

Understanding the Israel-Palestine Issue and its Relation with the International Criminal Court

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ABSTRACT

The reason behind Palestine’s ratification to the Rome Statute was to threaten to bring charges against Israeli officials who had committed severe crimes in the Occupied Territories. This paper will deal with the details of the Israel-Palestine conflict and identify issues with the illegal settlement processes in occupied territories of Palestine. Furthermore, it will shed light on whether the International Criminal Court (ICC) has jurisdiction over crimes committed by Israeli officials, the forces and the settlers and will also determine the role of ICC in putting an end to this conflict. The paper hopes to bring about a path that can lead forward to peace and prosperity.

KEYWORDS: International Criminal Court, Israel, Palestine, International Law, United Nations

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I. INTRODUCTION

Often referred to as the “World’s most intractable conflict”, the Israel-Palestine issue has its roots in the dispute over land claims by the Israeli Jews and the Palestinian Arabs. When this dispute led to a war in 1967, Israel was successful in capturing parts of Palestine - namely West Bank and East Jerusalem. The Israeli authorities since then have seized thousands of acres of Palestinian land and facilitated transfer of Israeli citizens to illegal settlements it has built there. Approximately 600,000 – 750,000 Israeli citizens now reside in these occupied territories.¹ Further data indicates that about 42% of the West Bank land is under the control of illegal settlers and 86% of East Jerusalem is under the control of the Israeli State for settler use.² Combined, it forms 11% of Israeli Jewish population settling in these territories, outside from the internationally recognized borders of Israel.

Illegal settlements have been the most distinctive feature of the Israeli State ever since the annexation process began. Their actions have aided the State to extend their legal jurisdiction to East Jerusalem and other occupied territories. While the settlers are provided with adequate infrastructures, subsidies, protection and rights, these benefits are not extended to Palestinians living in the same area. Palestinians are instead subjected to oppression, discrimination and severe violations of Human Rights. Despite constant criticism of this “colonisation” process, it has had no effect as the number of illegal settlements is on the rise.³

A resolution was passed by the Security Council in 1967, which emphasized on the inadmissibility of the acquisition of territories by war and instructed Israel to withdraw from the territories it occupied.⁴ However, the Israeli authorities have clearly disregarded this resolution and have instead accelerated the illegal settlement process. Another resolution passed by the Security Council in 2016 reaffirmed that the Israeli settlements have no legal validity and constitute flagrant violation of International Law.⁵ This resolution was also met with the same fate of non-compliance by Israel. Although the international community unequivocally recognizes the annexation as illegal, Israel continues to violate terms of International Law regardless.

On April 1, 2015, Palestine became the 123rd member to ratify the Rome Statute and become a member to the International Criminal Court (ICC). The reason behind this ratification was to threaten to bring charges against Israeli officials who had committed severe crimes in the Occupied Territories. The European Parliament described it as a “historic moment in the Palestinian people’s struggle for justice,

1 Israel: 50 Years of Occupation Abuses, Human Rights Watch, June 4, 2017, Available at <https://www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses>

2 Stephen Lendman, Israel’s Illegal Annexation of East Jerusalem, Counter Currents, April 01, 2009, Available at <https://www.countercurrents.org/lendman010409.htm>

3 Ilan Pappé, The Israel/Palestine Question, R Writing Histories, Available at https://edisciplinas.usp.br/pluginfile.php/771206/mod_resource/content/1/isra_palestine%20question%20%5BIlan%20Pappe%CC%81%5D.pdf

4 The Situation in the Middle East, Security Council, S/PV.1381, November 20, 1967, Available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/96842546E13A993905256723004E8175>

5 Resolution 2334, United Nations Security Council, S/RES/2334 (2016), December 23, 2016, Available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>

freedom and peace.”⁶ Similarly, this decision has met widespread approval amongst the international community.⁷ Both International Law and public opinion has sided strongly with the Palestinians, but the defiant Israel shows no signs of stepping back, especially after President Trump’s recognition of Jerusalem as the capital of Israel.⁸

II. HISTORY OF THE PROBLEM

The crux of this issue dates back to the late 19th century when the Zionists moved out of Eastern Europe to the Middle East.⁹ This group of people claimed that Jewish population deserved a nation and were in search for a modern Jewish State. Thus, citing their belief that God had promised Palestine to them, the Zionists began purchasing land there and started building settlements in order to strengthen their claim on the land.¹⁰ Laying a stake to the area ensured that it would be a part of their future State and made it difficult to get rid of them later. Consequently, the Jewish population had control over six percent of the land by 1948.¹¹ As the Jewish people accelerated their colonization process in Palestine, the balance of control of land between Palestinians and Jewish immigrants shifted greatly. The Zionists bought lands from absentee landlords and kept displacing thousands of Palestinian tenants from their land. By 1935, the Jewish population had risen to 27 percent of the total population.¹² This led to a chaotic situation amongst the original Palestinian residents and the Jewish immigrants as small fights occurred on a regular basis.

To bring the situation under control, the UN intervened and under their 1947 Partition Plan, the Jewish people were allocated approximately 55 percent of the land;¹³ however, the main cities with Palestinian Arab majority fell under the Jewish side of

6 Harsh Mahaseth and Nirupan Karki, *Breaking Deadlocks: Palestine and the International Criminal Court*, Berkeley Journal of International Law, Available at <https://www.berkeleyjournalofinternationallaw.com/post/breaking-deadlocks-palestine-and-the-international-criminal-court>

7 Palestine Joins the International Criminal Court, Middle East Policy Council, Available at <http://mepc.org/commentary/palestine-joins-international-criminal-court>

8 Mark Heinrich, *Arabs, Europe, U.N. reject Trump’s recognition of Jerusalem as Israeli capital*, Reuters, December 6, 2017, Available at <https://in.reuters.com/article/usa-trump-israel-reaction/arabs-europe-u-n-reject-trumps-recognition-of-jerusalem-as-israeli-capital-idINKBN1E02AS>

9 J. L. Gelvin. (2014). *Zionism and the Colonization of Palestine*. In J. L. Gelvin (Ed.), *The Israel-Palestine Conflict-One Hundred Years of War* (3rd ed., pp. 46–75). Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781139583824.004>

10 Stephen R. Sizer. (2002, July). *The promised land: a critical investigation of Evangelical Christian Zionism in Britain and the United States of America since 1800*. (Thesis). Middlesex University and Oak Hill Theological College. <https://core.ac.uk/display/17301104>

11 Zena Tahhan, *Israel’s settlements: 50 years of land theft explained*, Aljazeera, November 21, 2017, Available at <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html>

12 *Origins and Evolution of the Palestine Problem: 1917 – 1947 (Part I)*, The Question of Palestine, United Nations, Available at <https://www.un.org/unispal/history2/origins-and-evolution-of-the-palestine-problem/part-i-1917-1947/>

13 Souad R. Dajani. (2005, May). *Ruling Palestine: A History of the Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine*. Centre on Housing Rights and Evictions (COHRE), BADIL Resource Center for Palestinian Residency and Refugees’ Rights. https://www.badil.org/phocadownloadpap/Badil_docs/publications/Ruling%20Palestine.pdf

the partition. This meant that the Palestinian residents would be deprived of key agricultural lands and seaports, due to which they rejected the proposal.¹⁴

Ultimately, a war broke out between Palestinian Arabs and Zionist armed groups. The forces, well trained and armed unlike the Palestinians, executed ethnic cleansing of Palestine Arabs with large-scale attacks and massacres.¹⁵ They even destroyed entire villages as a part of mass exodus of the Palestinian population in order to establish a Jewish state. As a result of this, by 1949, more than 78 percent of historical Palestine belonged to the Jewish immigrants.¹⁶ The remaining Palestinian territories of West Bank and East Jerusalem came under the control of Jordan, while Egypt controlled Gaza. Thus, the international community recognized the State of Israel based on the 1948 borders.

Another Arab-Israeli war broke out in 1967, when the Israeli Military occupied East Jerusalem, West Bank and Gaza. In response to the war, the UN Security Council unanimously passed a resolution condemning actions of Israel and stating that it must withdraw from the areas it seized during the war.¹⁷ However, Israel neglected the resolution by building settlements on Palestinian territories for the Jewish-Israeli population in areas it occupied during war, including East Jerusalem and West Bank. Since then, the illegal settlements have become the hallmark of the Israeli colonization process over the course of 50 years. Almost 600,000-750,000 Jewish people residing in the occupied areas live in 160 settlements and enjoy numerous privileges that are not ordinarily given to the Palestinian Population.¹⁸

III. CURRENT SITUATION :

Palestinians are trapped between the settlements and the wall

- Hossam Hamid speaking to the XinhuaNet¹⁹

The annexation of East Jerusalem has made it easy for the state of Israel to declare it a part of its eternal and undivided capital.²⁰ By making this claim, Israel has extended its law to East Jerusalem as well. This declaration has however not been recognized by the international community as it believes Israel's actions to be a gross violation of several principles of International Law, especially because the occupying power does not have sovereignty in the territory it occupies. The international community, except the United States of America and Israel, officially regard East

14 Supra 10.

15 Supra 12.

16 Id

17 Mark Tessler. (2020). *The Israeli-Palestinian Conflict*. Sage Publications, 63–132. https://us.sagepub.com/sites/default/files/upm-assets/105482_book_item_105482.pdf

18 Pia Krishnankutty. (2019, November 21). What Israel-Palestine conflict is all about and why both want West Bank & Gaza Strip. *ThePrint*. <https://theprint.in/theprint-essential/what-israel-palestine-conflict-is-all-about-and-why-both-want-west-bank-gaza-strip/323825/>

19 Zena Tahhan, Farah Najjar, Why Jerusalem is not the capital of Israel, *Aljazeera*, December 10, 2017, Available at http://www.xinhuanet.com/english/2018-03/03/c_137012044.htm

20 Hani Albasoos. (2013). Sovereignty over Jerusalem. *Journal of Conflictology*, 4(2), 23–31. <https://doi.org/10.7238/joc.v4i2.1881>

Jerusalem as occupied territory.²¹ In Israel's perspective, since Jerusalem is its eternal capital, it refers to the illegal settlements as "neighbourhoods".²²

Israel has found different ways to seize the land that belongs to Palestine. In the occupied West Bank, due to lack of jurisdiction, it issues military orders when required and often comes up with versions of Ottoman, British and Jordanian laws that work in their favour to seize the property.²³ Unlike in West Bank, Israeli Law is applicable in East Jerusalem. This gives Israel the autonomy to use their own laws to build settlements there.²⁴ Although the international community has condemned this action continuously, Israel continues to build settlements. Similarly, in the pretext of "State land", Israel has taken away more than 26 percent of public and private Palestinian settlements in the West Bank.²⁵ Most of the Palestinians had not registered their land during the rule of the Ottoman and the British Empire but have continued to pay taxes and cultivate their land. However, the Israeli government took advantage of this and stopped the registration process of lands to lay their claim on the lands not registered.²⁶ This kind of seizure of land is strictly prohibited under international law.

In West Bank, a State can only take away private Palestinian lands for the public benefit of their citizens. But under this excuse, Israel has consistently confiscated private lands to build Jewish-only settlements to which they connect roads leading to Israel. A similar strategy has been adopted to establish 12 illegal settlements in East Jerusalem.²⁷

According to the Fourth Geneva Convention²⁸, an occupying territory is allowed to issue a temporary seizure on private lands of residents. But the Israeli military has been using this method since early 1967 to take over private lands of the Palestinians.²⁹ Although the original owners can have the land back, most of the owners do not return because of the fear created by the Israeli military forces. Up to 42 settlements have been seized in order to establish "secure zones" and have not been returned back to Palestinian residents. Similarly, an "Absentee Property Law" was passed by Israel in order to take over property of Palestinian Citizens who fled back in

21 New Israeli wall isolates Palestinian family in West Bank, XinhuaNet, March 03, 2018, Available at <https://www.aljazeera.com/indepth/features/2017/05/jerusalem-capital-israel-170524091310050.html>

22 Israel and the Palestinians: Can settlement issue be solved?, BBC NEWS, February 16, 2017, Available at <http://www.bbc.com/news/world-middle-east-38458884>

23 Supra 10.

24 Supra 12.

25 Leila Stockmarr. (2012). *Is it All About Territory? Israel's Settlement Policy in the Occupied Palestinian Territory Since 1967*. Danish Institute for International Studies. https://reliefweb.int/sites/reliefweb.int/files/resources/DIIS_IsItAllAboutTerritory_IsraelsSettlementPolicyInTheOccupiedPalestinianTerritorySince1967.pdf

26 Id

27 Supra 12.

28 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

29 Mélanie Jacques. (2012). Case study: Israeli settlements, the Separation Wall and displacement of civilians in the Occupied Palestinian Territory. In *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (pp. 77–124). Cambridge University Press. <https://doi.org/10.1017/CBO9780511794513.004>

1950.³⁰ The government of Israel has even introduced this legislation in East Jerusalem in 2015 after which it escalated its settlement process rapidly.

It is important to note that the Israeli settlements in West Bank is structured in such a way that the Palestinian population cannot be found in a cluster. It has built a ring of major settlement blocs in north, east and south of Jerusalem in hopes of annexing the entire city to Israel in the future. Due to such strategic settlement, Palestinians cannot move from the North to South of West Bank without facing harsh circumstances. Israel has also built a separation wall in 2004 between Israel and West Bank to enhance safety for the Israeli Population. This excuse of building the wall gave them further opportunities to encroach upon settlements on the boarder of West Bank as those lands were placed on the “Israeli side”. Moreover, more than 80 percent of the wall falls inside the West Bank Territory rather than on the no-mans-land.³¹ The separation wall has added unnecessary travel hours to short journeys as well. While traveling, one must cross checkpoints to enter and exit their own villages.

Due to the annexation and illegal settlements, the day-to-day life of Palestinian people has been affected to a large extent. The 53 yearlong Israeli occupation can be seen as an effective attempt to thwart developments in the state of Palestine and to delay the establishment of a sovereign Palestinian state.³²

Area C of the West Bank has most of the infrastructures as this area contains most of West Bank’s water resources, fertile pastures, agricultural lands, mining resources and tourist sites.³³ However, most of the Palestinian settlement is limited to Area A and B only. The residents of Area A and B, in order to access the resources of Area C, have to pass through restricted areas as 60 percent of that territory is occupied by the Israeli authorities who often resort to mistreatment of the residents. Although most Jewish settlers are limited to Area C only, they use almost three times the water resources than the 3.1 million Palestinians in West Bank. The most fertile part of West Bank is the Jordan valley and the Dead Sea. Although Israel does not have jurisdiction in this area, almost 40 percent of the date fruits produced in this area is exported by Israel. They have occupied the stone mining locations as well as agricultural lands in West Bank in similar ways.³⁴ It is very evident that the Israeli occupation has endured a huge financial loss to Palestine.

These instances show how only a few Palestinians have escaped stern abuses from Israeli authorities. As Human Rights Watch puts it, this is a “repression that extends far beyond any security rationale.”³⁵ Furthermore, Israel has seized around 2,500 acres of Palestinian land, destroyed 500 buildings and constructed eight new Jewish settlement units in 2017, according to Palestine’s Land Research Centre

30 Supra 12.

31 Supra 27.

32 OHCHR. (2020, June 16). Israeli annexation of parts of the Palestinian West Bank would break international law – UN experts call on the international community to ensure accountability. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960&LangID=E>

33 Supra note 16

34 Supra 10.

35 Supra 1

(LRC).³⁶ The Peace Now movement also announced that Israeli government approved the construction of 1,982 houses in 2015, 2,629 houses 2016 and this figure increased to 6,500 in 2017.³⁷

IV. PALESTINE IN THE ICC

The ICC has jurisdiction over war crimes, crimes against humanity, crimes of aggression and genocide committed in the Palestinian territory since June 13, 2014. A preliminary investigation is currently under way. The 700-page submitted by the Palestinian human rights organisations is the fourth one submitted till date, which contain substantive communication to the ICC regarding crimes against humanity committed in the occupied West Bank including East Jerusalem.³⁸

The preliminary examination in Palestine began in January 2015.³⁹ Amidst this phase comes the decision by the Office of the Prosecutor of the ICC whether a formal investigation can be pursued or not, subject to certain criteria. With a 700-page communication sent to the ICC by the Palestine human rights organizations, it is believed that it consists of evidence of the war crimes and crimes against humanity committed by the Israeli officials in West Bank and East Jerusalem.⁴⁰ According to the Palestinian human rights groups, this step is “necessary to ending the culture of impunity that has long prevailed in regard to Israeli crimes and to hold high-level political and military officials accountable”. There are also several other instances where an organization has put forward a request to the ICC to start a formal investigation. In 2016, the Human Rights Watch had requested the ICC to open a formal probe regarding “unlawful attacks” carried out by both, Israeli and Palestinian, sides during the Arab-Israeli war on the Gaza strip and regarding the continuous expansion of illegal settlements by Israel⁴¹. This process now looks to be taken further in light of the submission of this report.

36 Days of Palestine, Israel Seized 2,500 Acres of Palestinian Land in 2017, Global Research, January 03, 2018, Available at <https://www.globalresearch.ca/israel-seized-2500-acres-of-palestinian-land-in-2017/5624701>

37 2,500 Acres of Palestinian Land Stolen in 2017 (VIDEO), The Palestine Chronicle, January 01, 2018, Available at <https://www.palestinechronicle.com/israel-seized-2500-acres-palestinian-land-2017-video/>

38 Palestinian Human Rights Organisations Summit Evidence to the ICC Prosecutor on Crimes Committed in West Bank, Al-Haq, September 20, 2014, Available at <http://www.alhaq.org/advocacy/targets/international-criminal-court-icc/1140-palestinian-human-rights-organisations-submit-evidence-to-the-icc-prosecutor-on-crimes-committed-in-west-bank>

39 Palestine: Preliminary examination, International Criminal Court, Available at <https://www.icc-cpi.int/palestine>

40 Zena Tahhan, Palestinians submit Israel ‘war crime’ evidence to ICC, Aljazeera, September 20, 2017, Available at <http://www.aljazeera.com/news/2017/09/palestinians-submit-israel-war-crime-evidence-icc-170920115342560.html>

41 Palestine: ICC Should Open Formal Probe, Human Rights Watch, June 05, 2016, Available at <https://www.hrw.org/news/2016/06/05/palestine-icc-should-open-formal-probe>

V. IN CONTRAVENTION TO INTERNATIONAL LAW?

Post-World War II, agreements known as the Geneva Conventions were made to establish rules for the protection of civilians, prisoners and injured persons during times of war. Israel is a party to the fourth Geneva Convention and should adhere to the principles enunciated under it. However, Israel has violated this on two counts: Firstly, Article 49 of this Convention prohibits the transfer of civilian population into an occupied territory.⁴² Article 53 of this Convention restricts States from destroying real or personal property belonging to persons, or the State or to public authorities.⁴³ Furthermore, Article 46 of the Hague Regulations of 1907 states that private property must be respected and that it cannot be confiscated.⁴⁴

The Fourth Geneva Convention specifically states that an occupying power is forbidden from transferring its civilians to occupied territories, but Israel, in contravention of the convention, has clearly violated this provision.⁴⁵

The rationale behind creating the Convention was quite clear: to ensure that the occupation is temporary and to allow for a solution to the conflict by preventing the occupying power from acquiring long-term interests through military control. But Israel now has been occupying the territory for almost 50 years and treats it as its own land rather than an occupied territory. This Convention protects occupied civilians from theft of resources by the occupying power. However, Israel has forced out Palestinian people from their own land and has demolished houses that once belonged to them. Most importantly, Israel prohibits a *de facto* situation in which two groups living on the same land are subject to two different legal systems such as the apartheid. In this case, the Jewish Israeli settlers and the Palestinians are subject to two different laws, which mean two separate laws are applicable in a single territory. A civil legal system governs the Israeli citizens and a military court system for Palestinian residents. This is a severe form of institutionalized discrimination. Unlike Israeli citizens, Palestinian people are tried in military tribunals for every crime, be it traffic violations or theft of a carton of milk.⁴⁶ This decade of “temporary” military rule has given rise to separate and unequal systems that discriminate between the two population groups living under a single territory. Thus, while Palestinians are subjected to apartheid-like conditions, Israeli-Jewish population enjoys a sense of normality granted to them by their state.

The UN Security Council passed Resolution 242 in 1967 and since then, this resolution has been used as a framework for implementing the two-state solution to the Palestinian-Israeli conflict. But Israel has violated the resolution by entrenching its occupation of the Palestinian territories through illegal settlements, making it the longest annexation in modern history. The annexation means that Israel has extended its legal jurisdiction to East Jerusalem and claims it as a part of Israel. The international community does not recognize this annexation as it is clearly violating several

42 Supra note 27 (Mélanie Jacques)

43 Id

44 Supra 24 (Leila Stockmarr)

45 Id

46 Association for Civil Rights in Israel. (2014, October). One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank. <https://law.acri.org.il/en/2014/11/24/twosysreport/>

principles of International Law and it does not have sovereignty in the territory it occupies.⁴⁷

The United Nations Security Council's (UNSC) primary function is to maintain international peace and security. Thus, member states of the UN are obligated to comply with its decisions. Article 25 makes all UNSC decisions binding.

In contradiction to what the International community believes, Israel has consistently maintained a position that the status of the Palestinian territories is ambiguous because there were no internationally recognized borders when the Arab-Israeli war broke out.⁴⁸ The West Bank is usually termed as "disputed" by Israeli authorities and has denied any existence of military occupation there, which gives them incentives to state that the Fourth Geneva Convention is not applicable in such scenario. However, the UN, the ICRC and the ICJ all have falsified their claim.⁴⁹

However, Israel disputes these claims and cites biblical, historical and political links to the West Bank, as well as security interests. The Israeli government has maintained a stance that the Geneva Convention does not apply to the West Bank, claiming the territory is "disputed", rather than "occupied".⁵⁰ These statements are mainly built on the premise that the West Bank has never been the legal territory of any state, and that there is no "High Contracting Party" to give the territories back to.

In the present years, the Israeli Supreme Court has also been according less importance to International Law that it did in the previous decade. The Supreme Court has been avoiding certain questions of International Law and turning to Israeli administrative and constitutional law as a substitute for International Law.⁵¹ This shift shows an attempt by Israel to employ domestic regulations for judicial review for violation of rights in the Occupied Territories. The current political scenario in Israel is such that it goes hand in hand with this approach, in which the question of the future of the Occupied Territories is an internal matter of Israel which it will decide unilaterally. This circumvention clearly shows an attempt of the Israeli Courts slowly opting out of the Global Community of Courts.⁵²

47 Yara Hawari, *Legalising the annexation of Jerusalem*, Aljazeera, November 07, 2017, Available at <https://www.aljazeera.com/indepth/opinion/legalising-annexation-jerusalem-171102061616140.html>

48 *Israel's Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms*, United Nations Security Council, SC/12657, December 23, 2016, Available at <https://www.un.org/press/en/2016/sc12657.doc.htm>

49 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Request for an Advisory Opinion*, International Court of Justice, Available at <https://unispal.un.org/pdfs/Annex.pdf>

50 *Israeli Settlements and International Law*, Israel Ministry of Foreign Affairs, November 30, 2015, Available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx>

51 Benjamin Rubin, *Israel, Occupied Territories*, Max Planck Encyclopaedia of Public International Law, October 2009, Available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1301>

52 Tamar Hostovsky Brandes, *The Declining Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories*, SSRN, November 30, 2017, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076843

VI. CONSENSUS AMONGST THE INTERNATIONAL COMMUNITY?

The International Court of Justice,⁵³ the UN General Assembly,⁵⁴ the UN Security Council⁵⁵ and the US State Department⁵⁶ have all described the West Bank and East Jerusalem as ‘occupied’, making the settlement of Israeli civilians in the area illegal under international law.

In an advisory opinion by the ICJ⁵⁷, the Court notes that by building the wall, nearly 80 per cent of the settlers living in the Occupied Palestinian Territory were being included and this wall was a method to include the great majority of Israeli settlements in the Palestinian Territory. This led the Court to the conclusion that the wall was being used as the first step towards annexation of the Closed Area which would impede the right to self-determination of Palestinian citizens. This would be a breach of Israel’s obligation to respect such a right.

Paragraphs 90-101 of the ICJ Advisory Opinion are devoted to arguing, and concluding, that the West Bank and Gaza are “occupied territories” within the meaning of the Convention.⁵⁸ And paragraph 120 concurs with the Security Council’s view that settlement activity is contrary to the Convention.⁵⁹

Similarly, Security Council Resolutions 446 passed on March 22, 1979, has also asserted that the Convention applies to the specific region and that the settlement activities should stop immediately. The international community demands that “Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem.” On the contrary, Israel termed this resolution as an anti-Israel manoeuvre and accused the international community for “ganging up” against them in the UN.

VII. IMPLICATIONS OF THE ICC’ DECISION

The ICC mandate states that Individuals can be tried and be held accountable for committing serious crimes that cause serious concern to the international community. The crimes should fall under any of the four criteria, namely genocide, war crimes, crimes against humanity, and the crime of aggression⁶⁰. The mandate also

⁵³ Supra 49

⁵⁴ Situation in Occupied Territories Moving ‘From Bad to Worse’, Permanent Observer Tells Palestinian Rights Committee, Decrying Settlements, Home Demolitions, United Nations Meeting Coverage, GA/PAL/1376, October 03, 2016,

Available at <https://www.un.org/press/en/2016/gapal1376.doc.htm>

⁵⁵ Supra 48.

⁵⁶ Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 2001, U.S. Department of State, March 04, 2002, Available at <https://www.state.gov/j/drl/rls/hrrpt/2001/nea/8262.htm>

⁵⁷ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004

⁵⁸ Id.

⁵⁹ Supra 49.

⁶⁰ Understanding the International Criminal Court, International Criminal Court,

specifically states that deportation or forcible transfer of population comes under the ambit of “crimes against humanity”. Thus, it can be deduced that the facilitation of illegal settlements of Israeli population in Palestinian territories and forcing the Palestinians to move out of their own houses constitutes as a serious war crime under ICC’s mandate and thus gives jurisdiction to the ICC to try those involved.

Given that Israel is not a party to the Rome Statute, it may not comply to whatever decision the ICC gives out and has also indicated that it shall not do so.⁶¹ However, the Israeli officials and military authorities involved in this war crime can be tried by the ICC. It is clear that enforceability of such a judgement is on the hands of the individual state and their international law polities. But Israel’s failure to comply to any decision against them will be dealt with repercussions from the international community. If Israel is to follow the path of non-compliance, it will definitely create a favourable outcome for Palestine as Israel will once more be in an unfavourable light. Considering Israel’s volatile relations with nations of the Middle East and other P5 nations except the US, disregarding the ICC judgment is not advised.

On January 22, 2020, pursuant to Article 19(3) of the Rome Statute, the prosecutor had made a request to the court for a ruling on the Court’s territorial jurisdiction in Palestine. Following which the International Criminal Court pre-trial chamber I held in a ruling on February 5, 2021 that it will have the power to investigate potential war crimes committed in the Palestinian territories.⁶² It was categorically held that Palestine has become a State Party to the Rome Statute by virtue of accession. This accession, as per the ICC, extends territorial jurisdiction of the court to Gaza, West Bank and East Jerusalem as they are territories occupied by Israel since 1967. The majority opinion said that their decision was based on the fact that Palestine had obtained membership in the founding treaty of the court and submitted the situation to the court.⁶³ The majority also added that the jurisdiction decision does not imply any attempt to establish an uncertain Palestinian state or national borders. They further pointed out that the court’s territorial jurisdiction in the Palestinian situation extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.⁶⁴ A major role was also played by the International Court of Jurists (ICJ) in aiding the court to come to this decision. As the *amicus curiae* of the court, the ICJ in its observations clearly indicated that Palestine satisfies the recognized international law criteria for statehood as it displays state activity and is capable of engaging in diplomatic relations with other sovereign States. Further, the *amicus curiae* observations also stated that by virtue of the instrument of accession to the Rome Statute, the ICC has jurisdiction over Palestine in the same manner as it does with

Available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

61 Williams, D., 2021. Israel to tell ICC it does not recognise court's authority. Aljazeera,.

62 Explained: ICC ruling says it has jurisdiction in Palestinian Territories. Here’s what it means. (2021, February 16). The Indian Express. <https://indianexpress.com/article/explained/icc-ruling-israel-palestine-territories-explained-7190979/>

63 Toby Sterling & Stephanie van den Berg. (2021, February 5). International Criminal Court says it has jurisdiction in Palestinian territories. Reuters. <https://www.reuters.com/article/us-icc-palestinians-israel-idUSKBN2A52CW>

64 Id.

respect to any other state.⁶⁵ This ruling opens doors for the prosecutor to break the impunity of crimes committed by Israeli officials in Palestine over a period of years as the Prosecutor can move next to the stage of filing warrants against individuals and summoning them to the court.

The present decision came more than a year after the ICC prosecutor Fatou Bensouda stated in December 2019 that the preliminary inspection had collected enough information to satisfy all the conditions of the investigation.⁶⁶ She named the IDF and Palestinian organizations like Hamas as possible perpetrators. She asked the court to determine the disputes arising from legal and factual issues in the area (that is, whether the situation falls within the jurisdiction of the court) and which areas will be covered by future investigations.⁶⁷ U.S. State Department spokesperson Ned Price expressed opposition to the decision and stated that the United States opposes this decision regarding the situation in Palestine, and will continue to support Israel and its security.⁶⁸

Luis Moreno Ocampo, former prosecutor of the ICC, is of the view that this situation will likely end in condemnation of Israeli officials.⁶⁹ He mentions that the establishment of settlements is considered as a continuing war crime and concludes that the settlements are a clear legal violation of the Rome statute and in severe contravention of International law, which prohibits an occupying power from transferring its own civilian population to an occupied territory.⁷⁰

VIII. US INFLUENCE REGARDING THIS ISSUE

The Israeli - American alliance has played an important role in Israel establishing itself as a dominant force in the Middle East. Israel, being the only liberal democracy in the region, has garnered its full-fledged support from the United States. This extensive support ranges from \$118 billion in aid over the years to US using its Veto to block critical resolutions in the UN that involves Israel. Furthermore, this “special friendship” also extends to use of Intelligence sharing over the Middle East.

Despite this close relationship, a few tussles developed between the two nations during the Obama Administration. During his time, Obama and Netanyahu clashed regularly over the issues of illegal settlements and the Iran Nuclear Deal.⁷¹ Obama also did not exercise his veto power and allowed the resolution to pass which condemned the building of settlements. Then secretary of state John Kerry also warned Prime

65 International Commission of Jurists. 2021. Palestine/Israel: ICC decision an important step towards accountability for crimes under international law. <https://www.icj.org/palestine-israel-icc-decision-an-important-step-towards-accountability-for-crimes-under-international-law/>.

66 BBC News. (2021, February 5). ICC rules it has jurisdiction over West Bank and Gaza “abuses.” <https://www.bbc.com/news/world-middle-east-55956771>

67 Supra 60.

68 Id.

69 Luis Moreno Ocampo. (2015, January 12). Palestine’s Two Cards: A Commitment to Legality and an Invitation to Stop Crimes. Just Security. <https://www.justsecurity.org/19046/palestines-cards-commitment-legality-invitation-stop-crimes/>

70 Id

71 Kershner, I., 2015. Iran Deal Denounced by Netanyahu as ‘Historic Mistake’. New York Times,.

Minister Netanyahu that “*his settlement policy could doom any chance at a peace deal and threaten Israel’s future as a Jewish and democratic state*”. It was during Obama’s administration that the issue, for once, seemed to reach an amicable solution.

However, the Trump administration renewed warmth in the Israeli-American relationship. On December 6, 2017, the Trump administration declared Jerusalem as the capital of Israel.⁷² According to then president Donald Trump, this statement was *long overdue in marking the beginning of new approach to solve the Israel Palestine crisis*. However, this decision quickly met with criticism from its allies and the Arab Nations.⁷³ The recognition of Jerusalem as the eternal capital of Israel hinders any possibility of a two-state solution. While Prime Minister Netanyahu was quick to congratulate the trump administration for “taking an important step towards peace”, the international community believes that this step will hinder the peace process and that this kind of provocation would derail any peace process.⁷⁴ The international community views Israel’s annexation of East Jerusalem as illegal and outlines that the occupying power does not have sovereignty in the territory it occupies. However, the position taken by the US directly contradicts this matter although it maintains that it is fully committed to resolve the conflict.

A resolution seeking to reaffirm the status of Jerusalem as unresolved was taken to the Security Council on December 18, 2017.⁷⁵ However, the exercise of veto from the United States meant that the resolution failed despite the 14-0 vote in favour of the resolution. After the veto, Palestine took matters to the UN General Assembly where the international community disregarded the US objections and voted in favour of declaring Trump’s decision as null and void. The resolution passed with majority voting of 128-9 whereas 35 nations chose to abstain.⁷⁶ The nations that voted no to the resolution are countries that are heavily reliant on the United States for foreign aid and took decisions to avoid any form of backlash. After the vote, ambassador Nicky Haley stated that the US will remember this decision when it is “called upon once again to make the largest contribution to the UN”. Following the vote, a decision came immediately from the Trump administration that it will cut funds to the United Nations Relief and Works Agency (UNRWA) for Palestinian refugees.⁷⁷ The decision to hold back the money is likely to affect the life of almost five million refugees, especially the ones in West Bank.

72 Julian Borger, Peter Beaumont, Defiant Donald Trump confirms US will recognise Jerusalem as capital of Israel, *The Guardian*, December 07, 2017, Available at <https://www.theguardian.com/us-news/2017/dec/06/donald-trump-us-jerusalem-israel-capital>

73 Laura Smith-Spark, Andrew Carey, Trump’s Jerusalem decision: How the world reacted, *CNN*, December 07, 2017, Available at <https://edition.cnn.com/2017/12/06/middleeast/jerusalem-israel-us-intl/index.html>

74 Trump threatens to stop aid to Palestinians, *BBC NEWS*, January 26, 2018, Available at <http://www.bbc.com/news/world-middle-east-42823429>

75 Peter Beaumont, US outnumbers 14 to 1 as it vetoes UN vote on status of Jerusalem, *The Guardian*, December 19, 2017, Available at <https://www.theguardian.com/world/2017/dec/18/us-outnumbered-14-to-1-as-it-vetoes-un-vote-on-status-of-jerusalem>

76 General Assembly Overwhelmingly Adopts Resolution Asking Nations Not to Locate Diplomatic Missions in Jerusalem, *United Nations Meetings Coverage, GA/11995*, December 21, 2017, Available at <https://www.un.org/press/en/2017/ga11995.doc.htm>

77 *Supra* 67.

The decision from the Trump administration triggered protests by Palestinian citizens residing in the occupied territory of Jerusalem. Their anger stems from the fact that Jerusalem holds an important place in their hearts. The protests can be justified because Israel has been colonizing their residence and Trump's declaration gave Israel the green light to continue its settler-colonial project even further.

Prime minister Azzam al Ahmad stated in his recent speech, "it is not possible to continue relationship with Israel as long as it keeps denying the rights of our people, particularly in Jerusalem."⁷⁸

Rather than sanctioning Israel for its gross violation of international law and human rights, this declaration by the US has instead paved way for further turmoil in the conflicted area. With decades of global inaction and a seal of US approval, Israel has now been strong-armed to hasten its colonization and annexation process even deeper into internationally recognized Palestinian territories.

IX. CONCLUSION

There are speculations that the recent withdrawals of some of the African countries from the Rome Statute could generate a domino effect and result in the end of the ICC.⁷⁹ During the near two decades of the operation of the ICC, it has been very reluctant to be proactive except in Africa, and that too has seen an immense backlash by the African nations as being unfairly targeted.

The ICC has shown reluctance in stirring up political opposition in the West which may be the reason for the reluctance in opening a full investigation in Palestine. However, with the ICC now beginning to take on powerful nations such as the United Kingdom for its actions in Iraq or Russia for its actions in Georgia or Israel for its actions in Palestine, there needs to be a more dominant role of the ICC. The dependence of the Court on the States' cooperation and the rage against the Court by the African Union nations has left the ICC in a conundrum. The ICC requires the States' cooperation and without this there can be no expectation of the victims of mass crimes having recourse to justice or atrocious crimes from being prevented from occurring now and in the future. The step taken by Palestine to take the Israelis to the ICC helps restore support for the flagging claims of the Palestinian Authority to serve as the sole legitimate representative of the Palestinian people.

As the Israelis have openly ignored every resolution passed against them regarding this issue, any kind of provocation would mean that they move forward aggressively by building more and more settlements and completely annexing the occupied territories. Although their disproportionate reactionary tendencies to any formal action questioning and condemning their actions may prove to be harmful to Palestine, but considering the vehement support for Palestine from the International Community, a strong foundation could be laid for Palestine to bring this political

⁷⁸ Elad Benari, PLO could declare Judea and Samaria a 'state under occupation', Aruts Sheva, Israel Nations News, December 25, 2017, Available at <http://www.israelnationalnews.com/News/News.aspx/239776>

⁷⁹ South Africa to withdraw from war crimes court, BBC NEWS, October 21, 2016, Available at <http://www.bbc.com/news/world-africa-37724724>

impasse to an end. Also seeing the bolstering support for greater international recognition of Palestine as a State will also be crucial.