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Israeli settlements as an obstacle to peace – possible ways forward

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CHECK AGAINST DELIVERY

PLENARY II

Legal aspects of Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem

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International Meeting on the Question of Palestine
Israeli Settlements as an Obstacle to Peace – Possible Ways Forward

Day 2: Legal Aspects of Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem: International and Domestic Legal Strategies to Address the Issue of Settlements

7-8 September 2015, Brussels, Belgium

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Introduction

1. I have been requested to address some of the available international and domestic legal strategies for addressing the issue of Israeli settlements in Occupied Palestine. To this end, my presentation will be divided into four parts: Part I will briefly examine the relevant international law on settlements; Part II will discuss some of the legal strategies available for dealing with the matter at the domestic level in Israel and Palestine; Part III will discuss various legal strategies at the international level, including in the domestic level of third states; and Part IV will offer some concluding remarks.

2. Before I delve into legal doctrine, however, I should like to offer two initial observations in the way of setting the larger context within which any discussion of legal strategy must, in my respectful submission, take place. The first of these regards the inherently political nature of how international law is observed by states. The second concerns the related imperative of ensuring that the legal tools relied upon to address internationally wrongful acts of states are, if at all possible, appropriately tailored, coordinated and situated within broader political, social, cultural, and economic strategies for maximum effect.

3. As to my first observation, it will come as no surprise that one of the most difficult challenges inherent to the international system is that in a world still dominated by state sovereignty, fidelity to law by states cannot be taken for granted. Louis Henkin was correct when he noted that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".[1] But what is to be done at those times when states, particularly powerful ones, are either unwilling or unable to abide by their international legal obligations, as is the case with Israel's prolonged occupation and settlement of Palestine? Unlike law at the municipal level, the international legal system does not benefit from legislative, executive and judicial branches of government, capable of regular and predictable deployment of everyday 'hard' tools of law enforcement. The closest one comes to such powers in the international realm are those vested in the Security Council, hampered as it is by limiting rules of procedure and geopolitics familiar to us all. In a world of sovereign states, therefore, adherence to

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[1] Henkin, L. *How Nations Behave: Law and Foreign Policy*, 2[d] ed., (New York: Columbia University Press, 1979) at 47. *See also* Franck, T.. *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990) at 3 ("In the international system, rules usually are not enforced yet they are mostly obeyed").

international obligations is overwhelmingly less a matter of *enforcement* as it is *observation*. That is to say, the best and most likely manner in which international law obligations are adhered to by sovereign states usually occurs through the eventual active cooperation and/or quiescence of those states. This means that while lawyers can expound upon strategies based on the substance of applicable international law, short of lawful recourse to force to compel compliance under the UN Charter (not an option in the case of occupied Palestine), the successful execution of any such strategy will depend as much, if not more, on concerted political will and action to ensure that enough pressure is brought to bear on malfeasant, aiding or abetting states to ensure their compliance with the law. Appreciating that any meaningful material change in international society usually only takes place at the meeting point between international law and international politics is therefore crucial.

4. As to my second observation, it is trite to observe that international law does not exist in a vacuum, but is rather part of a larger system of tools that defines, shapes and governs a social world primarily, though not exclusively, made up of states. In the absence of hard enforcement mechanisms on the international plane, ensuring that the legal tools relied upon to address situations of injustice are appropriately tailored, coordinated and situated within broader political, social, cultural, and economic strategies for maximum effect is of utmost importance. In view of the particular set of challenges presently faced by the State of Palestine, both internal and external, this must mean that each of the legal tools available should be pursued by it in a coordinated and, if appropriate, simultaneous, manner. Set against the backdrop of the continued effort of the Palestinian leadership to re-internationalize the question of Palestine through the UN and other international bodies, along with the increasingly successful actions of global civil society to boycott, divest from and sanction the State of Israel until it complies with its international obligations *vis à vis* the Palestinian people, taking such an approach offers a real and substantial prospect of effecting change through nonviolent and diplomatic means unseen since the first anti-Apartheid struggle of the latter half of the twentieth century. Now, as with then, the challenge must be to continue the momentum produced through such means, with similar purpose and conviction, in order to impose costs sufficient enough to convince those satisfied with the status quo to reverse course.

Part I: Relevant International Law

5. The relevant international law on civilian settlement of occupied territory is codified in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[2] to which both Israel and Palestine are party. Article 49, paragraph 6, of the Convention provides that: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". This prohibition is absolute and admits of no exceptions. As noted in the International Committee of the Red Cross commentary on the Convention, this is because the prohibition was:

> "[I]intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."[3]

[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 1, 75 UNTS 287 [hereinafter "Fourth Geneva Convention" or "Convention"].
[3] Pictet, J. ed., *The Geneva Conventions of 12 August 1949: Commentary* (Geneva:ICRC, 1994) 283.

6. A related pair of provisions of the Convention that are rarely cited in connection with the absolute prohibition on civilian settlement are articles 146 and 147, which concern penal sanctions for commission of what are called "grave breaches". Article 147 specifically proscribes the following acts, "if committed against persons or property protected by the present Convention": (1) "unlawful deportation or transfer"; and (2) "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". To the extent that Israel's settlement of occupied Palestine has entailed, in any particular case, the unlawful transfer of one or more member of the protected Palestinian population or the extensive destruction and appropriation of Palestinian property, not justified by military necessity and carried out unlawfully and wantonly, those who have carried out such acts may bear international criminal responsibility under the terms of the Convention. This is because Article 146 requires the High Contracting Parties of the Convention to pass laws that criminalize the commission of grave breaches, and also to locate, prosecute or extradite persons suspected of having committed such grave breaches. The nexus between article 49 and the grave breach regime in articles 146 and 147 is therefore of vital import from the standpoint of international accountability mechanisms, as the grave breach regime has, to a large extent, been incorporated into the domestic legislation of numerous High Contracting Parties. We shall return to this when we discuss various legal measures available to address the settlements at both the international and domestic levels of third states.

7. A final piece of relevant law is that which is codified in the Rome Statute of the International Criminal Court (ICC), to which Palestine has acceded. Article 8 of the Rome Statute enumerates an extensive list of acts constituting war crimes, including the "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" (8(2)(b)(viii)). As will be discussed, the recent accession by Palestine to the Rome Statute holds out possibilities as yet unexplored.

8. With that said, allow me to turn to the matter of available domestic and international legal strategies for addressing the issue of Israeli settlements in occupied Palestine. I will canvass a number of the available methods of bringing Israel, as the occupying power, into a state of compliance with the terms of the Fourth Geneva Convention, including in relation to the Convention's grave breaches regime in so far as they relate to the settlements. These methods fall into two distinct categories: domestic compliance measures and international compliance measures. For reasons that will become apparent, emphasis will be placed on the latter category. It should be kept in mind, however, that all of the measures here examined have their basis in common article 1 of the Fourth Geneva Convention under which all High Contracting Parties undertake "to respect and to ensure respect for the present Convention in all circumstances"[4], as well as in the principle *pacta sunt servanda*, namely that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[5]

Part II: Legal Strategies at the Domestic Level

9. Legal strategies at the domestic level cover those measures local in nature and which contemplate the active involvement of the two parties most directly affected, namely Israel and Palestine.

10. As the occupying Power, compliance with the Fourth Geneva Convention, including the prohibition on civilian settlement, falls to Israel in the first instance. This flows from Israel's general treaty obligations to "respect and to ensure respect" for the Convention, which includes the prohibition on

[4] Fourth Geneva Convention, *supra* note 1, art. 1.
[5] Vienna Convention on the Law of Treaties, 23 May 1969, art. 27, 1155 UNTS 331.

settlements, as well as the requirement that Israel pass laws that criminalize the commission of grave breaches of the Convention, including those that might accompany settlement construction, maintenance and expansion.

11. The obvious forum for the investigation and adjudication of Israeli violations of the Fourth Geneva Convention is the Israeli judicial system itself. The problems with this are considerable, however. For one, the system has not been impartial when adjudicating Palestinian claims.[6] Its position on settlements is instructive, as the High Court of Justice has consistently treated that as a matter of policy within the preserve of the legislative and executive branches of government, and therefore non justiciable. In any event, in none of the cases adjudicated by Israeli tribunals have the terms of the Fourth Geneva Convention been applied as a matter of law, because of Israel's position that the Convention is non-self-executing (rejecting the convention's status as a codification of customary international law) and therefore requiring of specific legislation incorporating it into Israeli domestic law before its tribunals can regard themselves as competent to apply its provisions.[7] Of course, the reason no such legislation has been passed is the Israeli government's long-held position that the Fourth Geneva Convention is not *de jure* applicable to occupied Palestine, a position definitively rejected by the principle organs of the UN, including the International Court of Justice (ICJ), Security Council and the General Assembly.[8] As a result, Israel has never taken any of the steps required of it as a High Contracting Party under article 146 of the Convention to enact legislation penalizing the commission of grave breaches, to search for and prosecute or extradite any individuals suspected of committing or ordering the commission of such breaches, or to suppress the commission of other violations of the convention not amounting to grave breaches.

12. Does this mean that there is no role for the State of Palestine, as a High Contracting Party, to unilaterally apply the terms of the Convention in Palestine? No it does not. The possibilities here are two fold. First, despite the historical record of the Israeli judiciary being unwilling to apply the terms of the Convention *de jure*, Palestine may wish to find ways to support civil society groups to engage in greater levels of test case litigation before Israel's High Court of Justice. This could be done through provision of more legal aid, either directly or through donors (in many cases, themselves High Contracting Parties), in cases focused on seeking clear and unequivocal rulings (where none already exist) on Israeli policies that violate the Convention, including the prohibition on civilian settlement of occupied territories by an occupying power. The result of such litigation would be to produce either positive results for the Palestinian litigants or, more likely, further confirmation that Israel is unwilling to subject itself to scrutiny under the terms of the Convention. This would prove useful in undercutting any Israeli argument that its courts are competent to hear matters that would otherwise come under the domestic jurisdiction of third states or the jurisdiction of the ICC according to the complementarity principle. Second, despite the fact that the State of Palestine does not exercise full self-determination, it has a judiciary that is capable of applying international law in its courts. This means that creative counsel can attempt to bring cases before the courts of Palestine aimed at giving affect to the terms of the Convention under domestic Palestinian law, including by launching litigation against Palestinian legal persons, including corporations, that may be engaged with Israelis implicated in violating the Convention, including through civilian settlement or

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[6] For instance, over the years the Israeli Supreme Court, sitting as the High Court of Justice, has upheld such practices as unlawful deportations and transfers, torture and inhumane treatment, and extrajudicial killing. *See*, for instance, Kretzmer, D. *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (New York: SUNY Press, 2002).

[7] *See* Imseis, A. "On the Fourth Geneva Convention and the Occupied Palestinian Territory" (2003) 44:1 *Harvard International Law Journal* 65 at 99.

[8] For detailed discussion of the grounds upon which the Israeli position is based, *see id.* at 92-100.

settlement related infrastructure. Admittedly, this is complex and requires greater levels of study.[9]

Part III: Legal Strategies at the International Level

13. Legal strategies at the international level include both independent and collective state activity, as well as global civil society action. These methods of compliance fall into two spheres: those internal to the Fourth Geneva Convention and those external to it.

14. One principal internal mechanism, already discussed in relation to Israel, is the obligation of all High Contracting Parties to search for and prosecute or extradite any individuals suspected of committing grave breaches, and to suppress the commission of other violations of the convention not amounting to grave breaches. In this sense, article 146 of the Convention allows for the exercise of universal jurisdiction by the national courts of third state High Contracting Parties.

15. Universal jurisdiction "refers to the authority of domestic courts and international tribunals to prosecute certain crimes, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim."[10] The concept rests upon the rationale that some crimes – such as war crimes – are so universally condemned, they warrant the exercise by any competent national or international judicial authority of criminal jurisdiction over those alleged to have perpetrated them, without regard to the traditional factors upon which such jurisdiction is usually based.[11] It is well to recall that the principle of universal jurisdiction was first used by the Supreme Court of Israel in litigation involving Israel's prosecution of Nazi war criminal Adolf Eichmann in 1961. Today, a growing number of High Contracting Parties have begun to enact domestic legislation empowering their courts to invoke

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[9] One challenge Israeli interested parties would be likely to raise before Palestinian courts would be the argument that as part of the Palestinian Authority, the Palestinian courts are limited in their jurisdiction to those matters set out in the Oslo accords, including the proviso that jurisdiction over "Israelis" shall vest in the Israeli authorities (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, art. 8). To be sure, the accords omit any reference to the Fourth Geneva Convention or the law of belligerent occupation. As a result, they do not expressly recognize the West Bank, including East Jerusalem, and the Gaza Strip as occupied territory, nor do they recognize Israel's status as a belligerent occupant. Nevertheless, there are two important provisions of the Fourth Geneva Convention that effectively render these and other aspects of the Oslo Accords a nullity. First, article 7 of the Fourth Geneva Convention provides, in part, that although agreements may be made between the purported political representatives of the occupied population and the occupying power, no such "agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." Second, article 47 of the Fourth Geneva Convention states that: "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory." Accordingly, to the extent that the Oslo Accords conflict with the requirements of the Fourth Geneva Convention, the latter shall prevail as a matter of international law.

[10] Michael P. Scharf & Thomas C. Fischer, Forward to Symposium, Universal Jurisdiction: Myths, Realities, and Prospects, 35 *New Eng. L. Rev*. 227, 227 (2001).

[11] These traditional factors include the principles of (1) territoriality (where the state assumes juris- diction over crimes committed in its territory); (2) protection (where the state assumes jurisdiction over crimes prejudicial to its national security, even if committed by non-nationals extra-territorially); (3) active personality (where the state assumes jurisdiction over crimes committed by its nationals, even if committed extra-territorially); and (4) passive personality (where the state assumes jurisdiction over extra-territorial crimes committed by non-nationals against its nationals). *See* Research in International Law of Harvard Law School, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. 435 (Supp. 1935).

universal jurisdiction in accordance with their obligations under article 146.[12] Accordingly, universal jurisdiction exercised at the national level would seem to hold out one possibility of ensuring compliance with the Fourth Geneva Convention, including "unlawful deportation or transfer" of a protected persons or persons, and the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly", that may have accompanied or been the result of the creation, expansion or maintenance of settlements. In this regard, increased efforts should be undertaken to study the domestic legislation of key High Contracting Parties with a view to identifying appropriate *fora* in which to prosecute legal persons who may be engaged in the commission of grave breaches under the Convention, including as connected to the settlements. In addition, interested stakeholders should encourage High Contracting Parties who have yet to incorporate the Convention into their domestic legislation to do so. Importantly, given the prolonged nature of the occupation it has been forced to endure, taking a leading role in promoting the progressive development of international humanitarian law globally would furnish the State of Palestine with an opportunity to expand its international influence as a good global citizen as well as provide real and substantial opportunities to bring justice to bear at home.

16. Among the mechanisms of compliance that are external to the Fourth Geneva Convention is the ICC. On 16 January 2015, following Palestine's accession to the Rome Statute, the Office of the Prosecutor of the ICC opened a preliminary examination into the situation in Palestine. As noted, the Rome Statute procribes the "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" (8(2)(b)(viii)).

17. In my respectful view, the settlements issue is the single most important potential cause of action that Palestine has under the Rome Statute at present. This is because of the broader impact the settlements have had on the Israel/Palestine conflict, representing an embodiment of Israel's attempts to, at once, illegally acquire territory through the use of force and to frustrate the right of the Palestinian people to self determination in that territory. The issue of illegal annexation through demographic transformation and colonization of occupied territory has been the principal concern of the international community in its treatment of the matter of Israeli settlements since 1967. Demonstrations of this include Security Council Resolutions 252 (1968),[13] 298 (1971),[14] 446 (1979),[15] 452 (1979)[16] and 465 (1980).[17] Now that the State of Palestine is a party to the Rome Statute, engaging selected High Contracting Parties who are also parties to the Rome Statute will be important in the event any case is brought against Israel or Israeli officials (some of whom may be dual nationals of such High Contracting Parties) in the future.

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[12] According to Amnesty International, a total of "166 (approximately 86%) of the 193 UN member states have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law." *See*, Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update*, October 2012, at 1, *available at*: http://www.amnesty.ca/sites/default/files/2012-10-09ior530192012enuniversaljurisdiction.pdf

[13] S.C. Res. 252, U.N. SCOR, 23d Sess., 1421st mtg., U.N. Doc. S/8590 (1968), *available at*: http://unispal.un.org/UNISPAL.NSF/0/46F2803D78A0488E852560C3006023A8

[14] S.C. Res. 298, U.N. SCOR, 34th Sess., U.N. Doc. S/10338/Rev.1 (1971), *available at*: http://unispal.un.org/UNISPAL.NSF/0/441329A958089EAA852560C4004EE74D

[15] S.C. Res. 446, U.N. SCOR, 34th Sess., 2134th mtg., U.N. Doc. S/RES/35 (1979), *available at*: http://unispal.un.org/UNISPAL.NSF/0/BA123CDED3EA84A5852560E50077C2DC

[16] S.C. Res. 452, U.N. SCOR, 34th Sess., 2159th mtg., U.N. Doc. S/RES/35 (1979), *available at*: http://unispal.un.org/UNISPAL.NSF/0/0B7116ABB4B7E3E9852560E5007688A0

[17] S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg. at 5, U.N. Doc. S/RES/36 (1980), *available at*: http://unispal.un.org/UNISPAL.NSF/0/5AA254A1C8F8B1CB852560E50075D7D5.

18. A related external mechanism is to once again have resort to the ICJ, only this time not to seek a confirmation of the illegality of the settlements as such, but rather to build upon its earlier ruling for a much more important declarative remedy concerning the legality of Israel's prolonged occupation of Palestine. The 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was a watershed in the legal history of the question of Palestine.[18] Following a request of the General Assembly, the Court made a number of important rulings, principal among which was the determination that the construction of the wall and its associated regime violates international law and that violation is not vitiated by the law of self-defense or necessity; that Israel is under an obligation to terminate its breaches of international law (including its prolonged frustration of the right of the Palestinian people to self-determination), and to make good any damage resulting from those breaches; and that all states, including the High Contracting Parties to the Fourth Geneva Convention, are obliged not to recognize the illegal situation resulting from the construction of the wall, not to render aid or assistance in maintaining the situation created by its construction, and to see that any impediment to the exercise by the Palestinian people of its right to self-determination caused by that construction is brought to an end. Importantly, the Court affirmed that the Israeli settlements in occupied Palestine "have been established in breach of international law", and that "the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council."[19]

19. It is now almost 11 years since that fateful ruling of the ICJ was issued. In the intervening time, with the exception of the establishment of the UN Register of Damage, little to no effective follow-up has been undertaken to build momentum around the ruling, of the sort that coalesced around the decisions of the ICJ on South-West Africa between 1950 and 1971 which helped further isolate and encourage Apartheid South Africa to reverse course and comply with relevant international law. It is not too late to do this, and on the basis of the questions first put to us by Professor John Dugard, former UN Special Rapporteur for Human rights in the OPT, in his January 2007 report to the United Nations Human Rights Council,[20] namely whether a prolonged occupation that has acquired "some of the characteristics of colonialism and apartheid" continues "to be a lawful regime", and if not, what are the legal consequences of that for Israel, Palestine and third States? To this end, the State of Palestine should be laying the groundwork with High Contracting Parties for support for a return to the ICJ. The idea would be to seek an opinion of the Court that Israel's prolonged occupation of Palestine, embodied first and foremost by the settlements and their related infrastructure, has become an illegal regime for its violation of two fundamental jus cogens norms: (1) the inadmissibility of the acquisition of territory thorough force; and (2) the right of self-determination of peoples. While not a panacea for the Palestine problem, such a ruling would go a long way in continuing to impose a moral and political cost on those who continue to violate international law with impunity.

20. Finally, another external legal mechanism that may be employed to address Israel's continued settlement of occupied Palestine is the use of various forms of economic and cultural pressure, such as restrictions on trade, foreign investment, and foreign aid. Israel currently enjoys preferential trade agreements with a number of High Contracting Parties and regional entities, including Canada, the European Union, and the United States.[21] Among other approaches, the exertion of economic pressure on

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[18] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, (ICJ 9 July 2004), 43 ILM 1009 (2004) [hereinafter Advisory Opinion].

[19] Id. at paras. 120 & 122.

[20] *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967* (29 January 2007) UN Doc. A/HRC/4/17, at para. 62.

[21] *See Free Trade Agreement*, Can.-Isr., July 31, 1996, http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp; *Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member*

Israel can take place at both the national level by third state High Contracting Parties to the Fourth Geneva Convention, as well as at the regional level, by bodies such as the European Union, where states can act in concert to deprive Israel of the benefits of an open trade policy so long as it continues to construct, expand and maintain settlements in occupied Palestine.[22] A good, if partial, example of this is the EU's effort to distance itself and its funding from Israeli settlements in recent years.[23] Similarly, such economic pressure may be exerted internationally by the United Nations. Under chapter VII of the UN Charter, if the Security Council determines that a conflict constitutes a threat to international "peace and security" it may require all Member States to apply measures short of the use of force to remedy the matter, including the use of economic sanctions.[24] Although the Security Council has historically been reluctant to resort to chapter VII powers in this manner, since the 1990's there has been an upswing in the use of this tool.[25] Because the mechanism of international sanctions must conventionally pass through the Security Council, the United States' veto power presents a considerable political obstacle.

21. One possible solution would be for Palestine to invoke the General Assembly's deemed residual responsibility over the maintenance of international peace and security in accordance with its "Uniting for Peace" resolution of 3 November 1950.[26] Article 24 of the U.N. Charter provides that the Security Council shall have "primary responsibility for the maintenance of international peace and security." Against the backdrop of the Cold War conflict in Korea, the General Assembly argued "that this did not preclude [it] from exercising a secondary or residual responsibility."[27] Accordingly, it passed the Uniting for Peace resolution in which it "asserted authority to act in matters relating to international peace and security if the Security Council could not discharge its 'primary' responsibility because of lack of

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States and the State of Israel, Nov. 20, 1995, http://www.moit.gov.il/root/sachar_hutz/heskermin_ben/eumedagr.htm; *Agreement on the Establishment of a Free Trade Area*, Isr.-U.S., Apr.22, 1985, 24 I.L.M. 653. Even more importantly, Israel has been "the largest cumulative recipient of U.S. aid since World War II." According to conservative estimates, Israel currently receives over $3.6 billion per year, and, since 1949 it has received a total of over $130 billion.[21] There is little question that much of this money directly underwrites Israeli's military occupation, not to mention the construction of colonies, bypass roads, and the like. See Shirl McArthur, A Conservative Total for U.S. Aid to Israel: More than $130 Billion, *Washington Report on Middle East Affairs*, Oct.-Nov. 2013, *available at*: http://www.wrmea.org/2013-october-november/congress-watch-a-conservative-estimate-of-total-u.s.-direct-aid-to-israel-more-than-$130-billion.html.

[22] In this respect, the work of the Mattin Group in lobbying the EU to comply with its own internal law regarding the obligation to uphold international law, including IHL, in its dealings with Israeli free trade from the settlements in occupied Palestine is a model to be followed. *See* Shamas, C. "Renegotiating the Terms of EU-Israel Partnership: Normative Power and International Law, *available at*: http://www.lse.ac.uk/middleEastCentre/Events/events2013/Re-negotiating-the-Terms-of-EU-Israel-Partnership.aspx

[23] *See, for example, Guidelines on the Eligibility of Israeli Entities and their Activities in the Territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 Onwards* (2013/C 205/05), Official Journal of the European Union, 19 July 2013, available at: http://eeas.europa.eu/delegations/israel/documents/related-links/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf

[24] UN Charter, art. 41.

[25] "Whereas the [Security] Council had only imposed sanctions twice in the first forty-five years of its existence, against Rhodesia in 1966 and South Africa in 1977, during the 1990s, the Security Council imposed comprehensive or partial sanctions against Iraq (1990), the former Yugoslavia (1991, 1992, and 1998), Libya (1992), Liberia (1992), Somalia (1992), parts of Cambodia (1992), Haiti (1993), parts of Angola (1993, 1997, and 1998), Rwanda (1994), Sudan (1996), Sierra Leone (1997), and Afghanistan (1999)." *See* Cortright, D. & Lopez, G.A., *The Sanctions Decade: Assessing UN Strategies in the 1990s,* 2d ed., (Lynne Reinner Publishers, 2000) at 1-2.

[26] G.A. Res. 377, U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

[27] Akehurst, M. *A Modern Introduction to International Law*, 6th ed. (London: Routledge, 1991) at 224-225.

unanimity among the permanent members."[28] Although the extent of the General Assembly's power to act is merely recommendatory, since Korea "the resolution has had limited but significant application, notably with respect to the creation of the United Nations Emergency Force in the wake of the Suez crisis of 1956."[29] In point of fact, the Uniting for Peace formula has been used by the General Assembly a number of times when considering the question of Palestine, including in its Tenth Emergency Special Session which, *inter alia*, convened meetings in 1999 and again in 2000 of High Contracting Parties of the Fourth Geneva Convention to examine ways of enforcing the convention in occupied Palestine.[30] Although those meetings have resulted in little more than declarations affirming the applicability of the Convention to the occupied Palestinian territory and the need for the parties to the conflict to abide by its terms, the use of the Uniting for Peace Resolution in the General Assembly is a precedent that is known and should be studied further as a potential tool for the recommendation of the imposition of economic sanctions on the occupying power.

Part IV: Conclusion

22. I should like to conclude by noting the important role of global civil society in all of this. Between the increasingly intransigent actions of successive Israeli governments in recent years, the ever desperate situation faced by the Palestinian people who either remain in exile or under attack in their own land, and the modern advances in information technology that have, for the first time, allowed all of this to be witnessed the world over, unfettered and virtually in real time, it seems fair to observe that we are living in a moment that holds out unique possibilities for progressive change in ways hitherto thought impossible. For all of the difficulties that lay ahead, no one can deny the unprecedented successes of the BDS movement in exposing the moral decay and hypocrisy at the heart of the status quo. It is a sign of the times when today, Israel can no longer count on the automatic support of the Western liberal left, but rather draws its greatest support from the most reactionary and rightwing amongst us, and is increasingly relying upon old, specious and tellingly futile canards and *ad hominem* where it is unable to answer its critics on the merits. In short, the past decade has witnessed an unprecedented shift in public attitudes toward the injustice long-festering in occupied Palestine, and all indications are that this will continue. As history has shown, such shifts have always played a pivotal role in fostering legal strategies directed at the great moral questions of the day, be it the end of slavery, the struggle for universal suffrage, or the South African anti-apartheid movement. It is respectfully submitted that the Palestinian freedom struggle is no different, and that any legal strategies adopted in furtherance of that struggle, including in respect of the settlements, will ultimately be made possible by changes in public policy at both the international and domestic levels, hastened by the work of civil society as an embodiment of a progressive and humanist public international politics and consciousness.

Thank you.

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[28] Damrosch, L. et. al., *International Law: Cases and Materials*, 4th ed. (American Casebook Series, 2001) at 969.
[29] *Id*. at 1013.
[30] *See* G.A. Res. ES-10/6, 9 Feb. 1999, *available at:* http://unispal.un.org/UNISPAL.NSF/0/E29F7195C53CDDA905256729005035E4; and G.A. Res. ES-7/2, 29 Jul. 1980, *available at*: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/ES-7/2.