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Can Palestine Bring Israeli Officials before the International Criminal Court?

By John Quigley

The acceptance of Palestine's statehood by the international community opens the path for Palestine to act at the international level in a way it has not heretofore done. These opportunities are available even as Palestine's territory remains under belligerent occupation. Palestine's status as a state is not dependent upon having control of its territory in the way most states do. Belligerent occupation, which has been the condition for Palestine's territory since the Arab-Israeli war of 1967, does not negate statehood.

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About This Issue

The International Criminal Court opened its doors on July 1, 2002.

It is the first treaty-based international court set up to prosecute individuals for the worst acts known to man: genocide, war crimes, and crimes against humanity.

Currently, 122 countries are parties to the Statute of the Court, 31 others have signed the Statute but have not yet ratified it.

At first, the United States did sign, but before it got to ratifying it, Pres. George Bush, in May 2002, directed his Undersecretary of State John Bolton to inform the U.N. Secretary General that the U.S. no longer intended to be a party to the Statute. Consequently, the United States had no legal obligations as a result of its former signature.

Soon thereafter, the State of Israel followed suit.

Then, on Nov. 29, 2012, the U.N. General Assembly, in the face of intense opposition from the United States and Israel, voted overwhelmingly to upgrade the U.N. status for "Palestine" from "non-member observer entity" to "non-member observer state."

This, at once, raised two questions: Does this upgrade in status mean that Palestine can now bring criminal charges against Israeli officials before the International Criminal Court? And, if so, what charges?

For the answers to these questions we went to John Quigley, professor emeritus of International Law at Ohio State University. He is the author of "The Genocide Convention: An International Law Analysis" and "Palestine and Israel: A Challenge to Justice." I reminded Professor Quigley that his last feature article for *The Link* was back in 1989 — a quarter of a century ago—entitled "The International Crimes of Israeli Officials."

On page 14, Jane Adas reviews the book "Contested Land, Contested Memory" by Jo Roberts.

The Order Form for this book, as well as other books and DVDs is on page 15.

We note with sadness the passing of Nick Eoloff, a longtime peace activist who, with his wife Mary, in 1996 adopted Mordechai Vanunu, the Israeli who was serving an 18-year prison sentence for revealing Israel's nuclear program. The Eoloffs, both Americans, told their story in our 2004 *Link* "Mordechai Vanunu."

Both the Quigley and Eoloff *Links*—as well as all our *Link* issues going back to 1968—can be found on our updated website: www.ameu.org.

John F. Mahoney
Executive Director

International Criminal Court, The Hague

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In the Spring of 2014, Palestine began on the path of accession to multilateral treaties. The fifteen treaties did not involve membership in any international organization but were major treaties dealing with important aspects of international life. These bring Palestine into rights and carry obligations across a range of international activity.

In 2011, Palestine acceded to a treaty that did involve membership in an international organization, namely, the United Nations Economic, Social and Cultural Organization (UNESCO). Palestine has taken advantage of that membership to secure status as a world heritage site for the Church of the Nativity in Bethlehem.

These initiatives and others that may be taken are fully within the legal capacity of Palestine as a state of the international community. As Palestine joins more international organizations, it will find itself engaging in relations with other states in a new way.

Palestine will have to deal not only with issues relating to it, but issues that relate to states generally. Palestine will need to take positions on a myriad of issues that extend beyond its own situation and which Palestine has previously not been called to address. It will find itself asked to deal with issues like world climate change.

This activity will require expenditure of resources and development of new expertise. Nonetheless, this kind of engagement holds the potential of enhancing respect for Palestine, of heightening an understanding of its positions, and of effectuating its legal rights.

The Rome Statute

None of the treaties to which Palestine has acceded to date involve it in international adjudicatory processes. As Palestine government officials have indicated, however, Palestine has ready a list of additional treaties to which it may accede. Much speculation has centered on whether one of these might be the Rome Statute of the International Criminal Court.

The Palestine Government has prominently mentioned the Rome Statute as a treaty it has in view. The possibility that Palestine might accede to the Rome Statute has drawn a negative reaction from Israel, because it would open the way for the International Criminal Court to investigate Israeli officials for possible commission of war crimes in the territory of Palestine.

Multilateral treaties typically include a proviso indicating which states may become parties. In some instances, the circle of potential parties is limited to states that are members of the United Nations, or members of specialized agencies of the United Nations. However, for accession to the Rome Statute such membership is not necessary. The Rome Statute is, by its Article 125, open to accession by "all states." The procedure Palestine would use to become a party to the Rome Statute is called accession. States that participate in the drafting of a treaty may sign it and then become a party by ratifying their signature. A state that is not involved in the drafting that seeks to join does so by a different process, typically by acceding.

Now that Palestine has become a party to a number of treaties, there is little question that its accession to the Rome Statute would be accepted as valid. The Rome Statute has as its depositary the Secretary-General of the United Nations. The Secretary-General is depositary as well for a number of the treaties to which Palestine recently acceded. For those treaties, the Secretary-General accepted Palestine's instruments of accession as valid. There would be no reason for the Secretary-General not to do the same with Palestine's instrument of accession to the Rome Statute.

As a party to the Rome Statute, Palestine would have the right to do what in the parlance of the Rome Statute is called a "referral." It could "refer" to the Prosecutor any situation that it considers to involve one of the crimes over which the Court has jurisdiction. Under Article 14 of the Rome Statute, any state that is a party to the Rome Statute may refer "a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."

So Palestine could determine what "situation" or "situations" it thinks involve criminal conduct and

then make a referral. It would not name persons it believes to be guilty. It would fall to the Prosecutor to investigate to see whether any crimes were committed, and which persons might have committed them. The Prosecutor after a preliminary investigation would need confirmation by a pre-trial chamber of the Court to carry out a full investigation. If that proceeded successfully, the Prosecutor could then prosecute particular individuals before a trial chamber of the Court.

The International Criminal Court has jurisdiction over individuals, but not over states. One sometimes hears mention in public discourse of the possibility of Palestine taking Israel to the International Criminal Court. That cannot happen. The Court is a criminal court that has jurisdiction to prosecute only individuals, not states.

That said, there is no limit on the individuals who may be prosecuted. Domestic courts have no jurisdiction to try the head of state of a foreign state. The International Criminal Court has no such limitation. The Court has issued an indictment for the President of Sudan and is presently trying the President of Kenya. Article 27 specifies that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute."

Before choosing a "situation," Palestine would need to identify one involving the commission of crimes within the Court's jurisdiction. The Court has jurisdiction over crimes against humanity, war crimes, and genocide. The Rome Statute gives a definition of each of these categories of crime.

Once Palestine is a party to the Rome Statute, the Prosecutor may initiate a prosecution based on information gained from any source. It would not be necessary for Palestine to refer a situation for the Prosecutor to begin an investigation. A referral under Article 14, however, does place a situation on the Prosecutor's agenda and calls for action at least to explore the possibility of an investigation that might lead to a prosecution.

Jurisdiction in the International Criminal Court

Before one can understand the significance of a possible Palestine accession to the Rome Statute, one must understand how the Court gets jurisdiction. Even though the Court was established with the idea that it would have broad jurisdiction, the Statute was written in a way that limits the Court to certain circumstances.

First, the Court is limited in the types of crime over which it has jurisdiction. These crimes – spelled out in the Rome Statute—are genocide, crimes against humanity, and war crimes.

The Court can entertain a prosecution for these crimes if they are committed in the territory of a state that is a party to the Rome Statute, or on board a ship registered in a state that is a party. Additionally, it can entertain a prosecution over a person who is a national of a state that is a party. Thus, the jurisdiction of the Court depends on the location in which a crime is committed. Under these provisions, an individual can be subject to prosecution who is not a national of a state party but who commits and act in the territory of a state party.

The Court already has one case within its jurisdiction in this way that relates to Palestine. The case came out of the Gaza flotilla incident of 2010, when a Turkey-based group tried to sail a fleet of vessels to the Gaza Strip to deliver supplies. The vessels sailed from Turkey in the direction of the Gaza Strip in May 2010. The Israeli Navy intercepted the vessels some sixty miles off Gaza to prevent them from continuing into port in Gaza. One of the vessels was called the *Mavi Marmara*. Israeli personnel forcibly boarded the *Mavi Marmara*, whereupon a violent confrontation developed during which nine passengers were killed, apparently at the hand of the Israeli personnel.

A U.N. investigation of this incident concluded that the Israeli personnel might be legally responsible for the deaths. Information was sent on the episode to the International Criminal Court. As it happened the *Mavi* Marmara was registered not in Turkey but in Comoros. Comoros is a party to the Rome Statute.

In 2013, the Comoros government referred this

situation under Article 14 of the Rome Statute. On the basis of this referral, the Prosecutor has opened a preliminary examination to determine if an investigation should follow.

In addition to jurisdiction based on a connection to a state that is a party to the Rome Statute, it is possible for the Court to have jurisdiction in relation to a state that is not a party.

A state that is not a party but that wants the Court to have jurisdiction over a specific set of crimes, or more generally, may send the Court a communication in which it grants jurisdiction, defining the scope of the jurisdiction it is granting. This procedure is governed by Article 12(3) of the Rome Statute.

As a recent example, on 17 April 2014 the Ukrainian government granted the Court jurisdiction over acts committed in its territory during the period of turmoil that led to a change of government in Ukraine—21 November 2013 to 22 February 2014. Ukraine is not a party to the Rome Statute, but under Article 12(3) it has the right to grant jurisdiction. On the basis of the Ukrainian communication, the Prosecutor has opened a preliminary examination. The aim of the Ukrainian government—expressed in press statements though not in its communication to the Court—is to gain prosecution of figures in the ousted government of Ukraine for the shooting of demonstrators in Kiev's central square.

Palestine's Declaration

Palestine did something similar following the brief war in Gaza at the end of 2008 and carrying over into 2009, the war that on the Israeli side was called Operation Cast Lead.

A few days after the Israel Defense Forces withdrew, Dr. Ali Khashan, as Minister of Justice of Palestine, filed a declaration under Article 12(3) on 22 January 2009, to confer jurisdiction on the Court. The Palestine communication, unlike the Ukraine communication, did not specify a time window. Instead it granted jurisdiction for acts in the territory of Palestine dating back to the time when the Court began to function, which was 1 July 2002. Like the Ukraine communication, the Palestine communication did not specify any particular offenses, though the aim was evidently to get the Prosecutor to investigate for war crimes for which Israeli officials might have been responsible in their prosecution of Operation Cast Lead.

Upon receipt of the 22 January 2009 declaration, the Office of the Prosecutor opened a preliminary examination but indicated it would need to determine whether Palestine was a state. Under Article 12 (3), only a state can grant jurisdiction to the Court.

By late 2009, the Prosecutor had reached no decision. On 14 December 2009 the Office of the U.N. High Commissioner for Human Rights sent the Prosecutor a letter to inquire why it was taking so long. The Prosecutor replied on 12 January 2010, stating, "In connection with this declaration, the Office must consider first whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements." The Prosecutor did not specify Palestine statehood as the issue, but the primary issue over which the Prosecutor had expressed uncertainty was the statutory requirement that the filing entity be a state.

As the Office of the Prosecutor recited in its 12 January 2010 letter, it was in receipt of communications from various parties who either argued that the Court had jurisdiction based on Palestine being a state, or who argued the contrary.

In October 2010, the Court invited eight persons who had submitted such communications to come to the Hague to argue the issue of Palestine's status and of the Court's jurisdiction flowing from the declaration of 22 January 2009. Four persons who had written in favor of jurisdiction were invited, along with four who had written against. This writer was invited as one who had written in favor. At the session at the Court's headquarters in the Hague, the eight of us argued, in the presence of the Prosecutor, over the issue of whether Palestine was a state.

At that session, the Prosecutor gave no indication of his inclination on the Palestine statehood issue. Only a year and a half later did he make any public statement.

On 2 April 2012, the Office of the Prosecutor issued a statement saying that it did not consider it to be its role to decide on Palestine's statement, rather that this question should be decided by the General

Assembly of the United Nations, or by the Assembly of States Party to the Rome Statute. So after three years of considering the Palestine declaration, the Office of the Prosecutor was indicating that it was not the proper party to do so.

The Palestine government did what the Office of the Prosecutor suggested. It approached the U.N. General Assembly, asking it to affirm that Palestine is a state.

On 29 November 2012, the General Assembly did so. By Resolution 67/19, the General Assembly addressed the question of the character of the permanent mission that was already functioning at the United Nations for Palestine. Prior to that time, the General Assembly had not specified whether the Palestine mission was that of a state, or that of a non-state entity. Resolution 67/19 specified that the observer mission of Palestine was the observer mission of a state.

Even though Resolution 67/19 seemed to resolve the Prosecutor's dilemma over Palestine statehood, the Office of the Prosecutor maintained silence on the matter for another year.

Then on 25 November 2013, it published a report on pending cases and included a section on the Palestine declaration. Instead, however, of acknowledging the validity of the 22 January 2009 declaration, now that the status of Palestine as a state had been affirmed by the General Assembly, the Office of the Prosecutor did the opposite.

In the 25 November 2013 report, the Office of the Prosecutor construed its statement of 2 April 2012 as one that had supposedly rejected Palestine's status as a state and that had said that the declaration of January 2009 was invalid. In fact the statement of 2 April 2012 had not said that Palestine was not a state. The report of 25 November 2013 went on to say that since the declaration of 22 January 2009 had been invalid, it could not be "cured" by Resolution 67/19. The consequence of this analysis was that the Office of the Prosecutor would not proceed to any investigation of war crimes that may have been committed in Palestine.

If Palestine accedes to the Rome Statute, this picture would change. With Palestine as a state party to the Rome Statute, the Court would have jurisdiction, as indicated above, over acts in the territory of Palestine, or acts by Palestine nationals. Additionally and importantly, Palestine could then refer situations to the Prosecutor under Article 14 of the Rome Statute. However, since the Office of the Prosecutor does not consider the declaration of 22 January 2009 valid, the Office would regard the Court as having jurisdiction in relation to Palestine only from the date of its accession to the Rome Statute.

If the declaration of 22 January 2009 were deemed valid, however, jurisdiction would, as indicated, relate back to 1 July 2002. That would be the correct outcome. This precise situation—an Article 12(3) declaration by a non-party followed by accession—is anticipated by Article 11 of the Rome Statute, a provision that deals with jurisdiction in respect of the time at which it attaches. Article 11 provides for the situation in which a state, like Palestine, files a declaration under Article 12(3) at a time when it is not a party to the Rome Statute, but later becomes a party. Article 11 states, "If a State becomes a Party to this Statute after its entry into force, the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

That would be precisely Palestine's situation, if Palestine accedes to the Rome Statute. In other words, Palestine's accession should not nullify the jurisdiction it previously granted.

Transfer of Civilians Into WB Settlements

The questionable view of the Office of the Prosecutor that the declaration of 22 January 2009 is invalid will make it difficult to get it to take up any possible crimes committed prior to a Palestine accession to the Rome Statute. The Office will be reluctant to deal with acts committed during the 2008-2009 Gaza war.

The situation would be different, however, on another issue that might be the subject of investigation, namely, the transfer of civilians into West Bank settlements. Since the transfers would likely continue after a Palestine accession to the Rome Statute, they would be ongoing acts. The transfers are a type of act

that falls within the jurisdiction of the Court as a war crime.

The Rome Statute gives a long list of war-related acts that constitute crimes. One item in this list, found in Article 8 of the Rome Statute, is "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies." So it is a crime for an individual to transfer the occupying power's civilians into the occupied territory. Israel has been in occupation of the West Bank since 1967.

As indicated, an individual can be subject to prosecution who is not a national of a state party but who commits an act in the territory of a state party. Under accepted principles of criminal law, an act is deemed committed in a particular location if it has its effect there, even if the perpetrator is not physically present there. So an individual would not have to set foot in the West Bank to be subject to prosecution.

Such transfers being a war crime, the Office of the Prosecutor should be taking it up on its own accord, on the basis of the Palestine declaration of 22 January 2009, even without a Palestine accession to the Rome Statute. But because of the Office's view that the declaration of 22 January 2009 is invalid, it is not doing so. Once Palestine accedes to the Rome Statute, the crime of transfer would, even on the Office's view of the invalidity of the 22 January 2009 declaration, be subject to investigation. It would be incumbent on the Office of the Prosecutor to initiate an investigation of persons responsible for transferring civilians into the West Bank, since under the Rome Statute that Office may investigate at its own initiative whenever it has information from any source about war crimes. The transfer of Israeli civilians into West Bank settlements is a situation that is well known publicly.

Of course, once Palestine is a party to the Rome Statute, Palestine would have the option of sending a communication to the Prosecutor requesting it to investigate the transfers. It would then be up to the Prosecutor to determine whether that is occurring, and whether particular individuals are responsible. Palestine would not name individuals to be investigated. The Prosecutor would open a preliminary examination. The matter would be referred to the chief judge, who would assign the case to a panel of three judges. Palestine could, if it chose, present evidence to the Office of the Prosecutor about the fact of the transfers. This might include evidence both about civilians moving into West Bank settlements and evidence about activity on the part of the Israeli government to promote the settlements. But the onus for gathering evidence is on the Office of the Prosecutor.

One issue for the Office of the Prosecutor would be to determine which individuals to investigate and, potentially, to prosecute.

The Court typically focuses on high level officials responsible for a crime. In deciding which persons to investigate, the Office of the Prosecutor would doubtless focus on the term "indirectly" in the definition of the transfer offense. The Rome Statute's provision on transfer includes that phrase, which was not written into Article 49(6) of the Fourth Geneva Convention, which is that treaty's transfer provision.

Under the Rome Statute definition, it is an offense to transfer "directly or indirectly." The apparent intent of the drafters of the Rome Statute was to make clear what was not specifically stated but nonetheless strongly implied in the Fourth Geneva Convention, namely, that to be guilty of "transfer," one need not physically move a civilian into occupied territory. One could be guilty for related acts that facilitate transfer. The term "indirectly" brings within the range of prosecution private parties who act to facilitate transfer, as well as officials who make decisions about settlement policy – decisions to open a settlement, to expand housing in a settlement, to fund infrastructure servicing a settlement.

Factors Involved In Deciding to Prosecute

After deciding that particular individuals have transferred civilians, directly or indirectly, into occupied Palestine territory, the Office of the Prosecutor would need to ask itself a series of additional questions before proceeding with an investigation. The Rome Statute sets a number of prerequisites for a prosecution.

One of these relates to the question of whether potential indictees have been, or are being investigated with a view to prosecution in any domestic

court for the same conduct. Under Article 17 of the Rome Statute, a case is considered "inadmissible" if it is investigated or prosecuted by the authorities of a state that has jurisdiction over it.

A procedure to make a determination on this point is required by Article 18 of the Rome Statute. The Office of the Prosecutor would inform the Israeli government that the Office is considering proceeding to an investigation with respect to a particular individual. The Israeli government would then have one month to inform the Court that it is investigating or has investigated. Since the Israeli government does not consider transfer of civilians into occupied territory to be a crime, however, no such investigation or prosecution in Israel is likely.

Articles 17 and 53 also require the Office of the Prosecutor to ascertain whether the offense is sufficiently serious to warrant prosecution. Under Article 17, a case is "inadmissible" if it is "not of sufficient gravity to justify further action by the Court." Arguably, a transfer of a handful of civilians might not rise to the necessary level of gravity. But transfers on the scale involved in Israel's West Bank settlements would seem to qualify.

A consideration that would favor proceeding with an investigation is the fact that the Rome Statute's provision on war crimes (Article 8) states that while the Court has jurisdiction over any war crimes, it has jurisdiction "in particular" when war crimes are "committed as a part of a plan or policy or as part of a large-scale commission of such crimes." This provision is in keeping with the concept that the Court is not to deal with isolated offenses.

The transfer of civilians into West Bank settlements fits squarely within the scope of what the Court was created to do. The transfers have been carried out as a matter of policy, and over a period of time. They have been substantial in numbers.

And in distinction to many other war crimes, they are carried out by persons who deny that the activity is unlawful. A person charged with, say, directing gunfire at civilians may argue that the gunfire was not so directed, but is not likely to argue that shooting civilians is acceptable.

Still, one other calculation might need to be made by the Prosecutor. Under Article 53 of the Rome Statute, the Prosecutor is to consider "the interests of justice" before deciding to initiate an investigation. "In deciding whether to initiate an investigation," recites Article 53, "the Prosecutor shall consider whether . . . [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

The Rome Statute is no more specific than this language as to what considerations might lead to a determination that, even though a crime has been committed, there might be "substantial reasons" to decline in "the interests of justice." No such interests would seem to be present in regard to the transfer of civilians into West Bank settlements.

Background to the Prohibition on Transfer

The Rome Statute's prohibition on the transfer of civilians into territory under occupation is based on propositions found in the law of war as it has developed in international law. The law of war covers not only the period of hostilities but any occupation of territory that follows upon the hostilities. Such an occupation is termed "belligerent" because it is the product of a use of force, even if a defending army offers no resistance. Belligerent occupation is subject to a body of international law regulating the rights and obligations of all parties involved. The law of belligerent occupation protects an occupied population, while ceding to the occupying power a certain flexibility of action to preserve its temporary tenure. The law of belligerent occupation operates on the premise that the occupying power is in a position of predominance with respect to the occupied population, and therefore that the occupied population needs international protection.

The law of belligerent occupation was first codified in 1907 at a conference of the major powers of the day, convened in the Hague. They adopted a treaty they called the Convention Respecting the Laws and Customs of War on Land, and they appended to the Convention an Annex that they titled Regulations Respecting the Laws and Customs of War on Land. It is in this Annex that one finds rules on belligerent occupation that over time have come to be accepted as binding on states generally as cus-

tomary international law.

According to Article 43 of the Hague Regulations, an occupant must preserve the "public life" in the territory. The Hague Regulations did not address transfer of civilians but contained provisions to protect property that would be violated by settlements in most situations. Under Article 55 of the Hague Regulations, public lands had to be administered by the occupier to benefit the local population. Thus, a settlement on public lands would be unlawful. Private property is protected by Article 46 from confiscation. Thus, if private land were taken for a settlement, the settlement would be unlawful. But even apart from these prohibitions with respect to property, the establishment of civilian settlements would interfere with the "public life" by violating the obligation to act to benefit the local population.

The Government of Palestine in 2014 acceded to the Hague Convention under which the Hague Regulations were adopted. The Swiss government acts as depositary. Palestine President Mohamed Abbas deposited an instrument of accession with the Swiss government in 2014.

That accession was not, however, critical to the applicability of the Hague Regulations to the West Bank. The Hague Regulations are considered to reflect customary international law that binds any state that occupies any territory through belligerency. That proposition is accepted at the international level, as reflected in the 2004 advisory opinion of the International Court of Justice in "Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory."

It is also accepted by the Supreme Court of Israel, which has been called upon to rule on complaints by West Bank Palestinians who have filed court cases to object to one or another action of Israel's military authorities. The Supreme Court of Israel has accepted the proposition in those cases that the West Bank is under belligerent occupation. The Supreme Court of Israel further accepts that the Hague Regulations are binding on Israeli authorities in the West Bank because customary international law is considered part of the law in Israel.

One aspect of the obligation to preserve the "public life" in the occupied territory is an obligation not to use the territory as a place to bring in outsiders as settlers. An occupying power normally does not settle its own citizens in the occupied territory. Thus, the four powers occupying Germany after World War II did not settle their civilians in Germany. But Germany did so in eastern Europe during World War II. In sectors of occupied Poland, the German government encouraged settlement by giving Germans willing to settle incentives in the form of exemptions from tax on income, real estate, sales, and inheritance.

Following these violations in World War II of the prohibition against civilian settlement, the law of war was re-codified and spelled out in greater detail. Four different treaties were adopted in 1949, this time in Geneva, to deal with aspects of warfare. The fourth of these treaties was titled the Convention Relative to the Treatment of Civilian Persons in Time of War. It dealt with protection of civilians, both during hostilities and, following hostilities, in a situation of belligerent occupation. The drafters wrote a provision specifically directed to settlements. "The Occupying Power," they wrote in Article 49(6), "shall not . . . transfer parts of its own civilian population into the territory it occupies." Israel became a party to this Convention in 1951. Palestine became a party in 2014.

Possible Defenses

The Office of the Prosecutor would also need to anticipate defenses that might be raised by persons it contemplates indicting. The Rome Statute does not specifically direct the Prosecutor to do so before initiating an investigation, but Article 15 requires that there be "a reasonable basis to proceed with an investigation." If a prospective defendant were to have available an obvious defense, the Prosecutor might well decide there was no reasonable basis to proceed.

An indictee who tried to challenge the basic proposition that the transfers in question violate the law would confront a substantial body of international opinion to the contrary. The international community considers Israel to be in violation of international standards for its settlement construction activity. In 1980, the U.N. Security Council adopted Resolution 465 dealing with Israel's occupation of Arab territories resulting from the 1967 war. Resolution 465 states that "Israel's policy and practices of set-

tling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War."

The General Assembly, in Resolution 37/88C of 1983, also referred to the Fourth Geneva Convention and condemned the "establishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an alien population thereto."

Israel's settlements were also taken up as a human rights issue by the Commission on Human Rights, which was the United Nations' body dealing with human rights. In 1987, in Resolution 1987/2, the Commission criticized Israel for the "settlement of alien populations brought from other parts of the world in the place of the original Palestinian owners of land." The Commission called the settlement activity a violation of the rights of the Palestinian population.

If transfers into settlements in east Jerusalem were charged, an indictee might try to defend by arguing that east Jerusalem is not occupied territory. However, the law as interpreted by international institutions is that east Jerusalem is under Israel's occupation. Security Council Resolution 465 specifically mentions Jerusalem as being included in the territory under Israel's belligerent occupation. Israel has, of course, purported to annex east Jerusalem. But the law of belligerent occupation prohibits annexation by an occupying power. Both the U.N. General Assembly and the U.N. Security Council have condemned Israel's purported annexation of east Jerusalem as violative of the law of belligerent occupation. A belligerent occupant that annexes territory it occupies does not thereby legalize a transfer of population.

Voluntary Settlement

An indictee might try to argue that the civilians settled on their own, hence had not been "transferred."

That argument has been made in the literature on the topic. Julius Stone, an international lawyer, in his 1981 book "Israel and Palestine: Assault on the Law of Nations," argued that it has been the settlers themselves who established the settlements, and therefore that neither Israel nor its officials had "transferred" them. Yoram Dinstein, a leading Israeli international lawyer, also took this view. In an article titled "The International Law of Belligerent Occupation and Human Rights," in the 1978 issue of the Israel Year Book on Human Rights, he wrote, regarding Article 49(6) of the Fourth Geneva Convention: "one should differentiate between the transfer of people—which is forbidden by Article 49—and the voluntary settlement of nationals of the occupant, on an individual basis, in the occupied territory. Such settlement, if not carried out on behalf of the occupant's Government and in an institutional fashion, is not necessarily illegitimate."

The settlement activity has, however, been government-backed on the Israeli side in a variety of ways. Even the Legal Adviser to the U.S. Department of State has issued a formal opinion that the settlement activity is unlawful under Article 49 of the Fourth Geneva Convention. In the course of that opinion, published in 1980 in the official Digest of U.S. Practice in International Law, the Legal Adviser said that Article 49 "seems clearly to reach such involvements of the occupying power as determining the location of settlements, making land available and financing of settlements." He found the settlements to violate "the generally accepted interpretation of the Convention's Article 49." The settlements, he said, violated Article 49 as an unlawful "transfer of parts of its own civilian population."

Displacement

It has also been argued that Article 49 of the Fourth Geneva Convention prohibits transfer of civilians into settlements only to the extent that settlements displace local residents.

This argument was advanced in 1981 by the Israeli National Section of the International Commission of Jurists. However, the text of Article 49 contains no such limitation. The U.S. Legal Adviser, in his legal opinion on the settlements, said that the view that local population must be displaced before Article 49 is violated is incorrect. He said that the Convention applies "whether or not harm is done by a particular transfer," and that "transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope

of interim military administration."

Security Considerations

It has been argued as well for Israel that it was permitted under the law of belligerent occupation to protect the security of its temporary tenure, and that the settlements served that purpose. Such a purpose was stated by the Labor Party to be its objective in establishing settlements. Settlements would create an Israeli presence in sectors of the occupied territories. This justification was questionable on two grounds, however.

First, although an occupying power may protect its security, Article 49 appears to admit of no exceptions. Thus, while an occupying power may, in general, take measures to protect its security, it may not use civilian settlements as one of those measures. Second, even if, in theory, settlement might be justified on security grounds, the Israeli settlements did not seem to serve that end.

The U.S. Legal Adviser, referring to limits on an occupying power under the customary law of belligerent occupation, said that "the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories, and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation."

A security rationale for settlements was also negated by Theodor Meron, Legal Adviser to the Ministry of Foreign Affairs of Israel. In September 1967, shortly after the occupation began, Meron was asked for a legal opinion on settlements that might be established in the newly occupied territories. Meron wrote that "the prohibition" against settlements was "categorical and not conditional upon the motives for the transfer or its objectives. Its purpose is to prevent settlement in occupied territory of citizens of the occupying state." Meron saw no security ground on which one might justify settlement activity.

Ownership Status of the Land

Another assertion made on Israel's behalf relates

WEST BANK CONSTRUCTION UPDATE (units)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Starts	1,369	2,057	1,988	1,889	1,516	1,487	2,324	1,963	737	1,110	1,133	2,534
Under Construction	4,081	4,101	3,842	3,537	3,161	2,780	3,192	3,295	2,215	1,789	1,707	2,895
Completions	2,139	2,376	1,794	1,746	2,171	1,748	1,601	2,063	1,670	1,682	1,271	1,365

Above source: Central Bureau of Statistics, Monthly Construction Bulletin; Report on Israeli Settlements in the Occupied Territories, v. 24, #2. Below: West Bank settlement, Getty Images, huffingtonpost.co.uk

to the ownership of the land on which settlements are built. In a few instances, land projected for construction of a settlement was owned by Jews from a time prior to Israel's establishment. Some settlements were built on land confiscated from private Palestinian landowners, while others were built on land that had been state-owned prior to the occupation. Much of the land in the West Bank was held in an unclear type of tenure that theoretically involved the state as owner but that, according to local custom involved private ownership.

After 1980, the Likud-led government of the time began to consider these lands to be state-owned, and rationalized their use for settlements.

Under the law of belligerent occupation, the ownership status of a particular parcel of land is irrelevant as regards settlement activity. The prohibition against transfer is against transfer into the occupied territory.

Sovereignty in the West Bank

The Court's jurisdiction would be based on the proposition that the act of transfer has its effect in territory under occupation.

An indictee might try to argue that the West Bank is territory of Israel. However, that is an argument not made by Israel itself. When Israel is called upon to account for its human rights record before the committees that monitor human rights treaties to which it is a party, Israel consistently maintains that those treaties apply only within a state's own territory, and that the West Bank is not within its territory.

Another argument that has been made in a similar vein is that, under the mandate that Great Britain held from the League of Nations to administer Palestine after World War I, Jews had a right to settle anywhere in Palestine, which would include what is now called the West Bank. This argument, which was made by, among others, Eugene Rostow, a former official of the U.S. Department of State, was based on language in the mandate instrument whereby Great Britain committed itself to promote a Jewish national home in Palestine. This language, Rostow said, gave Israel a right to settle Israelis in any part of Palestine.

The argument has found little approbation. The mandate instrument spoke of a Jewish national home in Palestine, but without specifying what that meant, and in particular, without indicating whether it was to apply to the entirety of the territory of Palestine. The West Bank, moreover, is firmly considered to be territory under Israel's belligerent occupation only. The U.N. General Assembly Resolution 67/19 refers to Palestine's territory as the territory occupied by Israel in 1967.

Consequences of an Indictment

If the Prosecutor did gain indictments against any Israeli officials, an arrest warrant would issue. Those most likely to be named would be individuals in high-ranking administrative or policy-level posts relating to the transfer of civilians into settlements.

The Court would then seek to gain custody. If the individuals were not to surrender voluntarily, the Court might issue a request to a relevant government. Under Article 89 of the Rome Statute, if the individuals were in the territory of Israel, the Court might send a request to the Israeli government, asking for their surrender to the Court. Israel, however, is not a party to the Rome Statute, hence has no obligation to comply with such a request.

The individuals would, however, be subject to arrest were they to venture into the territory of a state that is a party to the Rome Statute. Any state that is a party has an obligation to cooperate with the Court, in particular by sending indictees for trial. This possibility would limit the extent to which an indictee could freely travel. The Court would not conduct a trial without having custody. So an indictment could remain pending for a long period of time.

Security Council Referral

Even apart from Palestine's 22 January 2009 declaration and Palestine's possible accession to the Rome Statute, there is one other way the Court could gain jurisdiction over the transfer of civilians into West Bank settlements. The Security Council of the United Nations could refer the situation to the Prosecutor. Article 13(b) of the Rome Statute gives the Court jurisdiction over any war crime that is "referred to the Prosecutor by the Security Council acting under

chapter VII of the charter of the United Nations." This power for the Security Council was inserted into the Rome Statute on the theory that the Security Council, in dealing with a situation that involves a threat to the peace, might determine that prosecution would be appropriate for crimes committed in connection with that situation. To this extent, the Rome Statute was building on the experience of the Security Council in dealing with the wars that accompanied the breakup of Yugoslavia in the 1990s. In that situation, the Security Council set up a special court to prosecute for war crimes, crimes against humanity, and genocide committed in the course of those wars.

The Security Council has had the Palestine situation on its agenda since 1948. The Security Council has already condemned the settlement policy as a violation of international law by Israel as a state. Prosecuting for that illegality would seem a logical next step. A referral is unlikely, however. The Security Council would need to adopt a resolution referring this situation to the Prosecutor. The Security Council construes the UN Charter to say that a vote on such a resolution is subject to veto by any one of the five permanent Council members. Such a proposal would be unlikely to gain the votes of all five permanent members, in particular that of the United States.

Since Security Council action is unlikely, the more feasible paths to jurisdiction in the International Criminal Court in relation to Palestine lie elsewhere. One is a change of view in the Office of the Prosecutor regarding the validity of Palestine's 22 January 2009 declaration. The other is accession by Palestine to the Rome Statute. ■

Prof. John B. Quigley

Names of the 36 people indicted thus far by ICC :

Bahr Abu Garda, accused of war crimes committed between 2003 and 2008 in the Darfur, Sudan conflict.

Mohammed Ali, crimes against humanity committed between 2007-08 in the Republic of Kenya.

Narcisse Arido, contempt of court charges in the 2009 case against Jean-Pierre Bemba.

Abdallah Banda, war crimes in Darfur.

Walter Barasa, contempt of court in 2013, in Kenya .

Omar al-Bashir, war crimes in the Darfur conflict.

Jean-Pierre Bemba, war crimes and crimes against humanity, 2002-2003, in the Central African Republic..

Charles Blé Goudé, crimes against humanity, 2010-11, in the Ivory Coast Republic.

Muammar Gaddafi, crimes against humanity, Libya, 2011.

Saif Gaddafi, crimes against humanity, Libya, 2011.

Laurent Gbagbo, crimes against humanity, Libya, 2011.

Simone Gbagbo, of crimes against humanity, 2010-11, in the Ivory Coast Republic.

Ahmed Haroun, crimes against humanity and war crimes, between 2003-05, in Darfur.

Abdul Rahim Hussein, war crimes and crimes against humanity, between 2003-04, in Darfur.

Saleh Jerbo, war crimes, 2007, in Darfur.

Jean-Jacques Kabongo, contempt of court in the 2009 case against Jean-Pierre Bemba.

Germain Katanga, war crimes in the Congo, 2003.

Uhuru Kenyatta, crimes against humanity, Kenya, 2007 -08.

Joseph Kony, war crimes in Uganda, 2002-2005.

Henry Kosgey, crimes against humanity in Kenya, 2007-08.

Ali Kushayb, war crimes in Darfur, 2003-04.

Thomas Luganga Dyilo, war crimes, the Congo, 2002-03.

Raska Lukwiya, war crimes, Uganda, 2002.

Callixte Mbarushimana, war crimes, the Congo, 2007-09.

Aimé Kilolo Musamba, contempt of court in the 2009 case against Jean-Pierre Bamba.

Sylvester Mudacumura, war crimes, 2009-10, in the Congo.

Francis Muthaura, crimes against humanity, Kenya, 2007 -08.

Mathieu Ngudjolo Chui, war crimes, 2003, in the Congo.

Bosco Ntaganda, war crimes, the Congo, 2002-03.

Okot Odhiambo. War crimes, Uganda, 2002.

Dominic Ongwen, war crimes, Uganda, 2002.

Vincent Otti, war crimes, Uganda, 2002.

William Ruto, crimes against humanity, Kenya, 2007-08.

Joshua Sang, crimes against humanity, Kenya, 2007-08.

Abdullah Senussi, crimes against humanity, Libya, 2011.

Fidèle Wandu, contempt of court in the 2009 case against Jean-Pierre Bemba.

Contested Land, Contested Memory: Israel's Jews and Arabs and the Ghosts of Catastrophe

By Jo Roberts

Reviewed by Jane Adas

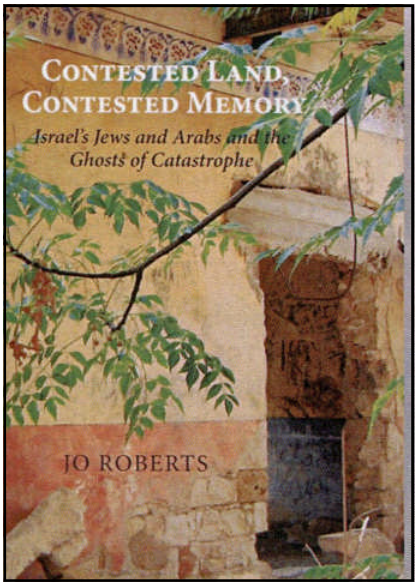
Dundurn Press, 2013, 302 pp., softcover.
Available from AMEU (see p. 15)

The writing in "Contested Land, Contested Memories" has the objective precision of a legal scholar and the openheartedness of a human rights advocate. Its author, Jo Roberts, is a British lawyer who for five years was the managing editor of the New York Catholic Worker. During that time she observed that because of guilt about Christian anti-Semitism, the publication "… is fearless in tackling some of the day's thorniest issues, it nevertheless avoided speaking about the situation in Israel's Occupied Territories."

Some years later as a volunteer with the International Women's Peace Service, Roberts lived in Hares, a village near Nablus, neither of which was identified on her Israeli tourist maps. These experiences led her to think deeply about "how vital an element in reconciliation and healing is the acknowledgement of another's pain."

Roberts points out that Nakba (in Arabic) and Shoah (in Hebrew) both mean catastrophe. Her focus in "Contested land, Contested Memories" is how the ghosts of both have influenced "Israel's engagement with the Palestinian Nakba of 1948." Through careful research and numerous interviews with Jewish and Palestinian Israelis, Roberts examines attitudes towards the events of 1948. She listens to internally displaced Palestinians whose concerns were not addressed in the Oslo peace process; Holocaust survivors whose trauma was unacknowledged until the Eichmann Trial in 1961; Jews from Arab countries who neither experienced the Holocaust nor took part in the Nakba, but who feel compelled to suppress the Arab part of their identity; and young Israeli Jews who rarely encounter Palestinians and were taught only the triumphal narrative of 1948.

A former Israeli ambassador bridles when Roberts uses the term Nakba: "Nakba schmakba. The Jews came back to their homeland. We were landlords; we left; we returned." A woman of the '48 generation of Holocaust refugees, now in her eighties, denies that Palestinians were expelled: "It was a war, and they fled. Many stayed. It was a problem. And now they are something like 20 percent of the country. And now they don't want to go and live in the Palestinian Authority."



Roberts describes how Israel has manipulated the landscape—planting European-style forests to obscure demolished villages and establishing a Government Names Commission to replace Arabic words with Hebrew. Meron Benvenisti, whose father was on the commission, described this as not even original, something that is "in the genes of settler society." Noga Kadman, a political geographer and author of "The Depopulated Villages of 1948 in Israeli Discourse" (in Hebrew), tells Roberts that Israelis "are enjoying the fruit that others have planted…. If someone paid a price for something that he was not responsible for, we should try to repair the damage that was done to him." Eitan Bronstein, co-founder of Zochrot ("remembering" in Hebrew), understands that many Jewish Israelis worry that Nakba awareness will somehow diminish Holocaust remembrance. Yet, because Zochrot believes the "Nakba is the central, unspoken trauma at the core of the Israel/Palestine conflict," making that missing history visible to Jewish Israelis is essential to achieving a just solution.

The hope is that Zochrot will prevail over Schmakba. ■

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