Leiden Journal of International Law, 20 (2007), pp. 825–839
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom doi:10.1017/S0922156507004475

Israel's Settlement-Policy Stumbling-Block in the Middle East Peace Process

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Abstract

According to Israel's Guide to the Mideast Peace Process, charges regarding the illegality of Israeli settlements in the 1967 Occupied Palestinian Territory (OPT) have no foundation in international law. Peace efforts between Israel and Palestine will have no chance of success as long as Israel uses its prolonged military occupation to promote and protect its annexation-in-disguise of the West Bank and East Jerusalem. John Dugard has passed on this hard truth consistently as Special Rapporteur on the situation of human rights in the OPT. The international community should take the same hard line towards the Guide as it has done towards the Hamas Charter. If it wants to establish a just and lasting peace in the Middle East, it should not allow Israel to bend the truth any more in respect of the legality of the Israeli settlements in the OPT as Hamas has done in respect of the illegality of Israel.

Key words

International Court of Justice; Israeli–Palestinian conflict; Israeli settlement policy; League of Nations Mandate; partition resolution; Road Map for Peace; Security Council

All special rapporteurs on the situation of human rights in the Palestinian territories occupied by Israel since 1967 (hereafter Occupied Palestinian Territor (OPT)) consider Israel's settlement policy to be a serious violation of international law and the stumbling block in the Middle East peace process. The reports of John Dugard rightly expose this policy as the root cause of Israel's violations of international law in the OPT. In his 2003 Report he exerted himself in an unmistakable signal to the international community: 'There is a humanitarian crisis in the West Bank and Gaza. It is not the result of a natural disaster. Instead, it is a crisis imposed by a powerful State on its neighbour'.[1] The heart of the matter is the half-answer of the international community, particularly Western states led by the United States, to Israel's untenable position that it has a better claim to sovereignty over the OPT than any other state and that its settlements are legal under international law. This position seems to be copied from the settlement policy of the two main originators of the question of Palestine, the United Kingdom and the United States, in their greed for territory, based as that policy was on the idea that fortune favours the bold.[2]

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1. UN Doc. E/CN.4/2004/6 (2003), at para. 21.
2. See B. Potter, *Empire and Superempire: Britain, America and the World* (2006), at 45–6: 'The most damaging kind of capitalist enterprise in the Empire, however, was the 'settler' kind. We have mentioned settlers already,

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

1. John Dugard, Special Rapporteur of character

1.1. A controversial mandate

In 1993 the then UN Commission on Human Rights (UNCHR) established the function of Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967. This position has been held by the Swiss René Felber (1993–5), the Finn Hannu Halinen (1995–9), the Italian Giorgio Giacomelli (1999–2001), and John Dugard from South Africa (since 2001).[3] Each of them had to cope with the refusal of Israel to recognize the mandate because of its 'inequitable nature'.[4] According to the 1993 mandate the Special Rapporteur is

> (a) To investigate Israel's violations of the principles and bases of international law, international humanitarian law and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian territories occupied by Israel since 1967;
>
> (b) To receive communications, to hear witnesses, and to use such modalities of procedure as he may deem necessary for his mandate;
>
> (c) To report, with his conclusions and recommendations, to the Commission on Human Rights at its future sessions, until the end of the Israeli occupation of those territories.[5]

In 2001 the Economic and Social Council of the UN welcomed the recommendations contained in the report of the High Commissioner and those contained in the report of the international commission of inquiry, urged the government of Israel to implement them, and requested the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, acting as a monitoring mechanism, to follow up on the implementation of those recommendations and to submit reports thereon to the General Assembly.[6]

After his appointment as General Rapporteur by the UNCHR in July 2001 John Dugard submitted an interim report in which he dwelt on his mandate in reply to the continuous wave of the criticism by Israel and its (Western) friends that the mandate was outdated from the very beginning. The critics argued that the mandate did not take into account that since the implementation of the Oslo Accords and related

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mainly in an idealistic kind of way . . . In fact settlers are well known to be some of the most problematical of colonists: the most avaricious, and in particular, the most careless of other peoples' human and economic rights'; R. Kagan, *Dangerous Nation: America's Place in the World from its Earliest Days to the Dawn of the Twentieth Century* (2006), at 75: 'The government could not declare on behalf of its citizens that it had no interest in further expansion or impose by fiats sharp limits on their ambitions. Nor could it easily refuse to protect them when they were endangered, even by their own risky and illegal behaviour. As the Indian inhabitants learned painfully, land once occupied by American settlers, even extra legally, could almost never be taken back and returned to the Indians by a popularly elected government'.

3. As of 1999, mandate-holders may serve a maximum of six years. The Human Rights Council confirmed the terms of office. See UN doc. A/HRC.5/L.11 (2007), at para. 57 and Appendix II, at 41.
4. See most recently Letter dated 19 March 2007 from the Permanent Mission of Israel to the United Nations Office at Geneva addressed to the President of the Human Rights Council, UN Doc. A/HRC/4/G/15 (2007), at 1.
5. Commission on Human Rights Resolution 1993/2A, para. 4, adopted by a roll call vote of 26 to 16 with 5 abstentions.
6. UN Doc. E/CN.4/RES/2001/7 (2001), at para. 14.

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

agreements the control of the lives of over 90 per cent of Palestinians in the OPT rests with the Palestinian Authority (PA). Dugard argued that this implementation did not end the Israeli occupation of the OPT – that is, the West Bank, including East Jerusalem, and the Gaza Strip. He stressed that the prolonged military occupation made the mandate of the Special Rapporteur unusual and distinguished it from other special rapporteurships established by the UNCHR.[7] According to the government of Israel Dugard's sense of duty resulted in an unprecedented expansive interpretation of the mandate. Dugard showed himself not to be the man to avoid difficulties. His first full report is telling in this respect, particularly in its response to the Israeli objection that control of the lives of over 98 per cent of the Palestinians had been passed to the PA in the so-called A areas.[8] Dugard did not mince matters in his elaborate rebuttal:

> While it is true that many powers have been transferred by Israel to the Palestinian Authority – including the important area of the administration of justice, in which most violations of human rights occur – the reality is that Israel not only has the power to intervene in the occupied territories, including those designated as A areas, on grounds of security, but that it has *in fact* done so in recent months. The denial that Israel is in military occupation of the territories is impossible to reconcile with recent military incursions into Ramallah, Bethlehem, Gaza, Beit Jala, Beit Rima and Tulkarem, the presence of Israeli tanks outside President Arafat's headquarters in Ramallah and over 150 military checkpoints in the occupied territories that have seriously disrupted the lives of Palestinians living in the A areas. Moreover, it takes no account of article 47 of the Fourth Geneva Convention, which provides that protected persons in an occupied territory shall not be deprived 'in any case or in any manner whatsoever' of the benefits of the Convention by any change to the government of the territory resulting from an agreement concluded between the authorities of the occupied territories and the Occupying Power.[9]

1.2. A revealing critic

In an addendum to his 2003 Report Dugard explained under the heading 'Terrorism, security and the violation of international law' that

> security cannot be achieved at the expense of basic principles of international law. There are limits to the measures that may be taken to achieve security. Israel cannot under international law advance its security by forcibly seizing the land of its neighbour and subjecting its neighbour to an oppressive regime in which basic human rights are violated.[10]

That earned him the rebuke of Israel's permanent mission to the United Nations Office at Geneva:

> By placing the entire blame for the hardship facing Palestinians on Israel, it [the Report] absolves the terrorists that have taken Palestinian society hostage, the corrupt leadership that has incited and abused people, and those Arab states that have deliberately

7. UN Doc. A/56/440 (2001), at para. 5.
8. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995, Article XI divided the OPT for redeployment and security arrangements in areas A, B, and C.
9. UN Doc. E/CN.4/2002/32 (2002), at para. 9 (a) (emphasis in original).
10. UN Doc. E/CN.4/2004/6/Add. 1 (2004), at para. 4.

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> sought to fund and inflame terrorism in the region. In so doing, the Report is clearly part of the problem and not the solution.[11]

The real problem is still the prolonged military occupation as an instrument to promote and protect the establishment of Jewish settlements, particularly in the West Bank and East Jerusalem.[12] Dugard's report runs this annexation-in-disguise into the ground as the root cause of Israel's violations of international law in the OPT. Nevertheless, Dugard shares the critical stand of his predecessors on the limited scope of the mandate, which precludes the examination of human-rights violations other than those committed by Israel in the OPT. The explanation in his 2007 Report is revealing: 'I shall not consider the violation of human rights caused by Palestinian suicide bombers. Nor shall I consider the violation of human rights caused by the political conflict between Fatah and Hamas in the OPT. Such matters are of deep concern to me but my mandate precludes me from examining them'.[13]

Dugard's frankness generated the harsh reprimand of Israel's permanent representative at the UN Office in Geneva, Itzhak Levanon, that among the one-sided reports of Special Rapporteurs, 'this most recent report reaches new depths of predilection and prejudice against Israel'.[14] The ambassador availed himself of the opportunity to annex 200 letters sent by the permanent mission of Israel to the UN Secretariat regarding Palestinian violence and terror between September 2000 and February 2007. In so doing, he conveniently forgot that 'the strain of vicious terrorism that the Irgun had bred into the Israeli character would never be removed. Worst of all, it would inspire vengeful imitation among the Palestinian Arabs'.[15] Besides, the inclusion of suicide bombing would have implied an extension of the mandate to Israel proper, since most of these bombers blew themselves up there.

11. UN Doc. E/CN.4/2004/G/24 (2004), at 6.
12. But see G. R. Watson, *The Oslo Accords, International Law and the Israeli–Palestinian Agreements* (2000), at 175–6. He concluded, 'In sum, humanitarian law has ceased to apply in the areas no longer "occupied" by Israel — Area A and, most likely, Area B.' Watson's book was published before the 9/11 tragedy in the United States. In my view the lapse of the peace process particularly after 9/11 supports Dugard's position. The way in which Israel's security needs have taken precedence over the human rights of the Palestinian people in the A Area and beyond has removed the last doubts as to the continuation of the military occupation in the OPT as a whole until this very day.
13. UN Doc. A/HRC/4/17 (2007), at para. 5.
14. Letter dated 19 March 2007 from the Permanent Mission of Israel to the United Nations Office at Geneva addressed to the President of the Human Rights Council, UN Doc. A/HRC/4/G/15 (2007), at 1.
15. See C. Carr, *The Lessons of Terror, a History of Warfare against Civilians* (2003), at 229–30. Irgun is the shorthand for Irgun Z'vai Leumi (or IZL), one of two notorious illegal Jewish gangs in the 1930s and 1940s in Palestine, the other being the Stern. See B. Morris, *Righteous Victims, A History of the Zionist–Arab Conflict 1881–1999* (1999), at 147: 'The Irgun bombs of 1937–1938 sowed terror in the Arab population and substantially increased its casualties'; at 657: 'While the Haganah [a Jewish paramilitary organization] generally cleaved to the defensive, the dissident right-wing organizations, the IZL and the LHI [Lohamei Herut Ysrael or Fighters for the Freedom of Israel], introduced in the arena (in 1937–38 and 1947–48) what is now the standard equipment for modern terrorism, the camouflaged bomb in the market place and the bus station, the car- and truck-bomb, and the drive-by shooting with automatic weapons (though not the suicide bomber, which was an Arab innovation of 1980s and 1990s)'.

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1.3. The heart of the matter

According to the Israeli Ministry of Foreign Affairs the West Bank and the Gaza Strip are disputed territory and not occupied territory.[16] The factsheet 'Disputed Territories: Forgotten Facts about the West Bank and Gaza Strip' contends that their status can only be determined through negotiations:

> In 1967, Israel fought a desperate war of self-defense and despite dire odds, won. As a result, the Jewish State not only survived, it also came into possession of additional lands, including territory that is of vital importance to its security . . . Claims of illegality [of the occupation] are politically motivated as neither international law nor the agreements between Israel and the Palestinian Authority support this baseless allegation.

In the context of the Fourth Geneva Convention the discussion on 'disputed' versus 'occupied' is irrelevant, for the Convention applies regardless of claims of sovereignty.[17] Moreover, Israel has known from the beginning of the occupation in 1967 that establishing Jewish settlements in the OPT was illegal under international law.[18] Nevertheless the factsheet noted that Israel is not obliged to withdraw from the OPT. In so doing, it invokes Security Council Resolution 242 (1967), adopted after the Six Day War:

> Resolution 242 recognizes the need, indeed the right, for 'secure and recognized boundaries.' By declining to call upon Israel to withdraw to the pre-war lines, the Security Council recognized that the previous borders were indefensible, and that, at the very least, Israel would be justified in retaining those parts of the territories necessary to establish secure borders.

The first Special Rapporteur Felber sighed in his 1994 Report, 'International public opinion is similar to Israeli public opinion: it regards security as taking precedence over human rights, and every terrorist attack brings out this feeling anew'.[19] Or, in the words of the most recent Special Rapporteur John Dugard,

> The EU pays conscience money to the Palestinian people through the Temporary International Mechanism but nevertheless joins the United States and other Western countries, such as Australia and Canada, in failing to put pressure on Israel to accept Palestinian self-determination and to discontinue its violations of human rights. The Quartet, comprising the United States, the European Union, the United Nations and the Russian Federation, is a party to this failure.[20]

All Special Rapporteurs have carefully avoided using the terms 'colonies' and 'colonists' in their criticisms regarding Jewish settlements and settlers in the OPT.

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16. Israel Ministry of Foreign Affairs, 'DISPUTED TERRITORIES: Forgotten Facts About the West Bank and Gaza Strip', February 2003, available at http://www.mfa.gov.il/MFA. The quotations are from the website.
17. 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 1: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.
18. Legal opinion of T. Meron, at the time legal adviser of the Israeli Ministry of Foreign Affairs, concluded in a memorandum three months after the Six Day War of 1967: 'Civilian settlement of the administered territories contravenes the explicit provisions of the Fourth Geneva Convention.' See *Independent on Sunday*, 26 May 2007, 'The Six Day War: Forty Years On', available at http://www.independent.co.uk/.
19. UN Doc. E/CN.4/1995/19 (1994), at para. 76.
20. UN Doc. A/HRC/4/17 (2006), at para. 63.

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

In his 2005 Report Dugard wondered 'whether the time has not come for the international community to change its use of language, for settlements do constitute a form of colonization in a world that has outlawed colonialism'.[21] In his 2007 Report he took the plunge himself by reporting on settlements under the heading 'Settlements: the new colonialism'.[22] The official website of the Israeli Ministry of Foreign Affairs provides the answer as to why Israel does not take the slightest notice of the unanimous condemnation of settlements by the international community. For it presents in plain terms the position that the 1947 UN resolution on partition is irrelevant to the peace process and that the Jewish settlements in the OPT are legal under current international law.

2. Settlement policy

2.1. Israel's political justification

According to the 'Guide to the Mideast Peace Process' (Guide) on the website of the Israeli Ministry of Foreign Affairs, the League of Nations Mandate for Palestine expressly recognized as legitimate Jewish settlement in the West Bank and the Gaza Strip.[23] Under the heading 'The historical context' the Guide declares,

> For more than a thousand years, the only administration which has prohibited Jewish settlement was the Jordanian occupation administration, which during the nineteen years of its rule (1948–1967) declared the sale of land to Jews a capital offense. The right of Jews to establish homes in these areas, and the legal titles to the land which had been acquired, could not be legally invalidated by the Jordanian or Egyptian occupation which resulted from their armed invasion of Israel in 1948, and such rights and titles remain valid to this day.[24]

International humanitarian law also would not oppose Jewish settlement in the OPT, because Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 would not prohibit the voluntary return of Jews to the West Bank and the Gaza Strip as of 1967:

> Repeated charges regarding the illegality of Israeli settlements must therefore be regarded as politically motivated, without foundation in international law. Similarly, as Israeli settlements cannot be considered illegal, they cannot constitute a 'grave violation' of the Geneva Convention, and hence any claim that they constitute a 'war crime', is without any legal basis. Such political charges cannot justify in any way Palestinian acts of terrorism and violence against innocent Israelis.[25]

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21. UN Doc. E/CN.4/2005/29/Add.1 (2005), at 6.
22. UN Doc. A/HRC/4/17 (2007), at paras. 32–34.
23. 1922 League of Nations Mandate for Palestine of 24 July 1922, Article 6 reads: 'The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in cooperation with the Jewish Agency referred to in Article 4, close settlement by Jews on the land, including State lands not required for public use'.
24. Israeli Settlements and International Law of 21 May 2001, website of the Israeli Ministry of Foreign Affairs, available at http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process. Quotations are from that website.
25. But see *supra* note 18.

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The Guide continues by stating that the Oslo Agreements have not changed the legitimacy of Jewish settlement in the OPT:

> The building of homes has no effect on the status of the area. The prohibition on unilateral measures was agreed upon in order to ensure that neither side take steps to change the legal status of this territory (such as by annexation or unilateral declaration of statehood), pending the outcome of permanent status negotiations. Were this prohibition to be applied to building, it would lead to the ridiculous interpretation that neither side is permitted to build homes to accommodate for the needs of their respective communities.

And, to crown everything,

> Politically, the West Bank and Gaza Strip is best regarded as territory over which there are competing claims which should be resolved in peace process negotiations. Israel has valid claims to title in this territory based not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not under the sovereignty of any state and came under Israeli control in a war of self-defense, imposed upon Israel.

The Guide overlooks the fact that even during the Mandate the duty of the mandatory power to facilitate Jewish immigration under suitable conditions and to encourage close settlement by Jews on the land was subject to its duty to ensure that the rights and position of other sections of the populations were not prejudiced. These very conditions put the United Kingdom to great trouble, resulting in proposals for the partition of the mandated territory between Jews and, in the wording of the Mandate, 'non-Jewish communities'. 'A Survey of Palestine', prepared in December 1945 and January 1946 for the information of the Anglo-American Committee of Inquiry was quite explicit in that respect.[26]

With respect to Jewish immigration and settlement the British Mandatory Administration (BMA) survey learns that in 1939 the mandatory power had drawn the conclusion from the findings of several expert commissions that

> [O]wing to natural growth of the Arab population and the steady sale in recent years of Arab land to Jews, there is now in certain areas no room for further transfers of Arab land, whilst in some other areas transfer of land must be restricted if Arab cultivators are to maintain their existing standards of living and a considerable landless Arab population is not soon to be created . . . . His Majesty's Government cannot hope to satisfy the partisans of one party or the other in such a controversy as the Mandate has aroused. Their purpose is to be as just as between the two peoples in Palestine whose destinies in that country have been affected by the great events of recent years, and who, since they live side by side, must learn to practise mutual tolerance, goodwill and co-operation.[27]

This very fact resulted in the formation after the Second World War of the Anglo-American Committee of Inquiry 'to examine the question of European Jewry and to

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26. See British Mandatory Administration (BMA), *A Survey of Palestine. Prepared in December 1945 and January 1946 for the information of the Anglo-American Committee of Inquiry* (1946), Vol. I, volume I, at 238, para. 39. Hereinafter referred to as BMA Survey. The Survey This book has been reprinted in 1991 by the Institute for Palestinian Studies, Washington, DC 'in full with permission from Her Majesty's Stationary Office'.

27. Ibid., at 98, para. 16.

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make a further review of the Palestine problem in the light of that examination'.[28] The dénouement was the termination by the United Kingdom of the Mandate and the adoption by the UN General Assembly of the partition resolution, Resolution 181 of 1947. The implication of the Guide is that the occupation of the remaining part of the former Mandate for Palestine by Israel in 1967 revived, as it were, the Jewish right to immigration and settlement in the OPT, albeit without ensuring that the rights and position of the people living there are not prejudiced. It is not very promising that the Israeli Ministry of Foreign Affairs keeps the document 'Israeli settlements and international law' on its official website until this very day as part of its Guide to the Mideast Peace Process.

Finally, the termination of the Mandate implied the end of the immigration of Jews to the territory of the Arab state and Jerusalem as *corpus separatum*. The partition resolution let there be no mistake as to that:

> Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews, who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon the recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights. Persons over the age of eighteen years may opt, within one year from the date of recognition of independence of the State in which they reside, for citizenship of the other State, providing that no Arab residing in the area of the proposed Arab State shall have the right to opt for citizenship in the proposed Jewish State and no Jew residing in the proposed Jewish State shall have the right to opt for citizenship in the proposed Arab State. The exercise of this right of option will be taken to include the wives and children under eighteen years of age of persons so opting.[29]

Thus the Guide is not correct in stating that for more than a thousand years only the Jordanian administration prohibited Jewish settlement in the territory of the Arab state, let alone the 1967 OPT. This prohibition has in any case bound Israel, lock, stock, and barrel, since its admittance to UN membership in 1949. Besides, the Guide's main argument supporting its view that the partition resolution is irrelevant to the question of whether or not Jewish settlements in the OPT are legitimate under international law, is the rejection by the Arab states: 'The Arab states refused to accept the Resolution and resorted to armed force in order to prevent its implementation . . . . [They] attacked the fledgling Israeli state and demonstrated, by force of arms, that Resolution 181 was in their eyes a legal nullity'.[30] Apart from the question of whether the Arab states had reason to do so, their rejection did not affect the legitimacy of the partition resolution itself, as appears from the references to this resolution in resolutions of the General Assembly from 1980 to the present day.[31]

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28. Ibid., at 82.
29. UN Doc. A/RES/181 (II) (1947), Part I C, Chapter 2, 'Citizenship, International Conventions and Financial Obligations', at para. 1 (Citizenship).
30. The Status of General Assembly Resolution 181 (II) of 29 November 1947, March 30 1999, Israeli Ministry of Foreign Affairs, available at http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process. Quotations are from that website.
31. See P. J. I. M. de Waart, *Dynamics of Self-Determination in Palestine: Protection of Peoples as a Human Right* (1994), at 126–7. See also Watson, *supra* note 12, at 20–7. According to Watson, 'there is a fair case to be made that

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Recent studies by Israeli historians show more understanding of the Arab rejection at the time.[32] In any case the Arab rejection, expected by Israel, did not imply that the borders of the Jewish state in Palestine, in the words of David Ben-Gurion, Israel's first Prime Minister, 'will be determined by force and not by the partition resolution'.[33] By opposing the validity of the partition resolution the Arab states and the Palestinians were guilty only of a miscalculation, in that they underestimated the element of negotiation in the origin of the League of Nations mandate system in the 1919 Peace Conference.[34] This may explain, but did not at all justify, the termination by the mandatory power of its Mandate for Palestine in 1948 as if it were simply giving up a colony. [35] Legally it forsook its Mandate, which, as the International Court of Justice (ICJ) stated at the earliest opportunity – in the dispute between South Africa and the United Nation in the case of South West Africa –

> was created, in the interest of the inhabitants of the Territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization . . . The international rules regulating the Mandate constituted an international status for the territory recognized by all the Members of the League of Nations, including the Union of South Africa.[36]

These opinions were not related to the special position of the South West Africa mandate as a C mandate. On the contrary, they were derived from the legal status of A and B mandates.[37] All in all, the State of Palestine Declaration of Independence of 15 November 1988 had every right to state that the partition resolution, despite the historical injustice done to the Palestinian people, 'nevertheless continues to attach conditions to international legitimacy that guarantee the Palestinian people the right to sovereignty and national independence' in the 1967 OPT as a whole. The Guide is on the wrong track when it states that elementary principles of equity and international law as well as agreements signed by the Palestinians themselves prohibited them from doing so.

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the Resolution had some legal effect, at least at the time of its adoption . . . But even if the Resolution was binding at the time of its adoption, it is unlikely that it is still binding today' (at 22 and 23).

32. See Morris, *supra* note 15, at 186; I. Pappe, *The Ethnic Cleansing of Palestine* (2006), at 34.
33. Pappe, *supra* note 32, at 36–7.
34. See G. Schwarzenberger, *Power Politics, a Study of World Society* (1964), at 470. 'The solution adopted in general outline by the Peace Conference of 1919, defined by the Supreme Council and executed by The League of Nations, gave to the victorious Powers the substance of their territorial ambitions, but in the form, and with the limitations, of League Mandates'.
35. Ibid., at 475: 'As the United Kingdom intended at an early date to relinquish her mandate, the mandatory Power took the view that there was little point in negotiating a trusteeship agreement for Palestine'. See also J. H. W. Verzijl, *International Law in Historical Perspective* (1969), II, at 564: 'Impatient of the lack of progress in the liquidation of the Mandate, the United Kingdom took the unusual and, in my opinion, illegal step of authoritatively renouncing her Mandate as from 15 May 1948, thus provoking the unilateral proclamation [of the State of Israel]'.
36. *International Status of South West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128, at 132, 133.
37. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at para. 54.

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2.2. Refutation under international law

In 2004 the ICJ advised the UN General Assembly on the legal consequences of the construction of a wall in the Occupied Palestinian Territory.[38] It affirmed that the authority to decide the status of Palestine after the demise of the League of Nations rested with the United Nations, particularly with the UN General Assembly, and that the UN was bound by the League of Nations Mandate as an international institute with an international purpose, embodied in two essential principles: the principle of non-annexation and the principle that the well-being and development of peoples not yet able to govern themselves formed a 'sacred trust of civilization'.[39]

Since the *Wall* Opinion John Dugard considered it no longer necessary to assert legal positions in the face of Israeli objections: 'The law is clear and it is now possible to focus on the consequences of Israel's illegal actions and to consider ways and means of enforcing compliance with international law'.[40] Dugard exposed in that report the incorporation of settlements into Israel, the seizure of Palestinian land and the encouragement of an exodus of Palestinians by denying them access to their land and water resources by restricting their freedom of movement.[41] Israel's response to the report complained, amongst other things, about the disregard for the Road Map for Peace and the peace process.[42] At the bottom of this complaint lies the opinion of Israel that Resolution 181 has been replaced by Security Council Resolutions 242 (1967) and 338 (1973) on the principles of a just and lasting peace in the Middle East and thus has lost its relevance for the peace process, if it ever had any. For, according to Israel,

> Resolution 181 has never been part of the agreed foundation for the peace process between Israel and the Palestinians. The letters of invitation to the Madrid Peace Conference of 1991, and the agreements signed between Israel and the Palestinians expressly provide that permanent status negotiations are to be based on Security Council Resolutions 242 and 338. No other United Nations Resolution is referred to. The Palestinians have thus affirmed that permanent resolution of the Israeli–Palestinian conflict will be achieved by negotiated settlement in West Bank and Gaza Strip territory that is the subject of those Security Council Resolutions.[43]

Unfortunately, the Israeli opinion that the UN partition resolution is not relevant to the peace process can take some heart from the *Wall* Advisory Opinion. For the ICJ emphasized that, indeed, the tragic situation of the Israeli–Palestinian conflict

> can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end.[44]

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38. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136. See P. J. I. M. de Waart, 'International Court of Justice Firmly Walled in the Law of Power in the Israeli-Palestinian Peace Process', (2005) 18 LJIL 467.
39. Ibid., at 165, para. 70.
40. UN Doc. E/CN.4/2005/29 (2004), at para. 7.
41. Ibid., at 3.
42. UN Doc. E/CN.4/2005/G/30 (2005), at 6–7.
43. See s*upra* note 30.
44. *Wall* Advisory Opinion, *supra* note 38, at 200, para. 162.

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It did so, however, in a more general context by referring to 1947 as 'the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated'.[45] Although the opinion of the ICJ left the relevance of the partition resolution and the Mandate for Palestine somewhat aside from the peace process, the termination of the Mandate and the adoption of the partition resolution still prevent Israel from claiming that the Israeli settlements in the OPT are legal under international law. For the legal significance of the termination of the Mandate, the partition of its territory between an Arab state, a Jewish state, and, for the time being, Jerusalem as a *corpus separatum*, and the acceptance of the partition resolution by Israel as a condition for the admission to UN membership in 1949 is that the provisions in the Mandate in respect of transfer of land to Jewish immigrants lost their validity.[46]

Neither did the transfer of land by the mandatory power to the Jewish Agency and individual Jewish immigrants to Palestine during the Mandate support any claim of Israel to sovereignty over the West Bank, including East Jerusalem, and the Gaza Strip. Therefore the Israeli government had no right whatsoever under international law to resume, as it were, after the 1967 occupation the British mandatory policy of transfer of land to Jewish immigrants in the OPT – the settlers or colonists. According to the Israeli non-governmental organization Peace Now, Israel did not even have a right to do so under Israeli law.[47] As a result of that policy nearly 40 per cent of the land on which the settlements have been built is privately owned by Palestinians. Moreover, more than 50 per cent of the land on which settlements have been constructed has been declared state land, 'often through controversial means and mostly for the benefit of the settlements'.[48] Dugard noted in his 2007 Report,

> As a result of expansion, the settler population in the West Bank numbers some 260,000 persons and that of East Jerusalem nearly 200,000. As indicated above, the Wall is presently being built in both the West Bank and East Jerusalem to ensure that most settlements will be enclosed within the Wall. Moreover, the three major settlement blocks of Gush Etzion, Ma'aleh Adumim and Ariel will effectively divide Palestinian territory into cantons, thereby destroying the territorial integrity of Palestine.[49]

2.3. Another advisory opinion?

The 2004 Advisory Opinion of the ICJ on the Wall has not had the desired effect of putting the solution to the dispute between the United Nations and Israel on the status of the OPT on the right track. In this connection Dugard brings to our attention the fact that the United Nations needed four advisory opinions from the ICJ to guide it in its approach to South Africa's occupation of South West Africa/Namibia. For

45. Ibid.
46. UN Doc. A/RES/273 (III) (1949), on the admission of Israel to UN membership.
47. See Peace Now Report, *Breaking the Law in the West Bank – One Violation Leads to Another: Israeli Settlement Building on Private Palestinian Property* (2006), at 5.
48. Ibid., at 4.
49. UN Doc. A/HRC/4/17 (2007), at para. 32.

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

that reason he suggests another advisory opinion on the continuation of Israel's occupation of Palestinian territory, raising crucial questions such as

> What are the legal consequences of a regime of occupation that has continued for more than forty years?
>
> What are the legal consequences when such a regime has acquired some characteristics of colonialism and apartheid?
>
> Does it continue to be a legal regime?
>
> Or does it cease to be a lawful regime, particularly in respect of 'measures aimed at the occupants' own interests'?
>
> And if this is the position, what are the legal consequences for the occupied people, the occupying power and third states? [50]

The answers to such question may also clarify once and for all that Israel's Guide to the Mideast Peace Process is off the track with respect to its guidance on the legitimacy of Israeli settlements in the OPT and the irrelevance of the partition resolution to reading the Road Map for Peace. This time Israel's government should be aware that it has less room to manoeuvre in order to distance itself from international law as the proper framework for a just and lasting peace because of the ICJ judgment of 26 February 2007 in the *Genocide* case between Bosnia and Herzegovina and Serbia and Montenegro. In this judgment the Court stated that Serbia had not committed genocide and had not conspired to commit genocide or incited genocide. But Serbia 'has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995'. Moreover it has violated is obligation under that Convention by failing to transfer Ratko Mladić to the International Criminal Tribunal for the former Yugoslavia for trial.[51] Whether or not the Israeli government(s) may be accused of having committed or incited the crime of genocide in the OPT, it should face the possibility of being accused of not having prevented or punished the crime of genocide. In that case any state party to the Convention may submit such a violation to the ICJ, because Israel has not made a reservation in respect of the jurisdiction of the ICJ.[52]

However undreamed of it might have been at the time of the adoption of the Genocide Convention, such a complaint regarding Israel's performance as occupying power has become increasingly thinkable after the 1967 occupation of Palestinian territory, however nasty a taste the very idea might cause. Even within Israel charges

50. Ibid., at para. 62.
51. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep., at 168–9.
52. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article IX: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any parties to the dispute.' According to the Advisory Opinion of the ICJ on *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* of 28 May 1951, parties may make a reservation as to Article IX. Out of 133 states parties to the Convention only 17 did so. Israel did not do so. Even if it were to change its mind, a withdrawal would not have retroactive effect.

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are now being made that Israel is employing genocidal policies in the Gaza Strip.[53] The possibility of a complaint that Israel has been violating the Genocide Convention may cause disbelief or fall on deaf ears in Israel, but it should concentrate the thinking of the Quartet on the implementation of the Road Map for Peace, developed by the United States in co-operation with Russia, the European Union, and the United Nations. For this attempt at implementation will continue to fail, and even contribute to the continuation of serious human rights violations, whether or not in the danger area of genocide, if there is no clarity regarding the illegitimacy of Israeli settlement under international law and the legal irrelevance for the peace process of the partition resolution in which the Guide to the Mideast Peace Process on the official website of the Israeli Ministry of Foreign Affairs tried to make us believe.

There can be no two ways about the Palestinian claim to sovereignty over the entire 1967 OPT. All peace initiatives in the Middle East since 1967 will continue to fail as long as Israel is not compelled to recognize that its settlement policy in the OPT is contrary to international law. Such recognition is also in the interest of Israel itself. After all, Israel cannot wish to be democratic, Jewish, and maintaining its settlements while at the same time entering the danger area of ethnic cleansing in the West Bank and East Jerusalem and even of genocide.[54] The solution simply is that 'as the last postcolonial European enclave in the Arab world, Israel has no choice but willingly to transform itself one day into a civic and democratic state'.[55] This requires the United Nations to take the firm position that by virtue of its responsibility with respect to the effective liquidation of the League of Nations estate in Palestine, both the 1948 resolution of the General Assembly on partition of the mandated territory of Palestine and the 1967/1973 resolutions of the Security Council on principles of a just and lasting peace in the Middles East are essential.

3. Real commitment to human rights

In the interests of a successful road to peace the Quartet should from now on be guided by Dugard's warning that 'if it cannot demonstrate a real commitment to the human rights of the Palestinian people, the international human rights movement, which can claim to be the greatest achievement of the international community of the past sixty years, will be endangered and placed in jeopardy'.[56] On the occasion of the meeting of the Quartet on 30 May 2007 in Berlin, John Dugard underlined that the Quartet is the body chosen by the Security Council to compel both Israelis and

53. See the Official Website of Dr Ilan Pappé, at www.ilanpappe.org: 'The Israeli Recipe for 2008: Genocide in Gaza, Ethnic Cleansing in the West Bank', published in the *Independent*, 23 June 2007. See also E. W. Said, *The Politics of Dispossession: The Struggle for Palestinian Self-Determination 1969–1994* (1994), at 253, quoting the Israeli commentator Yav Karni, who wrote in 1983, 'It should have been forbidden to Jews to treat the concept of "genocide" as applying to them alone. It should be told in every Israeli school that many other peoples were, and still are, expelled and massacred'.

54. See Pappe, *supra* note 32, at 248, quoting Arnon Soffer's statement in the *Jerusalem Post* of 10 May 2004: 'So, if we want to remain alive, we have to kill and kill. All day, every day . . . . If we don't kill, we will cease to exist . . . . Unilateral separation doesn't guarantee "peace" – it guarantees a Zionist-Jewish state with an overwhelming majority of Jews'.

55. Ibid., at 256.

56. UN Doc. A/HRC/4.17, at para. 63.

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

Palestinians seriously to address the issues that stand in the way of an independent Palestinian state. In doing so, he stressed that the full recognition of the Palestinian Government of National Unity is an indispensable requirement to further peace.

> This means the recognition of both Hamas and non-Hamas members of the Palestinian Government of National Unity. In order to prevent another season of violence and to protect human rights in the region, the Quartet must intervene immediately in a fair and even-handed manner.[57]

Unfortunately, the recommendation fell on deaf ears. The resulting discord effectively provoked provoked in Palestinian ranks does not promise well for the success of the Road Map. The only way to bring Israel to its senses might be now another involvement of the International Court of Justice, if necessary through the rough remedy of a contentious procedure under the 1948 Genocide Convention. In doing so, friends of Israel should be mindful of the saying spare the rod and spoil the child.

To begin with, the United Nations should show that it takes the work of the Special Rapporteurs seriously by demanding of Israel that its Ministry of Foreign Affairs cleans its official website. Israel cannot have it two ways: it cannot demand of Hamas that it cleans its Charter in respect of the illegality of Israel while at the same time upholding documents in its Guide to the Mideast Peace Process on the irrelevance of the partition resolution to the Palestinian claim to sovereignty over the OPT and on the legitimacy of Jewish settlements under international law. The United Nations should give the Israeli government to understand that it should destroy its Ministry of Foreign Affairs Guide on the spot for leading its followers astray like the Pied Piper of Hamelin and for keeping up the myth of the so-called generous proposals of Israel's Prime Minister Ehud Barak for his so-called best deal offered to the Palestinians.[58] The prevailing view in Israel and among its friends is that the Palestinians showed their unwillingness to take part in peace negotiations when President Arafat rejected this held-out hand. But there was no such offer, let alone a generous one.[59] If Israel really wants peace with Palestine, it should not bend the truth any more in respect of the legality of the Jewish settlements in the OPT under international law.

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57. United Nations Press Release of 29 May 2007, Statement by the Special Rapporteur on the Situation in the Occupied Palestinian Territory, available at http://www.unhchr.ch/huricane/huricane.nsf/view.
58. Pappe, *supra* note 32, at 241, 244; B. Kimmerling, *Politicide: Ariel Sharon's War against the Palestinians* (2003), at 129–38; U. Avneri, 'Barak: a Villa in the Jungle, July 2002, available at http://gush-shalom.org/archives/barak.htm. The quotation is from the website. 'In order to hide his catastrophic character weaknesses, Barak invented the historic lie of Arafat's rejectionism, now accepted by almost all Israelis and the world at large. By doing so, he paved the way to the premiership for Sharon and also caused most Israelis to despair of peace. A wise old Hebrew adage says: "He who finds fault (with others) finds his own fault". By branding the Arabs as habitual liars, this self-appointed paragon of Judeo-Christian culture is actually branding himself'.
59. See J. Carter, *Palestine Peace Not Apartheid* (2006), at 152; J. Halper, 'The Key to Peace: Dismantling the Matrix of Control', latest newsletter of the Israeli Committee against House Demolitions (July 2007), available at http://www.icahd.org/eng/articles.asp?menu=6&submenu=3. The quotation is from the website: 'Barak's "offer" at Taba deserves to be looked at carefully, not because it was truly an "offer" or because it truly represented the Israeli position or a genuine possibility, but because, as Barak never tired of saying, it is by far the best "deal" the Palestinians will ever be offered, the most "generous", a one-time "take-it-or-leave-it" that would be a "historic mistake" for the Palestinians to reject. If all this is true, would the so-called "95% offer" at Taba have led to a sovereign and viable Palestinian state? Would it have in fact dismantled Israel's Matrix of Control? The answer to this "best case" scenario is "no"'.

https://doi.org/10.1017/S0922156507004475 Published online by Cambridge University Press

It is certainly not the fault of the mandate of the Special Rapporteurs on the situation of human rights in the Occupied Palestinian Territory that the situation has got out of hand in such a tragic way at the expense of people on both sides. John Dugard has stuck out his neck by persisting with the indispensibility of respect for international law by Israel each time it argued that the peace process has come to a standstill first and foremost because of Palestinian terrorism. As Special Rapporteur he has always stood firm for the final responsibility of the United Nations to implement the right to self-determination of the Palestinian people by establishing an independent and sovereign State of Palestine with the whole of the OPT as its territory. For that and for his real commitment to international law in general and to human rights law in particular as the right framework for a just and lasting peace in the Middle East John Dugard compels great admiration.

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