CLIMBING THE WALLS: INTERNATIONAL LAW, SETTLEMENTS AND THE CONSTRUCTION OF A SECURITY BARRIER PROTECTING SETTLERS

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Abstract

This article addresses two related issues: the legality of Israeli settlements in the West Bank and the construction of a security barrier to protect these settlements. In the July 2004 Construction of a Wall advisory opinion, the International Court of Justice stated that the Israeli settlements in the Palestinian Territories and the security barrier constructed by Israel in that area are illegal. Its finding that the settlements are illegal is in line with the vast majority of scholarly opinion. While the Court did not discuss the relationship between the settlements and the security barrier, according to scholarly opinion the illegality of the Israeli settlements renders the construction of a security barrier to protect them illegal as well.

Following an introduction and an outline of the more accepted legal approaches regarding Israel's settlement activity, the article seeks to determine whether international law actually prohibits this settlement activity. Additionally, and assuming such settlement activity is illegal, the article examines whether the construction of a security barrier protecting these settlements is unlawful under the international legal regime governing Israel vis-à-vis the West Bank.

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I. INTRODUCTION

The Israeli settlements in the West Bank and its security barrier there are two of the most controversial elements, if not symbols, of Israel's policies in its ongoing conflict with the Palestinians. It is hence unsurprising that the combination of the two – constructing and maintaining a security barrier to protect settlements – is the subject of fierce criticism. The condemnation of both these elements,separatelyand combined, often rests on international legal arguments.On 9 July 2004, the International Court of Justice ("ICJ") delivered its *Construction of a Wall* advisory opinion in which it considered both the entirety of the security barrier in the West Bank and Israeli settlements illegal.[2] The ICJ's analysis of the legality of the settlements, however, was not necessary for finding the security barrier illegal, and could thus be considered to have been *obiter dicta*.[3] Nevertheless, it is submitted that the "illegal nature of settlements makes it impossible to justify the penetration of the Wall into Palestinian territory as a lawful or legitimate security measure to protect settlements."[4]

A decade following the *Wall* opinion, this article seeks to revisit the following two questions. *First*, does international law prohibit settlements in the West Bank? *Second*, and assuming the

[2]Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Construction of a Wall].

[3]Ruth Lapidoth, *The Advisory Opinion and the Jewish Settlements*, 38 ISR. L. REV. 292, 293 (2005) [hereinafter Lapidoth, *The Advisory Opinion*] ("since the Court ruled that all the segments of the fence situated in the territories occupied by Israel in 1967… are illegal, without making a distinction among its various segments (eg. those that protect Israel proper and those that protect settlements) the discussion of the legality of the settlements was not necessary, and thus is only an *obiter dictum*").

[4]Special Rapporteur on the Situation of Human Rights on Palestinian Territories Occupied Since 1967, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, ¶ 26, U.N. Doc. E/CN.4/2004/6/Add.1 (Feb. 27, 2004). See also Construction of a Wall, *supra* note 2, at 244, ¶ 9 (declaration of Judge Buergenthal) (opining that due to the illegality of the settlements, "[i]t follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law"); MÉLANIE JACQUES, ARMED CONFLICT AND DISPLACEMENT: THE PROTECTION OF REFUGEES AND DISPLACED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW 112 (2012) ("Israel must bear in mind that the settlements have been established in breach of international humanitarian law and that it has an obligation to put an end to it. Therefore, any long-term measure, such as construction of a separation wall, which consolidates a situation considered illegal under international law, is unlawful").

settlements are illegal, is it unlawful to construct a security barrier protecting such settlements? This article shall not address the policy questions of whether Israel *should* allow settlements in the West Bank and whether it *ought* to build a security barrier. These are questions for politicians, whereas a legal analysis can only be mindful of the context of its determinations and applications – no more than that.[5]

Part II of this article shall briefly lay out the factual background of the legal regime governing the West Bank. Additionally, it shall present the common approach regarding the legality of Israel's settlements in the West Bank.

Part III shall address the question of whether the settlements are illegal under international law. As shall be demonstrated, under contemporary international law, there is no prohibiting norm binding upon Israel concerning construction of settlements. Even if the settlements are unlawful, it shall be submitted that there are additional legal considerations that preclude such a determination from rendering certain Israeli settlements illegal.

Part IV shall assume that the settlements are illegal and subsequently analyze whether the construction of a security barrier for the settlements and settlers' protection is unlawful as well. Here too, the article shall demonstrate that despite learned consensus to the contrary Israel may construct a security barrier for the protection of settlements.

II. THE COMMON APPROACH

a.Background

[5] See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 190, ¶ 26 (Dec. 19) [hereinafter Dem. Rep. Congo v. Uganda] (the Court stating that, although the case before concerned a part of a larger – and tragic – problem in the Great Lakes region, its role is to address the dispute "on the basis of international law").

The West Bank is an area west of the Jordan River which was previously part of the United Kingdom League of Nations Palestine Mandate.[6]It was captured by Jordan – then called Transjordan – during Israel's War of Independence of 1948-49.[7]Though Jordan annexed the West Bank, its claim to sovereignty was only recognized by the United Kingdom and Pakistan[8] and it was not considered the lawful sovereign of the territory.[9]During the Six Day War of 1967, Israel captured – but did not annex – the territory from Jordan.[10]

Since the purpose of this article is to discuss the issues of settlement legality of the settlements and the construction of a security barrier to protect them, a brief analysis of the existing legal framework governing the West Bank shall suffice. The relatively complex history of the territory led to disagreements as to whether the status of the West Bank under international law is that of occupied territory.Article 42 to the annexed *Regulations concerning the Laws and Customs of War on Land* of the *Convention respecting the Laws and Customs of War on Land* ("*Hague Regulations*"), of customary international law status,[11] considers territory to be occupied "when it is actually placed under the authority of the hostile army."[12]Some contend that the land cannot be

[6] See British Mandate for Palestine, July 24, 1922, 3 YEARBOOK OF THE LEAGUE OF NATIONS 402; Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia art. 1, Dec. 23, 1920, 22 L.N.T.S. 353 (regarding precise boundaries between the British and French mandates).
[7] For cease-fire arrangement, see Hashemite Jordan Kingdom-Israel General Armistice Agreement, art. V-VI, U.N. Doc. S/1302/Rev.1 (Apr. 3, 1949).
[8]ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 78 (1978).
[9]Stephen M. Schwebel, *What Weight to Conquest?*, 64 AJIL 344, 346 (1970) ("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").
[10]MICHAEL OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 258 (2002) (discussing the "consolidation of Israel's position on the West Bank").
[11]In re Goering, 13 I.L.R. 203, 212 (1946) ("by 1939 these rules laid down in the [Hague] Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war…"); In re Hirota, 15 I.L.R. 356, 365-66 (1948) ("the [Hague] Convention remains as good evidence of the customary law of nations"); Dem. Rep. Congo v. Uganda, *supra* note 5, at ¶ 172 ("under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army…").
[12] Convention Regarding the Laws and Customs of Land Warfare annex, art. 42, Oct. 18, 1907, 2 Supplement AJIL 90 [hereinafter Hague Regulations].

considered occupied as it did not previously belong to a legitimate sovereign – Jordan.[13] This position is furthered by the fact that a central interest of the law of occupation is to preserve the previous sovereign's – here non-existent – interests.[14] However, Israel's Supreme Court[15] – along with learned opinion[16] – considers the territory to be occupied. This more expansive approach corresponds with the humanitarian interests underlying the law of occupation, though it should be noted that this interest is "the secondary aim of any lawful military occupation"[17] and is provided minimal attention.[18]

A similar discussion exists regarding the applicability of the *Convention (IV) relative to the Protection of Civilian Persons in Time of War*[19] ("GCIV") to the West Bank. Article 2 to GCIV stipulates the Convention's applicability to "cases of partial or total occupation of the territory of a High Contracting Party."[20] A textual interpretation confines this instrument's applicability to

[13]JULIUS STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 119-120 (1981) (arguing that the lack of a previous sovereign over the West Bank "results in dramatic transformation of Israel's territorial standing, beyond that of a mere military occupant");William M. Brinton, *Israel: What Is Occupied Territory? A Reply to the Legal Adviser*, 2 HARV. J. L. & PUB. POL'Y207, 214 (1979) ("Israel has a rational, legally sound basis for stating that it is not obligated to withdraw from the West Bank or the Gaza Strip, since neither area was "occupied [by Israel] during the recent [1967] conflict.""); Alan Baker, *International Humanitarian Law, ICRC and Israel's Status in the Territories*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 1511, 1513-1514 (2012) (noting that the West Bank has never belonged to a sovereign entity, arguing that "[t]he expression 'Occupied Palestinian Territory' is nothing more than a political term").

[14]THE JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT §§11.9-11.11 (2004) ("[d]uring occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended.").

[15]See e.g. HCJ 10356/02 Hess v. Israel Defence Force Commander, 58(2) PD 443, 455 [2005] (Isr.) (in Hebrew) (stating that the laws of belligerent occupation are applicable in the West Bank).

[16] Construction of a Wall, *supra note* 2, at 167, ¶ 78 (the areas captured by Israel from Jordan "remain occupied territories and Israel has continued to have the status of occupying Power"); Yoram Dinstein, *Zion Through International Law Shall be Redeemed*, 27 HAPRAKLIT 5, 8 (1971) (in Hebrew) ("as long as the war has not reached its end, Israel remains in a legal status of belligerent occupation").

[17]Gerhard Von Glahn, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 97 (1957).

[18]H.A. Smith, *The Government of Occupied Territory*, 21 BYBIL 151, 151 (1944) (noting that the concept of occupation in the Hague Regulations was envisioned in a system in which "in which civilians would play the role of spectators").

[19]Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GCIV].

[20]*Id*. at art.2(2).

instances in which the territory's previous sovereign was legitimate.[21] Nevertheless, the ICJ rejected this literal approach, stating that since "the intention of the drafters of the Fourth Geneva Convention [was] to protect civilians who find themselves, in whatever way, in the hands of the occupying Power" GCIV should apply regardless of the previous status of the territory occupied.[22]

Finally, an additional layer of law that is considered applicable to the West Bank is international human rights law ("IHRL"). Article 2(1) to the *International Covenant on Civil and Political Rights*("ICCPR") provides that a state must respect and ensure the stipulated rights of persons "within its territory and subject to its jurisdiction."[23] Though it would appear that the territory and jurisdiction conditions are cumulative for the purposes of applying the ICCPR,[24] the United Nations Human Rights Committee[25] and the ICJ[26] have opined that territory and jurisdiction

[21]Meir Shamgar, Leg*al Concepts and Problems of the Israel Military Government – The Initial Stage*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 13, 38-40 (Meir Shamgar ed., 1982) (noting that the more accepted interpretation of Article 2(2) to GCIV leads to the conclusion "that the Convention applies merely to the occupation of *the territory of a High Contracting Party*" (emphasis in original)).

[22] Construction of a Wall, *supra* note1, ¶ 95. See also Central Front, Ethiopia's Claim 2, 135 ILR 334, 347, ¶ 28 (Eritrea-Ethiopia Claims Commission 2004) (stating that neither the text of the *Hague Regulations* nor that of GCIV "suggests that only territory the title to which is clear and uncontested can be occupied territory").

[23]International Covenant on Civil and Political Rights art.2(1), Dec. 16, 1966, 99 U.N.T.S. 171.

[24]MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 222 (2011) ("it fair to say that the conjunctive reading of Article 2(1) is textually or grammatically more natural"). See also Commission on Human Rights, Summary Record of the 194th Meeting, 5, ¶ 14, U.N. Doc. e/cn.4/sr.194 (May 25, 1950) (E. Roosevelt stressing that the usage of the term "territory and subject to its jurisdiction" demonstrates that the "United States Government would not, by ratifying the covenant, be assuming an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation"); Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Report, United States of America, ¶ 505, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) ("[t]he United States… has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party‘s jurisdiction").

[25] U.N. Human Rights Comm., General Comment No. 31 on the General Legal Obligation Imposed on States Parties to the Covenant, 80th Sess., Mar. 12-Apr. 2, 2004, ¶ 10, U.N. Doc. CCPR/C/21Rev.1/Add.13 (Mar. 29, 2004) ("a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party").

[26] Construction of a Wall, *supra* note2, at 179-80, ¶¶ 109-111 ("the Court considers that the [ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); Dem. Rep. Congo v. Uganda, *supra* note5, at ¶ 217 (noting that the ICCPR is applicable to the Ugandan occupation in the Democratic Republic of the Congo).

should be read as alternative grounds for the ICCPR's application,[27] thereby conforming "to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction."[28] It follows that, since a state practices effective control in a territory it occupies, it is bound by the ICCPR.[29] However, considering the law of occupation constitutes part of international humanitarian law – the *jus in bello*[30] – and is thereby *lex specialis*, the *lex generalis* of IHRL is to be interpreted in its light[31] and in instances of contradiction the former supersedes.[32]

b.Argumentson the Illegality of Israeli Settlements

In contemporary discourse, the term West Bank "settlements" refers to those communities which Israeli Jews inhabit in that territory,[33] including east Jerusalem.[34] It would be an understatement to note that the prevailing view of the international community is that the Jewish settlements in the West Bank are contrary to international law.[35] The following discussion shall explain the

[27] See also Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in*THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981) (arguing that "[c]learly, the phrase "within its territory and subject to its jurisdiction" should be read as a disjunctive conjunction").

[28]Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AJIL 78, 82 (1995).

[29]Concluding Observations: Israel, Human Rights Comm., 99th sess., July 12-30, 2010, ¶ 5, U.N. Doc. CCPR/C/ISR/CO/3 (Sep. 3, 2010) ("[t]he State party should ensure the full application of the Covenant in… the occupied territories").

[30]MALCOLM N. SHAW, INTERNATIONAL LAW 1167 (6th ed. 2008).

[31]Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 24 (July 8) (discussing the right to life).

[32] For recognition of this as an international legal norm, see Colleanu v. German State, 5 I.L.R. 438, 440 (1929) ("[a]s a rule the special law overrides the general law"); OSPAR Dispute (Ire. v. U.K.), 126 I.L.R. 334, 364 (2003) ("[a]n international tribunal… will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*").

[33] See e.g. *Israel Profile*, BBC NEWS (Mar. 17 2013), http://www.bbc.co.uk/news/world-middle-east-14628835.

[34] See e.g. *Israel Approves 558 New Homes in Occupied East Jerusalem*, THE GUARDIAN (Feb. 5, 2014), http://www.theguardian.com/world/2014/feb/05/israel-approves-558-new-homes-east-jerusalem-settlements-palestinian-west-bank.

[35]See e.g. S.C. Res. 465, ¶¶ 5-7, U.N. Doc. S/RES/465 (Mar. 1, 1980) (stating that settlements are a "flagrant violation" of GCIV); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 85 (1990) (arguing that settlements are "so plainly in violation of" GCIV); *Statement by the International Committee of the Red Cross, Geneva*, ICRC, ¶ 5 (Dec. 5, 2001), *available at* http://www.icrc.org/eng/resources/documents/misc/57jrgw.htm ("the ICRC has expressed growing concern about

various bases to this conclusion. While there are those who argue that any settlement activity is prohibited[36] and others who argue that there must be incentives from the occupying power prompting settlers to move,[37] the following analysis shall consider these together. The absence of making a distinction between these views is because Part III shall refute both these views together.It should be noted that the following analysis shall not address the questions whether particular settlements are legal due to the ownership status of the lands they are built upon. This would necessitate a very detailed examination of each and every settlement, something beyond the scope of this article.

The starting point of a discussion concerning the legality of settlements finds itself in Article 49(6) of GCIV. It stipulates that an "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."[38] A number of reasons why this Article prohibits settlement activity have been provided.

One reason provided argues that the purpose of Article 49(6) is to protect "the civilian population of an occupied territory by disenabling the Occupying Power to bring about fundamental

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the consequences in humanitarian terms of the establishment of Israeli settlements in the occupied territories, in violation of" GCIV); G.A. Res. 68/82, U.N. Doc. A/RES/68/82 (Dec. 16, 2013) ("[*e*]*xpressing grave concern* about the continuation by Israel, the occupying Power, of settlement activities in the Occupied Palestinian Territory, including East Jerusalem, in violation of international humanitarian law, relevant United Nations resolutions, the agreements reached between the parties and obligations under the Quartet road map, and in defiance of the calls by the international community to cease all settlement activities"); Construction of a Wall, *supra* note2, ¶ 120 ("[t]he Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law").

[36]EYALBENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 240-41 (2nd ed. 2012) ("whether or not the settlers move freely to the occupied territory is beside the point").

[37]YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION § 579 (2009) (opining that "[w]hen settlers act entirely on their own initiative" their settlement will not be illegal); David David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AJIL 88, 91 (2005) [hereinafter Kretzmer, *The Advisory Opinion*] (expressing "doubt" as to whether all forms of movement – even involving the Occupying Power – are illegal).

[38] GCIV, *supra* note19, at art. 49(6).

demographic change in its composition."[39] It is further noted that "[f]rom the point of view of the protected persons, whether the transfer of outsiders into their territory is forcible or not would seem to be irrelevant."[40] This interpretation conforms to the general purpose of GCIV "to protect certain categories of civilians, referred to in the Convention as 'protected persons'":[41] persons "who… find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[42]

An additional reason provided rests on the use of different language,and the contrast between them,in the different paragraphs of Article 49 to GCIV. Article 49(1) stipulates that "[i]ndividual or mass *forcible* transfers… 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…"[43] This contrasts to Article 49(6) which merely employs the term "transfer" without mention of force.[44] It is hence contended that the distinction in this language demonstrates that actions of a lesser degree than force causing movements of the civilian population of the occupying power into the occupied territory are prohibited.[45]

Recourse is also made to Article 43 to the *Hague Regulations*, which obligates the Occupying Power "to restore, and ensure, as far as possible, public order and safety."[46] It is argued that since the authorities of the Occupying Power may only be implemented for "military needs or benefit

[39]DINSTEIN, *supra* note37, at § 571.
[40] Kretzmer, *The Advisory Opinion, supra* note37, at 91.
[41]Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 BYBIL 294, 320 (1949).
[42] GCIV, *supra* note19, at art. 4(1).
[43]*Id*. at art. 49(1) (emphasis added).
[44]*Id*. at art.49(6).
[45]JACQUES, *supra* note4, 91 ("as opposed to the first paragraph of Article 49, which expressly prohibits 'forcible transfers' of population, there is no reference in paragraph 6 to any notion of force"); Iain Scobbie, *Justice Levy's Legal Tinsel: The Recent Israeli Report on the Status of the West Bank and Legality of the Settlements*, EJIL: TALK! (Sep. 6, 2012), www.ejiltalk.org/justice-levys-legal-tinsel-the-recent-israeli-report-on-the-status-of-the-west-bank-and-legality-of-the-settlements/ (arguing that in contrast to Article 49(1) to GCIV, "there is no indication in the text of Article 49(6) or its published travaux that this requirement of coercion is necessary…").
[46] Hague Regulations, *supra* note12, at art. 43.

of the local population",[47] settlements that are not constructed for these purposes are not permitted under the laws of occupation.[48]It is also argued that settlements in and of themselves are illegal under customary international law.[49] In reaching this conclusion, the International Committee of the Red Cross referred extensively to international condemnation of Israel's settlement policy.[50]

III. THE LEGALITY OF SETTLEMENTS: A REAPPRAISAL

As demonstrated in Part III, there are essentially three sources of norms that are invoked for the purpose of proving the illegality of Israeli settlements: Article 49(6) to GCIV, the customary international law generally governing occupation and custom on the specific subject of settlements. Accordingly, this Part shall attempt to reassess the validity of utilizing these two sources – treaty and customary law –in arguing that Israeli settlements in the West Bank are illegal. Additionally, this Part shall attempt to see whether the applicability of the principle of *ex injuria jus non oritur* may provide for additional considerations, bearing in mind the history of Jewish settlement in the West Bank prior to 1948.

a. Article 49(6) to GCIV

[47]DAVID KRETZMER, THE OCCUPATION OF JUSTICE 77 (2002).
[48] See also Antonio Cassese, *Power and Duty of an Occupant in Relation to Land and Natural Resources*, *in*INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 419,431 (Emma Playfair ed. 1992) (arguing that Article 49(6) to GCIV is a result of the general prohibition upon the occupying power from using "the property of the occupied country, or of its inhabitants, for the furtherance of its own economic or other interests").
[49]1 JEAN-MARIE HENCKAERTS& LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 462-463, n. 38 (2005) (referring to condemnation of Israel as evidence of custom).
[50]2 JEAN-MARIE HENCKAERTS& LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 2963ff. (2005).

Israel– along with practically the rest of the international community – is a party to GCIV.[51]Though Israel has not incorporated GCIV in its municipal law,[52] it is nevertheless bound by the Convention for the purposes of international law.[53] Being a treaty provision, it is necessary to determine the legality of settlements in light of the customary rules of treaty interpretation, as codified in Articles 31-32 to the *Vienna Convention on the Law of Treaties*[54] ("VCLT"). The following discussion shall analyze Article 49(6) step by step through the treaty interpretation process.

1. Article 31(1) to the VCLT

Article 31(1) to the VCLT stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[55] As noted by the ICJ in *Libya/Chad*, "[i]nterpretation must be based above all upon the text of the treaty."[56] Relying on the ordinary meaning of the text is important since it "is most likely to reflect what the parties intended."[57]After all, a treaty's

[51]*Geneva Convention Relative to the Protection of Civilian Persons in Time of War Participants*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a.
[52] Ruth Lapidoth, *International Law Within the Israel Legal System*, 24 ISR. L. REV. 451, 470-471 (1990) ("Israel has ratified the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, but has not yet transformed these provisions into internal law").
[53]Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] ("[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.), Judgment, 1958 I.C.J. 55, 67 (Nov. 28) ("a national law cannot override the obligations assumed by treaty").
[54] VCLT, *supra* note53, at art. 31-32; Maritime Dispute(Peru v Chile), Judgment, ¶ 57 (Int'l Ct. of Justice, Jan. 27, 2014), http://www.icj-cij.org/docket/files/137/17930.pdf (the Court referring to the "customary international law of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties"); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 150 I.L.R. 244, ¶ 57 (Int'l Trib. of Law of the Sea 2011) (noting that Articles 31-33 to the VCLT "are to be considered as reflecting customary international law").
[55] VCLT, *supra* note53, at art 31(1).
[56]Territorial Dispute (Libya/Chad), Judgment, 1994 I.C.J. 6, ¶ 41 (Feb. 3).
[57]ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 235 (2nd ed. 2007).

interpretation should be "in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation."[58]

What is the literal interpretation of the stipulation that the "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies"?[59] In this respect, recourse may be had to dictionary definition.[60] The word "transfer" is defined as "convey, remove or hand over."[61] Thus, the natural meaning of Article 49(6) demonstrates that there must be a dominant element of proactivity on the part of the occupying power, whereas the population transferred would be passive – involuntary –in this process.

However, the interpretation of a treaty provision should not be severed from its context.[62] In this regard, does the lack of the use of the word "forcible" in Article 49(6), in contrast to Article 49(1),[63] vitiate from the interim conclusion reached here concerning the interpretation of the word "transfer"? A deeper analysis of Article 49 as a whole answers this question in the negative.*First*, the term "force", as an adjective for "transfer", only appears once in Article 49 – in Paragraph (1). However, Paragraph (4), which refers to previous paragraphs clearly

[58]Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, 237, ¶ 48 (July 13). See also Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 189 (Aug. 27) (the Court, in interpreting treaties, referred to the need to discern the meaning of the text at the time of the treaties' conclusion); 1 D.P. O'CONNELL, INTERNATIONAL LAW 257-58 (2nd ed. 1970) ("[a]n expression in a treaty is to be interpreted in the way in which it was understood when the treaty was signed; and the intentions of the parties are to be construed in the light of the situation which existed at the time").
[59] GCIV, *supra* note19, at art. 49(6).
[60] See e.g. Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, ¶ 9 (Int'l Ct. Justice, Mar. 31, 2014), *available at* www.icj-cij.org/docket/files/148/18154.pdf (separate opinion of Judge Sebutinde) (referring to the Oxford Dictionary to find the "ordinary grammatical (dictionary) meaning of the phrase").
[61]THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 1481 (Della Thompson ed., 9th ed. 1995).
[62] Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2, at 23 (Aug. 12) ("it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense").
[63] See text accompanying *supra* notes 43-45.

concerning forcible transfers, merely uses the term "transfer", without the word force.[64] Thus the terms"transfer" in Article 49 actually appears to retain the element of force with it, even though the coercive element is only explicitly mentioned once in the Article.

Second, it appears that the interpretation of a provision in light of its context further strengthens the proposed interpretation here, in light of the inclusion of Paragraph (6) in Article 49. Were a distinct meaning to be given to the term transfer, Paragraph (6) should have been placed in a different or separate Article.[65]

Third, it should be noted that a violation of Article 49(1) is considered a grave breach of GCIV,[66] and thereby creating individual criminal responsibility for persons who violate it.[67] However, under the interpretation that regards non-forcible movements of the occupying power's own civilian population unlawful, GCIV would actually provide greater protection against movements of non-protected persons than protected persons. This result appears illogical, considering the gravity – leading to criminal responsibility – of forcibly transferring protected persons unlawfully.

In relation to GCIV's object and purpose, it is indisputable that a treaty's interpretation does not end with its text. The object and purpose of the *treaty as a whole*– distinct from the object and purpose of the specific treaty provision being interpreted, which has no foundingas a basis for treaty interpretation under Article 31(1) to the VCLT– is relevant to the correct interpretation determination. However, the object and purpose may not "lead to an "interpretation" contrary to

[64] GCIV, *supra* note19, at art. 49(4).
[65] See Lapidoth, *The Advisory Opinion*, *supra* note3, at 294 (noting that "a term which appears several times in a treaty, should usually be given the same meaning in each provision").
[66] GCIV, *supra* note19, at art. 147.
[67] *Id.* at art. 146.

the express terms of the text."[68] In this regard, it should also be remembered that the VCLT's provisions on treaty interpretation were drafted in light of the "great distrust of many international lawyers of what is sometimes called "teleological" interpretation and other extra-textual approaches which at times lead to extravagant conclusions."[69]

Accordingly, a teleological approach which attempts to interpret Article 49(6) in light of *that provision's* alleged purpose[70] does not have a basis in the norms of treaty interpretation. Moreover, reference to GCIV's general purpose of safeguarding the basic interests of protected persons[71] may not supersede the fact that the term "transfer" involves a degree of force.

2. Subsequent practice (Articles 31(3)(b) and 32 to the VCLT)

The labor of the treaty interpreter does not end with the body of the treaty. There are other external circumstances that must be considered in treaty interpretation. As there are no agreements between all the parties to GCIV regarding the Convention[72] or instruments accepted by all parties to GCIV that relate to interpretation of Article 49(6),[73] the next stage of treaty

[68] Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L. Q. 318, 338 (1969) (additionally noting that, while "textuality [is] subject to a variety of important qualifications", the VCLT "gives expression to the primacy of the text").

[69] Shabtai Rosenne, *Interpretation of Treaties in the Restatement and the International Law Commission's Draft Articles: A Comparison*, 5 COLUM. J. TRANSNAT'L L. 205, 221 (1966) (also noting that Articles 31-32 to the VCLT are "designed to stress the dominant position of the text itself in the interpretative process, the material running in sequence from the text to related elements lying outside the text").

[70] See text accompanying notes 39-40.

[71] See text accompanying notes 41-42.

[72] VCLT, *supra* note 53, at art. 31(2)(a) ("[t]he context for the purpose of the interpretation of a treaty shall comprise… any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty"); *Id.* at art. 31(3)(a) ("[t]here shall be taken into account, together with the context… any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions").

[73] *Id.* at art. 31(2)(b) ("[t]he context for the purpose of the interpretation of a treaty shall comprise… any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty").

interpretation shall be that of subsequent practice. The question of other binding norms upon the parties to the Convention[74] shall be addressed separately later.[75]

The source of subsequent practice may manifest itself in two manners: as a primary source of interpretation or as a supplementary source. Subsequent practice is of significance since "the fulfilment of obligations is, between states as between individuals, the surest commentary on the meaning of these obligations".[76] Such subsequent practice may be discerned from a variety of sources, including statements and declarations of states.[77] This would also conform to the acceptance that state practice for the purposes of creating customary international law may involve verbal manifestations, and not only actual conduct.[78]

For subsequent practice to be a primary source of interpretation it must include all the parties to the treaty.[79] Considering there is no universal practice regarding settlements, this particular source of interpretation is irrelevant.

However, subsequent practice – even when not universal – may nevertheless be relevant a supplementary source of interpretation.[80] If we are to follow the analogy made with the state

[74] *Id.* at art. 31(3)(c) ("[t]here shall be taken into account, together with the context… any relevant rules of international law applicable in the relations between the parties").
[75] See *infra* Part III.*b.*
[76] Russian Claim for Interests on Indemnities (Russ. v. Turk.), 3 (Permanent Ct. Arbitration 1912), *available at* http://www.pca-cpa.org/showfile.asp?fil_id=1114.
[77] Georg Nolte (Special Rapporteur), First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation, 45, U.N. Doc. A/CN.4/660 (Mar. 19, 2013) ("[f]or the purpose of treaty interpretation "subsequent practice" consists of conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application").
[78] See Michael Akehurst, *Custom as a Source of International Law*, 47 BYBIL 1, 2 (1975) (citing a wide variety of instances in which statements – made abstractly or in the context of specific disputes – have been considered state practice for the development of custom).
[79] *Law of Treaties*, [1964] 2 Y.B. INT'L L. COMM'N 204, U.N. Doc. A/CN.4/SER.A/1964/Add.1 ("the practice of an individual party or of only some parties as an element of interpretation is on a quite different plane from a concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty. Subsequent practice of the latter kind evidences the agreement of the parties as to the interpretation of the treaty and is analogous to an interpretative agreement"). See also *Draft Articles on the Law of Treaties with Commentaries*, [1966] 1 Y.B. INT'L L. COMM'N 222, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (stating that although the Article 31(3)(b) does not stipulate that "all" parties must be involved in the practice, this is implicit in the Article).

practice element of custom, "actual practice" should be given greater weight than other acts of state practice.[81]

It is obvious to observe that Israel's settlement policy is condemned nearly universally by states parties to GCIV.[82] Yet, actual practice of states parties to GCIV does not appear to reflect the opinion expressed by states upon condemning Israel.[83] State practice such as Indonesia in relation to East Timor,[84] Armenia vis-à-vis Nagorno-Karabakh,[85] Turkey in regards to Northern Cyprus[86] and Morocco towards Western Sahara[87] demonstrates a severe lack of uniformity in considering settlement activity unlawful. This is compounded by the fact that the state practice of

[80]Report of the International Law Commission, 65th sess., 37, U.N. Doc. A/68/10 (2013) ("any practice in the application of the treaty that may provide indications as to how the treaty should be interpreted may be a relevant supplementary means of interpretation under article 32" to the VCLT).

[81] Continental Shelf (Libya/Malta), Judgment, 1985 I.C.J. 13, 29-30, ¶ 27 (June 3) [hereinafter Libya/Malta] (the Court noting that "[i]t 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, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them").

[82] In addition to sources cited in *supra* note 35, see also various United Nations General Assembly resolutions condemning settlements: G.A. Res. 67/120, U.N. Doc. A/RES/67/120 (Dec. 18, 2012) ("[*r*]*eaffirm*[*ing*] that the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem,… are illegal"); G.A. Res. 58/98, U.N. Doc. A/RES/58/98 (Dec. 17, 2003) ("[*e*]*xpressinggrave concern* about the continuation by Israel of settlement activities in violation of international humanitarian law"); G.A. Res. 48/212, ¶ 2, U.N. Doc. A/RES/48/212 (Mar. 15, 1994) ("[*r*]*eaffirming* that Israeli settlements in the Palestinian territory, including Jerusalem, and other Arab territories occupied since 1967, are illegal"); U.N. G.A. Res. 38/79-D, ¶ 7(c), U.N. Doc. A/RES/38/79A-H (Dec. 15, 1983) (condemning the "[e]stablishment of new Israeli settlements and expansion of existing settlements").

[83] See Eugene Kontorovich, *Other Countries' Settlements*, THE VOLOKH CONSPIRACY (Nov. 27, 2012), http://www.volokh.com/2012/11/27/other-countries-settlements/ (noting the ongoing study of examining "civilian population movements into occupied territory from Morocco, Turkey, Indonesia, and several other cases, and the international legal response to these actions").

[84]MARIËLOTTEN, TRANSMIGRASI: INDONESIAN RESETTLEMENT POLICY, 1965-1985 208-209 (1986) (discussing the Indonesian transmigration policy, which involved incentivizing persons to move to East Timor).

[85]*Nagorno-Karabakh: Viewing the Conflict from the Ground*, INTERNATIONAL CRISIS GROUP, 7 (Sep. 14, 2005), *available at* http://www.crisisgroup.org/~/media/Files/europe/166_nagorno_karabakh_viewing_the_conflict_from_the_ground (observing that Armenian "authorities gave various incentives to settle" Nagorno-Karabakh).

[86]Luke Harding, *Cyprus Remains Bitterly Divided as Turkish North Buries Former Leader*, THE GUARDIAN (Jan. 20, 2012), www.theguardian.com/world/2012/jan/20/cyprus-divided-turkey-rauf-denktash (noting that "Turkish Cypriots are now a minority in their homeland, outnumbered by mainland settlers").

[87]Brunt Smith, *FMO Country Guide: Western Sahara*, FORCED MIGRATION ONLINE, 9, http://www.forcedmigration.org/research-resources/expert-guides/western-sahara/fmo035.pdf (last accessed Mar. 17, 2014) (observing that ethnic Moroccans have been provided with incentives to settle Western Sahara, creating a substantial change to the demographics in that territory).

condemnation of settlements activities reported by the International Committee of the Red Cross[88]focuses solely on Israel.

3. The travaux préparatoires *(Article 32 to the VCLT)*

While often considered a subsidiary source of interpretation,[89] recourse may be had to the *travaux préparatoires*for various reasons. Namely, recourse may be had in order to confirm the meaning reached through the other means of interpretation or to understand the meaning of a provision when its meaning is unclear or when an otherwise absurd understanding would be accepted.[90] One recent thorough study of the *travaux préparatoires*of the VCLT itself reached the conclusion that the VCLT in fact gives preparatory works a standing equal to the other methods of interpretation stipulated in the VCLT.[91] In actuality, recourse is often made to the *travaux* in order to discern a provision's meaning.[92]

What may the *travaux préparatoires* to GCIV teach us about the meaning of Article 49(6)? The drafters of GCIV whenagreeing uponthe wording of Article 49(6) were concerned with

[88]CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE, *supra* note 50, at 2963ff.
[89] Yves Le Bouthillier, *Article 32: Supplementary Means of Interpretation*, *in* 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 841, 848-849 (Olivier Corten & Pierre Klein ed., 2011) (arguing that the intention of the drafters of the VCLT was "not to place supplementary means of interpretation [including the *travaux*] on an equal footing with the means listed in Article 31, but, nevertheless, permit the interpreter to have recourse to them in cases where he or she would find it useful").
[90] VCLT, *supra* note 53, at art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").
[91] Julian Davis Mortenson, *The* Travaux of Travaux*:Is the Vienna Convention Hostile to Drafting History?*, 107 AJIL 780, 821 (2013) (observing that the intention of the VCLT's drafters was that "in addition to tools like dictionaries, context, and subsequent practice, interpreters should rely on drafting history in every plausibly contestable case to shed light on the meaning of that text—and in some cases even to override what had initially seemed like its clear import. Far from being disfavored, travaux were expected to be an integral component of interpretation.").
[92] See e.g. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Preliminary Objections, Judgment, 1984 I.C.J. 392, ¶ 31 (Nov. 26) (the Court referring to the *travaux* in determining whether Nicaragua should be considered to have accepted its compulsory jurisdiction); Questions Relating to the Obligation to Extradite or Prosecute (Belg. v. Senegal), 2012 I.C.J. 422, ¶ 90 (July 20) (referring to the *travaux* to determine the nature of the *autdedereautjudicare* provision in the *Convention against Torture*).

addressing those "abominable transfers of population which had taken place during" World War II.[93] Accordingly, the *travaux* to GCIV confirm that Israel's voluntary settlement policy does not fall under the ambit of Article 49(6).

b. Customary International Law and Settlements

As mentioned above,[94] recourse is made to customary international law in demonstrating that settlements are prohibited under international law. While treaty law can prompt subsequent custom,[95]the two sources of law nevertheless "retain a separate existence".[96] Thus, while Article 43 to the *Hague Regulations*– a source considered to prohibit settlements[97] – has on numerous occasions been considered to enjoy customary status,[98] this does not preclude customary law evolving beyond and distinctively from the content of that provision.

Article 43 to the *Hague Regulations* stipulates that the occupying power must "restore, and ensure, as far as possible, public order and safety".[99] As noted above, it is contended that this

[93]2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA of 1949 759 (1949) (Du Pasquier). See also: OSCAR M. UHLER ET AL., IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 283 (Jean S. Pictet ed., 1958) (noting that the purpose of Article 49(6) is "to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories").
[94] See *supra* Section II.*b*.
[95] R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 44 BYBIL 275, 294 (1966) ("treaties… may be constitutive of new customary law when their provisions have been recognized by other States as having passed into customary law").
[96]Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶¶ 178-179 (June 27) (the Court also stating that "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content").
[97] See *supra* notes 46-48 and accompanying text.
[98] See e.g.: Affo v. Commander Israel Defence Force, 83 I.L.R. 121, 185 (Israel 1988) (noting that Israel is obligated under Article 43 to the *Hague Regulations* as a matter of customary international law); R (Al-Jedda) v. Secretary of State for Defence, 137 I.L.R. 202, 264 (U.K. 2005) ("it was common ground that articles 42 and 43 contained a statement of the relevant principles of customary international law"). For a more cautious analysis, see: Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still Be Considered Customary International Law?*, 189 MIL. L. REV. 51 (2006).
[99] Hague Regulations, *supra* note 12, at art. 43.

provision prohibits any alterations made by the occupying power to the status quo.[100] Considering the textual interpretation of this provision does not demand such an outcome, the applicability of Article 43 to the *Hague Regulations* as a source prohibiting settlements shall be scrutinized under the elements of custom.

It is tedious to say that customary international law involves state practice and *opinio juris*.[101] The elements of state practice, however, are not as clear-cut. On an abstract level, the practice of states must be "constant and uniform."[102] Whereas statements – *inter alia* those embodied in UN General Assembly resolutions – may amount to state practice,[103] these are of a lesser weight than that embodied in "actual practice."[104] Additionally, particular attention must be given to the practice of those states most affected by the potential development of the customary norm.[105]

As noted above, while Israel's settlement policy has been subject to near-universal condemnation,[106] actual state practice in the area of settlement activity paints a different picture,

[100] See *supra* notes 47-48 and accompanying text.
[101] Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 1 U.N.T.S. 993 [hereinafter ICJ Statute] ("international custom, as evidence of a general practice accepted as law"); Prosecutor v. Hadžihasanović (Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility), 133 I.L.R. 54, 60, ¶ 12 (ICTY 2003) (stating that"to hold that a principle was part of customary international law, it has to be satisfied that State practice recognized the principle on the basis of supporting *opinio juris*").
[102] Asylum (Colombia/Peru), Judgment, 1950 I.C.J. 266, 276 (Nov. 20).
[103] Michael Wood, *State Practice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (by subscription) (Apr., 2010), *at* http://opil.ouplaw.com/home/epil (opining that "[s]tatements made on behalf of States in debates in international organizations, such as the General Assembly and the Security Council, and in written communications to international organizations, such as letters to the President of the Security Council or written comments on matters before the ILC can be a valuable source of practice"); Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BYBIL 376, 394-95 (1950) (noting that proclamations by states related to the continental shelf helped develop custom on that subject).
[104] Libya/Malta, *supra* note 81, ¶ 27; Michael Akehurst, *Custom as a Source of International Law*, 47 BYBIL 1, 2, n. 1 (1975) ("[i]t may be that a claim supported by physical acts carries greater weight than a claim not supported by physical acts").
[105] North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20) (noting that attention should be given to those "States whose interests are specially affected"); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BYBIL 1, 31 (1953) (stating that the practice of those states "directly affected" by a certain norm is of particular significance).
[106] See *supra* note 82.

one in which various states have embarked upon settlement projects and have been subject to little condemnation.[107]

What may be concluded from the foregoing analysis? It appears that the widely held opinion that Israel's settlement policy is contrary to international law actually has very shaky and weak support in the *lex lata*. While the subsidiary sources of international law – the most highly qualified publicists and judicial decisions[108] –near-universally consider Israel's settlement policy unlawful, a careful review of international law's primary sources[109] reflects a different conclusion.

c. Ex Injuria Jus Non Oritur

Were we to accept the notion thatin light Article 49(6) to GCIVany demographic change to an occupied territory should be prohibited, would all Israeli settlements be considered illegal? It is submitted here that the principle of *ex injuria jus non oritur*– "a right does not arise from a wrongdoing"[110] – should at least mitigate from this conclusion in light of Jordan's actions that led to the lack of Jewish presence in the West Bank during the former's occupation.

The norm of *ex injuria jus non oritur* is a general principle of law.[111] While this principle does not purport to entirely deny the rights of persons who relied on a situation created by a wrongful

[107] See *supra* notes 84-88 and accompanying text.
[108] ICJ Statute, *supra* note 101, art. 38(1)(d).
[109] See *Id*. at art. 38(1)(a)-(c) (i.e. treaties, customary international law and general principles of law, though the latter was less relevant to the above discussion).
[110] AARON X. FELLMETH& MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 94-95 (2009).
[111] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. 7, ¶ 133 (Feb. 5) (the Court making clear in its analysis that "[t]he principle *ex injuria jus non oritur* is sustained"; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 576, ¶ 132 (July 22) (separate opinion of Judge Cançado Trindade) ("[a]ccording to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or rights for the wrongdoer: *ex injuria jus non oritur*").

act in good faith,[112] international jurisprudence demonstrates this is nevertheless the exception to the rule of invalidity of unlawful acts.[113]

By 1948, the prohibition of the use of force had been enshrined in both the *Kellogg-Briand Pact*[114] and the United Nations Charter.[115] Additionally, from a *jus in bello* perspective, the murder and deportation of civilian populations in an occupied territory was considered a violation of the "laws and customs of war" and a war crime.[116] In certain areas of the West Bank where Jews lived prior to 1948 – such as the Etzion Block[117] and the Old City of Jerusalem[118] – the lack of Jewish presence following Jordanian occupation was a direct result of Jordanian war crimes and violations of the prohibition of the use of force.[119] Accordingly, in these particular

[112]HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW § 124 (1948) (opining that an illegality "may become, in the interests of intercourse and general security, a source of rights for third persons acting in good faith." Lauterpacht also notes that prescription may play a role in transforming the result of an illegality into a legal right); Cyprus v. Turkey, 140 I.L.R. 10, 45, ¶ 98 (Eur. Ct. H.R. 2001) (the European Court of Human Rights noting that it cannot simply ignore all the acts of the Turkish Republic of Northern Cyprus).

[113] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶¶ 119ff. (June 21) (stating that states are under an obligation not to recognize the *substantial* effects of South Africa's unlawful presence in Namibia); *Id.* at 218-19 (Separate Opinion of Judge de Castro) (noting that, in relation to South Africa's actions following its illegal presence in Namibia, "acts and transactions of the authorities in Namibia relating to public property, concessions, etc." should be considered invalid).

[114]General Treaty for Renunciation of War as an Instrument of National Policy art. 1-2, Aug. 27, 1928, 94 L.N.T.S. 57 ("[t]he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another"). However, the *Pact* did not impose a total ban on the use of force: Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 475 (1952) (observing that the *Pact* "did not forbid the customary rights of reprisals and interventions short of war").

[115]U.N. Charter art.2, para. 4("[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").

[116]Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 284. See also: Prosecutor v. Tadić, Jurisdiction, 105 I.L.R. 419, 445-46, ¶¶ 62-63 (I.C.T.Y. Appeals Chamber 1995) (noting that "[a]lthough the Statute of the International Military Tribunal limited its competence to the international armed conflict of World War II, historically laws or customs of war have not been limited by the nature of the conflict they regulate").

[117]BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR 167-71 (2008) (describing the threats made against, and the massacre of, Jewish inhabitants of the Etzion Block); ALAN DERSHOWITZ, THE CASE FOR ISRAEL 79 (2003) ("when the Arab Legion's Sixth Battalion conquered Kfar Etzion, they left no Jewish refugees").

[118]MOTTIGOLANI, ZION IN ZIONISM: THE ZIONIST POLICY AND THE QUESTION OF JERUSALEM 1937-1949 128 (1992) (in Hebrew) ("immediately upon its entrance into the city the [Arab] Legion opened with a series of shelling that threatened to completely destroy the civilian Jewish population").

[119]ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 42 (1968) (noting that the 1948 Arab militaries' "invasion was entirely unlawful"). It should be noted that under the principle of intertemporal law, what is important

regions, arguing that Jewish return would violate international law due to the change in demographics it would bring to those areas would be tantamount to accepting the validity of severe violations of international law. Therefore, were it to be accepted that the claimed object and purpose interpretation of Article 49(6) to GCIV should be applied, this may not serve as a basis for objecting to Jewish return to areas where they settled prior to the unlawful Jordanian occupation.[120]

IV. Construction of a Security Barrier to Protect Settlers

a. Introduction

Were we to consider that settlements are illegal under international law, would this constitute a security barrier protecting such communities illegal as well? While there is much authority supporting the conclusion that the finding of settlements being illegal automatically leads to the finding that a security barrier would be illegal as well,[121] some have been more cautious.[122] It is undisputed that settlers do not receive the rights of protected persons,as they are nationals of the

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is what the status of an act was at the time of its commission and how the rights and obligations manifest themselves today. Hence the examination is of the legality of the acts in 1948. See e.g. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 831, 845-46 (Permanent Ct. Arbitration, 1928) (discussing the "principle which subje[c]ts the act creative of a right to the law in force at the time the right arises"); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea Intervening), Judgment, 2002 I.C.J. 303, ¶ 205 (Oct. 10) (stating that "the principle of intertemporal law" demands that legal effect be given to rights created under the existing law at the time).

[120] Note that this is similar to the conclusion reached by T. Meron, while serving as legal counsel for Israel's foreign ministry, when asked for his opinion in 1967 regarding potential Jewish settlement in the West Bank. In regards to the Etzion Block, Meron stated that justification could be provided for return to the area. However, he merely referred to the "settlers' return to their homes" as his reasoning. See Theodore Meron, *Settlement in the Held Territories*, Israel Ministry of Foreign Affairs (Sep. 18, 1967), 3, *available at* http://southjerusalem.com/wp-content/uploads/2008/09/theodor-meron-legal-opinion-on-civilian-settlement-in-the-occupied-territories-september-1967.pdf (in Hebrew).

[121] See *supra* note 3 and accompanying text.

[122] Kretzmer, *The Advisory Opinion*, *supra* note 37, at 93-94 (arguing that "a theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law". However, D. Kretzmer does opine that there is a "consequent duty of the occupying power to return its civilians in those settlements to its own territory").

occupying power.[123] Additionally, it should be noted that it is debatable as to whether a state may argue the customary norm of military necessity as a ground to protect its civilians located in an occupied territory illegally.[124] Considering the ground of military necessity is not necessary to prove that Israel may adopt measures protecting settlers in the West Bank, this question shall not be resolved in this article.It should also be emphasized that the purpose of the following analysis is not to determine whether in each particular situation a security barrier is justified. Rather, the question is whether a security barrier protecting settlers is *per se* illegal.

If Israeli settlers are not protected persons or subject to the protection of military necessity, is Israel prohibited from adopting security measures to protect them? The answer to this question is no, as the relevant legal regimes to the West Bank do not end at the *Hague Regulations* and GCIV. Rather, there are two additional realms of legal protection relevant to the current discussion: the*Declaration of Principles on Interim Self-Government Arrangements*[125] ("*Declaration of Principles*") together with the*Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*[126] ("*Interim Agreement*"; together "*Oslo Accords*") concluded between Israel and the Palestine Liberation Organization ("PLO") and IHRL. Regarding the former two

[123] GCIV, *supra* note 19, at art. 4(1) ("[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals"); HCJ 1661/05 Gaza Coast Regional Council v. State of Israel, 59(2) PD 481, 517 [2005] (Isr.) (in Hebrew) (quoting with approval the state's argument that settlers are not protected persons for the purposes of GCIV).

[124]ArdiImseis, *Critical Reflection of the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AJIL 102, 112 (2005) (arguing that "[a]n attempt to extend the concept of military necessity to protect the interests of Israeli colonies and their civilian inhabitants would offend this general principle, not to mention the well-established maxim… *ex injuria jus non oritur*");HCJ 2612/94 Sha'ar v. Commander of IDF Forces in the Judea and Samaria Area, 48(3) PD 675, 679 [1994] (Isr.) (in Hebrew) (Justice E. Mazza arguing that protecting settlers is a duty "required upon the 'military commander' through customary international rules").

[125]Declaration of Principles on Interim Self-Government Arrangements, Sep. 13, 1993, 32 I.L.M. 1527 [hereinafter Declaration of Principles].

[126]Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sep. 28, 1995, 36 I.L.M. 557 [hereinafter Interim Agreement].

instruments, while there are repetitive – and genuine – claims of serious breaches, they are nevertheless still in force as neither party has terminated them.[127]

b. Settlements under the Oslo Accords

Before addressing whether measures may be taken to protect settlements under the *Oslo Accords*, the status of the settlements themselves under these agreements should be examined. According to the *Declaration of Principles*, the question of the future of Israeli settlements shall only be resolved at the phase of final status negotiations.[128]Hence, "[p]lainly the Palestinians were expected to live with existing settlements during the interim period leading to final status talks."[129]

This justification of consent to the continued existence of settlements is not without controversy.[130] Some scholars refer to the provisions in GCIV that prohibit consent to derogation from the rights enshrined in that Convention.[131] Each of the relevant Articles in GCIV shall be addressed.

[127]Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AJIL 6, 23-24 (2005) (also noting that "[i]t may well be that Oslo is politically dead… But that does not mean they are dead legally").
[128] Declaration of Principles, *supra* note 125, at art. V(3). See also Interim Agreement,*supra* note 126, at art. XXXI(5) (reaffirming that the question of settlements shall be resolved in permanent status negotiations).
[129]GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 134 (2000).
[130]Yuval Shany, *Head Against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 7 YIHL 352, 365 (2004) (noting that the *Oslo Accords*' "ability to restrict the rights of protected persons in the Occupied Territories is debatable"); Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LJIL 393, 417-18 (2006) (arguing that "when it signed the Oslo accords, the Palestine Liberation Organization (PLO) could not waive the humanitarian rights to which protected people are entitled, including the right enshrined in Article 49(6) of the Fourth Geneva Convention not to have civilian population from the occupying power transferred into their territory").
[131] GCIV, *supra* note 19, at art. 7, 8, 47.

First, reference is made is made to Articles 7 and 8 to GCIV.[132] Article 7 stipulates that "[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, not restrict the rights which it confers upon them."[133] However, this provision is irrelevant since the beginning of the Article explicitly refers to agreements between "High Contracting Parties",[134] which the PLO was not. Article 8 to GCIV stipulates that "[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention…"[135] Yet, this provision is also immaterial since it refers towaivers by individual protected persons,[136] and not an organization like the PLO.

Second, reference is made to Article 47 to GCIV.[137] That Article states

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."[138]

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[132]Michael Mandel, *Israel and Palestine: Three Questions for International Law*, 9 DARTMOUTH L.J. 101, 131 (2011) (arguing that "the fundamental objection to the Oslo Agreements affecting the legal situation… lies in the non-derogation provisions of the [Geneva] Conventions themselves").
[133] GCIV, *supra* note 19, at art. 7(1).
[134]*Id.*
[135]*Id.* at art. 8.
[136]UHLER, *supra* note 93, at 73-74 (discussing the importance of this provision since such persons may be pressured by the occupying power authorities to waive their rights).
[137]Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice*, 40 VAND. J. TRANSNAT'L L. 1425, 1446 (2007) (opining that "[e]ven if one were to interpret [the *Oslo*] provisions as "legalizing" the settlements, such legalization would be prohibited by Article 47 of Geneva Convention IV")
[138] GCIV, *supra* note 19, at art. 47.

However, as shall be demonstrated, this provision is also not relevant to the *Oslo Accords*. This provision concerns three scenarios. The relevant scenario to the *Oslo Accords* is an agreement between the occupying power and the government of the occupied territory. This occurs "where the lawful authorities in the occupied territory have concluded a derogatory agreement with the Occupying Power and to cases where that Power has installed and maintained a government in power."[139] Accordingly, Article 47 to GCIV is an attempt to address derogating agreements concluded with governments previously existing in the territory prior to its occupation and puppet governments and states established by the occupying power.[140]

The *Oslo Accords* concluded between Israel and the PLO donot conform to any of these situations. On the contrary, "the PLO is not exercising authority that is legally dependent on that of another State, still less acting as agent of the belligerent occupant."[141] The PLO's significance derives from it being "the representative of the Palestinian People."[142]The PLO is not to be confused with the Palestinian Authority, the latter which "is rather an entity deriving its legitimacy and powers from the [Oslo] agreements."[143]

c. The Protection of Settlements and Settlers

Having established that the *Oslo Accords* are lawful under GCIV and thereby permit the continued existence of Israeli settlements until final negotiations, we may now consider what the *Oslo Accords*' legal effect is vis-à-vis constructing a security barrier to protect

[139]UHLER, *supra* note 93, at 275.
[140]Adam Roberts, *What is a Military Occupation?*, 54 BYBIL 249, 284-285 (1984) (observing that these are the three possibilities this part of Article 47 addresses and provides examples – predominantly from World War II – in which such agreements were concluded).
[141]JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 445 (2nd ed. 2006).
[142]G.A. Res. 3210 (Oct. 14, 1974), U.N. Doc. A/RES/3210.
[143]Malcolm N. Shaw, *Territorial Administration by Non-territorial Sovereigns*, *in*THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW : CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY : ESSAYS IN HONOUR OF PROFESSOR RUTH LAPIDOTH 369, 387 (Tomer Broude& Yuval Shany ed., 2008).

settlements.Inaccordance with the *Interim Agreement*, "Israel shall continue to carry… the responsibility for overall security of Israelis and Settlements."[144] Thus, this provision authorizes Israel to adopt measures to protect the lives of settlers, *inter alia* constructing a security barrier.

Moreover, this conclusion is only strengthened if one accepts that a state'sIHRL obligations apply extraterritorially.[145] The right to life is "the supreme right."[146] Moreover, IHRL is characterized by its seeking to attain universality,[147] its application not being subject to distinction.[148] It is accordingly Israel's legal obligation to protect settlers in the face of terrorist attacks, whether or not the settlers are in the territory illegally.Human rights do not derive from an illegality – they derive from one's humanity – and are thus no subject to the principle of *ex injuria jus non oritur*.

None of this is grants Israel with a *carte blanche* in deciding how to construct a security barrier. Israel's Supreme Court has received many petitions regarding the route of the barrier and has accordingly engaged in analyzing the proportionality of the route taken. In doing so, the Supreme Court balances between the infringement of the rights of the local Palestinian population and the rights of Israelis.[149]

V. CONCLUSION

[144]Interim Agreement, *supra* note 126, at art. XII(1).
[145] See *supra* notes 23-29 and accompanying text.
[146]U.N. Human Rights Comm., General Comment No. 6: The Right to Life (art. 6), 127, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.6 (Apr. 30, 1982).
[147]THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 246 (1989) (opining that "[e]fforts to promote the universality of human rights through attempts to assure concordant behaviour both by non-parties to the pertinent instruments and by those states that have dissented from their adoption will and must continue").
[148] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind").
[149] See e.g. Beit Sourik Village Council v. Israel, 129 I.L.R. 189 (Israel H.Ct.J. 2004); HCJ 940/04 Abu Tir v. Military Commander in the Judea and Samaria Area, 59(2) PD 320 [2004] (Isr.) (in Hebrew); HCJ 3721/09 Mahissan v. Israel (May 22, 2011), Nevo Legal Database (by subscription) (Isr.) (in Hebrew).

Justice Aharon Barak, in stating why Israel has the right to protect settlers by building a security barrier, proclaimed that "[e]ven if a person is located in the area [i.e. the West Bank] illegally, he is not outlawed."[150] Nevertheless, this does not solve the problem why if one is situated somewhere illegally the state does not simply evacuate the person.[151] This may be said to provide two proposed solutions to this problem. *First*, Israeli settlers are not in the West Bank illegally. *Second*, even if settlers are in the West Bank unlawfully, other agreements, namely the *Oslo Accords*, in conjunction with IHRL allow these settlers to stay and permit – and in fact obligate – Israel to take proportionate measures to protect them.

As observed by the ICJ in the *Wall* advisory opinion, the current subject matter is part of a broader political problem, yearning for a solution.[152] Nevertheless, this article does not attempt to solve these questions, many of which are not a matter of legal but rather political discussion.This article has instead focused on what international law determines on the question of settlements and the legality, or illegality, of protecting their inhabitants.

[150]Mara'abe v. Prime Minister, 129 I.L.R. 241, 258-59 (Isr. H.Ct.J. 2005).
[151]Shany, *supra* note 130, 372 (noting that Barak did not address the question that Israel "might be obliged to consider evacuating settlers in order to protect their lives (instead of protecting them while they remain in place)").
[152] Construction of a Wall, *supra* note 2, at ¶¶ 54, 162 (["t]he Court is indeed aware that the question of the wall is part of a greater whole"). The broader political context of the question of protecting settlements, from an Israeli perspective, was noted by the Israeli High Court of Justice: Beit Sourik, *supra* note 149, at 237, 240.