

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

This PDF is auto-generated for reference only. As such, it may contain some conversion errors and/or missing information. For all formal use please refer to the official version on the website, as linked below.

## Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

<https://www.e-ir.info/2013/01/14/the-legality-of-israeli-settlements-in-the-occupied-palestinian-territories-under-international-law/>

TILMAN RODENHÄUSER, JAN 14 2013

### Introduction

Following Palestine's acceptance as a "non-member observer State" to the United Nations in November 2012, Israel announced the construction of new settlements in the Occupied Palestinian Territories[1]. The construction of Israeli settlements in the occupied territories is considered to be one of the main obstacles for peace negotiations between Israel and Palestine.<sup>[2]</sup> The Israeli-Palestinian conflict as a whole and the questions on the legality of Israeli settlements in the West Bank in particular involve historical, religious and political positions of the conflicting parties that seem barely reconcilable. Faced with these complex and conflicting views, this article argues that international law could serve as an 'objective framework' to clarify some of the disputed issues.

While international law can be interpreted in different ways and according to the various interests involved, legal arguments have two main comparative advantages to historic, political, or religious arguments: first, any reasonable legal interpretation of facts must first follow legal rigor. This means that no argument can be advanced without finding support in the sources of international law.[3] Thereby, law provides a language which contains a certain level of objectivity. Moreover, international law as a mechanism of dispute settlement is designed to apply in situations where opposing opinions clash. Second, while jurisprudence of international courts or tribunals does not create obligations for all States, the International Court of Justice (ICJ) and other judicial bodies have authoritatively clarified a number of important legal questions. Presupposing that any State aims – or pretends to aim – at compliance with international law, it is difficult to question findings by the ICJ or other international tribunals. Therefore, sources and authoritative interpretations of international law provide a 'set of rules' or a 'framework' on the basis of which international disputes should be solved. While international law is often only one aspect taken into consideration by States in international disputes, having legal questions resolved by a court of a commission of legal experts could provide a promising point of departure for political negotiations.

Throughout the last four decades, Israel has claimed that its settlements in the Occupied Palestinian Territories are in accordance with international law. It stresses to have,

*valid claims to title in this territory based not only on its historic and religious connection to the land, and its recognized security needs, but also on the fact that the territory was not under the sovereignty of any state and came under Israeli control in a war of self-defence.*[4]

The aim of this paper is to analyse under international law the validity of the three main arguments advanced by Israel: First, Israel claims to have a right to the occupied territories;[5] second, Israel considers international humanitarian law (IHL) not to be applicable;[6] and third, Israel considers that even if IHL was applicable, the settlements in the Occupied Palestinian Territories were not in violation of these rules.[7] Alleged human rights violations committed through the settlement practise by Israel will not be analysed.

### Israel Does Not Have a Legal Claim on the Occupied Palestinian Territories

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

By referring to the Occupied Palestinian Territories as “disputed” instead of “occupied” territories, Israel claims that it holds a legitimate right to these territories.[8] This claim is either argued to be a historic title deriving from a long-term presence in these territories, or that Israel’s right to settle in the Occupied Palestinian Territories derives from the Mandate for Palestine of 1922.[9] The possibility to claim historic rights to territory – understood as a right to territory which derives from the continued presence of a state’s people in that particular territory or a right which consolidated over time – is frequently invoked by States.[10] However, the International Court of Justice has found that this theory of historic consolidation of title “is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law”.<sup>[11]</sup> Indeed, the claim that Jews lived in the territory which forms today the Occupied Palestinian Territories over thousands of years without constituting a State can hardly justify a legal claim on a territory to which a different legal regime applies.<sup>[12]</sup> Accepting that states could claim historic title to territory for which different legal titles are in force would create a potentially dangerous situation of instability that would contravene the aims of peace and stability under international law.<sup>[13]</sup>

Furthermore, it has been argued that Israel’s right to the Occupied Palestinian Territories derives from the Mandate for Palestine of 1922<sup>[14]</sup> which includes the provision that Jewish immigration and their close settlement shall be facilitated.<sup>[15]</sup> This would, first of all, require that rights obtained from a mandate given by the League of Nations over 90 years ago still apply today. In its advisory opinion on the International Status of South-West Africa the ICJ established that the mandate system remains in force even though the League of Nations ceased to exist.<sup>[16]</sup> It could be claimed that under this assumption the Jewish right to ‘close settlement’ in the whole of the mandate territory does still exist.<sup>[17]</sup> However, after the General Assembly had decided the partition of the territory in 1948<sup>[18]</sup> and the state of Israel was established, the Jewish people’s rights under the mandate have been fulfilled and they no longer have the right to settle in the former Mandate territory except for the state of Israel.<sup>[19]</sup> Moreover, the right to Jewish settlement in the mandate territories was not unlimited but conditioned on the preservation of “the rights and position of other sections of the population”.<sup>[20]</sup> Such civil and religious rights of the Palestinian populations are certainly violated by on-going Israeli settlement in Palestine.<sup>[21]</sup>

As a result, Israel’s claim of having a legal entitlement to build Israeli settlements in the Occupied Palestinian Territories does not find support in international law. This conclusion has been emphasized by the highest political and judicial international authorities: the UN Security Council and the International Court of Justice find that the legal status of the Palestinian territories is that of occupied territories and not of disputed territories. <sup>[22]</sup> By definition, a State cannot belligerently occupy its own territory. Therefore, both the ICJ and the UN Security Council do not consider that Israel has a legally valid claim to these territories under international law.

## Israel’s Conduct in the Occupied Palestinian Territories is Governed by International Humanitarian Law

Since Israel does not have a legal entitlement to the territories which it conquered in 1967, these territories could *a priori*, be considered occupied territories with the consequence that Israel became an occupying power. As such, Israel would be bound by international humanitarian law. In addition to claiming a legal right to the Occupied Palestinian Territories as discussed in the previous section, Israel disputes the applicability of international humanitarian law on belligerent occupation. It argues that the application of the rules governing belligerent occupation is based on the assumption that, first, there has been a legitimate sovereign who was ousted by a belligerent occupant,<sup>[23]</sup> and second, that the aim of the provisions is *‘to safeguard the revisionary rights of the ousted sovereign’*<sup>[24]</sup>. Israel advances that because Jordan, as the ousted state, has not been the legitimate sovereign of the occupied territories and did therefore not have any revisionary rights, neither the ‘The Hague Convention’ of 1907<sup>[25]</sup> (HC) nor the Fourth Geneva Convention of 1949<sup>[26]</sup> (GCIV) apply.<sup>[27]</sup>

Although Israel is not party to the HC, according to the ICJ the rules contained in the convention form part of international customary law and are therefore binding upon all States, including Israel.<sup>[28]</sup> According to Art. 42 HC, the listed rules on belligerent occupation apply to territory *“when it is actually placed under the authority of the hostile army”*. There is no criterion as to who was the sovereign of the occupied territory before occupation in Art. 42 HC. The scope of application is solely defined according to the question of whether effective control is exercised over the territory in question.<sup>[29]</sup> According to the fact that Israel occupied the territory concerned in the course of an

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

armed conflict in 1967, and exercises effective control over it,[30] the Occupied Palestinian Territories must be regarded as under belligerent occupation and therefore the HC is applicable. This legal analysis has been confirmed by the Israeli High Court of Justice on a number of occasions.[31] Therefore, the argument that the rules on belligerent occupation as found in the 'The Hague Convention' of 1907 do not apply can hardly be upheld by Israel.

Additional rules on belligerent occupation are found in the Fourth Geneva Convention. According to Art. 2 (2) GCIV, the convention applies "*to all cases of partial or total occupation of the territory of a High Contracting Party*". Israel argued that the convention does not apply to the Occupied Palestinian Territories because these territories do not qualify as *territory of a High Contracting Party*.<sup>[32]</sup> While apparently in line with the wording of the Geneva Conventions, this interpretation of the GCIV is hardly convincing.<sup>[33]</sup> The scope of application of the convention is defined in Art. 2 (1) GCIV which prescribes that it "*shall apply to all cases of [...] any other armed conflict which may arise between two or more of the High Contracting Parties*". The purpose and function of Art 2 (2) GCIV is not to restrict the applicability of the convention but to extend it to situations where territory is occupied without the use of force.<sup>[34]</sup> In addition, the aim of the GCIV is not to protect revisionary rights of states but the protection of the individual.<sup>[35]</sup> Accordingly, the application of IHL is not subject to the recognition of sovereignty over territory by the other party to the conflict because this limits its scope of application significantly and contradicts its purpose. What is decisive in order to determine if a belligerent occupation exists is that as a consequence of armed conflict a state exercises governmental authority over a territory that has previously not been under its control.<sup>[36]</sup> As a result, Israel qualifies as a belligerent occupant and is bound by the GCIV as well as the HC in the Occupied Palestinian Territories. Once again, this view finds support in resolutions of both the United Nations General Assembly and Security Council as well as by the ICJ.<sup>[37]</sup>

## The Construction of Israeli Settlements in the Occupied Palestinian Territories Violates International Humanitarian Law

Art. 49 (6) GCIV prescribes that "*the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies*". At first sight, permitting and supporting the construction of settlements in an occupied territory and permitting its own citizens to live in these settlements appears to be a transfer of population in occupied territories. Justifying its settlement policy, Israel claims that Art. 49 (6) GCIV only concerns the *forcible* transfer of civilian population, that the settling of Israelis in the Occupied Palestinian Territories is entirely voluntary and therefore not illegal.<sup>[38]</sup> Indeed, the intent of the drafters of the clause was to prevent practices that appeared in World War II, when certain Powers "*transferred portions of their own population to occupied territory for political or racial reasons*".<sup>[39]</sup> Referring to the Nazi practice, it was argued that Art. 49 (6) GCIV only includes situations where a local population is replaced by the transfer of an occupant's own population, which was said is not the case in the occupied territories.<sup>[40]</sup> However, contrary to the Israeli understanding of the law, Art. 49 (6) GCIV is not limited to forcible transfer or the replacement of population but prohibits "*any transfer*".<sup>[41]</sup> The authoritative commentary by the International Committee of the Red Cross points out that the word "*transfer*" in Art. 49 (6) GCIV cannot be regarded as similar to "*forcible transfer*" in Art. 49 (1) GCIV.<sup>[42]</sup> Therefore, Israel's policy of facilitating and encouraging transfer of its own population into the Occupied Palestinian Territories is in violation of Art. 49 (6) GCIV.<sup>[43]</sup>

The Fourth Geneva Convention is not the only set of international rules applicable in situations of occupation. In order to be legal under international law, the Israeli settlement policy must also be in line with the 'The Hague Convention' of 1907. Whereas Art. 46 HC states that "*private property cannot be confiscated*", Art. 52 HC allows the occupant to take requisitions in kind from inhabitants for the needs of the army of occupation.<sup>[44]</sup> Interpreting these provisions, the Israeli High Court found that if a settlement is justified by security needs of the army and only temporary, settlements on private property in the Occupied Palestinian Territories are permitted under international law.<sup>[45]</sup> However, neither the argument that settlements serve military purposes nor that they should be regarded as temporary are unequivocal.<sup>[46]</sup> In the particular case of the Elon Moreh settlement in 1979, the Israeli High Court found that the construction of the Elon Moreh settlement was neither militarily necessary nor intended to be temporary and ordered the land to be returned to its Palestinian owners.<sup>[47]</sup> This ruling of the Israeli High Court shows that it is difficult to justify the construction of Israeli settlements on private property in the Occupied Palestinian Territories. As a result, Israel changed its policy and started to build settlements on so called 'state lands' as defined

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

under Ottoman Land Law over which Israel exercise authority for the duration of the occupation.[48]

According to the Israeli non-governmental organization B'Tselem, in order to increase the amount of so called 'state land' on which settlements can be built Israel conducted a practise under which it declared territory for which no private legal title existed 'state land' in accordance with Ottoman Land Law. Such declarations are also made for territories for which no legal title can be proved by the potential private owner.[49] Moreover, land that has been left by its original owner was declared "abandoned land" and came under the custody of the military authority.[50] The Israeli High Court declared this practise to be in line with both Israeli and international law.[51]

It can, however, also be argued that this practise, which is based on a military order, is questionable under international law. Although it is allowed for the occupant to enact regulations, including military orders, in occupied territories under Art. 43 HC in order "*to restore, and ensure, as far as possible, public order and safety*", these regulations are only admissible when the occupant is absolutely prevented to respect the laws in force in the country. The provision to be "*absolutely prevented*" from applying the law in force must be understood as the necessity to enact a new regulation either for the legitimate interests of the occupying power or the interests of the civilian population.[52] Legitimate interests of the occupying power as permitted by IHL can only be the security interests of the occupant. As a result, it is highly questionable if the military order that enables Israel to declare land "state land" is permissible under Art. 43 HC. As mentioned above, claiming land in order to build civil settlements can hardly be justified by legitimate security interests of the occupant. Neither can it be argued that the military order was in the interest of the local Arab population.[53]

Even if we assume that it is internationally lawful to enact a military order which allows Israel to declare occupied territories 'state land', Art. 55 HC restrict the possibility to use property of foreign powers. Art. 55 HC provides that with regard to property of the foreign power, the occupant shall only "*administer them in accordance with the rules of usufruct*". According to the Israeli High Court of Justice, under the rule of usufruct under Art. 55 HC "a state holding such territories is allowed to administer the property of the hostile state situated in the occupied territory and to enjoy the fruits of such property. At the same time, the state is obliged to safeguard such property and refrain from damaging it." [54] Accordingly, one could argue that building settlements is not damaging the territory but making use of it. At the same time, it is similarly valid to conclude that the construction of civilian settlements, which by their very nature are intended to be permanent and certainly impact on the occupied territory, constitute a violation of the rule of usufruct under Art. 55 HC.[55]

## Conclusion

In the view of this author, Israel cannot claim under international law to have a valid title to the Occupied Palestinian Territories – neither historically, nor based on the Palestine Mandate of 1922. This conclusion is supported by the findings of the UN Security Council and the International Court of Justice that the Palestinian Territories have the legal status of occupied territories – a title which could legally not be given to a territory which forms part of the occupying power's own territory. Furthermore, Israel did not gain any title to territory by occupation in the course of the Six-Day War in 1967 or would be able to claim them as *terra nullius*. [56] Instead, Israel's conduct in the Occupied Palestinian Territories is governed by IHL. As a result, first, and confirmed by the Israeli High Court, Israeli settlements on private property in the Occupied Palestinian Territories are normally neither justified by security needs nor temporary and therefore in violation of Art. 52 HC. Second, it can be argued that the construction of settlements constitutes an excess of the rights granted to the occupying state under the rules of usufruct and therefore not permitted under Art. 55 HC. Third, it has been found by the International Court of Justice that the Israeli settlement policy constitutes a "*transfer [of] parts of its own civilian population*" into the occupied territories and therefore violates Art. 49 (6) GCIV. As a result, the construction of Israeli settlements in the Occupied Palestinian Territories is illegal under international law.

The finding of clear violations of international law by Israel imposes the question of the legal consequences of these wrongful acts. According to the Draft Articles on the International Responsibility of States, [57] a State that violates a rule of international law is under the continued obligation to respect international law, has the obligation to cease the wrongful act and shall "make full reparation for the injury caused by the internationally wrongful act" [58] Accordingly,

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

Israel is first under the continuing obligation to comply with its international obligations, notably those under IHL. Secondly, Israel is under the obligation to put an end to its settlement policy. This does not only demand Israel to cease the construction of new settlements but also to dismantle all existing civil settlements in the occupied territories and to render ineffective legislative and regulatory acts establishing the settlement regime. Thirdly, Israel is under an obligation to make reparation. This demands from Israel either to provide *restitutio in integrum*, or if this is not possible, to pay compensation for the damage caused.[59]

The view that Israel violates various provisions of international law and international humanitarian law in particular has been advanced by different states and finally confirmed by the ICJ in 2004. In addition to declaring Israeli settlements in the Occupied Palestinian Territories as having “no legal validity” the Security Council determined already in 1979 that Israel’s settlement practice “constitute[s] a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East”[60]. This statement has not lost any validity today. In order to achieve peace between the parties it will be essential that Israel recognizes – at least implicitly – its violation of international law.

—

**Tilman Rodenhäuser** is a PhD candidate in International Law at the Graduate Institute of International and Development Studies, Geneva. His research interests include international humanitarian law, international criminal law, and international human rights law.

[1] The term “Occupied Palestinian Territories” will be used by the author to refer to the territories of the former British Mandate Territories that Israel occupied during the 1967 Six-Day War.

[2] Cf. Statement by Richard Miron, Spokesman for the UN Special Coordinator for

the Middle East Peace Process, Robert Serry on Israeli settlement plans in East Jerusalem and the West Bank, available under <http://unispal.un.org/UNISPAL.NSF/0/6768ABE3972DA18F85257869004C8760> .

[3] According to Art. 38 of the Statute of the International Court of Justice, primary sources of international law are international conventions, international custom, and general principle of law.

[4] Israel Ministry of Foreign Affairs, *Israeli Settlements and International Law*, available under <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm>.

[5] In 1977 the Likud government claimed that “the Jewish people have an eternal, historic right to the land of Israel”, Cf. Mallison, Jr., W. T. and Mallison, S.V., *A juridical analysis of the Israeli settlements in the occupied territories*, in: Palestine Yearbook of International law, (Birzeit, Birzeit University, 1998), p. 9.

[6] Israel claims that the territories are “disputed territories whose status can only be determined through negotiations” and that they “should not be considered occupied territories”, Israel Ministry of Foreign Affairs, *Disputed Territories – Forgotten Facts About the West Bank and Gaza Strip*, available under [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2003/2/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We) .

[7] Cf. Fn. 4.

[8] See fn. 7.

[9] Cf. Rostov, Eugene V., “*Palestinian Self-Determination*”: *Possible Futures for the Unallocated Territories of the Palestine Mandate*, in: Yale Studies in World Public Order (Yale, Yale Law School, 1979), pp. 157-158.

[10] In a very topical dispute, China claims its right to the Senkaku Islands *inter alia* due to its historic rights to these

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

islands.

[11] International Court of Justice, *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria*, Judgment, I.C.J. Reports 2002, para. 65.

[12] As discussed below, a valid territorial title to the Occupied Palestinian Territories can be found in the Mandate of the League of Nations. Moreover, it can be argued that the Palestinian people in the territory in question possess a right to self-determination which prevails over a potential historically consolidated title.

[13] This aim of stability of frontiers is also reflected in the principle of *uti possidetis*, the purpose of which the ICJ described as “to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power”, see International Court of Justice, *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 554, para. 20; Cf. Cattan, Henry, *Palestine and International Law*, 2nd Edition, (London, Longman, 1976), p. 48.

[14] Cf. Fn. 7.

[15] See Art. 6 Mandate for Palestine, available under <http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB>.

[16] International Court of Justice, *International status of South-West Africa*, Advisory Opinion: I.C.J. Reports 1950, p. 136. Moreover, the rights of states and people are safeguarded under Art. 80 United Nations Charter.

[17] Cf. Rostov, Eugene V, p. 159.

[18] GA/Res/181 (1948)

[19] Cf. Kohen, Marcelo G., p. 25.

[20] See Art. 6 Mandate for Palestine. Similarly, the Balfour Declaration, included in the Mandate for Palestine, made the “establishment in Palestine of a national home for the Jewish people” subject to the provision that “nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine”.

[21] Cf. Mallison, Jr., W. T. and Mallison, S.V., p. 6. This aspect has also been highlighted by the ICJ with regard to the construction of the wall, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*.

[22] See *Ibid.*, para. 120, and Security Council Resolution S/RES/446 (1979).

[23] Cf. Shamgar, Meir, *The Observance of International Law in the Administered Territories*, in: Israel Yearbook on Human Rights, (Tel Aviv, Tel Aviv University, 1971), p. 263; Oppenheim, Lassa (edited by Hersch Lauterpacht), *International Law: A treatise*, Vol. 2, (London ; New York [etc.], Longmans Green, 1963), p. 434.; Blum, Yehuda Z., *The Missing Revisioner: Reflections on the status of Judea and Samaria*, in: Israel Law Review (Jerusalem, Hebrew University, 1968), p. 293.

[24] Blum, Yehuda Z., p. 293.

[25] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907..

[26] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

[27] Cf. Blum, Yehuda Z., p. 293

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

[28] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, para. 89.

[29] Cf. Arai-Takahashi, Yutaka, *The Law of Occupation*, (Leiden, Boston, Martinus Nijhoff Publishers, 2009), p. 6, 8.

[30] Cf. *Ibid.*, p. 9.

[31] The Israel High Court of Justice stated in the Beit Sourik Village Council v. The Government of Israel (HCJ 2056/04) judgement that “*since 1967, Israel has been holding the areas of Judea and Samaria in belligerent occupation*”. Moreover, it affirms that the “*authority of the military commander flows from the provisions of public international law regarding belligerent occupation. These rules are established principally in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. These regulations reflect customary international law.*”

[32] Israel does not “*agree that the Convention is applicable to the occupied Palestinian territory, citing the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt and, therefore, not a territory of a High Contracting Party as required by the Convention.*”, A/ES-10/248, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, Annex I, 2003.

[33] According to Art. 31 of the Vienna Convention on the Law of Treaties, a “*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.

[34] Cf. Pictet, Jean S., *The Geneva conventions of 12 August 1949 : commentary*, (Geneva, International Committee of the Red Cross, 1952), p.21.

[35] Cf. *Ibid.*, p. 21.

[36] Cf. Kohen, Marcelo G., p. 57, Arai-Takahashi, Yutaka, p. 9.

[37] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, para. 101. In its argumentation, the ICJ stated particularly the opinions of the Conference of High Contracting Parties to the Fourth Geneva Convention Declaration Geneva, 5 December 2001, as well as different General Assembly and Security Council resolutions which all regard the GCIV as applicable.

[38] Cf. fn. 4.; Rostov, Eugene V., p. 160.

[39] Cf. Pictet, Jean S., p. 283.

[40] Cf. Berliner M.J., *Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality under International Law*, in: Loyola International and Comparative Law Review (Los Angeles, Loyola Law School Los Angeles 1985), p. 577.

[41] Mallison, Jr., W. T. and Mallison, S.V., p. 19.

[42] The ICRC commentary explicitly states that the meaning of transfer in Art. 49 (6) is distinct from the meaning in the other paragraphs of Art. 49. Cf. Pictet, Jean S., p. 283.

[43] Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, para. 120.

[44] Cf. Oppenheim, Lassa (edited by Hersch Lauterpacht), p. 410.

# Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?

Written by Tilman Rodenhäuser

[45] Ginbar, Yuval, *Israeli Settlement in the occupied territories as a of Human Rights: Legal and Conceptional Aspects*, available under <http://www.btselem.org/english/publications/index.asp?TF=08>.

[46] The late Israeli Prime Minister and Minister of Defence Yitzak Rabin argued that most settlements did not increase Israeli security. This view has also been held by Israel generals. Cf. Ginbar, Yuval. This view is also shared by a number of scholars, cf. Mallison, Jr., W. T. and Mallison, S.V., p. 17; Kohen, Marcelo G., p. 48.

[47] In the Israeli High Court of Justice found in 1979 that the construction of the Elon Moreh settlement was neither militarily necessary nor intended to be temporary and ordered the land to be returned to its owners. See: Israeli High Court of Justice, Izzat Muhammad Mustafa Duweikat et 16 al. v Government of Israel et al., available at [http://www.hamoked.org/files/2010/1670\\_eng.pdf](http://www.hamoked.org/files/2010/1670_eng.pdf).

[48] Cf. van Nuffel, Piet, *The Story of the Israeli settlements in the West Bank as it is told in international law*, in: *Military Law Review* (Charlottesville, The Judge Advocate General's Legal Center & School, 1994), p. 371.

[49] For an extensive study of the Israeli policy of declaring Palestinian territory 'state land', see B'tselem, *Under the Guise of Legality – Israel's Declarations of State Land in the West Bank* (2012), available under [http://www.btselem.org/download/201203\\_under\\_the\\_guise\\_of\\_legality\\_eng.pdf](http://www.btselem.org/download/201203_under_the_guise_of_legality_eng.pdf).

[50] Cf. van Nuffel, p. 372.

[51] See Ginbar, Yuval.

[52] Cf. Dienststein, Yoram, p. 111.

[53] Cf. van Nuffel, Piet, p. 375-376.

[54] See Israeli High Court of Justice, "Yesh Din" – *Volunteers for Human Rights vs. The Commander of the IDF Forces in the West Bank et al.*, 2011.

[55] Cf. Mallison, Jr., W. T. and Mallison, S.V., p. 17.; van Nuffel, Piet, p. 373.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 87. In addition, the argument that the Occupied Palestinian Territory are terra nullius that could be claimed by Israel is not pertinent because even if they are currently not under the sovereignty of a state, they are under an international legal regime, see *International status of South-West Africa, Advisory Opinion: I.C. J . Reports 1950, p. 136.*, cf. Kohen, Marcelo G., p. 47.

[57] While the Draft Articles on the Responsibility of States for Internationally Wrongful Acts have only been adopted by the International Law Commission and do not as such constitute binding international law, the provisions relevant to the following analysis form part of international customary law, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 149-153.

[58] Art. 29-31 of the Draft Articles on the International Responsibility of States.

[59] Similar findings have been made by the ICJ with regard tot he construction oft he wall, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, para. 149-153.

[60] UN Security Council, SC/Res/446 (1979).



# **Israeli Settlements in the Occupied Palestinian Territories: Legal under International Law?**

Written by Tilman Rodenhäuser

## **About the author:**

Tilman Rodenhäuser is a PhD candidate in International Law at the Graduate Institute of International and Development Studies, Geneva. His research interests include international humanitarian law, international criminal law, and international human rights law.