stone<sup>5</sup> argues

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<sup>3</sup> Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971.

<sup>4</sup> Yehuda Z. Blum, ‘*The Missing Reversioner: Reflections on the Status of Judea and Samaria*’, The Israel Law Review, Volume 3, Issue 2 April 1968, pp. 279-301

<sup>5</sup> The Challis Professor of Jurisprudence and International Law at the University of Sydney from 1942 to 1972, and thereafter a visiting Professor of Law at the University of New South Wales and concurrently Distinguished Professor of Jurisprudence and International Law at the Hastings College of Law, University of California and the author of 27 books on jurisprudence and international law. Professor Stone is hailed as one of the premier legal theorists in Biography of Julius Stone, Julius Stone Institute of Jurisprudence, Sydney Law School, University of Sydney.

that there are solid grounds in international law for denying any sovereign title to Jordan in the ‘West Bank’, and therefore any rights as “*reversioner state*” under the law of belligerent occupation. Without a displaced sovereign power and affected citizens of that sovereign government, the laws of belligerent occupation are inappropriate. The absence of a State as an initial sovereign renders the Convention inapplicable to the ‘West Bank’, as Article 2 of the Convention established that it applies “*to cases of ... occupation of the territory of a High Contracting Party*”, by another such Party.<sup>6</sup>

While Israel rejects the *de jure* (legal) application of the laws of occupation, under the Geneva Convention, to the disputed territory, it does accept its *de facto* (practical) application. What this means is that in the absence of another objectively applicable body of law to govern the unusual phenomenon that is the ‘West Bank’, Israel has voluntarily applied provisions of the Geneva Convention with respect to its activities within that area. The criticism of Israeli settlements is based on the application of the Fourth Geneva Convention.

### ***The Fourth Geneva Convention, Article 49***

The international discourse on Israeli settlement activity revolves around Article 49(6) of the Fourth Geneva Convention, which provides that the:

*“Occupying Power shall not deport or transfer parts of its own civilian population in the territory it occupies”.*<sup>7</sup>

On this basis, settlement policy has been criticized as a breach of international law by the ICJ, the Security Council, the International Committee of the Red Cross (ICRC) and various countries and international commentators.<sup>8</sup> The ICRC has noted the incorporation of this provision into customary international law.<sup>9</sup>

There are two substantial errors with this criticism. The first is the question of the applicability of the provisions of occupation to the disputed territory, as discussed above. Indeed, while the Israeli Government has voluntarily accepted the application of certain aspects of the Geneva Convention

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<sup>6</sup> See also David John Ball, ‘*Toss The Travaux? Application Of The Fourth Geneva Convention To The Middle East Conflict-A Modern (Re)Assessment*,’ 79 N.Y.U. L. Rev. 990 2004 for an assessment of the *Travaux préparatoires* in respect of Article 2 of the Convention and its application.

<sup>7</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949

<sup>8</sup> Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory Advisory Opinion [2004] ICJ Rep. 136, at para 120.

Security Council Resolution 465 (1980) (“Determines that ... Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention” (UN Doc. S/RES/ 465). The ICRC Viewed the settlement issue as being controlled by Article 49 in *The Middle East Activities of the ICRC*, 10 Int’l Rev. Red Cross 424 (1970). It states that the ICRC has intervened against settlement efforts when such were “immediately detrimental to the Arab residents” Id. At 459. On the reactions of the UN General Assembly and Security Council.

<sup>9</sup> ICRC Customary IHL, Rule 130; [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule130](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule130)

The rule highlights the following treaty provisions in relation to transfer Fourth Geneva Convention 1949, Article 49(6) provides: “*The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.*” Article 85(4)(a) of the 1977 Additional Protocol I provides that “*the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies*” is a grave breach of the Protocol. Under Article 8(2)(b)(viii) of the 1998 ICC Statute, “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” constitutes a war crime in international armed conflicts.

in respect of the individual inhabitants of the disputed territory, so that it has a structure from which to work, it has never acknowledged its status as an occupier in respect of the full provisions of the laws of occupation with respect to the 'West Bank'.<sup>10</sup> To do so would not be in keeping with the text and the spirit of the Convention.

The second error relates to the mischief which Article 49(6) was designed to counter. Indeed, the context in which this article was drafted was the aftermath of World War Two and the forced transfer of populations by the Nazi regime.

The full text of Article 49 is as follows:

*“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.*

*Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.*

*The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.*

*The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.*

*The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.*

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

It is clear that the entire Article is concerned on forced transfer of populations against their will, and the last paragraph would not appear to merit an exception. Indeed, it has been argued that this position is reinforced with reference to the preparatory materials of the Convention, the *travaux préparatoires*, which indicate that amendments were proposed and debated in the context of the

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<sup>10</sup> Yehuda Z. Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', The Israel Law Review, Volume 3, Issue 2 April 1968, pp. 279-301. The application of the Fourth Geneva Convention is based on a territory being occupied. This requires the fulfilment of a factual test, not a legal one, which the territory commonly referred to as the 'West Bank' does not meet.

transfers of populations against their will.<sup>11</sup> The text of the Convention was finalised at the Geneva Diplomatic Conference in 1949. According to the Record of this Conference,<sup>12</sup> this provision (then in Article 45) was taken unchanged from the draft prepared at the 17th International Red Cross Conference, Stockholm, 1948. According to the report of the Stockholm Conference,<sup>13</sup> there was no specific consideration in the plenary of the provisions drafted by the Legal Commission. The Committee was unanimous in its condemnation of the abominable practice of deportation and there was remarkably little discussion about that last paragraph, certainly nothing to distinguish it from the overall concern which the Article addressed.

Indeed, Professor Stone argued on this basis that “*the claim that Article 49 of the Convention forbids the settlement of Jews in the West Bank is difficult to sustain*”.<sup>14</sup> In this context, he also looks to the draft history of the article which indicates that it was directed against the heinous practice of the Nazi regime during its occupation of Europe in World War II, of forcibly transporting populations of which it wished to rid itself, into or out of occupied territories for the purpose of “*liquidating*” them, or to provide slave labour. Dr. Jean Pictet's often quoted commentary on the Convention paints the context in which Article 49 was drafted:

*“It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. These mass transfers took place for the greatest possible variety of reasons, mainly as a consequence of the formation of a forced labour service. The thought of the physical and mental suffering endured by these “displaced persons,” among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.”*<sup>15</sup>

The general theme of the Fourth Geneva Convention is to protect people from acts of a government that is not their own.<sup>16</sup> Under Article 4 of the Convention, the persons protected are those who find themselves in the hand of the occupant “*of which they are not nationals*”.<sup>17</sup> This position, however, relates to the purpose of the law of occupation, which is to hold in abeyance the rights of the initial sovereign. Indeed, Professor Eyal Benvenisti argues on this basis that, “*the purpose of the Article must be to protect the interests of the occupied population – the protected persons – rather than the population of the occupant.*”<sup>18</sup> This reasoning reaches back to the problematic application of the

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<sup>11</sup> As there are no specific *Travaux préparatoires* published in respect of Article 49 of the Fourth Geneva Convention, the analysis is drawn more generally from discussion of what was initially Article 45 in the record of the Diplomatic Conference on the Convention and the Commentaries.

<sup>12</sup> Final Record of the Diplomatic Conference of Geneva of 1949, Vol II Section A, pages 759-760 and 827-828; [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Dipl-Conf-1949-Final\\_Vol-2-A.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-A.pdf)

<sup>13</sup> Seventeenth International Red Cross Conference Record, Stockholm, 1948 pages 69-73; [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC\\_XVIIth-RC-Conference.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf)

<sup>14</sup> Professor Julius Stone, ‘Israel and Palestine: Assault on the Law of Nations’, 1981.

<sup>15</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958, Article 49, Deportations, Transfers, Evacuations.

<sup>16</sup> Commentary: The Fourth Geneva Convention 283 (jean S. Pictet ed., 1958); Hersch Lauterpacht, Ed., Oppenheim’s International Law 452 (7<sup>TH</sup> ed., 1948).

<sup>17</sup> Article 4, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>18</sup> Eyal Benvenisti, ‘The International Law of Occupation’, 1993, 240.

principles of occupation, and their purpose, in a situation where there was no ‘legitimate sovereign’ before 1967, and the unusual circumstances in which Israel assumed control of this territory.

The Israeli interpretation of Article 49 asserts that the settlements do not contravene the Fourth Geneva Convention since “*Arab inhabitants have not been displaced by Israeli settlements,*” and that the Article “*refers to State actions by which the government in control transfers parts of its population to the territory concerned. This cannot be construed to cover the voluntary movement of individuals ... not as a result of State transfer but of their own volition and as an expression of their personal choice*”.<sup>19</sup> Professor Yoram Dinstein contends that we should differentiate between the transfer of people, which is forbidden under Article 49, and the voluntary settlement of nationals of the occupant, on an individual basis, which if not carried out on behalf of the occupant’s Government and in an institutional fashion, is not “*necessarily illegitimate*”.<sup>20</sup>

It is worthy of note that there exist further references to the illegality of transfer in international legal instruments, which mirror the provisions of 49(6). There is an argument to say that the scope of the prohibition on transferring the occupant’s population has been strengthened and refined over the years. Article 81 of Additional Protocol I of 1977 included the transfer of the occupant’s population in the list of “*grave breaches*” of the Geneva Conventions,<sup>21</sup> and the 1989 ICC Statute prohibited the transfer of such population “*directly or indirectly*”.<sup>22</sup> Both provisions are reflected in numerous military manuals.<sup>23</sup>

However, the application of these provisions to Israeli settlements remains problematic as the settlement movement concerns individuals and collectives voluntarily moving to the area after 1967. This, importantly, is in the context of a desire amongst these people to repopulate their ancestral land, ‘biblical Israel,’ and re-establish a ‘Jewish presence’ often, for example in the contexts of Hebron, Gush Etzion or Jerusalem, in areas which had a continuous Jewish presence until expulsion by the Jordanians in 1948. In this context the anti-colonialist provisions which are employed against such popular movement are inappropriate. The restriction on “*transfer*” is a restriction on government action. Not a requirement that the government stop civilian movement into the area (although the government has on occasion done exactly this, as many settlements have

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<sup>19</sup> The Israeli section of the International Commission Of Jurists, *The Rule Of Law In The Areas Administrated By Israel* 54-5 (1981).

<sup>20</sup> Dinstein, ‘*Belligerent occupation and human rights*’, 124. See also Eugene V Rostow, ‘*Palestinian Self-Determination: possible Futures of the Unallocated Territories of the Palestine Mandate*’, 5 *Yale Studies In World Public Order* 147, 160 (1979).

<sup>21</sup> Article 85(4)(a) of Protocol Additional to the Geneva Conventions of August 12,1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted June 8, 1977, entered into force December 12, 1978) 1125 UNTS 3

<sup>22</sup> Rome Statute of the International Criminal Court, Art 8(2)(b)(viii), UN Doc, A/CONF.183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

<sup>23</sup> Australia’s Defence Force Manual (1994) provides: “*The occupying power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonising the area.*” Canada’s LOAC Manual (1999) provides: “*The occupying power is forbidden to move parts of its own population into the occupied territory, with the intention of changing the nature of the population or annexing or colonizing the area.*” The UK Military Manual (1958) provides: “*The Occupant is not permitted to deport or transfer parts of its own civilian population to occupied territory.*” The US Field Manual (1956) reproduces Article 49 of the 1949 Geneva Convention IV.

been built against its will). The spontaneous or voluntary movement of Israeli nationals simply does not trigger the text of Article 49(6).

The Israeli authorities have never forcefully deported their nationals to disputed territory. On the contrary, government institutions have historically been under significant pressure by the civilian ‘grassroots’ settler movement to allow them the freedom to live and build in ‘Judea and Samaria’, many seeking to return to the area to which they were indigenous before Jordanian occupation. Many settlements have even been established against the will of the government. Nevertheless, there is no dispute about the Israeli government being in control of the relevant territory. In 2005, in response to a petition by Jewish settlers against their eviction from the Gaza strip, the state attorneys pointed out that the settlers remained at all times subject to the will of the occupant: *“the setting up of the Israeli settlements in the areas of Judea and Samaria and the Gaza Strip was subject to the approval of state authorities. Moreover, state authorities were involved, this way or the other, in setting up those settlements, including by allocating resources for this purpose”*.<sup>24</sup> Arguments that movement may have been facilitated or encouraged by both the Israeli government and the military commanders do not objectively seem sufficient to engage the provisions on “transfer”.

The legal analysis of the settlement situation was addressed by the Levy Commission, established in 2012 to investigate the legal status of unauthorised ‘West Bank’ Jewish settlements, and to examine whether the Israeli presence in the ‘West Bank’ ought to be considered an occupation. The report analysed in detail the administrative permit processes and property rights pertinent to the area. It concluded, *inter alia*:

*“Our basic conclusion is that from the point of view of international law, the classical laws of “occupation” as set out in the relevant international conventions cannot be considered applicable to the unique and sui generis historic and legal circumstances of Israel’s presence in Judea and Samaria [ie, the West Bank] spanning over decades.*

*In addition, the provisions of the 1949 Fourth Geneva Convention, regarding transfer of populations, cannot be considered to be applicable and were never intended to apply to the type of settlement activity carried out by Israel in Judea and Samaria.*

*Therefore, according to International Law, Israelis have the legal right to settle in Judea and Samaria and establishment of settlements cannot, in and of itself, be considered to be illegal.”*<sup>25</sup>

### ***Outside the ‘Jewish’ context***

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<sup>24</sup> HCK 1661/05 Regional Council, Coast of Gaza v Knesset of Israel, 59(2) PD 481 (2005), para 12.

<sup>25</sup> The Levy Commission Report on the legal Status of Building in Judea and Samaria, page 74.

The inappropriateness of applying Article 49 is further compounded when we consider how settlements are treated by the international community when they exist outside of the Jewish context. Professor Eugene Kontorovich has examined the stance of the international community in relation to settlements in ‘occupied territories’ in other contexts and found that no accusations of illegality arise in those circumstances.<sup>26</sup> By analysing examples of belligerent occupation in modern times he establishes that for any occupation of more than a few years, settlement activity is part of the occupation. Kontorovich writes:

*“First, the migration of people into occupied territory is a near-ubiquitous feature of extended belligerent occupation. Second, no occupying power has ever taken any measures to discourage or prevent such settlement activity, nor has any occupying power ever expressed opinion juris suggesting that it is bound to do so. Third, and perhaps most strikingly, in none of these situations have the international community or international organisations described the migration of persons into the occupied territory as a violation of Article 49(6). Even in the rare cases in which such policies have met with international criticism, it has not been in legal terms. This suggests that the level of direct state involvement in “transfer” required to constitute an Article 49(6) violation may be significantly greater than previously thought. Finally, neither international political bodies nor the new governments of previously occupied territories have ever embraced the removal of illegally transferred civilian settlers as an appropriate remedy.”*

In his study Kontorovich looks at examples of settlement activity in East Timor, Western Sahara, Northern Cyprus, Syria/Lebanon, Vietnam/Cambodia, Armenia/Azerbaijan, Russia/Georgia, Russia/Crimea, and the Baltic States. He highlights, by way of example, that under Russian occupation, Abkhaz authorities have embarked on an explicit settlement enterprise, designed specifically to bolster the proportion of ethnic Abkhazians in the territory, at the expense of Georgians, and thus cement the split from Georgia. To that end, the occupation authorities have established an official government entity, the State Committee on Repatriation, which encourages ethnic Abkhaz from the diaspora to move to the occupied territory. It actively recruits such individuals and organises their flights and transportation. The authorities also provide them with free housing, subsidies, and other assistance. Significant sums are invested in construction for the settlers. Such enterprise is not anomalous.

What the research highlights is the absence of criticism of these actions by the international community, even when the same international community has listed other violations of international law by the belligerent side in these conflicts. Therefore, outside of the Israel situation, none of these activities are considered a violation of the Geneva Conventions’ prohibition of “transfer”. The bar to violate Geneva is much higher and appears to be the forced transfer of a population, not the passive or active encouragement by the occupying power of such population movements.

The lack of an international response to these activities also has the effect of legitimising the policy of government orchestrated settlement projects, as the development of public international law through custom is rooted in state practice. International acquiescence to a practice is inferred from

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<sup>26</sup> Eugene Kontorovich, ‘Unsettled: A Global Study of Settlements in Occupied Territories,’ Northwestern University School of Law, Public Law and Legal Theory Series. September 2016, No. 16-20.

the absence of condemnation; affirmative approval in establishing *opinio juris* is rare.<sup>27</sup> Kontorovich relies on Professor Malcom Shaw:

*“Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be made that such behaviour is accepted as legitimate ... This means actual protests are called for to break the legitimising process [when a new rule is being established by affirmative conduct]”.*<sup>28</sup>

Kontorovich explains that in the situations studied in the article, *“the failure to raise legal objections is consistent and general, and extends to international organisations and group (the UN Human Rights Commission, the ICRC, and humanitarian NGOs like HRW), whose work it is to systematically point out violations of these norms”.*<sup>29</sup> These circumstances are not ones that escaped international political condemnation and legal scrutiny in other respects as the international community has condemned the underlying occupation or aggression and in most, if not all cases, it has criticised the occupying power for violations of international humanitarian law and human rights norms. The refusal of the UN and the EU Parliament, amongst others, to denounce these activities as illegal, speaks volumes.

### ***The International Court of Justice***

Critics of the Israeli presence in the ‘West Bank’ often quote the ICJ advisory opinion on the legality of the security barrier built by Israel to stem the tide of suicide bombings and other terrorist attacks which were rampant during the 1990s and 2000s. Although the *‘Wall Opinion’*<sup>30</sup> is not legally binding, as it is not a judgment of the ICJ, it is taken to be a useful indication of the perspective of the Court on the questions raised before it. Its utility is arguably curtailed by the politicised nature of the judgement. In the decision, the ICJ objected to what it considered to be annexation, achieved through the building of a security barrier and settlements. It is noteworthy that Israel has, as yet, never made any claim of annexation to the area called the ‘West Bank’ and that Israeli Governments have consistently regarded the final status of the territory as a matter for direct negotiations.

The approach of the ICJ in the *‘Wall Opinion’* can be viewed in contradistinction to the judgement of the Israeli Supreme Court, sitting as the High Court of Justice,<sup>31</sup> on the subject of the security barrier and this distinction highlights the problematic approach of the ICJ. While the Israeli Court considered the detail of the proposed route and the counterbalancing security need for the barrier, the ICJ did not once mention the reason behind the construction, namely the wave of suicide bombings and shooting attacks which had been terrorising the Israeli civilian population up until the completion of the barrier. This omission must be viewed alongside the ICJ’s cursory review of the applicable international law. The Court cites Article 49 as the impasse to the legality of settlement activity. The limitations of this position have been addressed above, but were not

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<sup>27</sup> Mark Osiel, *The End Of Reciprocity: Terror, Torture, And The Law Of War,* 55 (2009).

<sup>28</sup> Malcolm N. Shaw, *International Law* 55 (7th ed. 2014).

<sup>29</sup> Eugene Kontorovich, *‘Unsettled: A Global Study of Settlements in Occupied Territories,’* Northwestern University School of Law, Public Law and Legal Theory Series. September 2016, No. 16-20. Page 64.

<sup>30</sup> Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004.

<sup>31</sup> HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel.*

addressed by the Court. On this basis it would appear that the Advisory Opinion is both factually and legally misguided.

Perhaps on a subject which is inevitably so politicised, it ought to be expected that any court seized of the matter will be subject to political influence. Justice Barak-Erez acknowledges as much when she accepts that the Israeli Justices were far more cognisant of the purpose of the barrier against terrorism, because they had lived through the waves of suicide bombings with the rest of Israeli civil society.<sup>32</sup> Nevertheless, the approach of the High Court indicates a concerted effort to focus on legal analysis as opposed to politics and a conduct the appropriate legal balancing exercise of competing interests according to both Israeli and international law. Indeed, it took instruction from the ICJ on the applicable international law and reached a different conclusion on its consideration of the facts and background security situation. The High Court's balancing approach on whether the location of the barrier was legal is arguably far more advanced and legalistic. Its application of the appropriate legal proportionality test is a serious endeavour to weigh public interest in security against the rights of the local residents, according to international humanitarian law.

### 3. Israeli domestic jurisprudence

The Israeli Supreme Court has a strong reputation in the international legal community for meeting complex and controversial issues head on and for being a pioneer in the application of public international law in a domestic context. The body which has most publically been tasked with finding its way through the legal quagmire that is the subject of this contribution is the Supreme Court of Israel, sitting in its capacity as the High Court of Justice. It has dealt with what at times it considered to be politically motivated petitions and legitimate grievances on a case by case basis. The Court has faced the difficulty of there being no objectively applicable legal framework in the context of the disputed territories, but has followed the Israeli Government's practice of applying the provisions of the Geneva Conventions, together with domestic legal principles of non-discrimination and equality.

The High Court has acknowledged the absence of an appropriate legal framework in international law for the situation. It's consideration of international law was arguably done without expressing a view as to the nature of the territories and the legally applicable legal regime. It has addressed the settlement question in a number of high profile cases based on each individual factual matrix and the applicable international legal principles. In so doing, it has sought to provide redress on the facts of the case, to the extent that they were well founded in law. It has refrained from any judgment on settlement policy, which is a political rather than a legal matter.

In *Bargil*,<sup>33</sup> the petitioners sought to challenge the legality of settlements, basing their arguments on public international law, administrative and civil law. In respect of public international law, the petitioners referred to the Geneva Convention, which prohibits the transfer of the State's population to the occupied territories. The President of the Court, Chief Justice Shamgar, recognised that the issue of settlements is an ideological one. The petition was denied as it was defective, in that it

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<sup>32</sup> Daphne Barak-Erez, 'Israel: The security barrier—between international law, constitutional law, and domestic judicial review', I-CON, Volume 4, Number 3, 2006, pp. 540–552.

<sup>33</sup> HCJ 4481/91 *Bargil v. Government of Israel*.

related to questions of policy within the jurisdiction of other branches of a democratic Government and it raised an issue whose political elements are dominant and clearly overshadowed all its legal aspects. The High Court of Justice called this out in the following way:

*“The overriding nature of the issue raised in the petition is blatantly political. The unsuitability of the questions raised in the petition for a judicial determination by the High Court of Justice derives in the present case from a combination of three aspects that make the issue unjusticiable: intervention in questions of policy that are in the jurisdiction of another branch of Government, the absence of a concrete dispute and the predominantly political nature of the issue”.*

It ought to be noted that it was not the fact that the matter regarded a dispute about land in the ‘occupied territories’ that stopped the Court from intervening, as it had in the past dealt more than once with petitions about a concrete dispute with regard to Jewish settlements in Judea, Samaria or the Gaza Strip.<sup>34</sup> While the Court has been prepared to hear objective, defined and specific quarrels and disputes, it has not been prepared to entertain abstract political arguments or deal with foreign, defence or social policy.

In the 1979 case of *Elon Moreh*,<sup>35</sup> the Court dealt with the specific instance of the expropriation of private land on the argument that it was necessary for the needs of the army. Indeed, military necessity is provided for,<sup>36</sup> so that the occupying power may requisition private land if necessary in these circumstances. The Court, however, was not convinced by the arguments of the State that this was necessary for military purpose and determined the use of private land to be illegal in this instance.

#### **4. Impact on negotiations**

The consistent general point of agreement in relation to the thorny issue of settlements is that the answer to the matter lies in a final status outcome achieved through direct negotiations between the two sides of the conflict. Indeed, the Declaration of Principles signed between Israel and the Palestinians in September 1993 (*The Oslo Agreement*) makes hardly any mention of Israeli settlements, except to put off debate on the issue to the permanent status negotiations.<sup>37</sup> Logic would dictate that if indeed continued settlement activity was having the negative effect which its critics allege, it would have brought the Palestinian leadership to the negotiation table long before now and would serve as a catalyst for a political resolution. On a practical level, it is clear that the existence of settlements in the Sinai did not prove an impediment to the withdrawal of Israel from that area in 1982 in pursuit of peace with Egypt. The existence of settlements in the Gaza Strip did

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<sup>34</sup> for example, HCJ 663/78 *Kiryat Arba Administration v. National Labour Court*.

<sup>35</sup> H.C. 390/79, *Mustafa Dweikat et al. v. the Government of Israel et al. (the Elon Moreh Case)*, in IYHR, 9, 1979, 350

<sup>36</sup> ICRC Codification of Customary International Law, Rule 50; [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule50](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule50).

<sup>37</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Washington, D.C., September 28, 1993; <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

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not pose an impediment to the unilateral withdrawal of Israel from that territory in 2005, again in pursuit of a peaceful outcome. In both instances the territory was rendered '*Judenrein*' ('Jew-free').

The central difficulty here is that anti-settlement arguments espouse the notion that Jews ought to be prohibited from living in certain areas, simply because they are Jews. Ironically, the mischief which Article 49 of the Fourth Geneva Convention was crafted to contend with related specifically to the racist policy towards European Jewry which dictated their deportation and forced transfer. Today, the same article is championed by those who are intent on the pursuit of another racist policy. It is the Palestinian Arab demand that the 'West Bank' be 'Jew-free' which must objectively pose the true obstacle to peace. It is a position which persists despite there being nothing in the international legal order to indicate that Israeli settlements are illegal.