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COMMENTS

ISRAEL REJECTS ITS OWN OFFSPRING: THE INTERNATIONAL CRIMINAL COURT

I. INTRODUCTION

In an attempt to protect civilians from the dangers of armed conflict, various international bodies have attempted to codify harmful actions against innocent civilians into violations of international law.[1] While people in one state often commit crimes against people in another state, nation-states have had numerous difficulties in prosecuting those responsible for trans-border crimes before national criminal courts. On July 17, 1998, one hundred and twenty countries voted to adopt a multilateral treaty establishing the world's first permanent international criminal court to try individuals accused of genocide, war crimes, and crimes against humanity.[2] The International Criminal Court (ICC) adheres to the notion that individual government officials, and not just the states they govern, could be responsible, under

1. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516, 3548, T.I.A.S. No. 3365 [hereinafter Geneva Convention IV]. The following four conventions were adopted at Geneva on August 12, 1949 and entered into force on October 21, 1950: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, T.I.A.S. No. 3362; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, T.I.A.S. No. 3363; Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, T.I.A.S. No. 3364; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, T.I.A.S. No. 3365. Two additional protocols were adopted subsequently: Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional II to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

2. *See* David Stoelting, *Rome Treaty Marks Historic Moment in International Criminal Law*, N.Y. L.J., Aug. 28, 1998, at 1. Seven countries voted against establishing the ICC and twenty-one countries abstained. Israel, together with the United States, was among the seven states that voted against the statute. *See id.*

international law, for certain gross abuses.[3] The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court[4] adopted the International Criminal Court Statute (ICC Statute)[5] as the ICC's governing document.[6] In accordance with Article 126, the ICC Statute, also known as the Rome Treaty, enters into force only after sixty states ratify the Treaty.[7] Although to date, eighty-four states signed the ICC Statute, only four have officially ratified it;[8] thus, the Statute has not yet taken effect.

Israel was one of the most fervent supporters of the ICC's creation.[9] Its support was undoubtedly influenced by the atrocities the Nazis committed during World War II. Although the International Military Tribunal at Nuremberg was created to prosecute Nazi war criminals,[10] Israel continued to pursue the establishment of a permanent criminal court to ensure that justice is brought against criminals who commit such heinous crimes.[11]

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3. *See* Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 224 (1999).

4. The United Nations (U.N.) General Assembly adopted a resolution determining that a diplomatic conference to adopt a convention on the establishment of an international criminal court would be held in Rome from June 15 to July 17, 1998. *See* G.A. Res. 52/160, U.N. GAOR, 52d Sess., Agenda Item 150, at 2, U.N. Doc. A/RES/52/160 (1998).

5. *See generally* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF/183/9 (1998), 37 I.L.M. 999 (1998). The ICC Draft Statute, the official name of which is the Rome Treaty, enumerates the violations to be tried before the ICC and describes the Court's power.

6. *See id.*

7. *See id.* art. 126, at 1068.

8. *See Rome Statute of the International Criminal Court: Ratification Status*, art. 126 (visited Oct. 18, 1999) <www.un.org/law/icc/statute/status.htm> [hereinafter *Ratification Status*].

9. *See* Statement by Alan Baker (Delegation of Israel) to the International Criminal Court, 53d G.A., 6th Comm., Agenda Item 153 (Oct. 22, 1998), *in* ISRAEL COMMUNIQUÉ, Oct. 22, 1998 (on file with the *Loyola of Los Angeles International & Comparative Law Review*) [hereinafter Statement by Alan Baker].

10. *See* AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS POWERS AND CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945) [hereinafter NUREMBERG CHARTER]. *See also* Daniel J. Brown, Note, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763, 766 (1999).

11. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th Plenary mtg., July 17, 1998, *available at* (last visited Aug. 27, 1999) <http://www.israel-mfa.gov.il> (Statement by Judge Eli Nathan, Head of the Delegation of Israel) [hereinafter Statement by Judge Eli Nathan].

Despite many laborious years of trying to create this permanent entity, when the ICC was finally conceived, Israel had no choice but to reject its own offspring.[12]

Israel's main objection to the ICC Statute is that Israel's settlement activity in the occupied territories has clearly been targeted as a prosecutable war crime.[13] The assertion that Israeli settlement activity constitutes a war crime fails to consider the context in which these settlements have been established. The Israeli Government also objects to the scope of the ICC's jurisdiction.[14] While the ICC's subject matter jurisdiction includes such core crimes as genocide,[15] serious violations of title laws and customs applicable in armed conflict (war crimes),[16] and crimes against humanity,[17] the Statute is both too broad and too narrow.[18] The Statute is too narrow because it fails to include several serious crimes, such as airplane hijacking and biological and chemical warfare.[19] It is too broad because the Statute expands the scope of preexisting international law to include specific acts as war crimes that have not before been recognized as such.[20] The Statute redefines "transfer of population" and includes the *indirect* transfer of a state's "own civilian population into the territory it occupies" within its definition of war crimes.[21] Under this provision, individuals living in Israeli settlements in the occupied territories[22] could be charged with a war crime offense.[23] The

12. *See* Statement by Alan Baker, *supra* note 9.

13. *See Palestinian Leaders Hail U.N. "Rejection" of Israeli Settlements*, AGENCE FRANCE PRESSE (Paris), July 25, 1998, *available in* LEXIS, News Library, All News Group File [hereinafter *Palestinian Leaders*]. *See also* Moshe Zak, *Geneva Versus Jerusalem*, JERUSALEM POST, July 16, 1999, at 08A. The ICC Statute, Article 8, paragraph 2(b), defines a crime as "[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." Rome Treaty art. 8(2)(b), *supra* note 5, at 1006–1007 (emphasis added).

14. *See* Statement by Alan Baker, *supra* note 9.

15. *See* Rome Treaty arts. 5–6, *supra* note 5, at 1003–1004.

16. *See id.* arts. 5, 8, at 1003–1004, 1006–1009.

17. *See id.* arts. 5, 7, at 1003–1005. *See also* Karen Berg, *A Permanent International Criminal Court*, 34 U.N. CHRON. 30, 32 (1997).

18. *See* Panel Discussion, *supra* note 3, at 233.

19. *See generally id.*

20. *See id.*

21. *See* Rome Treaty art. 8 (2)(b)(viii), *supra* note 5, at 1007.

22. The term "occupied territories" refers to the territories Israel captured during the 1967 Six-Day War, including the areas commonly known as the West Bank and Gaza. *See* Ahmad H. Tabari, *Humanitarian Law: Deportation of Palestinians from the West Bank*

Israeli territories, however, do not constitute "the most serious crimes of international concern,"[24] for which the Court was established.[25]

In addition, the ICC Statute provides the Court with jurisdiction over the nationals of nonparty states.[26] This practice is contrary to the fundamental principle of international treaty law, which provides that only a signatory to a treaty will be bound by its terms.[27] Due to this expansive definition of jurisdiction, the ICC Statute lacks the legitimacy and support it needs to survive in the realm of international law.[28] Moreover, the Court's problems are "exacerbated by the fact that the Statute does not permit reservations, thus making it impossible for states to accept the Court's jurisdiction with respect to some crimes and not others."[29]

Throughout the negotiating process, the Israeli Government voiced its concern with regard to several drafting developments that it considered potentially prejudicial to what should be the impartial nature and character of the ICC.[30] Originally, the Statute was to be voted on provision-by-provision, but ultimately, Israel was faced with accepting or rejecting the Statute in its entirety.[31] Affording states an opportunity to object to particular

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and Gaza, 29 HARV. INT'L L.J. 552, 552 n.1 (1988).

23. *See War Crimes Court*, INT'L HERALD TRIB., July 22, 1998 at 22.

> The inclusion of this provision was perceived to be an attempt to abuse the statute of the Court for political ends, directed principally against Israel . . . . The proposed formulation, which had been transcribed from Additional Protocol I to the Geneva Convention, with various adaptations, neither represented a grave breach of the Fourth Geneva Convention, nor did it reflect customary international law. In fact, it had been cynically adapted and proposed in order to advance a political viewpoint maintained by certain states.

Alan Baker, *The International Criminal Court: Israel's Unique Dilemma*, 18 JUSTICE 19, 24 (1998). *See also* Panel Discussion, *supra* note 3, at 233–234 n.82.

24. Rome Treaty preamble, *supra* note 5, at 1002.

25. *See id.*

26. *See* Rome Treaty art. 12(3), *supra* note 5, at 1010.

27. *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34–38, 1155 U.N.T.S 331, 341, U.N. Doc. A/CONF.39/27 [hereinafter Vienna Convention].

28. *See generally* Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 311 (1998).

29. Panel Discussion, *supra* note 3, at 234. Article 120 states that "no reservation may be made to this Statute." Rome Treaty art. 120, *supra* note 5, at 1066.

30. *See* Statement by Alan Baker, *supra* note 9.

31. *See id. See also* Rome Treaty art. 120, *supra* note 5, at 1066.

provisions would have facilitated broader acceptance of the ICC and led to Israel's adoption of the Statute.[32]

While the establishment of the ICC takes international law one step closer to bringing criminals who commit heinous crimes to justice, it fails to establish a strong basis for accomplishing this goal. By examining the ICC's structure and various sources of international law regarding transfer of population and deportation, this Comment illustrates the weaknesses in the Statute's war crime provision that expands the definition of transfer of population into occupied territory. Part II discusses the ICC's structure and function. Part III explores the history of the Palestinian-Israeli conflict. Part IV discusses pre-existing international law, particularly in light of transfer of population and deportation. Part V examines the Statute's misidentification of Israeli settlement activity as a war crime. Part VI discusses the role of politics in the ICC and policy considerations regarding the ICC's overly expansive jurisdiction.

II. THE STRUCTURE AND FUNCTION OF THE INTERNATIONAL CRIMINAL COURT

As early as 1948, the U.N. General Assembly asked the International Law Commission (ILC)[33] to examine the possibility of creating a permanent international criminal court.[34] Prior to the ICC's creation, the international community relied on ad hoc tribunals such as those at Nuremberg[35] and Tokyo.[36] The ICC proposal was finally triggered by the United Nations (U.N.) Security Council's creation of two ad hoc international criminal tribunals in response to the atrocities committed in the former Yugoslavia[37] and Rwanda.[38] Ultimately, the ICC was established

32. *See* Statement by Judge Eli Nathan, *supra* note 11.

33. The ILC is "a United Nations advisory group composed of jurists from around the world, set to work developing a draft code of the law of treaties." M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 15 (1988), *reprinted in* INTERNATIONAL LAW 114, 114 (Barry E. Carter & Phillip R. Trimble eds., 3d ed. 1999).

34. *See* Israel Ministry of Foreign Affairs, *The International Criminal Court—Background Paper*, July 30, 1998 (visited Aug. 25, 1998) <http://www.israel-mfa.gov.il> [hereinafter *ICC Background Paper*].

35. *See* NUREMBERG CHARTER.

36. *See* Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, at 20 (1946).

37. *See* Statute for the International Criminal Tribunal for the Former Yugoslavia,

as a permanent judicial body, independent from the U.N., with its seat in the Hague.[39]

From its very inception, however, the ICC faced criticism when several delegations deplored the inclusion and exclusion of various acts as crimes within the Court's jurisdiction.[40] Many commentators believed that "limiting the Court's competence to a few 'core crimes' would facilitate designing a coherent and unified approach to the exercise of jurisdiction and the requisite State cooperation."[41] Instead, the Statute, as drafted, hinders the necessary state cooperation by expanding, rather than limiting, the Court's jurisdiction. While the Statute excluded such heinous crimes as terrorism and the use of nuclear, chemical, and biological weapons, it supplemented the traditional definition of war crimes to include the transfer of population into an occupied territory.[42] The Statute's jurisdiction has been assailed as an intrusion on the principle of sovereignty.[43]

A. The International Criminal Court's Jurisdiction and the Principle of Complementarity

"National criminal jurisdiction is seen by many states as a vital aspect of their sovereignty."[44] In an attempt to respect that sovereignty, the ICC adopted a principle of complementarity.[45] This principle of international law helps determine when the ICC has jurisdiction over a national court and when the ICC can overrule a national court's verdict.[46] The principle's basic tenet is

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S.C. Res. 827, U.N. SCOR, 84th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

38. *See* Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]. *See also* Stoelting, *supra* note 2.

39. *See ICC Background Paper*, *supra* note 34.

40. *See* Panel Discussion, *supra* note 3, at 233. *See also* David J. Scheffer, *Developments in International Criminal Law: The U.S. and the International Criminal Court*, 93 AM. J. INT'L. L. 12, 18 (1999).

41. Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INTL. L. 22, 24 (1999).

42. *See U.N. Diplomatic Conference Concludes with Decision to Establish Permanent International Criminal Court*, M2 PRESSWIRE, July 21, 1998, *available in* LEXIS, News Library, Wire Service Stories File [hereinafter *U.N. Diplomatic Conference*].

43. David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 11 (1998).

44. Berg, *supra* note 17, at 30.

45. *See* Pejic, *supra* note 28, at 308. *See also ICC Background Paper*, *supra* note 34.

46. *See* Pejic, *supra* note 28, at 308.

that the ICC will complement, rather than replace, national courts in cases where the necessary trial procedures may not be available or are possibly ineffective.[47] A case is only admissible to the ICC when a state is "unwilling or unable genuinely" to carry out the investigation or prosecution.[48]

Notwithstanding the principle of complementarity, the Statute nevertheless encroaches on state sovereignty. One of the fundamental principles of international treaty law is that only a signatory to a treaty is bound by its terms.[49] Article 12 of the ICC Statute, however, "reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a nonparty state."[50] "The ICC may exercise jurisdiction over anyone anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents."[51]

> Paradoxically, the Court may not have jurisdiction over perpetrators of war crimes who are nationals of a state that is party to the Statute. The Statute permits a state, on becoming a party, to declare that it does not accept the jurisdiction of the Court with respect to war crimes alleged to have been committed by its nationals or on its territory for a period of seven years.[52]

Plainly, the Court's jurisdiction to try individuals, even when the state of their nationality is not party to the Statute, disregards the fundamental principle that a treaty may only bind its own parties.[53]

Under Article 12 of the ICC, for example, an individual Israeli soldier acting on foreign territory would be subject to the Court's jurisdiction even if Israel is not a party to the ICC

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47. *See id.*

48. *See id.* at 309.

49. *See* Vienna Convention arts. 34–38, *supra* note 27, at 341.

50. Scheffer, *supra* note 40, at 18.

51. *Id. See* Rome Treaty art. 12, *supra* note 5, at 1010.

52. Panel Discussion, *supra* note 3, at 257. *See* Rome Treaty art. 124, *supra* note 5, at 1068.

53. *See ICC Background Paper*, *supra* note 39. The U.S. Government believes that the Statute's jurisdiction and application over non-state parties "will pose a serious threat to its sovereignty." Martin Sieff, *Settlements No Crime, Israel Protests; U.S. Says New Court Invades Sovereignty*, WASHINGTON TIMES, July 21, 1998, at A1.

Treaty.[54] The same holds true if the foreign territory on which the soldier acts is not a party to the Treaty but consents to the Court's ad hoc jurisdiction.[55] For example, with only Saddam Hussein's consent, "even if Iraq does not join the treaty, the treaty text purports to provide the Court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the Court could not on its own prosecute Saddam for massacring his own people."[56] As these examples illustrate, the ICC's ability to extend its jurisdiction to non-party states infringes on state sovereignty and inhibits states from contributing efforts to help protect international peace and security.[57]

B. The Role of the Prosecutor

The prosecutor plays a key role in deciding what cases appear before the Court. Together with the state parties, the Registry,[58] the members of which are elected by the ICC judges,[59] is responsible for electing the prosecutor.[60] The Office of the Prosecutor acts independently as a separate organ of the ICC and does not seek or act on instructions from any internal source.[61] The prosecutor may initiate investigations based on information about crimes within the subject-matter jurisdiction of the Court.[62] Further, the prosecutor can "analyze the seriousness of the information received, and may seek additional information from states, organs of the U.N., intergovernmental or non-governmental

54. *See generally* David Scheffer, *Development at Rome Treaty Conference*, U.S. DEPT. ST. DISPATCH, Aug. 1, 1998, at 19 [hereinafter Scheffer, DISPATCH] (discussing the ICC's jurisdiction under Article 12).

55. *See* Scheffer, *supra* note 40, at 18.

56. Panel Discussion, *supra* note 3, at 258.

57. It is important to note that the Statute is not retroactive. *See* Rome Treaty art. 11, *supra* note 5, at 1010. Thus, the ICC only has jurisdiction over crimes committed after the Statute's adoption. *See ICC Background Paper*, *supra* note 34.

58. *See* Rome Treaty art. 43, *supra* note 5, at 1025. The Registry will be "responsible for the non-judicial aspects of the administration and servicing of the Court." *Id.*

59. *See generally* Rome Treaty arts. 35–36, *supra* note 5, at 1020–1022. The Court will consist of eighteen judges from eighteen different countries, who will be elected as full-time members of the Court. *See id. See also World Atrocities Court Will be Reality; Over U.S. Opposition, Treaty Establishes Permanent Tribunal*, BALTIMORE SUN, July 18, 1998, at 1A.

60. *See* Arsanjani, *supra* note 41, at 37.

61. *See id.*

62. *See* Rome Treaty art. 53, *supra* note 5, at 1029.

organizations, or other reliable sources that he or she deems appropriate . . . ."[63] The prosecutor then submits the examination to the Pre-Trial Chamber, which authorizes further investigation if the matter falls within the ICC's jurisdiction.[64] Because the Security Council's power to defer such investigations or prosecutions for a one-year period is indefinitely renewable, the Security Council could ultimately prevent a prosecution from going forward altogether.[65] This factor negatively affects states that are excluded from the U.N.'s regional grouping system and are therefore precluded from serving on the Security Council.[66]

One criticism of the Court is that the prosecutor has too much discretion and power in determining whom the ICC will try.[67] The Statute creates a "*proprio motu*—or self-initiating prosecutor—who, on his or her own authority with the consent of two judges, can initiate investigations and prosecutions without referral to the [C]ourt of a situation either by a government that is party to the treaty or by the Security Council."[68] There is a concern "that it will encourage overwhelming the [C]ourt with complaints and risk diversion of its resources, as well as embroil the [C]ourt in controversy, political decision-making, and confusion."[69] The power of the prosecution, and the manner in which the provisions of the Statute were decided, essentially on a take-it-or-leave-it basis,[70] plant the seeds for a politically motivated international judicial body.

C. The International Criminal Court's Enumerated Crimes

The International Law Commission's Draft Statute,[71] which the ICC Statute will supplant upon its ratification, states that the

63. *U.N. Diplomatic Conference*, *supra* note 42.

64. *See* Rome Treaty art. 15, *supra* note 5, at 1011.

65. *See id.* art. 16, at 1012.

66. U.N. General Assembly, *General Assembly Concludes Consideration of Security Council Reform*, PRESS RELEASE GA/9693, Dec. 20, 1999, *available at* <http://www.un.org/search/>.

67. *See* Scheffer, DISPATCH, *supra* note 54, at 21.

68. *Id.*

69. *Id.*

70. *See* Statement by Alan Baker, *supra* note 9. *See also* Rome Treaty art. 120, *supra* note 5, at 1066.

71. *See* Draft Statute for an International Criminal Court, Report of the International Law Commission, U.N. GAOR, 48th Sess., Supp. No. 10, Annex, U.N. Doc A/48/10 (1993).

Court's jurisdiction shall be limited to the "most serious crimes of concern to the international community as a whole."[72] These "core crimes" include crimes against humanity,[73] genocide,[74] war crimes,[75] and the crime of aggression.[76]

There were numerous definitional problems, however, with regard to the scope of the crime of aggression during the Preparatory Committee's negotiations.[77] First, it was difficult for the Committee to define what constitutes "a crime of aggression" for purposes of the Statute.[78] Any definition of an act of "aggression" must account for the fact that aggression may not always be an individual act, but rather, a cumulative definition of war itself.[79] Second, while some states preferred a fixed and independent definition of aggression unsusceptible to review by the Security Council, other states, including the five permanent members,[80] insisted that the Security Council make a specific finding that a state did in fact commit an act of aggression.[81] Such a precondition would give the Security Council, and thus any one of its permanent members, the power to veto the prosecution of an individual.[82] Third, many states, including Israel, viewed the inclusion of aggression in the list of crimes as inappropriate, arguing that the crime itself is a political one.[83] As a compromise, the final Statute incorporates the crime of aggression in Article 5(2), but leaves the definition to be determined at a later date.[84]

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72. *U.N. Diplomatic Conference*, *supra* note 42. *See also* Rome Treaty art. 1, *supra* note 5, at 1003. *See also* Berg, *supra* note 17, at 30. "It was hoped that this limitation would promote broad acceptance of the Court by states and consequently enhance its credibility, moral authority and effectiveness." Arsanjani, *supra* note 41, at 24.

73. *See* Rome Treaty arts. 5, 7, *supra* note 5, at 1003–1005.

74. *See id.* arts. 5–6, at 1003–1004.

75. *See id.* arts. 5, 8, at 1003–1004, 1006–1009.

76. *See id.* art. 5, at 1003–1004. *See also U.N. Diplomatic Conference*, *supra* note 42.

77. *See* Arsanjani, *supra* note 41, at 29.

78. *See ICC Background Paper*, *supra* note 34.

79. *See U.N. Diplomatic Conference*, *supra* note 42.

80. The Security Council's permanent members include the United States, Great Britain, Russia, China, and France. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, *What is International Law?*, *in* INTERNATIONAL LAW, *supra* note 33, at 1, 89.

81. *See* Arsanjani, *supra* note 41, at 29. *See also* Berg, *supra* note 17, at 30.

82. *See* Berg, *supra* note 17, at 30.

83. *See ICC Background Paper*, *supra* note 34.

84. *See* Rome Treaty art. 5(2), *supra* note 5, at 1004. The Court may exercise jurisdiction over the crime of aggression once it has been defined and the conditions for such exercise have been agreed upon. *See* Arsanjani, *supra* note 41, at 30.

The following "core crimes" fall within the ICC's jurisdiction and are generally defined by the Statute in this manner:

> '[C]rime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;[85] (f) Torture; (g) Rape, sexual slavery . . . .[86]
>
> '[G]enocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[87]
>
> '[W]ar crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949,[88] namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; . . . (viii) Taking of hostages. . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, . . . [including] (viii) The 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.[89]

There are two crucial limitations on the Court's power that attempt to prevent politically motivated charges and prejudicial influences. One limitation is the fundamental ICC principle that

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85. "[S]evere deprivation of physical liberty in violation of fundamental rules of international law . . ." may raise similar concerns in the context of transfer of population, however, this issue is beyond the scope of this Comment.

86. Rome Treaty art. 7(1), *supra* note 5, at 1004–1005.

87. *Id.* art. 6, at 1004.

88. *See generally* Geneva Convention IV, *supra* note 1.

89. Rome Treaty art. 8, *supra* note 5, at 1006–1009 (emphasis added).

the Court is not to create new substantive law, but only to prosecute crimes international law already prohibits.[90] In addition, the ICC is not to base its interpretation or application of the Statute on factors such as language, color, religion, or political belief.[91] Contrary to these clear limitations, the ICC Statute expands preexisting international law,[92] thus creating new substantive law, particularly with respect to defining the crime of transfer of population.[93] As a result of this new definition, Israeli settlement activity has been labeled a war crime;[94] this "is an example of either poor drafting or deliberate misuse of the Court for political purposes."[95]

The Statute's definitions of "war crimes" and "crimes against humanity" are too expansive and leave boundless room for political manipulation. For example, the overbroad definitions of "war crimes" and "crimes against humanity" could be applied to actions taken by the United States during the 1991 Gulf War.[96] According to the ICC Statute, these actions would qualify as war crimes.[97] Expanding the definition subjects too many states' actions during recognized hostilities to war crime liability and ultimately undermines the gravity of war crime prosecutions.

III. HISTORY OF PALESTINIAN-ISRAELI CONFLICT

The Middle East is a region with a rich history dating back thousands of years. Palestinian-Israeli relations stem from a combination of law, justice, morality, and history. Asserting rights to land based on history alone, however, results in inconsistent conclusions.

From an international legal perspective, the Balfour Declaration of November 2, 1917,[98] is a meaningful starting point in discussing the Palestine issue.[99] The purpose of the Balfour

90. *See* Arsanjani, *supra* note 41, at 25.

91. *See U.N. Diplomatic Conference*, *supra* note 42.

92. *See* Panel Discussion, *supra* note 3, at 233.

93. *See generally id.* at 233, 259–60. *See also* discussion *infra* Part V.A.

94. *See* David Frum, *The International Criminal Court Must Die*, WEEKLY STANDARD (Wash., D.C.), Aug. 17, 1998, at 27.

95. Panel Discussion, *supra* note 3, at 263.

96. *See* Arsanjani, *supra* note 41, at 26.

97. *See id.*

98. *See* Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 228 (1997).

99. *See* Yoram Dinstein, *The Arab-Israeli Conflict from the Perspective of*

Declaration was to create a foundation for the establishment of a Jewish national entity in Palestine.[100] After the First World War, pursuant to Article 22 of the Covenant of the League of Nations,[101] the Middle East was placed under the mandate system,[102] with Palestine assigned to the British Mandate.[103] The preamble of the British Mandate for Palestine incorporated the Balfour Declaration, thus providing a home for the Jewish people in that region.[104]

In 1947, the U.N. General Assembly adopted the Partition Resolution, No. 181,[105] which was "premised on the termination of the British Mandate and the establishment of two independent states, one Jewish and the other Arab, linked by an economic union, plus a special international regime for the city of Jerusalem . . . ."[106] The Arab countries (Egypt, Iraq, Syria, Lebanon, and Transjordan) immediately rejected the Partition Resolution,[107] igniting hostilities between the Jews and Arabs. On May 15, 1948, Israel declared its independence; within several hours, Egypt, Jordan, Lebanon, Syria, and Iraq, declared war on the new state.[108] In 1949, a series of armistice Agreements[109] ended Israel's war with all Arab armies except Iraq.[110] Under international law, international borders only become final if and when they are modified by the bordering countries' mutual

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International Law, 43 U. N.B. L.J. 301, 303 (1994).

100. *See id.*

101. *See* LEAGUE OF NATIONS COVENANT art. 22.

102. A mandate system is one that gives "advanced nations" control over particular territories in order to help develop them into a self-governing territory. *See* Shah, *supra* note 98, at 228. Britain was designated as the mandatory power for Palestine and was to render administrative advice and assistance until the region was able to stand alone. *See* Allison M. Fahrenkopf, Note, *A Legal Analysis of Israel's Deportations of Palestinians from the Occupied Territories*, 8 B.U. INT'L L.J. 125, 132 (1990). Completion of the Mandate's terms would vest sovereignty in the beneficiaries of the Mandate. *See id.*

103. *See* Fahrenkopf, *supra* note 102, at 132. *See also* Terms of the British Mandate for Palestine Confirmed by the Council of the League of Nations, July 24, 1922, 3 LEAGUE OF NATIONS O.J. 1007 (1922) (entered into force Sept. 29, 1923).

104. *See* MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 158 (Salih J. Altoma et al. eds., Ind. Univ. Press 1994).

105. *See* G.A. Res. 181, U.N. GAOR, 2d Sess., at 131, U.N. Doc. A/519 (1947).

106. Dinstein, *supra* note 99, at 306.

107. *See* Shah, *supra* note 98, at 228.

108. *See* Dinstein, *supra* note 99, at 308.

109. *See, e.g.*, General Armistice Agreement, Feb. 24, 1949, Egypt-Isr., 42 U.N.T.S. 252; General Armistice Agreement, Mar. 3, 1949, Jordan-Isr., 42 U.N.T.S 304.

110. *See* Dinstein, *supra* note 99, at 308.

consent.[111] As a result, until Israel and its bordering neighbors mutually agreed on the location of their borders, the scope of the territory constituting their respective sovereign lands was not "final."[112]

The 1947–1948 War resulted in numerous boundary shifts.[113] Historically, Gaza was never an integral part of Egypt, but rather a narrow coastal strip of Palestine running north from the Israeli-Egyptian border.[114] At the conclusion of the 1947–1948 War, Jordan controlled the West Bank.[115] In 1950, the Hashemite Kingdom of Jordan formally annexed the territory.[116] The West Bank was of great strategic importance to Israel because of its mountainous geography.[117]

In June 1967, Egypt amassed troops along the Israel-Egypt armistice line, requested that the U.N. Emergency Force (UNEF) withdraw from the Sinai Peninsula,[118] and closed the Straits of Tiran to Israeli shipping.[119] In response to these acts of aggression, Israel invaded Egypt.[120] Shortly thereafter, Jordan and Syria attacked Israel.[121] Eventually, Israel captured the Sinai Peninsula and Gaza Strip from Egypt, the West Bank from Jordan,[122] and the Golan Heights from Syria.[123]

The "[c]apture of the West Bank, along with Gaza, gave Israel control over the territory that had been allocated for Jewish

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111. *See id.* at 308–309.

112. *See id.*

113. In addition, as a result of the 1947–1948 War, thousands of Palestinian Arabs lost their homes. *See id.* There has been great debate surrounding the origin of this population displacement. *See* Behnam Dayanim, *The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy*, 30 STAN. J. INT'L L. 115, 123–124 (1994). Many adherents to the Palestinian perspective assert that the Jewish people were responsible for the expulsion. *See id.* Other commentators contend that a combination of social and political factors contributed to the vast numbers of Arab refugees. *See id.*

114. *See* TESSLER, *supra* note 104, at 401.

115. *See id.*

116. *See id.*

117. *See id.* at 403.

118. Following a military confrontation between Egypt and Israel in 1956, the U.N. put an emergency force (UNEF) on the Egyptian side of the 1949 armistice line to assure there were no further hostilities. *See* JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 156 (Duke Univ. Press 1990).

119. *See id.* at 162.

120. *See id.*

121. *See id.*

122. *See* TESSLER, *supra* note 104, at 399.

123. *See* QUIGLEY, *supra* note 118, at 163.

and Palestinian states under the United Nations Partition Resolution of 1947."[124] As a result, many refugees fled the Israeli occupied territory and many remaining Palestinian Arabs were placed under Israeli military administration.[125] With the Israeli army's assistance, Israeli settlements were established along the perimeters of the occupied territories.[126] Security considerations motivated their construction as part of the military's effort to prevent infiltration of the oppositions' forces.[127] Some Israeli citizens also undertook settlement activity after the 1967 War.[128] The Israeli Government, however, did not plan to annex the West Bank and Gaza.[129] In November 1967, the U.N. adopted Resolution 242[130] requesting that Israel withdraw from the occupied territories as part of a general settlement with the Arab countries.[131] It was unclear, however, "whether withdrawal was to be from all the territories it had occupied, or only from some portion,"[132] and whether peace was a prerequisite for withdrawal or vice versa.[133]

On October 6, 1973, Egypt and Syria launched a surprise attack on Israel on Yom Kippur, the Day of Atonement.[134] Continuous fighting ensued and by October 24, 1973, Israel improved its position and recaptured territory it lost in the beginning days of the war.[135]

Following the 1973 War, the Palestine Liberation Organization (PLO) dramatically improved its political strength with a new emphasis on political dialogue.[136] In 1977, the Camp

124. TESSLER, *supra* note, 104, at 401–402.

125. *See id.* at 402.

126. In this Comment, the word "territories" refers both to the areas seized from Jordan during the Six-Day War in 1967 and to Gaza. *See* U.N. Security Council, *Focus on Situation in Occupied Territories*, U.N. CHRON., Oct. 1983, at 3.

127. *See* TESSLER, *supra* note 104, at 466.

128. *See id.*

129. *See id.* at 467.

130. *See* S.C. Res. 242, U.N. SCOR 22d Sess., at 8, U.N. Doc. S/INF/22/Rev.2 (1967) [hereinafter S.C. Res. 242].

131. *See id.*

132. QUIGLEY *supra* note 118, at 170.

133. *See* TESSLER, *supra* note 104, at 468. According to a report prepared by Israel's Ministry of Defense, U.N. Resolution 242 "confirmed Israel's right to administer the captured territories *until* the cease-fire was superseded by a 'just and lasting peace' arrived at between Israel and her neighbors." *Id.*

134. *See id.* at 474–475.

135. *See id.* at 477.

136. *See id.* at 483.

David Accords ultimately resulted in a peace treaty between Israel and Egypt.[137] The Camp David Accords called for Israel's return of the Sinai to Egypt and set the stage for negotiations about the future of the West Bank and Gaza.[138] During the 1970s and 1980s, the PLO continued to gain political support in the occupied territories and Israeli settlement activity expanded.[139]

The Palestinians demanded autonomy and eventually, in December 1987, spontaneous and violent protest demonstrations, also known as the *Intifada*, erupted throughout the occupied territories.[140] These uprisings were a response to the Israeli stronghold military administration in the occupied territories, disappointment with the PLO leadership, and the Palestinians' strained relationships with Jordan.[141] The Palestinians' new assertiveness and resistance to the Israeli occupation seeped into the Israeli public and political consciousness.[142]

In the aftermath of the *Intifada*, new diplomatic efforts led to U.S.-sponsored peace talks between Israel and its Arab neighbors, including negotiations between Israel and the Palestinians.[143] Both parties acknowledged the need to end the conflict and recognized their mutual legitimate political rights.[144]

On September 13, 1993, Israel and the Palestinians agreed to a Declaration of Principles (DOP),[145] which, among other things, established a Palestinian Interim Self-Government Authority that would lead to a permanent settlement based on Security Council Resolutions 242[146] and 338.[147] As of November 1999, final status

137. *See id.* at 514–515.

138. *See id.* at 516.

139. *See id.* at 483, 516.

140. *See id.* at 677.

141. *See id.* at 677, 714–715.

142. *See id.* at 707–708.

143. *See id.* at 713.

144. *See* Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, preamble, 32 I.L.M. 1525, 1527 (1993) [hereinafter DOP]. *See also* Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, 36 I.L.M. 551, 558 (1997) [hereinafter Interim Agreement].

145. *See* DOP art. I, *supra* note 144, at 1527.

146. *See* S.C. Res. 242, *supra* note 130. Resolution 242 called for withdrawal of Israeli armed forced from territories occupied in the 1967 conflict and for termination of the state of belligerency. *See id.*

147. Resolution 338 called for a cease-fire and reaffirmed the provisions of Resolution 242. *See* S.C. Res. 338, U.N. SCOR, 28th Sess., 1757th mtg., U.N. Doc. S/INF/29 (1973). *See also* DOP art. I, *supra* note 144, at 1527.

negotiations between Israel and the Palestinian Authority had yet to take place.

IV. INTERNATIONAL LAW PRIOR TO THE ICC AND TRANSFER OF POPULATION

The ICC's foundation draws on a rich history of various international treaties and conferences. "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; (c) or by derivation from general principles common to the major legal systems of the world."[148] As an international agreement, the ICC Statute may be accepted as international law, but should, in accordance with fundamental principles of international law, only bind its own signatories.[149]

Customary international law[150] is rooted in an effort to achieve peace, security, and justice. The Hague Convention[151] and the Geneva Conference[152] are two recent influences on the structure of customary international law and the creation of the ICC. The ICC Statute derives from a combination of various international tools and experiences. Its mere creation, however, does not automatically render it binding on the international community solely as a matter of customary international law.[153]

Therefore, to determine whether Israeli settlements fall under the ICC's definition of war crimes, it is crucial to determine what preexisting international law does, and does not, permit. This Part analyzes the act of transfer of population from a historical perspective by examining some of the ICC's predecessors: the

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS].

149. *See* Vienna Convention art. 34, *supra* note 27, at 341.

150. Customary international law results from the general and consistent practice of states that follow such law out of a sense of legal obligation. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102. *See also* discussion *infra* Part IV.C.

151. Convention Respecting the Laws and Customs of War on Land (1907 The Hague Convention), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention].

152. *See* Geneva Convention IV, *supra* note 1. A plethora of international agreements have influenced customary international law and ultimately the creation of the ICC; for purposes of this Comment, however, the examination is limited to customary international law, the Hague Convention, and the Geneva Conference.

153. *See* discussion *infra* Part IV.C. Customary international laws "evolve after a long historical process culminating in their recognition by the international community." CARTER & TRIMBLE, *in* INTERNATIONAL LAW, *supra* note 33, at 1, 134.

Hague Convention,[154] the Geneva Convention,[155] and customary international law.

A. The Hague Convention

The current status of deportation and transfer of population is greatly influenced by their historical treatment under the Hague Convention.[156] The 1907 Hague Convention, often referred to as the Law of War, established the rights and obligations of belligerent military operations, and limited the means belligerents could employ to harm their enemies.[157]

Section III of the Hague Convention, entitled *Military Authority Over the Territory of the Hostile State*, defines an occupied territory as an area that is "actually placed under the authority of the hostile army."[158] This section places several limitations on the exercise of military authority over an enemy state's occupied territory.[159] The regulations in section III do not explicitly prohibit the deportation or settlement of civilians within an occupied territory.[160]

Arguably, the omission of deportation in the Hague Regulations is due to the fact that the use of deportation and population transfer as a policy tool had fallen into disuse at the time of the Convention's drafting.[161] Such an argument, however, does not imply that the parties intended to prohibit deportation or transfer of population.[162] Article 43 of the Hague Convention states that the occupying power "shall take all measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[163] As a result, the language of Article 43 anticipates the possibility of occupation and therefore includes restrictions and guidelines during such occupation.[164]

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154. *See* Hague Convention, *supra* note 151.
155. *See* Geneva Convention IV art. 49, *supra* note 1, at 3548.
156. *See* Hague Convention, *supra* note 151.
157. *See* International Committee of the Red Cross, *International Humanitarian Law* sec. 1 (visited Oct. 23, 1998) <http:www.icrc.org/unicc/icrcnews...>.
158. Hague Convention art. 42, *supra* note 151.
159. *See id.*
160. *See generally id.* Annex, § 3.
161. *See* Dayanim, *supra* note 113, at 140.
162. *See id.*
163. Hague Convention art. 43, *supra* note 151.
164. *See generally id.*

Article 43[165] requires that an occupant preserve the occupied territory's existing laws. Because there was no existing Palestinian law in the West Bank and Gaza prior to Israeli occupation, however, it is arguable that Article 43 does not apply.[166] Further, Jordan relinquished any claims to the West Bank[167] and Egypt never claimed the Gaza Strip as part of its country.[168] In accordance with Article 43, in order to restore and ensure public order and safety, some form of law enforcement must rule the occupied territory.[169] In the absence of an official governing system functioning in the occupied area, Israel implemented its own policies, law, and enforcement mechanisms to maintain order, as the Hague Regulations mandate.[170] Therefore, Israel's implementation of its own law enforcement, under these circumstances, may very well have been required by the Hague Regulations.[171]

The Hague Convention also fails to distinguish deportations from settlements.[172] Nevertheless, the notorious Nazi practice of annexing territories and establishing "Aryan" civilian settlements in occupied territories was deemed a violation of the Hague Convention.[173] Because the Israeli settlements are in no way comparable to the Nazi atrocities, it is difficult to assess the applicability of the Convention's rules to the settlement activity. Unlike the Nazi transfers, which were used for purposes of "forced servitude or physical annihilation,"[174] there is "no body of evidence . . . of large-scale transfers of Arabs from the occupied territories."[175] Moreover, the absence of Palestinian residency in the many parts of the territory at the time of Israeli occupation

165. *See id.*

166. *See generally* Michael Curtis, *International Law and the Territories*, 32 HARV. INT'L L.J. 457, 473, 487, 492 (1991) (discussing the inapplicability of the Hague Convention to the West Bank and Gaza).

167. *See* TESSLER, *supra* note 104, at 715.

168. *See* QUIGLEY, *supra* note 118, at 153.

169. *See* Hague Convention art. 43, *supra* note 151.

170. *See* Dayanim, *supra* note 113, at 140.

171. *See id.*

172. *See generally* Hague Convention, *supra* note 151.

173. *See* Craig Jackson, *Israeli West Bank Settlements, the Reagan Administration's Policy Toward the Middle East and International Law*, 79 AM. SOC'Y INT'L L. PROC. 217, 227–228 (1987).

174. Dayanim, *supra* note 113, at 141.

175. Jackson, *supra* note 173, at 231.

precludes the argument that the Palestinian population was deported as a result of Israeli occupation.[176]

While the Hague Convention does not expressly prohibit deportations, the practice is arguably incompatible with Article 46, which states: "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."[177] This argument, however, fails to classify settlements as violations of Article 46 because most of the Israeli settlements were established on uncultivated and unregistered land.[178] These areas are considered state land and are therefore subject instead to Article 55, which states that the occupant is regarded as administrator and usufructuary of such property.[179] Consequently, Israeli settlement activity is based on the occupant's (Israel's) authority to administer and utilize governmental property under Article 55,[180] and therefore does not violate Article 46.

There is some debate regarding the Hague Convention's formal applicability to the occupied territories.[181] The Israeli Government, for example, has not acknowledged the Hague Regulations' de jure applicability to the Israeli occupied territories.[182] The Israeli Supreme Court, however, has accorded the Hague Regulations the status of customary international law applicable to the Israeli administration of the territories.[183] Despite the debate over the Hague Convention's applicability, there is a general consensus within Israel and the international community that Israel accepts that the Hague Convention governs the occupied territories on either a de facto or a de jure basis.[184]

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176. *See generally* Zak, *supra* note 13, at 8A.

177. Hague Convention art. 46, *supra* note 151.

178. *See* Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future of Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 314 n.106 (1995).

179. *See* Hague Convention art. 55, *supra* note 151. "Usufructuary" is defined as one who has a right of limited duration to use and enjoy another's property. *See* BLACK'S LAW DICTONARY 1544 (6th ed. 1990).

180. *See* Benvenisti & Zamir, *supra* note 178, at 314–315.

181. *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since* 1967, 84 AM. J. INT'L L. 44, 63 (1994).

182. *See* Dayanim, *supra* note 113, at 139.

183. *See id.*

184. *See* Roberts, *supra* note 181, at 63.

B. The Geneva Convention

On August 12, 1949, the Fourth Geneva Convention was adopted largely in response to the Nazi atrocities committed during World War II.[185] It was created to address the protection of civilians during international and domestic armed conflicts.[186] In determining the legality of Israeli settlements under the Geneva Convention, it is important to determine (1) whether the Convention constitutes customary or conventional law; and (2) whether the Convention applies to the overall situation in the occupied territories.

1. Does the Geneva Convention Constitute Customary International Law?

Ascertaining whether the Geneva Convention constitutes customary international law is important in determining its binding authority on nation-states. Customary international law is internationally binding and results from the general and consistent practice of states following such law out of a sense of legal obligation.[187] Considering that the Geneva Convention represented an attempt to expand and update the Hague Regulations,[188] it is arguable that the Geneva Convention represents customary international law and thus applies to Israel's occupied territories. Some scholars claim that the Geneva Convention and many of the humanitarian norms it embodies have acquired the status of *jus cogens*.[189] Conversely, unlike the Hague Regulations, "the Fourth Geneva Convention has not been regarded as solely representative of customary international law. Thus, it is legally binding only on those states who are parties to

185. *See* Dayanim, *supra* note 113, at 159.

186. *See* Geneva Convention IV, *supra* note 1. *See also* Protocol I, Protocol II, *supra* note 1.

187. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102 (2) (1986).

188. *See* Dayanim, *supra* note 113, at 147. The Israeli Supreme Court accorded the Hague Regulations customary law status applicable to the Israeli territories. *See id.* at 139.

189. *See id.* at 151–152. *Jus cogens* is an international principal that means "peremptory norms," which is "said to be so fundamental that states cannot agree to contravene it." CARTER & TRIMBLE, *in* INTERNATIONAL LAW, *supra* note 33, at 1, 125. *See also* BLACK'S LAW DICTIONARY 356 (Pocket ed. 1996) (defining the term, "*jus cogens*," as a "mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.").

it."[190] The Israeli High Court has consistently treated the Geneva Convention as conventional law, non-self-executing,[191] and therefore non-binding unless specifically incorporated into Israeli law.[192] In addition, Protocol I of the Geneva Convention[193] "cannot be considered customary international law because many major powers, including Britain, France, Japan, and the United States, have not acceded to it."[194]

As the above arguments illustrate, great debate continues to surround the issue of whether the Geneva Convention constitutes customary international law.[195] Even if the Convention is afforded such status, however, Israel could still be a "persistent objector"[196] to the Convention's application to the settlements. Under the "persistent objector" principle, if a dissenting state consistently opposes a law in its formative period, that law does not apply to that state.[197] Israel objected to the claim that the settlements are illegal and expressed that "the establishment of any settlement is predicated upon an extensive analysis of the title to land concerned, as well as an intricate appeals procedure . . . in order to ensure that private rights are not prejudiced."[198] Alternatively, if

190. Shah, *supra* note 98, at 241. A fundamental international principle is that a treaty does not bind non-parties. *See* Vienna Convention art. 34, *supra* note 27, at 341.

191. A self-executing treaty operates on its own force and, unlike a non-self-executing treaty, does not need legislation to effectuate it domestically. *See generally* CARTER & TRIMBLE, *in* INTERNATIONAL LAW, *supra* note 33, at 1, 185.

192. *See* Dayanim, *supra* note 113, at 153. *See also Israel Supreme Court Judgment in Cases Concerning Deportation Orders*, Apr. 10, 1988, 29 I.L.M. 139, 149 (1990) (discussing H.C.785/87, Affo v. Commander of Israeli Defense Forces in the West Bank, where the Israeli Supreme Court acknowledged that the Geneva Convention is not part of customary international law). Conventional treaties do not become binding as domestic law unless formally incorporated through enabling legislation by the Knesset (Israeli Parliament). *See* Dayanim, *supra* note 113, at 153.

193. *See* Protocol I, *supra* note 1. Protocol I to the 1949 Geneva Convention of August 12, 1949 addresses the protection of victims of international armed conflicts. Protocol II addresses the protection of victims on non-international armed conflicts. *See id.*

194. Curtis, *supra* note 166, at 480.

195. *See* Justus R. Weiner, *Human Rights in Limbo During the Interim Period of the Israeli Palestinian Peace Process: Review, Analysis, and Implications*, 27 N.Y.U. J. INT'L L. & POL. 761, 766–767 (1995).

196. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102 cmt. d. This principle is sometimes referred to as "the principle of the persistent objector." LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 89 (3d ed. 1993).

197. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102 cmt. d. *See also* OSCAR SCHACHTER, *International Law in Theory and Practice*, *in* 178 REC. DES COURS 111–121 (1982), *reprinted in* INTERNATIONAL LAW, *supra* note 33, at 139, 143.

198. Alan Baker & Ady Schonmann, *Presenting Israel's Case Before International Human Rights Bodies* (visited Sept. 16, 1999) <www.israel.org/mfa/go.asp>.

the Geneva Convention does not constitute customary international law and Israel rejects its applicability to the territories, then the Convention would not apply to the settlements.

If the Geneva Convention does represent customary international law, or the Israeli High Court declares the Convention self-executing or incorporates it into Israeli domestic law, the question becomes whether the Israeli settlement activity violates the Geneva Convention. Article 49 provides that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[199] The Geneva Convention's drafters adopted this provision to prevent transfers of population like those the Nazis committed in Czechoslovakia, Poland, and Hungary before and during the Second World War.[200] According to the authoritative International Committee of the Red Cross (ICRC) commentary, the purpose of Article 49 was 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 colonise these territories."[201]

2. Israeli Settlements and the Geneva Convention

Israel ratified the Geneva Convention in 1951[202] but has not yet ratified the Geneva Protocols I or II.[203] Israel, however, refuses to accept the Fourth Geneva Convention's full de jure applicability to the occupied territories.[204] The Israeli High Court has thus far avoided directly addressing the Convention's applicability to the territories[205] and has repeatedly refused to accept that the Convention has acquired customary international

199. Geneva Convention IV art. 49, *supra* note 1, at 3548.

200. *See* Israel Foreign Ministry, *Israel's Settlements—Their Conformity with International Law* (last modified Dec. 1996) <www.israel-mfa.gov.il>. *See also* Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 471 (1993).

201. Israel Foreign Ministry, *supra* note 200.

202. *See* Roberts, *supra* note 181, at 62.

203. *See id.*

204. *See id.*

205. Dayanim, *supra* note 113, at 143–144.

law status.[206] In contrast, "proponents of the Convention's applicability present their strongest case when invoking the overarching purposes of the Geneva Convention and the very fact of occupation itself."[207]

It is worth noting, that "among the many states that have captured territory in recent decades, only Israel has undertaken to apply the Geneva Convention on even a de facto basis."[208] Israeli military officials have, in fact, instructed Israeli soldiers to abide by the Convention's provisions,[209] and have rejected any allegations made by the international community that Israel has violated the Convention.[210] The view that the Fourth Geneva Convention should apply in the occupied territories is nevertheless widely accepted in the international arena.[211]

One of Article 49's salient features is that it only prohibits "forcible" transfers, and thus does not absolutely prohibit all transfers.[212] The plain reading of the Fourth Geneva Convention, which speaks of "forced" transfer of population,[213] makes classifying voluntary settlements as "forced" transfers troublesome. In fact, the United States recognizes Israel's reading of the Fourth Geneva Convention.[214] As a result, in 1983, despite its vocal opposition to Israeli settlements, the U.S. Government shifted from classifying the settlements as "illegal" to labeling them "obstacles to peace."[215]

Article 147 of the Fourth Geneva Convention's reference to "unlawful deportation or transfer"[216] implies that some deportations and settlements are lawful because of the voluntary nature of the deportation or settlement.[217] Some scholars argue that the "word 'deportation' in [A]rticle 49 is a term of art,

206. *See* Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245, 250 (1996).

207. Dayanim, *supra* note 113, at 143.

208. Weiner, *supra* note 195, at 768–769. *See also* Shoham, *supra* note 206, at 250.

209. *See* Shoham, *supra* note 206, at 250.

210. *See* Statement by Judge Eli Nathan, *supra* note 11.

211. *See* Roberts, *supra* note 181, at 69.

212. *See* Henckaerts, *supra* note 200, at 472.

213. *See Another U.N. Obscenity*, JERUSALEM POST, July 20, 1998, at 08, *available in* 1998 WL 6532789.

214. *See id.*

215. *Id.*

216. Geneva Convention IV art. 147, *supra* note 1.

217. *See* Henckaerts, *supra* note 200, at 472.

referring to German atrocities during World War II."[218] Thus, "[i]t is 'essentially unrelated to the measure employed by Israel, which is more a form of banishment or expulsion to protect the security of the state.'"[219] "The existence of Israeli settlements in these areas is a continuation of a long-standing Jewish presence . . . . [T]he movement of individuals to these areas is entirely voluntary while the settlements themselves are not intended to displace Arab inhabitants, nor do they do so in practice."[220] While these settlements are often considered a prelude to annexation, which Article 47 of the Geneva Convention absolutely prohibits,[221] Israel has neither expressed any desire, nor has it devised a plan, to annex the occupied territories.[222]

The contention that Israeli settlements on the West Bank violate Article 49(6) has gained extraordinary support in the U.S., Arab, Israeli, and international political arenas.[223] Although Israel's occupation purportedly violates certain provisions of the Fourth Geneva Convention, "[u]nlike the Hague Regulations, the Fourth Geneva Convention has not been regarded as solely representative of customary international law."[224] Moreover, the authoritative Hague Convention, which does reflect customary international law, does not espouse the same prohibition against deportation as does Article 49 of the Geneva Convention.[225]

Even if the Geneva Convention constitutes customary international law, Israel's activity in the occupied territories is completely incomparable with the atrocities that Article 49 was designed to prevent.[226] Although many Palestinians in the occupied territories have endured hardship during Israeli occupation, Israel has made no institutionalized attempt to destroy the Palestinian people economically or exterminate them as a race, as was the case in the Second World War.[227] "As contrasted with

218. Dayanim, *supra* note 113, at 164.
219. *Id.* at 164 n.244.
220. Israel Foreign Ministry, *supra* note 200.
221. *See* Thomas Kuttner, *Israel and the West Bank: Aspects of the Law of Belligerent Occupation*, 7 ISR. Y.B. HUM. RTS. 166, 218 (1977).
222. *See* TESSLER, *supra* note 104, at 467.
223. *See* Henckaerts, *supra* note 200, at 477.
224. Shah, *supra* note 98, at 241.
225. *See* Henckaerts, *supra* note 200, at 484.
226. *See* Israel Foreign Ministry, *supra* note 200.
227. *See* Panel Discussion, *supra* note 3, at 262. *See also* JULIUS STONE, ISRAEL AND PALESTINE 178 (1981).

this main evil at which Article 49 was aimed, the diversion of the meaning of paragraph 6 to justify prohibition of the voluntary settlement of Jews in Judea and Sumaria (the West Bank) carries an irony bordering on the absurd."[228]

C. Customary International Law

Customary international law results from the general and consistent practice of states that follow such law out of a sense of legal obligation.[229] Customary international law is comprised of two elements: first, states' common and consistent behavior under like circumstances;[230] and second, that the behavior results from a sense of legal obligation to follow such practices.[231] Therefore, customary international law does not derive from one source, but rather, is a compilation of states' common behavior as it evolves over time. For a treaty to become binding as customary international law, it must become a generalized and consistent practice among states.[232] Because the ICC Statute was recently adopted, it has not yet obtained sufficient ratification to put it into force[233] or received the opportunity to establish itself as custom.

1. Sovereignty and the Principle of the Persistent Objector

A predominant principle of customary international law is the concept of state sovereignty, which is the notion that "a nation is master in its own territory."[234] State sovereignty is an issue whenever allegations that internal actions violate international law arise.[235] Sovereignty is a widely accepted theory that goes beyond legal theory; it reflects conceptions of international order that

228. STONE, *supra* note 227, at 180.

229. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102 (2).

230. *See generally id.*

231. *See generally id.*

232. *See id.*

233. *See Ratification Status*, *supra* note 8.

234. LOUIS HENKIN, HOW NATIONS BEHAVE 13–27 (2d ed. 1979), *reprinted in* INTERNATIONAL LAW, *supra* note 33, at 31, 33.

235. *See id.* The issue of whether international law can be properly deemed "law," and why is it binding on "sovereign" states, is complex and subject to various theories. *See* CARTER & TRIMBLE, *in* INTERNATIONAL LAW, *supra* note 33, at 1, 39. For purposes of this Comment, the discussion of sovereignty will not extend beyond the basic rule of international law that: "a state *generally* has the exclusive authority to regulate conduct within its territory." Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 833–834 (1990), *reprinted in* INTERNATIONAL LAW, *supra* note 33, at 46, 46 (emphasis added).

influence political and legal decisions.[236] "The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference . . . ."[237] Although the principle of sovereignty is often violated,[238] the International Court of Justice[239] considers it an integral part of customary international law.[240] It is arguable that there can be "no . . . 'international democracy' in which a majority or representative proportion of states is considered to speak in the name of all and thus be entitled to impose its will on other states."[241] Therefore, the ICC has the potential to undemocratically impose its will on other states by expanding the definition of universally recognized war crimes and subjecting non-party states to the Court's jurisdiction. Consequently, once the ICC is established "it is more likely to expand its own jurisdiction at the expense of state sovereignty"[242] and intervene in another state's national policies.

The adoption of new laws does not necessarily bind states that expressly objected to the implementation of such laws. The consensus in the international legal community is that:

> [A] customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that otherwise the necessary degree of generality is reached. But they also seem to lay down that the rule so created will not bind the objectors; in other words, that in international law there is no majority rule even with respect to the formation of customary law.[243]

As discussed earlier, the "persistent dissenter" principle in the *Restatement (Third)*,[244] acknowledges that "in principle a state that

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236. *See* HENKIN ET AL., *supra* note 196, at 53.

237. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 35 (June 27) [hereinafter Nicaragua].

238. *See id.*

239. The Permanent Court of International Justice was established in 1921 at the Hague to be succeeded in 1946 by the International Court of Justice (I.C.J.). *See* John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535 (1993), *reprinted in* INTERNATIONAL LAW, *supra* note 33, at 16. The I.C.J. is probably the principal forum for resolving certain forms of legal issues between states. *See id.*, *reprinted in* INTERNATIONAL LAW, *supra* note 33, at 20.

240. *See* Nicaragua, 1986 I.C.J. at 35.

241. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 420 (1983).

242. Bloch & Weinstein, *supra* note 43, at 11.

243. HENKIN ET AL., *supra* note 196, at 87.

244. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102 cmt. d.

indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."[245] This principle provides an objecting state with a tool for negotiating with proponents of a new international law and limits the international community's ability to infringe on state sovereignty.

Accordingly, Israel has persistently objected to application of the transfer of population principle to the occupied territories and to allegations that the settlements violate customary international law.[246] From the moment the ICC drafting committee expanded the definition of "transfer of population," implicating Israeli settlement activity, the Israeli Government made its opposition clear.[247] Assuming the ICC Statute attains customary international law status, Israel, as a persistent objector, has a convincing claim that it is not bound by this particular provision.

Because the ICC Statute has not yet risen to the level of customary international law, states do not have an opportunity to persistently object. At the same time, unlike the fundamental principle that a treaty binds only its signatories,[248] the ICC Statute has the potential to subject non-parties to the Court's jurisdiction.[249] Thus, the ICC Statute departs from pre-existing practice by leaving little, if any, room for a state to determine the course it will follow in the development of international law. This practice could amount to blatant infringement on state sovereignty.

2. Customary International Law of Human Rights

In the area of human rights, customary international law is violated if a state practices, encourages, or condones: (1) genocide, slavery or slave trade; (2) murder or causing the disappearance of individuals; (3) torture or inhumane punishment; (4) prolonged arbitrary detention; (5) systematic racial discrimination; or (6) consistent patterns of gross violations of internationally recognized

245. *Id.*

246. *See generally* Israel Foreign Ministry, *supra* note 200; Shoham, *supra* note 206; Sieff, *supra* note 53. *See, e.g.*, Roberts, *supra* note 181, at 63 n.56 (noting that Israel has "always voted against the applicability of the [Geneva] Convention.").

247. *See generally* Statement by Alan Baker, *supra* note 9.

248. *See* Vienna Convention, *supra* note 27.

249. *See* Rome Treaty art. 12, *supra* note 5, at 1010.

human rights.[250] This list of violations does not directly include transfer of population as a violation of customary international law. Unless the act is deemed a "consistent pattern of gross violations of human rights,"[251] it is arguable that transfer of population does not amount to a war crime under customary international law.[252]

Customary humanitarian international law was applied in the "Nuremberg Military Tribunal,[253] which dealt with the most notorious instance of wartime deportations that occurred in the period after the adoption of Hague—the Nazi atrocities during World War II."[254] The Nuremberg Charter changed the concept of national sovereignty by enforcing international norms governing the conduct of armed conflict against the accused, individually or in their capacity as members of organizations or groups.[255] Political, racial, and colonization ends motivated Nazi Germany's mass transfers of population across internationally recognized borders.[256]

The Nuremberg Charter charged the Nazi war criminals with "crimes against humanity," "war crimes" and "crimes against the peace."[257] Article 6(b) of the Charter defines "war crimes" as including "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory."[258] Article 6(c) defines "crimes against humanity" as including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population."[259]

Nazi Germany's forced expulsions of civilian populations, mass deportations for purposes of forced labor, and intent to

250. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 702. *See also* HENKIN ET AL., *supra* note 196, at 615.

251. HENKIN ET AL., *supra* note 196, at 616.

252. *See generally id.* at 616–617.

253. *See id.* at 601.

254. Dayanim, *supra* note 113, at 141.

255. *See* Henry T. King, Jr., *The Meaning of Nuremberg*, 30 CASE W. RES. J. INT'L L. 143–144 (1998).

256. *See* STONE, *supra* note 227, at 178. *See also* Herbert J. Hansell, *Letter from State Department Legal Adviser Concerning Legality of Israeli Settlements in the Occupied Territories*, 17 I.L.M. 777, 779 (1978).

257. HENKIN ET AL., *supra* note 196, at 601. *See also* Dayanim, *supra* note 113, at 141.

258. NUREMBERG CHARTER art. 6(b).

259. *Id.* art. 6(c).

exterminate national, ethnic, racial, and religious groups,[260] led to an unprecedented number of deportations and population transfers, which constituted war crimes and crimes against humanity under the Nuremberg principles.[261] Some commentators equate the Nuremberg Military Tribunal's conception of deportations with the Israeli expulsion practices.[262] Others interpret the Charter as referring to deportation solely in the context in which the Nazis used it: for purposes of forced servitude or physical annihilation.[263] "While the 'correct' interpretation of the Nuremberg Charter lies open to debate, the weight of scholarly opinion tends to discount the view that . . . non-Nazi-style expulsions, are prohibited under the Charter."[264]

On May 25, 1993, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY)[265] to prosecute serious violations of international humanitarian law, including "mass killing, massive, organized and systematic detention and rape of women, and the continuance of the practice of 'ethnic cleansing'. . . ."[266] The ICTY concluded that population transfer and deportation in the form of ethnic cleansing or mass expulsion constituted both war crimes and crimes against humanity.[267] "[T]he massive, gross and systematic human rights violations occurring in the territory of Bosnia and Herzegovina . . . committed in connection with the systematic policy of 'ethnic cleansing' and genocidal acts . . ."[268] resulted in an estimated 200,000 people killed or missing since the Bosnian War's inception.[269]

As Nuremberg and the ICTY illustrate, the acts of deportation and transfer of population that have been declared war crimes are the types of acts that utterly shock the conscience.

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260. *See* STONE, *supra* note 227, at 178–179. *See also* Dayanim, *supra* note 113, at 141.

261. *See* Christopher M. Goebel, *A Unified Concept of Population Transfer*, 21 DENV. J. INT'L L. & POL'Y 29, 31–32 (1992).

262. *See* Dayanim, *supra* note 113, at 141.

263. *See id.*

264. *Id.* at 142. *See also* Ruth Lapidoth, *The Expulsion of Civilians from Areas Which Came Under Israeli Control in 1967: Some Legal Issues*, 2 EUR. J. INT'L L. 97, 98 (1990).

265. *See* ICTY Statute, *supra* note 37.

266. *Id.*

267. Alfred de Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM. L.F. 257, 259 (1995).

268. *Id.* at 281.

269. *See id.* at 272.

It is clear from precedent and development of the law regarding the types of acts constituting a transfer of population war crime, that the settling of individual civilians into Israel's occupied territories does not amount to a prosecutable offense.

V. ISRAELI SETTLEMENTS AND THE ICC STATUTE

The ICC Statute classifies transfer of population as a war crime.[270] The Statute's language implies that the Israeli settlements do, in fact, fall within the "war crime" definition.[271] The issue of Israeli settlements, however, is inseparable from the context in which it arises.[272] The nature of the Palestinian-Israeli conflict, the Oslo negotiations,[273] including the Declaration of Principles (DOP),[274] and the effect of customary international law, collectively illustrate the misapplication of the ICC Statute to the Israeli settlements.

A. The ICC Statute Does Not Accurately Reflect Preexisting International Law

Treaties typically govern international relations. On occasion, however, a principle may be so important that the international community regards it as customary international law even in the absence of a formal treaty.[275] The international community accepts the following practices as the building blocks of international human rights law: adherence to the U.N. Charter and

270. *See* Rome Treaty art. 8(2)(b)(viii), *supra* note 5, at 1007.

271. *See Palestinian Leaders*, *supra* note 13. *See also War Crimes Court*, *supra* note 23; Frum, *supra* note 94, at 27.

272. *See generally* Curtis, *supra* note 166, at 464 (stating that "Israel's present occupation of the West Bank and Gaza was brought about by attempts of Arab states to change the Mideast map by threatening Israel with annihilation in 1967. . . . Because it was the result of Israel's legitimate actions taken in self-defense, the occupation cannot be regarded as illegal.").

273. Oslo I is known as the Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr-PLO. *See* Interim Agreement, *supra* note 144. *See also* Yehuda Z. Blum, *From Camp David to Oslo*, 28 ISR. L. REV. 211, 211 (1994). In 1993, bilateral talks between Israel and the Palestinians took place in the Norwegian capital, Oslo, which resulted in the signing of the DOP, which states that Israel and the PLO "recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement . . . ." *Id.* at 214. *See* DOP preamble, *supra* note 144, at 1527.

274. *See* DOP, *supra* note 144.

275. *See generally* HENKIN ET AL., *supra* note 196, at 617.

its human rights provisions;[276] virtual universal acceptance of the Universal Declaration of Human Rights;[277] and state participation in preparing and adopting international agreements recognizing human rights.[278] A population's right not to be transferred is neither listed in the U.N. Charter[279] nor in the Universal Declaration of Human Rights.[280] Additionally, as noted earlier, customary international law, as defined by the *Restatement (Third)*, does not classify transfer of population as a violation of the customary international law of human rights.[281]

The Geneva Convention is the only international law that directly prohibits settlements,[282] but it is disputable whether the Geneva Convention has achieved customary international law status.[283] To the extent that the Geneva Convention constitutes customary international law, the ICC Statute inappropriately expands the Geneva Convention's definition of transfer of population[284] to include acts outside the scope of the preexisting definition.[285] Furthermore, the ICC Statute strays from the well-recognized principle that a treaty only binds its signatories.[286] For all of these reasons, the ICC Statute fails to accurately reflect preexisting international law.

The language in Article 8(2)(b)(viii) of the ICC Statute departs from preexisting international law, particularly the Geneva Convention IV,[287] by defining the prohibition against deportation and population transfer in a new way. It prohibits "the transfer, *directly or indirectly*, by the Occupying Power of its own civilian population into the territory it occupies."[288] The Statute's drafters

276. *See id.* (referring to the U.N. CHARTER preamble, arts. 1, 13, 55, 62, 68, 76).

277. *See* G.A.Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

278. *See* HENKIN ET AL., *supra* note 196, at 618.

279. *See* U.N. CHARTER arts. 55–56. *See also generally* U.N. CHARTER arts. 1(3), 62(2), 68, 76(c).

280. *See generally* G.A. Res. 217A, *supra* note 277.

281. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 702. *See also* HENKIN ET AL., *supra* note 196, at 615.

282. *See* Goebel, *supra* note 261, at 42.

283. *See* Shah, *supra* note 98, at 241.

284. Article 49 of the Geneva Convention states that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Geneva Convention IV art. 49, *supra* note 1, at 3548.

285. *See* Panel Discussion, *supra* note 3, at 260.

286. *See* Vienna Convention art. 34, *supra* note 27, at 341.

287. *See* Geneva Convention IV art. 49, *supra* note 1, at 3548.

288. Rome Treaty art. 8(2)(b)(viii), *supra* note 5, at 1007 (emphasis added).

added the words "indirectly or directly" to the Geneva Convention's definition of transfer of population, and thereby created the "concern . . . that you could have transfers of population that would fall within the ambit of the Statute that might not now be covered, but could be covered in the future."[289]

The ICRC interprets the "inclusion of 'indirect' to indicate that the population of the occupying power need not necessarily be physically forced or otherwise compelled."[290] Although acts of inducement or facilitation may fall under this war crime definition, the requirement that the transfer must be executed "by the Occupying Power"[291] implies government involvement.[292] The debate over the voluntary nature of the Israeli settlements and the extent of the Israeli Government's involvement continues.[293] The fact that nationals of the occupying power choose to voluntarily settle into the occupied territory dilutes government culpability.[294] While "there are legal difficulties inherent in defining 'voluntary'"[295] because settlements may also be "facilitated by a government's actions,"[296] individuals who move to these areas do so voluntarily and without the intent to displace Palestinian inhabitants.[297]

It is important to note that there is also debate as to whether Israel actually "occupies" the territories because "that term applies to controlling territory that was captured from another country in a war of aggression."[298] Arguably, prior to Israeli occupation, the West Bank was not legally part of any country, but consisted of unallocated portions of the British Mandate.[299]

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289. Panel Discussion, *supra* note 3, at 260–261.

290. Coalition for an International Criminal Court, *International Committee of the Red Cross Working Paper—Art. 8(2)(b) ICC Statute*, June 18, 1999 (visited Nov. 7, 1999) <www.igc.org/icc/html/icrc8_2b19990618.html> [hereinafter *ICRC Working Paper*].

291. Rome Treaty art. 8 (2)(b)(viii), *supra* note 5, at 1007.

292. *ICRC Working Paper*, *supra* note 290.

293. *See generally* Goebel, *supra* note 261, at 36–37 (discussing claims that civilian settlements are for purposes of National Security). *See also* STONE, *supra* note 227, at 179 ("[S]ettlements are merely directed to the requirements of military security in the occupied territory they do not violate either the spirit or the letter of . . . Article 49.").

294. *But See* Goebel, *supra* note 261, at 36 (stating "that most settlements, if not forced, are facilitated by government actions.").

295. *Id.*

296. *Id.*

297. *See* Israel Foreign Ministry, *supra* note 200.

298. *Another U.N. Obscenity*, *supra* note 213.

299. *See generally* Dayanim, *supra* note 113, at 135–137.

Therefore, Israel did not capture the West Bank from another country in a war of aggression, but rather, captured it from another occupying power in the 1967 defensive war.[300]

Another factor to consider in determining whether the ICC Statute is consistent with preexisting international law is its treatment of population transfer, which Article 8(2)(b)(viii) categorizes as a "war crime." In general, a violation of international law does not necessarily constitute a war crime or a crime against humanity.[301] By expanding the definition of "transfer of population," and applying the term "war crime" to Israel's settlement activity, the ICC Statute dilutes the gravity of a war crime offense. Although the U.N. declared that Israeli settlements violated international law,[302] "[t]he great majority of the numerous resolutions of the U.N. General Assembly and the Security Council on the Israeli occupation have not stated that it is illegal per se."[303] Furthermore, Israel's activity under no circumstances can be compared to the mass deportations Nazi Germany committed during World War II or the "ethnic cleansing" committed in the Former Yugoslavia.[304]

> [T]he provision on transferring civilian populations into or out of occupied territories in the Geneva Convention of 1949 was adopted in response to what the Nazis had done to civilian populations under their control—deliberately moving vast groups of people for the purpose of destroying them. It has always been interpreted to refer to the involuntary transfer of populations . . . .[305]

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300. *See Another U.N. Obscenity*, *supra* note 213.

301. *See* Yoram Dinstein & Mala Tabory, *War Crimes in International Law*, 91 AM. J. INT'L L. 570, 571 (1997).

302. *See Israeli Settlements in the Occupied Palestinian Territory, Including Jerusalem, and the Occupied Syrian Golan*, G.A. Res. 51/133, 51st Sess., Agenda Item 85, U.N. Doc. A/51/592 (1997). *But see generally* Frum, *supra* note 94 (discussing the U.N.'s habitual denouncement of Israel and its policy decisions).

303. Roberts, *supra* note 181, at 67. *See, e.g.*, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, G.A. Res. 41/63, 41st Sess., 95th plen. mtg. (1986); *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, G.A. Res. 43/58, 43rd Sess., 71st plen. mtg. (1988).

304. *See generally* STONE, *supra* note 227, at 178–180. *See also generally* Zayas, *supra* note 267, at 260–261, 272, 281 (condemning the "massive, gross and systematic human rights violations occurring in the territory of Bosnia and Herzegovina, most of which are committed in connection with the systematic policy of 'ethnic cleansing' and genocidal acts . . . .").

305. Panel Discussion, *supra* note 3, at 261–262.

By adding the words "directly or indirectly" to the transfer of population definition, the ICC Statute wrongly places voluntary movement of civilians on par with the type of forcible transfer of populations the Nazis employed.[306] Therefore, the ICC Statute elevates what once was arguably only a violation of international law, to a war crime, which is one of the most serious international offenses.[307]

B. International Law of Belligerent Occupation and the Declaration of Principles

The conflict between Israel and the Palestinians, which is rooted in both peoples' struggle and right of self-determination,[308] is neither a conventional international struggle between two sovereign entities nor a purely domestic matter. Consequently, "[t]he creation of Israel did not involve the substitution of one sovereignty for another, instead it was a state emerging from a mandate."[309] Israel's formation fostered the emergence of sovereignty in a territory where sovereignty had been suspended.[310] It is important to recognize that the circumstances giving rise to the issue of Israeli settlements differ greatly from those surrounding the crimes committed in Nazi Germany and the former Yugoslavia.

The laws of belligerent occupation empower the occupant "to maintain order and utilize the resources of the country for its own military needs."[311] Normally, under the laws of belligerent occupation, the occupying power is expected to rely on the organs of the subservient government to maintain law and order.[312] "When these institutions prove inadequate, the belligerent may replace them with institutions of a military nature."[313] Because Israel did not oust a legitimate sovereign from the area,[314] it is arguable that the laws of belligerent occupation do not apply to

306. *See id.* at 262.
307. *See generally id.* at 261–262.
308. *See generally* U.N. CHARTER art. 1(2).
309. John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171, 210 (1998).
310. *See id.*
311. HENKIN ET AL., *supra* note 196, at 1032.
312. *See id.*
313. *Id.*
314. *See* Shah, *supra* note 98, at 245.

the Israeli occupation.[315] The international community, however, applied the customary international law of belligerent occupation to the territories,[316] and consequently, considers the territories to be under Israeli belligerent occupation.[317]

According to the law of belligerent occupation,[318] Israel implemented its own military institutions because the subservient government was not only inadequate, it was nonexistent.[319] The land did not have an established, cohesive legal structure.[320] The laws of belligerent occupation continue to apply to the occupied territory until the occupier leaves, which has not yet occurred in this case, or until the parties enter into an express agreement.[321] Israel's implementation of laws in the occupied territories is therefore consistent with the law of belligerent occupation.

In 1993, at the Oslo discussions, Israel and the PLO entered into the DOP.[322] This bilateral agreement signaled the end to the application of the laws of belligerent occupation.[323] Under international law, such a bilateral treaty has a contractual character that places a legal obligation on the parties and may prevail over general law.[324] "The rights and duties of States are determined . . . by their agreement as expressed in treaties—just as in the case of individuals their rights are specifically determined by any contract which is binding upon them."[325] As a result, when a controversy arises between two states regarding a matter regulated

315. *See id.*

316. *See generally* Hansell, *supra* note 256, at 777.

317. *See* Dinstein, *supra* note 99, at 313.

318. *See* HENKIN ET AL., *supra* note 196, at 1032.

319. *See generally* Curtis, *supra* note 166, at 492 (discussing the fact that there was no single cohesive legal system because the region consisted of an "amalgam of Mandatory law, Jordanian law, Israeli law, military administrative law, and recently enacted local ordinances.").

320. *See id. See also generally* Shoham, *supra* note 206, at 252. The "laws in force" in the West Bank were a combination of Jordanian law, British Mandatory legislation, remnants of the 1922–1947 British rule in Palestine, and Ottoman law surviving from WWI. *See id.* In Gaza, Egypt enacted security-related laws and regulations specifically for the area, and in most other areas, the prevailing legislation remained the British Mandatory Ordinances and Orders, together with some Ottoman remnants. *See id.*

321. *See* Eyal Benvenisti, *The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement*, 4 EUR. J. INT'L L. 542, 550–551 (1993).

322. *See* DOP, *supra* note 144.

323. *See generally* Shoham, *supra* note 206, at 270–271 (discussing the DOP's applicability, the withdrawal of Israeli forces in the West Bank, and the resulting transfer of agreed powers and authorities to the Palestinian Council).

324. *See* HENKIN ET AL, *supra* note 196, at 95.

325. *Id.* at 94–95.

by a treaty, the parties should invoke and apply the applicable provision of that treaty.[326] Although the treaty does not automatically prevail over customary international law, the parties' intentions are of "paramount importance."[327] The treaty-making process allows states to participate equally in creating law and influencing its progressive development to make it more responsive to the states' needs and ideals.[328] Newly independent states would otherwise be subject to a body of customary international law they played no part in creating.

The DOP is a bilateral treaty that binds both Israel and the PLO.[329] Questions arose regarding the DOP's characterization, because it is an agreement between a state (Israel) and a non-state organization (the PLO), which was granted U.N. observer status.[330] Consistent with the 1969 Vienna Convention on the Laws of Treaties, the DOP is a bilateral treaty because it is a valid international agreement between a state and another subject of international law (such as international organizations).[331] The DOP provided Israel, a relatively young country, and the PLO, a self-governing authority without a sovereign state, an opportunity to develop law based on principles of equity. The DOP is more responsive and tailored to the parties' specific concerns than many existing international laws, in which neither had the opportunity to actively participate in developing.

Article V(3) of the DOP provides that the issue of settlements, among other things, is to be left for permanent status negotiations, which are part of the fourth and final stage of implementation.[332] In the interim, while permanent status negotiations are pending, Article XXXI(7) of the Interim Agreement[333] provides that "[n]either side shall initiate or take any step that will *change the status* of the West Bank and the Gaza

326. *See id.* at 95.

327. *Id.*

328. *See id.* at 97.

329. *See* DOP, *supra* note 144, at 1527.

330. *See* G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/RES/3237 (1974).

331. *See generally* Vienna Convention art. 5, *supra* note 27 ("The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization . . . .").

332. *See* Joel Singer, *The West Bank and Gaza Strip: Phase Two*, JUSTICE, Dec. 1995, at 1–2.

333. Interim Agreement preamble, *supra* note 144, at 558.

Strip . . . ."[334] "The Declaration does not define the area of the settlements, which are to stay under Israeli control, and thus there is doubt as to how their boundaries are to be defined."[335] During the interim, Israel will re-deploy its military forces in several stages and transfer control to the Palestinian Authority.[336] Once Israel withdraws from the territories, the Palestinian Authority will take control over all areas, except for the Israeli settlements.[337]

"Changing the status"[338] of the territory is subject to various interpretations and raises many questions. Neither the DOP nor the Interim Agreement prohibit or restrict the establishment or expansion of Israeli settlements.[339] The prohibition on changing the status of the areas is intended to ensure that neither side takes unilateral measures, such as annexation or declaration of statehood.[340] Additionally, because of the assumption that building will continue throughout the interim period, the Interim Agreement's provisions do not address planning and zoning.[341] Although establishing settlements may be viewed as a precursor to annexation, Israel neither intends to annex the West Bank or Gaza[342] nor has it requisitioned private land for purposes of establishing settlements.[343] The settlements are only established on public land after an investigation confirms that no private rights thereto exist.[344]

Arguably, the fact that the DOP postpones addressing the settlement issue until the final status negotiations[345] demonstrates

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334. *Id.* art. XXXI(7), at 567–568 (emphasis added).

335. Benvenisti, *supra* note 321, at 547.

336. *See* Interim Agreement art. I, *supra* note 144, at 559. "Re-deployment" refers to the withdrawal of the Israeli military from the areas designated within the agreement. *See id.*

337. *See* Benvenisti, *supra* note 321, at 548.

338. Interim Agreement art. XXXI(7), *supra* note 144, at 568.

339. *See* Israel Foreign Ministry, *supra* note 200.

340. *See* Singer, *supra* note 332, at 3.

341. *See generally* Interim Agreement art. XII(1), *supra* note 144, at 562.

342. *See* TESSLER, *supra* note 104, at 466. East Jerusalem, however, was annexed shortly after the 1967 Six-Day War; in 1980, the Israeli Government designated the united city of Jerusalem as the capital of Israel. *See* Shmuel Berkovitz, *The Holy Places in Jerusalem: Legal Aspects*, JUSTICE, Sept. 1996, at 4, 5.

343. *See* Israel Foreign Ministry, *supra* note 200.

344. *See id.* "The process of investigation includes an appeals process, through which any individual claiming rights in the land can object. Decisions of the Appeals Board and any declaration that land is state-owned can also be appealed to the High Court of Justice." *Id.*

345. *See* DOP art. 5, *supra* note 144, at 1528–1529.

the lack of urgency or grave threat to the Palestinian people's existence. Were the Israeli settlements on par with the gross mass deportations committed by Nazi Germany and in the Former Yugoslavia, the issue would have been far too serious to be left to negotiate years after the DOP's implementation.

Efforts to advance the peace process continue. On October 23, 1998, the Wye Agreement[346] called for Israel to withdraw from an additional thirteen percent of the West Bank, in three stages, in return for specific Palestinian security steps.[347] On November 19, 1998, the Israeli Cabinet approved the Israeli military's withdrawal.[348] In October 1999, the Israeli Government agreed to uproot several of the West Bank settlements.[349] Despite the obstacles the parties encounter, ongoing discussions and efforts to carry out the DOP continue.[350] Evidently, both parties still consider themselves bound by the bilateral treaty. Considering that the parties' intentions are of "paramount importance,"[351] other international legal instruments cannot undermine their commitment to achieve peace on mutually beneficial terms.

Israelis and Palestinians realize the necessity of achieving peace and opt to achieve that goal via bilateral negotiations. The Israel-PLO agreements outlined above do not restrict the building of settlements.[352] They do, however, reflect the parties' intentions to delay negotiating the future of the settlements until the final status negotiations.[353] As a result, the ICC Statute attempts to

346. Israel-Palestine Liberation Organization: Wye River Memorandum (Interim Agreement), Oct. 23, 1998, Isr.-PLO, 37 I.L.M. 1251 (1998).

347. *See id.* §§ I, II. *See also* Jim Lobe, *Wye Accord Only Another Step*, INTER PRESS SERV. (New York, N.Y.), Oct. 23, 1998, *available in* 1998 WL 19901150.

348. *See Background: Chronology of Palestinian Autonomy Process*, DEUTSCHE PRESSE-AGENTURE (Hamburg), Sept. 4, 1999, *available in* Westlaw, All News Plus Wires Database.

349. *See* Tracy Wilkinson, *Young Israeli Protesters Block Removal of Settlement Outpost*, L.A. TIMES, Oct. 20, 1999, at A8. *See also* Rebecca Trounson, *Bombs Injure 30 Israelis Ahead of Peace Talks*, L.A. TIMES, Nov. 8, 1999, at A12.

350. *See, e.g.*, Edwin Chen & Tracy Wilkinson, *Leaders Join Clinton in Tribute to Slain Israeli Premier. President Calls on Both Sides to 'Finish the Job' Started by Rabin*, L.A. TIMES, Nov. 3, 1999, at A1 (discussing the continued efforts and negotiations between Israeli Prime Minister Ehud Barak and Palenstian Authority President Yasser Arafat to reach a framework agreement to resolve outstanding issues and ultimately obtain peace).

351. HENKIN ET AL., *supra* note 196, at 95.

352. *See generally*, DOP art. V, § 3, *supra* note 144, at 1529; Interim Agreement arts. XII, XXXI, *supra* note 144, at 562, 568.

353. *See* DOP art. V, *supra* note 144, at 1529.

deprive these parties of their right, as nation-states, to foster international relations free from outside interference.

VI. POLITICS IN THE ICC AND POLICY CONSIDERATIONS

As a judicial body, the ICC's role is to apply and interpret international law. The ICC should be an independent, fair, impartial, and broadly representative international criminal judiciary free from political influences. To achieve this objective,[354] the ICC Statute's application and interpretation "must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[355]

Since its creation, however, power politics have played a part in the ICC's development. Arab countries and their supporters used the ICC as a political tool to condemn Israel.[356] Israel and the United States protested the provision expanding the transfer of population definition.[357] The ICC Statute was deliberately and openly drafted "in order to meet a political agenda of certain states, with little affinity to what genuinely constitutes the gravest of war crimes."[358] If the ICC becomes a politically driven judicial body, its role, as an independent and impartial court, will be severely undermined. States with less political clout are more susceptible to exaggerated violations and thus become political targets.[359] Although the ICC is obligated to apply human rights norms impartially, such an unbiased application is unlikely with regard to politically weaker states.[360] Moreover, despite this judicial body's purported "neutrality" and its prohibited use of

354. *See* Rome Treaty preamble, *supra* note 5, at 1002 (discussing the reason for the ICC's formation and purpose, which is to prosecute the most serious crimes threatening the international community's peace, security, and well being).

355. *U.N. Diplomatic Conference*, *supra* note 42.

356. *See Palestinian Leaders*, *supra* note 13.

357. *See generally* Scheffer, *supra* note 40. *See also* Frum, *supra* note 94.

358. Statement by Alan Baker, *supra* note 9.

359. *See generally* Panel Discussion, *supra* note 3, at 257 ("[A] small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the Court and risks deterring responsible international action to promote peace and security.").

360. *See generally id. See also* Statement by Alan Baker, *supra* note 9.

arbitrary or adverse distinctions,[361] it is highly improbable that the ICC will completely divorce politics from the international arena.

In this author's view, Israel has been targeted politically, and in light of transfer of population precedent, its alleged international law violations have been exaggerated.[362] Additionally, ICC judges will be selected using the U.N. standard of "equitable geographic representation."[363] Previous international judicial elections illustrate that this system leaves little hope for the successful election of an Israeli candidate.[364]

In matters concerning Israel, "the United Nations has been more a political battlefield than a court of justice or a reasonable legislative assembly."[365] For example, the General Assembly's attitude towards Israel has often been strident and denunciatory—most notably in General Assembly Resolution 197,[366] which equated Zionism with "racism and racial discrimination."[367] Curiously, the U.N. has never officially condemned Arab aggression against Israel or terrorist actions by the PLO and other Arab groups.[368] These examples and the ICC Statute's recent drafting evince that Israel continues to be subject to politicized, selective targeting and politically motivated charges.

VII. CONCLUSION

The international community has witnessed grave atrocities throughout history. While the ICC admirably attempts to provide the international community with tools to prosecute those who commit heinous crimes, it tumultuously reaches far beyond

361. *See U.N. Diplomatic Conference*, *supra* note 42. Adverse distinctions include, gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. *See id.*

362. *See generally* Roberts, *supra* note 181, at 75 (discussing the U.N.'s preoccupation with the occupied territories and the phraseology employed in some General Assembly resolutions suggesting that in occupations, as in war, the laws of war are easily used as political propaganda).

363. Rome Treaty art. 36 (8)(a)(ii), *supra* note 5, at 1022.

364. *See* Statement by Alan Baker, *supra* note 9 (referring to the fact that Israel is excluded from the U.N. regional grouping system and is therefore precluded from participating in the U.N.'s main organs, including the Security Council). *See also General Assembly Concludes Consideration of Security Council Reform*, *supra* note 66.

365. Curtis, *supra* note 166, at 462.

366. *See Elimination of All Forms of Racial Discrimination*, G.A. Res. 3379, U.N. GAOR, 13th Sess., Agenda Item 68, U.N. Doc. A/RES/3379 (XXX) (1975).

367. Roberts, *supra* note 181, at 75.

368. *See* Curtis, *supra* note 166, at 464.

recognized boundaries of international law. "What started out as a treaty to establish an international court has transformed into a treaty defining crimes and establishing a super-legislature with power to define additional crimes in the future, and which can be changed, . . . by amendment by a two thirds majority . . . ."[369]

The ICC has become an entity that *defines* crimes and creates unnecessary complexities.[370] By expanding the definition of "war crimes," the ICC Statute fails to reflect customary international human rights law and thus the ICC thereby exceeds its subject matter jurisdiction. "The Statute should not have added new crimes; it should have incorporated existing crimes by reference to treaties defining those crimes."[371] Had the Statute "established a court to deal with crimes over which there exists consensus and then, as consensus developed for new crimes, added them to the court's jurisdiction, the court would have had a much better chance of being widely accepted and of succeeding."[372] The ICC's body of law will eventually expand, but rather than on the terms of a few states or an individual prosecutor, such expansion should be through the natural evolution of an impartial judicial body working for all.

Use of transfer of population in the past has resulted in unimaginable atrocities;[373] categorizing Israeli settlements as war crimes, however, is entirely inappropriate because they fall well short of "grave crimes which deeply shock the conscience of humanity."[374] Labeling Israeli settlement activity as a war crime does nothing more than illustrate the effects of extreme political influence on the Court and further demonstrate this purported "impartial" international judiciary's potential to abuse its power and use it as a political tool.

The ICC Statute's indiscriminate jurisdictional scope further illustrates how the Statute rebukes longstanding principles of

369. Panel Discussion, *supra* note 3, at 235.

370. *See id.* at 235, 256.

371. *Id.* at 256.

372. *Id.* at 235.

373. The transfer of population in the former Yugoslavia amounted to ethnic cleansing. *See generally* Zayas, *supra* note 267, at 259–261, 271–272.

374. Rome Treaty preamble, *supra* note 5, at 1002. The preamble to the Rome Treaty provides that the Court was established to address the "unimaginable atrocities which deeply shock the conscience of humanity" and "the most serious crimes of international concern." *Id. See* Panel Discussion, *supra* note 3, at 234.

international law.[375] International law does not automatically govern all states; rather, it must evolve over time.[376] Subjecting non-parties to the Statute undermines the international law principles of sovereignty and the "persistent dissenter."[377] The ICC infringes on states' rights to negotiate bilaterally and discourages parties from negotiating tailored agreements because the ICC can undermine such agreements by prosecuting states for exaggerated violations of the Statute.

After examining the ICC's jurisdiction, the history of the Israeli-Palestinian conflict, preexisting international law, and the erroneous application of the "war crime" provision to Israeli settlements, it is evident that the ICC Statute needs extensive improvement. The need for a universal body of law protecting human rights and an international court enforcing the law is undeniable. Such an endeavor, however, requires a judicial body that is truly independent of political influence and does not overstep customary boundaries of international law—the ICC, as presently composed, is woefully ill equipped to achieve this essential and compelling goal.

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375. *See* Bloch & Weinstein, *supra* note 43, at 24.

376. *See generally* RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 148, § 102.

377. *See id.* § 102 cmt. d.

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