CREATING "STRANGERS IN THEIR OWN LAND": SETTLEMENTS AS *DE FACTO* ANNEXATION IN PALESTINE AND TIBET

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ABSTRACT

The transfer of non-native settlers into an occupied territory is not a new phenomenon. Yet, debates about the legality of settlements and their surrounding regimes of occupation have resurfaced in both the contexts of Palestine and Tibet. In Palestine, the passing of the fiftieth anniversary of the 1967 War rekindled criticisms of Israel's continuing settlement programs in the West Bank, which have only grown in both number and strength over the last fifty years. In Tibet, a wave of self-immolations after the 2008 Olympics drew attention to the plight of Tibetans living under Chinese rule, accompanied by heavy incentives provided to Han Chinese to move and resettle in Tibet.

These two case studies share many similarities in their history of occupation and settlements, an overlap that has previously gone understudied. In both territories, issues surface regarding the legitimacy of the occupation, denials by both occupying governments, and, most importantly, the dispossession of native inhabitants' right to exercise self-determination. The demographic shifts that result from over fifty years of settler implantation in Palestine and Tibet have rendered native inhabitants strangers in their own land.

The implications of these demographic and governance changes are grave. This Note argues that not only are settlements presumptively illegal under international humanitarian law, but also that such activity is tantamount to *de facto* annexation if conducted systematically by the occupying governments over a significant period of time. By reframing settlement activity as examples of *de facto* annexation, the consequences for the perpetrating governments could be more severe for having breached fundamental tenets of international law.

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I. INTRODUCTION

2017 marked the fiftieth anniversary of the 1967 Six-Day War, when a nascent Israel defeated Arab forces and tripled its territory in a conflict that ended in less than a week.[1] Fifty years later, the Middle East region continues to grapple with the legacy of the war and the resulting Israeli governance of Palestine and the West Bank.[2] The passing of the fiftieth anniversary also renewed ongoing discussions about Israel's use of settlements in Palestine, which arose as an outgrowth of Israel's occupation of the territory. Although the United Nations, international nonprofit organizations, and many legal scholars have criticized Israel's settlement program for the last fifty years,

[1] *See How the 1967 War Changed the Shape of Israel*, THE ECONOMIST (May 20, 2017), https://www.economist.com/special-report/2017/05/18/how-the-1967-war-changed-the-shape-of-israel [https://perma.cc/CGG9-MYM4].

[2] *See* Anton La Guardia, *Israel Still Rules Over Palestinians 50 Years After Its Six-Day War*, THE ECONOMIST (May 20, 2017), https://www.economist.com/special-report/2017/05/18/israel-still-rules-over-palestinians-50-years-after-its-six-day-war [https://perma.cc/4F9G-7KZR] ("Fifty years after 1967, it has become all too easy . . . to forget that, just a short drive away [from Israel], the grinding occupation of Palestinians has become all but permanent"]; Peter Beaumont, *The Six-Day War: Why Israel Is Still Divided Over its Legacy 50 Years On*, THE GUARDIAN (May 20, 2017), https://www.theguardian.com/commentisfree/2017/may/20/six-day-war-israel-still-divided-over-legacy-50-years-on [https://perma.cc/AHG4-5EDT] ("[I]f the war was short, its continuing aftermath has dragged on for decades . . .").

the anniversary revived the debate and prompted many to revisit the international legal implications surrounding the continuing legacy and legality of settlement programs in Palestine.[3]

While settlements—which refers to the transfer of an occupying state's civilian nationals into an occupied territory[4]—are most often associated with the activity occurring in Palestine, a number of States have used settlements or population transfers in a variety of territories around the world. In the fifty years since the modern Israeli settlement program began, history seems to have repeated itself through settlements and occupations in other territories like Namibia, East Timor, the Western Sahara, and Tibet. Unlike Palestine and the first three territories listed, Tibet is rarely discussed as an example of settlement activity, as China disagrees that Tibet is even considered an occupied territory. Because it maintains that Tibet is a part of China, the Chinese government contends that any movement of Han Chinese[5] to Tibet is purely domestic and cannot be considered unlawful settlement activity under international law.

Public international law condemns the use of such settlements. Settlements are *per se* unlawful under the laws of occupation, which are governed by international humanitarian law.[6] But beyond being presumptively unlawful during times of occupation, the resulting consequences of settlement activity are grave enough to merit a closer look through an international law lens. As settlers move into occupied territories they may acquire more land and start new communities among themselves. In aggregate, these slow, piecemeal acquisitions can ultimately amount to eventual annexations, which are also

[3] *See* Michael S. Lynk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Since 1967), *Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/72/43106 (Oct. 23, 2017) [hereinafter Lynk, *Report of the Special Rapporteur*]; Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AM. J. INT'L L. 357, 357 (2017).

[4] *See* discussion *infra* Section I.A.

[5] "Han Chinese" refers to the demonym given by the Chinese government to describe the predominant ethnicity of China's population, even though some have noted "Han Chinese" is a "tautology," as all Chinese are Han from a "racial, cultural, or ethnic" perspective. For the purposes of this Note, however, "Han Chinese" will be used as a means of distinguishing between ethnic Tibetans and ethnic Chinese. Robert D. Sloane, *Tibetan Diaspora in the Shadow of the Self-Immolation Crisis: Consequences of Colonialism*, *in* STILL WAITING FOR TOMORROW: THE LAW AND POLITICS OF UNRESOLVED REFUGEE CRISES 55, 64 (Susan Akram & Tom Syring, eds., 2014).

[6] *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War art. 49, ¶6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

per se illegal in international law.[7] Ultimately, these population transfers implicate significant, long-lasting demographic changes that can then render native populations "strangers in their own land," as they possess increasingly less land and no longer form the demographic majority of their native territory.[8]

Accordingly, this Note seeks to explore whether—and in what ways—these territorial land grabs from settler implantation constitute unlawful activity in occupied territories. This Note argues that settlements and settler activity amount to *de facto* annexation in Palestine and Tibet, two territories occupied by Israel and China, respectively. By slowly transferring civilian nationals from the Occupying State into the occupied territory, the Occupying States are acquiring land that formerly belonged to native populations in the occupied territories. Because land acquisition through annexation or conquest is *per se* unlawful under international law, this settlement activity is illegal irrespective of establishing the existence of occupation or an international armed conflict.

This thesis will be explored through the twin case studies of Palestine and Tibet—the former representing a frequently-cited example of unlawful settlement activity, and the latter representing an uncommon example of settlement activity.[9] Although existing scholarship often focuses on the Israeli settlements in Palestine, and considerably less attention is paid to Tibet as an example of settlement activity,[10] many features of the Han Chinese resettlement in Tibet parallel the activity observed in Palestine.[11] Ultimately, this Note posits that in both contexts, the Israeli and Chinese government

[7] *See* Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT'L L. & POL. 747, 758 (2017) (asserting that in addition to constituting "a per se illegal form of the acquisition of territory," the prohibition against annexation is considered customary international law and "arguably even *jus cogens*, a peremptory rule").

[8] Sloane, *Tibetan Diaspora in the Shadow of the Self-Immolation Crisis*, *supra* note 5, at 58.

[9] Most of the existing literature on settlements focuses on Israeli activity in Palestine. Other prominent examples of settlement activity include: Indonesia's occupation of East Timor, Morocco's occupation of the Western Sahara, Turkey's occupation of Northern Cyprus, South Africa's former occupation of Namibia (or Southwest Africa), among many others. *See* YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTIONS WITH INTERNATIONAL HUMAN RIGHTS LAW 346 n.84 (2009). *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1992) (providing a primer on occupations and settlements around the world).

[10] There have been some scholars who have referenced the phenomenon of Han Chinese migrating or relocating to Tibet, but often as a supporting point in conversations about Tibetans' right to self-determination or violations of Tibetan human rights. *See* Sloane, *Tibetan Diaspora in the Shadow of the Self-Immolation Crisis*, *supra* note 5, at 58.

[11] *See* discussion *infra* Section III.B.

programs to resettle Israeli and Han Chinese nationals in Palestine and Tibet, respectively, are unlawful pursuant to international humanitarian law. In both cases, the creeping territorial accumulations from settlements amounts to *de facto* annexation by the Israeli and Chinese governments, which is manifestly forbidden under international law.

Part I will provide a brief introduction to settlements, as well as a historical overview of the territorial disputes in Palestine and Tibet, respectively. Part II will introduce the relevant international law, beginning with a discussion of the international humanitarian law and the law of occupation, which provide the legal frameworks for law on settlements. Part II will also provide an overview of the law regarding annexation. Part III will compare the application of the relevant laws to the cases of Palestine and Tibet, addressing threshold questions of whether the law of occupation is the appropriate regime to describe Palestine and Tibet. The section will continue with a discussion of how the influx of Israelis and Han Chinese observed in Palestine and Tibet, respectively, constitutes "settlement" activity. Part III will end by arguing that these settlements and settler implantations are systemic enough to establish *de facto* annexation in the occupied territories, and the Conclusion will offer some closing thoughts on the ramifications of viewing settlement activity in Palestine and Tibet as forms of annexation.

II. FACTUAL BACKGROUND

Although settlements occur in a variety of contexts and may be achieved in a myriad of ways, there are nevertheless common patterns of conduct barred by the laws on occupation, as discussed in Section II. In this section, a brief, initial discussion of settlements will precede an overview of the factual histories of Palestine and Tibet. The factual background will focus on the origins of the disputed territory, the history of settlers in those areas, and details about the settler programs supported by the Israeli and Chinese governments, respectively.

A. Settlements

Settlements refer to the transfer of an occupying state's civilian population into a territory that is being occupied.[12] Notably, the term "settlements" is not a legal term of art, and is neither defined nor codified as a term in international treaty law.[13] Settlements are often thought to include the

[12] *See* Geneva Convention IV, *supra* note 6, at art. 49(6) ("The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.").

[13] Although the Fourth Geneva Convention addresses settlements in Article 49(6), the

physical and non-physical structures, processes, and systems that "enable and support the establishment, expansion and maintenance" of settler communities.[14] Settlements are a form of population transfer,[15] a legal term of art that refers to "a practice or policy that has the purpose or effect of moving persons into or out of an area, whether within or across an international border, or into or out of an occupied territory."[16] Although there is some literature on the validity of population transfers and the many forms it can take,[17] this Note will examine settlements in the context of belligerent occupation, as the paradigm of occupation best exemplifies the activity observed in Palestine and Tibet, discussed in detail in Part II.

B. Palestine

Perhaps more than any other contested territory, Palestine is most closely associated with the term "settlements." Palestine generally refers to the area west of the Jordan River and east of the "Green Line," or the armistice declaration line that delineated the boundary between the Israeli and Arab States after World War II.[18] After the 1967 Six-Day War, Israel began to occupy additional Palestinian areas past the Green Line, including the West Bank (referring to the area of Palestine east of the Green Line), parts of the Golan Heights, the Gaza Strip, and the Sinai Peninsula.[19] Israel also took

text does not mention the term "settlements" by name.

[14] U.N. Human Rights Council, *Rep. of the Independent International Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem*, ¶ 4, U.N. Doc. A/HRC/22/63 (Feb. 7, 2013) [hereinafter UNHRC, *Report on Israeli Settlements*].

[15] *See* Awn Shawkat Al-Khasawneh (Special Rapporteur on the Human Rights Dimensions of Population Transfer), *Freedom of Movement: Human Rights and Population Transfer*: *Final Rep. of the Special Rapporteur, Mr. Al-Khasawneh*, ¶1, U.N. Doc. E/CN.4/Sub.2/1997/23 (June 27, 1997) (including "the implantation of settlers and settlements" in its study on the human rights dimensions of population transfer).

[16] *Id.* ¶ 66. *See also id*., Annex II, art. 3.

[17] *See, e.g.*, Eric Kolodner, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, 27 N.Y.U. J. INT'L L. & POL. 159, 162 (1994); Christopher M. Goebel, *A Unified Concept of Population Transfer (Revised)*, 22 DENV. J. INT'L L. & POL'Y 1, 8 (1993).

[18] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 72-3 (July 9) [hereinafter "ICJ Wall Advisory Opinion"]. *See also* G.A. Res. 181 (II), at 5, annex A (Nov. 29, 1947) (describing the U.N. General Assembly's proposed boundaries of the Arab State, Jewish State, and city of Jerusalem).

[19] UNHRC, *Report on Israeli Settlements*, *supra* note 14, annex I, at 26; ICJ Wall Advisory Opinion, *supra* note 18, ¶ 73.

steps after 1967 to acquire the holy city of Jerusalem.[20] When Israel annexed East Jerusalem in late June 1967, the Security Council condemned Israel's actions—including the transfer of its population into East Jerusalem—as an illegitimate attempt to "change the status of the City of Jerusalem."[21]

Geographically, settlements are located all over Palestine, most notably in East Jerusalem and areas east of the Green Line in the West Bank. Specifically within the West Bank, settlements are common in "Area C," which the Oslo Accords of 1993 and 1995 designated as under Israeli military control.[22] By contrast, Area A was placed under Palestinian control and Area B was meant to be shared between Israeli and Palestinian control.[23] Although the Oslo Accords divided the West Bank for military control purposes, today Area C is considered to be allocated for Israelis, as settlers in Area C live under Israeli law, drive on roads for the exclusive use of Israelis, and benefit from Israeli-governed "state land" in the form of national parks and archeological sites.[24] Area C accounts for roughly 60% of the West Bank, and is home to an estimated 400,000 settlers living in 225 settlements.[25] By contrast, only 1% of Area C is designated for the use of the roughly 150,000 to 300,000 Palestinians living in the Area.[26] In addition to making up the largest portion of the West Bank and being virtually off-limits to Palestinians, Area C is also the only contiguous area in the West Bank—while Areas A and B are isolated and do not touch, one could travel from one end of Area C to the other without stepping foot in Areas A or B.[27] As a result, because

[20] ICJ Wall Advisory Opinion, *supra* note 18, ¶ 75.

[21] S.C. Res. 298, ¶ 3 (Sept. 25, 1971) ("[A]ll legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status"). *See also* Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 45; ICJ Wall Advisory Opinion, *supra* note 18, ¶ 75. The U.N. further declared Israel's annexation of East Jerusalem "null and void." S.C. Res. 478, ¶ 3 (Aug. 20, 1980).

[22] UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 18; Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 47; Meron, *supra* note 3, at 359.

[23] UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 18.

[24] Lynk, *supra* note 3, ¶ 47; U.N. Secretary-General, *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, ¶¶ 14-18, 21-24, U.N. Doc. A/HRC/34/39 (Mar. 16, 2017) [hereinafter U.N. Secretary-General 2017 Report, *Israeli Settlements*].

[25] Lynk, *supra* note 3, ¶ 47.

[26] *Id.*; UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 37.

[27] U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank*, 3 (Dec. 2009) [hereinafter OCHA, *Restricting Space*].

Palestinians cannot travel freely between Areas, they are unable to benefit from Area C's critical agricultural, water, and infrastructure resources.[28]

Many successive Israeli governments have actively used and constructed settlements since at least the beginning of Israel's occupation of the West Bank in June 1967.[29] In fact, one United Nations ("U.N.") Report determined that "[e]very Israeli government since 1967 has left office with more settlers living in the occupied territory than when it assumed office."[30] Several Israeli administrations have certainly approved measures that abandoned or decelerated the growth of settlements in Palestine, including most notably an agreement to formally vacate Jewish settlers from Gaza in 2005.[31] However, despite these promises to withdraw, Israel has in many ways maintained its unofficial presence and effective control over Gaza, including monitoring its land, sea, and air borders, as well as instituting a travel blockade that has left 60% of Gaza residents relying on humanitarian aid for basic necessities like electricity and drinking water.[32] Thus, the government's formal plan to "disengage" in Gaza by removing Jewish settlers belies the underlying reality that to this day, Israel continues to occupy Gaza and maintain effective control—meaning an ability to exercise authority over a territory regardless of the formality of its presence[33]—over its residents.[34]

Since 1967, an estimated 250 settlements have been established in the West Bank, transferring a total of over 500,000 Israeli settlers from various

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[28] *Id*. *See also* U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 24, ¶ 11 (describing how the Israeli settlements in Area C have resulted in "the gradual fragmentation of the West Bank, demographic changes and illegal exploitation of natural resources, while restricting Palestinians' access, and denied possibilities for Palestinian development").

[29] U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 24, ¶ 10. One U.N. Report lists September 1967 as the establishment of the first Israeli settlement in the newly-occupied Palestinian territories. UNHRC, *Report on Israeli Settlements*, *supra* note 14, annex I, at 26.

[30] Lynk, *supra* note 3, ¶ 50.

[31] *See id*. ¶ 56.

[32] *Id*.

[33] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2016 TO THE CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD ¶ 301 n.158 (2d ed., 2016) [hereinafter ICRC 2016 COMMENTARY TO THE FIRST GENEVA CONVENTION]. In the updated 2016 Commentary to the First Geneva Convention, the ICRC also describes the three elements of the "effective control" test, which can be used to assess whether a situation is considered an occupation under international humanitarian law. *See id.* ¶¶ 301-04.

[34] Lynk, *supra* note 3, ¶ 56 (" . . .[Israel's] effective control over [Gaza] . . . means that it retains its responsibilities as an occupier."); AEYAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 5 (2017).

parts of Israel into the West Bank.[35] While the number of construction proposals varies by year, the general trend of settlement activity continues "unabated" today, with reports of settlement expansion in the West Bank occurring as recently as 2016.[36] In September 2017, a Special Coordinator for the Middle East Peace Process reported to the U.N. Security Council that in the previous four months, there were plans to build 2,300 settler houses in East Jerusalem, a 30% increase from the entire previous year's activity.[37] In its regular reports on the Israeli settlements in Palestine, the U.N. Human Rights Council noted that 2016 oversaw an "overall acceleration in settlement expansion," citing evidence of higher numbers of construction and building starts.[38] Another source estimates that the settler population has grown at a rate more than three times the rate of Israel's national population growth over the last decade.[39] These figures together suggest an overall trend that, despite repeated calls by the U.N. and other international organizations, the settlements in Palestine have grown steadily in recent years rather than slowed down.

C. Tibet

Although Tibet is rarely referred to in the context of settlements, there are notable factual similarities between Chinese settlements in Tibet and Israeli settlements in Palestine.[40] The occupation of Tibet began when Beijing sent Chinese military troops to Tibet in October 1950, one year after Mao Zedong

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[35] Estimates of the number of settlers vary from 520,000 to 594,000, depending on the date of estimation. *See* U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 28, ¶ 11; UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 28; John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN. ST. INT'L L. REV. 363, 371 (2002).

[36] U.N. Secretary-General, *Israeli Settlements in the Occupied Palestinian Territory, Including East Jerusalem, and the Occupied Syrian Golan*, ¶¶ 2, 5, U.N. Doc. A/71/355 (Aug. 24, 2016) [hereinafter U.N. Secretary-General 2016 Report, *Israeli Settlements*].

[37] *Ongoing Settlement Activities Undermining Israeli-Palestinian Peace Efforts, Warns UN Envoy*, UN NEWS (Sept. 25, 2017), https://news.un.org/en/story/2017/09/566982-ongoing-settlement-activities-undermining-israeli-palestinian-peace-efforts [https://perma.cc/J7Q2-M3R8].

[38] U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 28, ¶ 25.

[39] UNHRC, *Report on Israeli Settlements*, *supra* note 14, at ¶ 28 (citing to the Israeli Central Bureau of Statistics, which found the settler population growth grew at 5.3% (excluding East Jerusalem), compared to 1.8% in Israel).

[40] For a brief discussion on unlawful population transfers into Tibet, see GROSS, *supra* note 34, at 123-24 & n.309; Regina M. Clark, Note, *China's Unlawful Control over Tibet: The Tibetan's People Entitlement to Self-Determination*, 12 IND. INT'L & COMP. L. REV. 293, 313-14 (2002).

declared the founding of the modern Chinese state (the People's Republic of China).[41] Soon after the 1950 military invasion into Tibet, and after the Chinese army captured a high-level Tibetan delegate, a Chinese delegation and the Tibetan *Kashag*, or Parliament, met in Beijing to negotiate terms of agreement.[42] Tibetan troops were no match for the Chinese military, so after being presented with a forced choice between cessation of hostilities and further devastation to Tibetan people and property, Tibet accepted China's Seventeen-Point Agreement in October 1951.[43] The Dalai Lama telegrammed Chairman Mao his concession offer, and two days later, the Chinese People's Liberation Army (PLA) overtook Lhasa, the capital of Tibet.[44]

The Chinese government began sending Han Chinese civilians, the predominant Chinese ethnicity, into Tibet shortly after the Chinese government invaded Tibet in 1950, with one estimate reporting roughly 500,000 Han settled in the region between 1954-1956.[45] Although not necessarily explicit, one of the Chinese government's purposes in resettling Han Chinese in Tibet seemed to be to establish and entrench loyalty to the Chinese government inside Tibet.[46] The Chinese government's resettlement policy also coincided with its desire to develop the Western region of China, harnessing its natural energy and potential for growth and development.[47] In the decades after China began occupying Tibet, and continuing even to today,

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[41] JOHN HEATH, TIBET AND CHINA IN THE TWENTY-FIRST CENTURY: NON-VIOLENCE VERSUS STATE POWER 73 (2005). *See also* Sloane, *supra* note 5, at 56.

[42] HEATH, *supra* note 41, at 98, 100-01. *See also* MICHAEL C. VAN WALT VAN PRAAG, THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW 147 (1987).

[43] HEATH, *supra* note 41, at 100-01.

[44] VAN WALT VAN PRAAG, *supra* note 42, at 149.

[45] *See* PRADYUMNA P. KARAN, THE CHANGING FACE OF TIBET: THE IMPACT OF CHINESE COMMUNIST IDEOLOGY ON THE LANDSCAPE 21 n.4, 53 (1976) (stating that at the time of writing, there was evidence that China was making a "concerted program of resettling Han elements in Tibet"). There are also reports that China sent "a call" out to "Chinese colonists to move into Tibet as permanent settlers" as early as 1907. Alfred P. Rubin, *The Position of Tibet in International Law*, THE CHINA Q. 110, 115 (1968).

[46] Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 178 (2002). *See also* J.P. MITTER, BETRAYAL OF TIBET 141 (1964).

[47] *See* Chris Fletcher, *Corporate Social Responsibility: A Legal Framework for Socioeconomic Development in Tibet*, 17 YALE HUM. RTS. & DEV. L.J. 120, 127 (2014) ("Since the late 1990s, the Chinese central government has poured billions of dollars into the [Tibetan Autonomous Region] and other western areas."). "Tibetan Autonomous Region" (TAR) refers to the province that China delineated in 1965, which does not include areas that are historically and culturally Tibetan, yet are now incorporated into the Chinese provinces of Qinghai, Gansu, Sichuan, and Yunnan. Sloane, *supra* note 5, at 68 n.3.

the Chinese government has intensified economic development and infrastructure growth in Tibet through government projects like the high-speed railroad between Qinghai and Tibet and the Great Western Development (GWD) Program, which created infrastructure, attracted foreign investment, and supposedly promoted ecological preservation goals.[48]

Today, Han Chinese are projected to outnumber Tibetans in Tibet, due in large part to a concerted effort to settle Han Chinese in Tibet.[49] Census or official figures of Tibet's demographic makeup vary, due in part to the Chinese government's secrecy and restrictive control over publications. Some Chinese officials reportedly stated that 95% of inhabitants in Tibet were Tibetans,[50] but other contemporaneous reports estimate that Tibet is home to a population of 7.5 million Han Chinese, as compared to the 6 million Tibetan inhabitants in the region.[51] One figure estimates that 50,000 to 60,000 Han Chinese live in the capital city of Lhasa, while Chinese immigrants "numbered in the millions" in the eastern regions of the Tibetan plateau.[52] Anecdotal evidence about the population changes in Tibet corroborates these varying estimates, such as one journalist's observation in 2010 that in Tibet's two largest cities, it was "clear that Han neighborhoods [were] dwarfing Tibetan areas."[53] Narratives about changes in everyday life in Tibet, from the food consumed on a regular basis to the expansion of Chinese businesses in downtown Lhasa, substantiate the personal impact that native Tibetans have experienced as a result of the Chinese settlement.[54]

Since the 1950's, and especially pronounced in the 1980's, the Chinese government has offered a number of incentives to Han settlers to move and resettle in Tibet.[55] Like in the Palestinian context, the Chinese government

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[48] Diana Jue, *Development for Tibetans, But By Whom?*, 5 CONSILIENCE: J. SUSTAINABLE DEV. 168, 169 (2011).

[49] *See* John. S. Hall, Note, *Chinese Population Transfer in Tibet*, 9 CARDOZO J. INT'L & COMP. L. 173, 173-77 (2001).

[50] Edward Wong, *China's Money and Migrants Pour into Tibet*, N.Y. TIMES (July 24, 2010), https://www.nytimes.com/2010/07/25/world/asia/25tibet.html [https://perma.cc/8CCP-P4ER].

[51] Sloane, *supra* note 5, at 58.

[52] Laura S. Ziemer, *Application in Tibet of the Principles on Human Rights and the Environment*, 14 HARV. HUM. RTS. J. 233, 253 (2001).

[53] Wong, *supra* note 50.

[54] *See* His Holiness the Dalai Lama, *Foreword* to HEATH, *supra* note 41, at 9 (lamenting the effects of having an "overwhelming number of Chinese . . . arriving in Tibet").

[55] *See* Sloane, *supra* note 5, at 63 (noting that the Chinese government has invested "intense propaganda [and] economic incentives to . . . ordinary Han, who have been encouraged to resettle in Tibet"); Ziemer, *supra* note 52, at 253 n.144

provides an abundance of predominantly economic incentives, including subsidies; housing; three-month paid vacations;[56] special access to new Chinese hospitals and other health care;[57] bonuses for active or retired Chinese soldiers and their families to relocate in Tibet;[58] financial incentives for Chinese entrepreneurs;[59] guaranteed employment for family members of Chinese settlers;[60] and wages and benefits for those who relocate, which are often "far more generous than are available in China."[61] Not only has there been a double standard for salary payments—one for native Tibetans and one for Han Chinese—but there were also reports that Han Chinese were given preferential treatment in hiring and promotions.[62] For many local Tibetans, the discriminatory treatment in their own land have made them deeply resentful of the Han Chinese settlers in Tibet.

The large population shift that displaced Tibetans within and from their homeland has noticeably affected the visible aspects of everyday life in Tibet. In addition to running the local governments, a large number of Han Chinese own and manage local businesses, hold property, and teach at local schools.[63] Also noteworthy are government policies that wipe Tibetan language, culture, and religion from Tibetan daily life.[64] Tibetans have reported widespread discriminatory policies that favor Han Chinese at the expense of local Tibetans, indicative of the trickle-down effect that resettlement has had in Tibet.[65] In Tibetan schools, for instance, Chinese students receive new or

("The Chinese government offers a wide variety of benefits to encourage Chinese immigration to Tibet.").

[56] Ziemer, *supra* note 52, at 253 n.144.

[57] *Id.*

[58] Statement from Tibet Justice Center to Forty-ninth Session of the U.N. Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, on Population Transfer in Tibet, ¶ 8, http://www.tibetjustice.org/?page_id=182 [https://perma.cc/EL36-LZRM] [hereinafter Statement from TJC on Population Transfer].

[59] *Id.* ¶ 6. In November 1997, Chinese government officials announced such incentives to Chinese manufacturers in Tibet as low-interest loans, tax breaks, and subsidies for three years. U.N., Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Statement Submitted by the Int'l League for Human Rights, ¶ 4, U.N. Doc. E/CN.4/Sub.2/1999/NGO/10 (June 24, 1999).

[60] Statement from TJC on Population Transfer, *supra* note 58, ¶ 6.

[61] *Id.*

[62] June Teufel Dreyer, *Economic Development in Tibet Under the People's Republic of China*, *in* CONTEMPORARY TIBET: POLITICS, DEVELOPMENT, AND SOCIETY IN A DISPUTED REGION 129, 134 (Barry Sautman & June Teufel Dreyer, eds., 2006).

[63] Wong, *supra* note 50.

[64] HEATH, *supra* note 41, at 22.

[65] Sloane, *supra* note 5, at 58 ("Slowly but inexorably, these Han settlers . . . are

nearly new textbooks, while Tibetan students at the same school receive older books with missing pages.[66] Tibetan students may also have to pay for their textbooks, while Chinese students received them for free.[67] Similar reports of discriminatory treatment are found in health services; enforcement of the one-child policy;[68] housing; business opportunities;[69] and representation in local government.[70] In its annual human rights report, the U.S. State Department found that the Chinese government has an unspoken policy of refusing to issue or renew passports for Tibetans, creating a barrier to freedom of travel that Han Chinese residents in Tibet do not experience.[71] This disparity has worsened since 2008, when Tibetans demonstrated against the Chinese government and began resorting to self-immolations when Beijing hosted the Summer Olympics. The protests only spurred the Chinese government to crack down harder in Tibet, which in turn has further disenfranchised and marginalized native Tibetans vis-à-vis Han Chinese settlers.

III. LEGAL BACKGROUND

Settlements, occupation, and annexation are interrelated components of an international law framework under the laws of armed conflict. International humanitarian law, or the laws of armed conflict, is the overarching framework that governs occupation, which in turn encompasses

overwhelming Tibet's indigenous population. . . .Because of Han migration, Tibetans have likewise become a minority in Tibet, strangers in their own land."). *See generally The Plateau, Unpacified*, THE ECONOMIST (Sept. 17, 2016), https://www.economist.com/china/2016/09/17/the-plateau-unpacified [https://perma.cc/JW7K-7447].

66 HEATH, *supra* note 41, at 24.

67 *Id.*

68 Although some reports previously suggested lenient policies for Tibetans with more than one child, there is no denial that restrictions on child-bearing through forced abortions and sterilizations are also more heavily enforced for Tibetans than Chinese. *See* Statement from TJC on Population Transfer, *supra* note 58, ¶ 13.

69 *Id.* ¶ 7 (describing the Chinese government's policy of relaxing regulations for Chinese entrepreneurs to start private businesses in Tibet).

70 Dreyer, *supra* note 62, at 143 (noting that although the Chinese government claimed to have "Tibetanized the governing structure," "the TAR has never had a first party secretary who is a Tibetan").

71 BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2017 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 44 (2018), https://www.state.gov/wp-content/uploads/2018/04/China.pdf [https://perma.cc/23AD-DMXB] [hereinafter U.S. STATE DEP'T, HUMAN RIGHTS REPORT].

settlements.[72] Accordingly, Part A will begin by discussing the relevant provisions of international humanitarian law that address the laws of occupation, before turning to a specific discussion on prohibiting settlements under the laws of occupation. Part B will elaborate upon the international laws governing annexation.

A. International Humanitarian Law Regarding Occupation and Settlements

International humanitarian law—which governs the *jus in bello* conduct of parties and actors during an armed conflict—is the overarching body of law that encompasses the laws of occupation and the law regarding settlements.[73] The international humanitarian law governing occupation is rooted in several main sources of law, most notably the Fourth Geneva Convention of 1949 and the Hague Conventions of 1907.[74] Customary international law and the 1977 Additional Protocol I to the Geneva Conventions are also sources of occupation law, but neither will be addressed in this Note for several reasons.[75] First, customary international law is generally difficult to verify because it relies on the consensus of general practice and *opinio juris* of States.[76] Customary international law on the subject of occupations is particularly difficult to pin down because state practice is inconsistent or undeveloped—relatively few States have encountered occupation as either the Occupying Power or the territory being occupied, so it is hard to make sense of a consistent practice from a minority of States.[77] Israel may stand as an exception because it is perhaps the most "extensive and detailed" occupation in modern history, but Israel's practice is not "commonly viewed

[72] BENVENISTI, *supra* note 9, at 11 ("Being an integral part of international armed conflicts, the main source of law that regulates occupations is the law of international armed conflict . . . ").

[73] *Id.*

[74] *See generally* Geneva Convention IV, *supra* note 6; Hague Conventions (IV) on War on Land and its Annexed Regulations art. 46, Oct. 18, 1907, 36 Stat. 2277205 Consol. T.S. 277 [hereinafter Hague Conventions IV].

[75] *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

[76] *See* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 4 (2009).

[77] *Id.* ("On a host of issues, the practice of States in the domain of belligerent occupation is desultory. One may therefore question whether it lays sufficient ground for the development of customary international law."). *Cf.* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1: RULES 462 (2005) ("State practice establishes this rule as a norm of customary international law applicable in international armed conflicts.").

as the customary *lex lata*."[78]

Second, although Additional Protocol I directly addresses occupation and echoes the prohibition against settlements, it nonetheless raises challenges as a source of occupation law. Additional Protocols I and II were drafted in 1977 in response to an emerging type of conflict between non-traditional actors, like rebel groups and ethnic minorities, in contrast with traditional wars that pitted states against states.[79] Additional Protocol I reiterated the Geneva Conventions' protections for victims in international conflicts, but it clarified that the scope of international armed conflicts included those "in which peoples are fighting against colonial domination[,] alien occupation [or] racist regimes."[80] With regards to settlements and occupation, Additional Protocol I also reiterates the Geneva Convention's prohibition against settlements, deeming such a violation to be a "grave breach" under Article 85(4) of the Protocol.[81]

While it would seem that Additional Protocol I is appropriate to discuss, this Note will leave that analysis aside for several reasons. First, neither the U.S. nor Israel has ratified the entirety of Additional Protocol I, so they are not bound to its provisions.[82] Although parts of Additional Protocol I have achieved customary international law status—which would render the text binding on non-party states like Israel—the text as a whole is not universally accepted.[83] The absence of universal State ratification thus renders the treaty less persuasive a source than the Hague and Geneva Conventions. Second, Additional Protocol I was meant to fill in gaps left by the Hague and Geneva Conventions by covering non-traditional international armed conflicts, while the Geneva and Hague Conventions govern traditional state-to-state conflicts.[84] If viewing the Palestinian-Israeli and Tibetan-Chinese disputes as

[78] DINSTEIN, *supra* note 76, at 4.

[79] *See The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols [https://perma.cc/89ZN-UJ2F].

[80] Additional Protocol I, *supra* note 75, at art. 1, ¶ 4.

[81] *Id.* at art. 85, ¶ 4(a).

[82] *See* INT'L COMM. OF THE RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 14-NOV-2018, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/0AB77CE1BF547803C1258411003C68AE/%24File/IHL_and_other_related_Treaties.pdf?Open [https://perma.cc/Z2B5-H9D5] (last updated June 11, 2019).

[83] Jakob Kellenberger, *Foreword* to HENCKAERTS & DOSWALD-BECK, *supra* note 77, at xvi.

[84] *See* Geneva Convention IV, *supra* note 6, at art. 2. *See also* GROSS, *supra* note 34, at 60 (explaining how Article 1 of Additional Protocol I clarifies that "the Geneva Conventions

purely domestic affairs and non-international in nature, Additional Protocol I would seem appropriate. However, this Note argues that Palestine and Tibet were once sovereign prior to being unlawfully occupied by Israel and China. Thus, the disputes are inherently international. Finally, both Israel and China are High Contracting Parties to the Geneva Conventions, but both are not High Contracting Parties to Additional Protocol I, so this Note will focus solely on applying the Geneva Conventions without discussing Additional Protocol I.[85]

Accordingly, this section will proceed with an overview of the laws of occupation and the legality of settlements, as governed by the Hague Conventions of 1907 and the Fourth Geneva Convention of 1949. The Fourth Hague Convention defines when occupation exists and regulates the behavior of the Occupying state, while the Fourth Geneva Convention also regulates the state conduct by providing inviolable safeguards for civilians during armed conflict—which includes an express prohibition against settlements.[86] Together, these two treaties suggest that when foreign occupation over a particular territory exists, as defined under the Hague Conventions, any settlement activity by the Occupying Power in the occupied territory becomes manifestly unlawful under Article 49(6) of the Fourth Geneva Convention.

1. Law of Occupation

Article 42 of the 1907 Hague Conventions defines "occupation" as the circumstance when a territory "is actually placed under the authority of [a] hostile army"—that of the Occupying Power.[87] The Fourth Geneva Convention does not establish its own definition of occupation and tacitly adopts the definition from Article 42, although the drafters of the Fourth Geneva Convention sought to clarify in Article 2(2) that the definition of occupation also includes occupation that meets no armed resistance—in other words, occupation met without resistance does not mean it is accepted by local civilians.[88] The law of armed conflict governs occupations by regulating the conduct of the Occupying Power primarily through Article 43 of the 1907 Hague Conventions and Article 49(6) of the Fourth Geneva Convention of 1949.[89] While the two treaties have a slightly different focus

apply in situations that may not amount to international armed conflict").

[85] *Cf.* GROSS, *supra* note 34, at 60-61.

[86] *See* Hague Conventions IV, *supra* note 74, at art. 42; Geneva Convention IV, *supra* note 6, at art. 49(6).

[87] Hague Conventions IV, *supra* note 74, at art. 42.

[88] ICRC 2016 COMMENTARY TO THE FIRST GENEVA CONVENTION, *supra* note 33, ¶¶ 288-89, 295.

[89] *See* BENVENISTI, *supra* note 9, at 11; *What does the law say about the establishment*

in their purpose and content, the provisions together outline the behavior and activities that are prohibited during occupation. Whether the treaty provision applies depends on whether the State in question is a party to the treaty, or, alternatively, whether the treaty has achieved customary international law status, which renders the law binding on all States regardless of ratification.

Whether international humanitarian law even applies to occupations is a threshold question that must first be addressed, because international humanitarian law only applies during times of armed conflict. Occupation often, although not always, stems from armed conflict.[90] Loosely defined as the occurrence of a State's armed forces exercising "domination or authority over inhabited territory outside the accepted international frontiers of their State,"[91] occupations can occur in many different forms and under a myriad of circumstances and triggers.[92] Although armed conflict is the classic precursor to occupation, occupation can also occur during peacetime, either through consent or a simple relinquishing of sovereignty.[93] However, the classic and most common paradigm of occupation is still considered to take place during or directly after an international armed conflict.[94] Given that the twin case studies of Palestine and Tibet occurred during or immediately after an international armed conflict, which is discussed in Section III, this Note will treat international humanitarian law as the most appropriate paradigm in which to analyze occupation.

As a second matter, it must also be stated at the outset that occupations are not *per se* unlawful.[95] The state of occupation is "neutral," and should not in

of settlements in occupied territory?, INT'L COMM. OF THE RED CROSS: FAQ (May 10, 2010), https://www.icrc.org/eng/resources/documents/faq/occupation-faq-051010.htm [https://perma.cc/RFZ4-PRH8]; Eyal Benvenisti, *Belligerent Occupation*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 12 (2011).

[90] Benvenisti, *supra* note 89, ¶ 1 ("[T]he regime of belligerent occupation does not depend on the existence of a state of war, nor on the armed resistance to the occupant.").

[91] Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 300 (1984).

[92] For a thorough description of the types of military occupation, *see id.*, at 260-295.

[93] *Id.* at 273-279. Occupation outside of armed conflict is often referred to as "pacific occupation." *See generally* Eyal Benvenisti, *Pacific Occupation*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2009).

[94] *See* BENVENISTI, *supra* note 9, at Preface (noting that "Occupation is often the outcome of war"); David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 848 (2003); Roberts, *supra* note 91, at 262 ("So central has belligerent occupation been to the development of the law on occupations that it is often called the 'law of belligerent occupation' . . . ").

[95] Lynk, *supra* note 3, ¶ 18 ("The prevailing approach of the international community has been to treat Israel as the lawful occupant of the Palestinian territory, albeit an occupant that has committed a number of grave breaches of international law in its *conduct* of the occupation, including the settlement enterprise . . .") (emphasis added). For a discussion on

and of itself connote illegal activity or aggression.[96] Rather, occupation simply describes a state of affairs in which authority and control shifts to another party.[97] It is the activities conducted during an occupation that may be considered presumptively unlawful, however. A similar analogy can be made to war, which is not unlawful in and of itself—only conduct *within* war can be considered unlawful. Put differently, the *jus in bello* lawfulness of conduct during occupation does not depend on the legality of the invasion that led to occupation, which is a question of *jus ad bellum*.[98] While some scholars have recently proposed that occupation can become *per se* illegal if certain norms are violated,[99] the treaties discussed below are traditionally thought to impose no judgment on the state of occupation itself—rather, they impose obligations and limitations on state behavior during occupation.[100]

Finally, the lawfulness of occupation is predicated on being temporary, as occupation can be "neither permanent nor indefinite."[101] Modern scholars have viewed temporariness as a formal element of lawful occupation, such that any prolonged occupation becomes presumptively unlawful.[102] Even without this interpretation, temporariness is generally considered a key factor in assessing the legality of an occupation because the temporal nature does not affect the *jus ad bellum* question of why or how a territory came to be occupied. Rather, the indefiniteness of an occupation implicates the Occupying State's *conduct* during occupation. Importantly, the requirement that occupation be temporary under international law stands in contrast with

differentiating between *jus ad occupation* and *jus in occupation*, see GROSS, *supra* note 34, at 2-10.

[96] For a critique of viewing occupation as "neutral," see GROSS, *supra* note 34, at 19-21 (calling occupation a "suspicious" regime under his normative, ethics-based approach to occupation, and ultimately arguing that viewing occupation as "neutral" can inadvertently legitimize unlawful behavior).

[97] BENVENISTI, *supra* note 9, at 15-16.

[98] *Id*.

[99] *See* Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 555, 559 (2005).

[100] Lynk, *supra* note 3, ¶¶ 18-20, 26-27 (discussing whether an "occupation that was once regarded as lawful can cross a tipping point and become illegal"). Special Rapporteur Lynk's report outlines four elements of a test to determine whether a lawful occupant has breached its responsibilities, which would therefore render it an unlawful occupant. *Cf.* Ben-Naftali et al., *supra* note 99, at 559 (describing how most legal scholars discuss the "legitimacy of the initial act of occupation or . . . the legality of specific actions undertaken during the course of an occupation").

[101] Ben-Naftali et al., *supra* note 99, at 555 (arguing temporariness is one of the three fundamental legal principles that determines the legality of occupation).

[102] *See supra* notes 100-101 and accompanying text.

"the permanency of conquest," and its related concept of annexation.[103]

The principle of temporariness, and its corollary that Occupying Powers show restraint during occupation, is echoed throughout the treaty provisions. Articles 42 through 56 of the Hague Conventions of 1907 regulate the behavior of states engaged in belligerent occupation, as these articles form the "keystone" of the law of occupation.[104] Drafted prior to the two World Wars, the Hague Conventions of 1907 emphasizes the protection of the occupied's property rights, including personal property rights of individual civilians and state property rights of government weapons and valuables. Article 46, for instance, forbids the confiscation of private property,[105] while Article 53 allows an occupying army to temporarily confiscate cash, arms, means of transport, and other movable property belonging to the Occupied State.[106] The Hague Conventions are thus more concerned with regulating the Occupying State's behavior, as it clarifies which objects can be taken, the types of limited purposes for such confiscation, and which objects are categorically prohibited from being confiscated.[107] The primary feature of the Hague Conventions is to offer a working definition of occupation, defining territory as occupied when "it is actually placed under the authority of the hostile army."[108] This conception of occupation suggests that the drafters of the Convention conceived of occupation as predicated on the outbreak of war.[109]

Fifty years after the Hague Conventions of 1907 were written, the Fourth Geneva Convention was drafted in the aftermath of World War II, during a wave of decolonization and an era awakened to the concerns about civilian and human rights.[110] The Fourth Geneva Convention therefore had a slightly different emphasis, but it did not "substantially alter the law's traditional

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[103] Ben-Naftali et al., *supra* note 99, at 592 (citing DORIS A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914—A HISTORICAL SURVEY 37 (1949)). *See also* BENVENISTI, *supra* note 9, at 6 (noting that the "occupying power is . . . precluded from annexing the occupied territory or otherwise unilaterally changing its political status" for the limited duration of the occupation).

[104] These Articles were originally introduced in the Hague Conventions (II) of 1899, but were later annexed to the Hague Conventions (IV) of 1907. DINSTEIN, *supra* note 76, at 6.

[105] Hague Conventions IV, *supra* note 74, at art. 46.

[106] *Id.* at art. 53.

[107] *See* BENVENISTI, *supra* note 9, at 11.

[108] Hague Conventions IV, *supra* note 74, at art. 42.

[109] Roberts, *supra* note 91, at 251.

[110] *Treaties and customary law*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/document/treaties-and-customary-law [https://perma.cc/H47N-TF57]. *See also* DINSTEIN, *supra* note 76, at 6; BENVENISTI, *supra* note 9, at 17.

focus."[111] In light of the post-war concerns about civilians and human rights, the Fourth Geneva Convention accordingly reflects a more focused attention on the need to protect local, civilian populations in occupied territories.[112] Part III, Section III of the Fourth Geneva Convention lists the many protections during occupation for local institutions and "protected persons," which is defined as "[p]ersons protected by the Convention . . . who . . . find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[113] Among these protections are the right to leave the occupied territory, freedom from conscription into the Occupying Power's army, and special safeguards to ensure food and medical supplies for the native population.[114] For extra measure, Article 47 underscores that these enumerated provisions must never be violated, regardless of subsequent occupation or annexation.[115] Finally, the Fourth Geneva Convention importantly describes in Article 49 an express prohibition of certain behaviors during times of occupation, including settlements, or the transfer of nationals from an Occupying Power into an occupied territory.[116]

2. Law on Settlements

The Fourth Geneva Convention is the primary source of international law governing settlements, although the Hague Conventions and Additional Protocol I also bear on the legality of settlements insofar as they regulate occupation generally. Settlements are one of several activities expressly prohibited by international humanitarian law through the Fourth Geneva Convention.[117] Although the treaty does not define or explicitly mention

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[111] Davis P. Goodman, Note, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1579 (1985).

[112] DINSTEIN, *supra* note 76, at 6; BENVENISTI, *supra* note 9, at 9, 11 (The Geneva Convention IV and Additional Protocol I turned their attention towards "secur[ing] the protection of the population in the enemy's hands, rather than to safeguard the interests of the ousted regime").

[113] Geneva Convention IV, *supra* note 6, at art. 4. *See generally id.* at arts. 47-78.

[114] *Id.* at arts. 48, 51, 55.

[115] *Id.* at art. 47. The ICRC Commentary notes that such protections were intended to be absolute, regardless of subsequent agreements between the Occupying State and the Occupied State, or territorial annexation *ex post facto*. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 273, ¶1 (1958) [hereinafter ICRC COMMENTARY ON THE GENEVA CONVENTION IV].

[116] Geneva Convention IV, *supra* note 6, at art. 49(6).

[117] It is worth noting that the law on settlements is also buttressed by two other treaties: Additional Protocol I, which deems settlements to be a "grave breach[]" of the Protocol, and the 1988 Rome Statute of the International Criminal Court, which lists settlements as a war

settlements by name, the sixth paragraph of Article 49 categorically prohibits an Occupying Power from "deport[ing] or transfer[ring] parts of its own civilian population into the territory it occupies."[118] The prohibition was aimed at preventing a practice that arose after World War II, whereby certain states—ostensibly motivated by political, racial, or even colonial reasons—transferred their own population into the recently occupied sovereign territory.[119] The German Nazis had, for example, famously sent Germans to territories they had acquired in Eastern Europe, displacing local populations in the process.[120]

The Geneva Convention's prohibition against settlements reflects the Convention's broader emphasis on protecting the rights of the occupied, rather than constricting the rights of the occupier. By forbidding the transfer of civilians belonging to the Occupying State, the treaty simultaneously extends protections to the native population, while also preventing the Occupying Power from bringing about a "fundamental demographic change" in the composition of the occupied territory.[121] As the ICRC Official Commentary to the Geneva Conventions suggests, the Convention drafters had similar concerns at the time about this potential for demographic change, which they viewed as simultaneously worsening the native population's economic standing while also endangering their ethnic identity.[122]

In addition to the express prohibition by the Fourth Geneva Convention, the concern for demographic change implicates other international laws. Most notably, a change in demographic composition complicates the native population's right to self-determination, a principle enshrined in the U.N. Charter.[123] The U.N. has repeatedly raised this concern about attempts to

crime. Additional Protocol I, *supra* note 75, at art. 85(4)(a); Rome Statute of the International Criminal Court art. 8(2)(b)(viii), July 17, 1998 [hereinafter Rome Statute]. Israel is not a party to either treaty. *See* Pnina S. Baruch, *Understanding the Settlements Debate*, 111 AM. J. INT'L L. 36, 39 (2017).

118 Geneva Convention IV, *supra* note 6, at art. 49(6).

119 ICRC COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 115, at 283.

120 ARAI-TAKAHASHI, *supra* note 9, at 346.

121 DINSTEIN, *supra* note 76, at 239. *See also* ARAI-TAKAHASHI, *supra* note 9, at 346; Ben-Naftali et al., *supra* note 99, at 593 (describing Article 49(6) as "designed to ensure that the sociological and demographic structure of the territory be left unchanged").

122 ICRC COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 115, at 283.

123 U.N. Charter art. 1, ¶ 2. *See also* G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) (affirming that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). For a wider discussion of self-determination principles as they apply to occupied territories, see Susan M. Akram, *Self-Determination, Statehood, and the Refugee Question Under*

alter demographic compositions in several contexts, including in Israel,[124] the former Yugoslavia,[125] and Kuwait.[126] If substantial enough, a change in the demographic makeup of an occupied territory would decrease the power and representation of the native inhabitants, which would in turn diminish their capacity to exercise the right to self-determination. Changes to demographics further violate the law that occupations be temporary and limited, given that demographic shifts over a generation or more could entrench the power of the Occupying State, in direct contravention of the temporariness principle.[127]

In 2005, the International Court of Justice ("ICJ") cited this exact concern about altering the demographic makeup in its landmark case about the legality of a wall built in the Occupied Palestinian Territory. In 2001, the Israeli government approved the construction of what it described as a "security fence" throughout the West Bank, stretching roughly 80 kilometers long and 50 to 70 meters wide.[128] After the U.N. Secretary-General reported that the wall lay within the territory of the West Bank and exceeded the bounds of the Green Line, the ICJ investigated the legality of the wall and ultimately concluded its construction violated international law.[129] Throughout its analysis, the ICJ expressed concern about demographic changes, concluding that in tandem with the Israeli settlements, the construction of the wall compelled Palestinians to leave their homes, which "tend[ed] to alter the demographic composition of the Occupied Palestinian Territory."[130]

Finally, it is worth noting that while some scholars see a legal distinction between voluntary and involuntary settlements by the Occupying State, there is a general consensus that the law on settlements does not distinguish between forcible and voluntary settlements.[131] Dinstein is one scholar who

International Law in Namibia, Palestine, Western Sahara, and Tibet, *in* STILL WAITING FOR TOMORROW, *supra* note 5, at 75.

[124] S.C. Res. 476 (June 30, 1980); S.C. Res. 465, ¶ 5 (Mar. 1, 1980); S.C. Res. 452 (July 20, 1979); S.C. Res. 446, ¶ 3 (Mar. 22, 1979).

[125] S.C. Res. 752, ¶ 6 (May 15, 1992) (calling for the cessation of attempts to change the ethnic composition anywhere in the former Yugoslavia).

[126] S.C. Res. 677, ¶ 1 (Nov. 28, 1990) (condemning "the attempts by Iraq to alter the demographic composition of Kuwait").

[127] *See* Ben-Naftali et al., *supra* note 99, at 555.

[128] ICJ Wall Advisory Opinion, *supra* note 18, at ¶¶ 79-84.

[129] *Id.* ¶¶ 83-4, 142.

[130] *Id.* ¶ 133. *See also id.* ¶ 115 (agreeing with reports that concluded "the wall [is] aimed at 'reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination'").

[131] Some scholars frame the issue as whether transfers must be forcible to constitute a

does draw this distinction, arguing that only involuntary settlements, or those directly or indirectly supported by the Occupying State government, are considered violations of international law.[132] Accordingly, Dinstein views Article 49(6) of the Geneva Convention as inapplicable to settlements carried out by individual civilians who move on their own volition.[133] However, neither the plain text of the Fourth Geneva Convention nor the Commentary to Article 49(6) makes reference to voluntariness or compulsory transfers.[134] Voluntariness must be a secondary concern "in view of the importance of the right of self-determination," given that the Occupying State still owes an underlying duty to "neither disturb the administrative structure nor upset a delicate demographic balance of the occupied territory."[135] Indeed, one legal expert considers the prohibition on settlements to be categorical, in that the prohibition should not be "conditioned on the motives or purposes of the transfer."[136] Given the overwhelmingly humanitarian nature of the Fourth Geneva Convention, the prohibition of settlements should be viewed squarely as designed to "prevent[] colonization of conquered territory by citizens of the conquering state."[137]

B. Annexation

Unlike the laws of occupation and settlements, annexation is not necessarily governed exclusively by international humanitarian law or the laws of armed conflict. Put differently, the prohibition on annexation stands without needing to first establish the existence of an armed conflict. Defined

violation, or whether transfers are involuntary as opposed to voluntary, but these paradigms seem to gloss over the more important feature that settlements may or may not be directed by a foreign government. *See* ARAI-TAKAHASHI, *supra* note 9, at 347-49; DINSTEIN, *supra* note 76, at 240-41.

[132] DINSTEIN, *supra* note 76, at 240.

[133] *Id.* at 240-41.

[134] *See* Geneva Convention IV, *supra* note 6, at art. 49(6); ICRC COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 115, at 283.

[135] ARAI-TAKAHASHI, *supra* note 9, at 348. *See, e.g.*, BENVENISTI, *supra* note 9, at 240 (disagreeing with the Israeli government position, and finding that as a factual matter, "[w]hile the Israeli authorities did not forcefully deport their nationals to the occupied areas, the movement was not merely voluntary"); GROSS, *supra* note 34, at 151-52 (stating that Article 49(6)'s prohibition on transfers "need not be forcible").

[136] Meron, *supra* note 3, at 358 (citing GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967-1977, 101 (2006)). *See also* BENVENISTI, *supra* note 9, at 240 (finding that because the purpose of Article 49(6) is to protect the occupied population rather than the population of the occupying state, "whether or not the settlers move freely to the occupied territory is beside the point").

[137] Meron, *supra* note 3, at 358 (citing GORENBERG, *supra* note 137).

as the "forcible acquisition of territory by one State at the expense of another State," annexation is widely considered an unlawful means of securing territory under international law.[138] Annexation most directly violates Article 2(4) of the U.N. Charter, a core tenet of international law that has also achieved customary international law status.[139] Article 2(4) prohibits a state from using force absent self-defense or consent of the U.N. Security Council, so annexation violates this protection of sovereignty because it involves the coerced acquisition of an already sovereign territory.[140] Indeed, the Rome Statute lists annexation as a "crime of aggression," which has been declared as the "supreme international crime."[141]

The prohibition against annexation is intertwined with occupation, as annexations are, "as a rule, the result of military occupation."[142] Annexation that occurs after belligerent occupation is not only *de facto* unlawful given the *per se* prohibition under Article 2(4), but is furthermore unlawful for violating the principle of temporariness—occupations must be temporary to be lawful, while annexation is a permanent, forward-looking venture.[143] Occupation cannot confer title by changing sovereignty, nor can it result in indefinite control, annexation, or colonialism.[144] As the famed legal expert Lassa Oppenheim once noted, "[t]here is not an atom of sovereignty in the authority of the occupying power."[145] Thus, any territorial acquisition resulting from occupation necessarily violates both the requirement that occupations be temporary, as well as the key principle of self-determination and non-acquisition of land by force.[146]

To assert that annexation has occurred in a given territory, traditionally two elements must be met: first, there must be a demonstration of "effective possession of the territory," and second, the acquiring State must clearly

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[138] Rainer Hofmann, *Annexation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (2013).

[139] *See id.* ¶ 16 (stating that consistent State practice and resolutions from the United Nations support the prohibition against annexation). *See also* Bering, *supra* note 7, at 758.

[140] U.N. Charter art. 2, ¶ 4. *See also* Bering, *supra* note 7, at 758.

[141] Rome Statute art. 8(2)(a); International Military Tribunal (Nuremberg), *Judgment and Sentences*, 41 AM. J. INT'L L. 172, 219 (1947).

[142] Hofmann, *supra* note 138, ¶ 28.

[143] Goodman, *supra* note 111, at 1580-81. *See also* Ben-Naftali et al., *supra* note 99, at 593.

[144] GROSS, *supra* note 34, at 20-23; Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 582-585 (2006).

[145] GROSS, *supra* note 34, at 20 (citing Lassa Oppenheim, *The Legal Relations between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 364 (1917)).

[146] *See id.*

manifest an "intention to hold the territory permanently under its dominion."[147] This second prong has become the more difficult element to prove because states have resorted to devious means of annexing foreign territory in order to steer clear of the bright-line prohibition against annexation.[148] Because annexation is a presumptively unlawful means of acquiring territory, a State interested in acquiring land through conquest will do so clandestinely. This allows the Occupying State to "obfuscate the reality of annexation" and its intention to annex foreign land, in direct contravention of the test's second prong.[149]

IV. APPLICATION TO PALESTINE AND TIBET

The case studies of Palestine and Tibet offer illuminating examples of occupation, settlement, and, ultimately, *de facto* annexation by their occupiers. Although the facts and circumstances of both territories are distinct, the commonality in their experiences is far greater than their differences. Palestinians and Tibetans have similarly experienced decades of occupation, being consistently denied by the Occupying Power that any settlement activity is unlawful, and sweeping demographic changes that have rendered them minorities in their own homeland. As a result of these settlements and occupation regimes, Palestinians and Tibetans have become subject to gradual, creeping annexation by Israel and China, respectively. This path will be explored in detail by first establishing the occupation and settlement activity in both regions, followed by an explanation of how these settlements create "*faits accomplis*"[150] equivalent to *de facto* annexation by their occupiers.

A. Settlements Under Article 49(6)

1. Palestine

There is little doubt that the movement of Israelis into areas of Palestine constitutes settler implantation. Not only are the Israeli communities in Palestine widely referred to as "settlements" in common parlance, but the Israeli government itself refers to the activity as settlements.[151] Many Israeli

[147] Omar M. Dajani, *Israel's Creeping Annexation*, 111 AM. J. INT'L L. 51, 52 (Apr. 2017) (citing COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 9 (1916)).

[148] *Id*.

[149] *Id.*

[150] The ICJ famously used this phrase to describe the dire and irrevocable state of affairs in Palestine. ICJ Wall Advisory Opinion, *supra* note 18, ¶ 121.

[151] ISR. MINISTRY OF FOREIGN AFF., ISRAELI SETTLEMENTS AND INTERNATIONAL LAW (Nov. 30, 2015),

government officials have openly referred to the activity as such, including current Israeli Prime Minister Benjamin Netanyahu, who has publicly supported and vowed to preserve settlements in Palestine.[152] As far back as 1974, former Prime Minister Yizthak Rabin also acknowledged the existence of Israeli settlements in Palestine, expressing in a Cabinet Communiqué that settlements "are established solely according to the decisions of the government," and that the Prime Minister and Minister of Defence are appropriately authorized to implement settlement programs.[153] The U.N. has also explicitly acknowledged the activity as settlements in its repeated condemnations of Israel's settlement-building activity.[154]

While the Israeli government may openly recognize the activity as settlements, it disputes that such conduct is unlawful under international law. The Israeli government has taken the position that the Fourth Geneva Convention does not apply to settlement activity in Palestine for several reasons. First, it argues that settlers move to Palestine voluntarily, without direction or instruction from the government, which the Geneva Conventions do not bar.[155] According to the Israeli Ministry of Foreign Affairs, the settlers' voluntary establishment of homes and communities in Palestine "does not match the kind of forced population transfers contemplated by Article 49(6)," demonstrating a narrow view that the Conventions only prohibit involuntary transfers of non-nationals.[156]

Israel's contention is indefensible with regards to its settlements. Although a minority of scholars hold the narrow view that Article 49(6) only prohibits

https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20settlements%20and%20international%20law.aspx [https://perma.cc/PQR4-KK9T].

[152] Jodi Rudoren & Jeremy Ashkenas, *Netanyahu and the Settlements*, N.Y. TIMES (Mar. 12, 2015), https://www.nytimes.com/interactive/2015/03/12/world/middleeast/netanyahu-west-bank-settlements-israel-election.html [https://perma.cc/Y57A-5UJ9] (quoting Prime Minister Netanyahu as having said in 2015, "I do not intend to evacuate any settlements").

[153] Statement from Yizthak Rabin, Prime Minister of Isr., to the Knesset (July 31, 1974), https://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook2/Pages/17%20Cabinet%20communique%20on%20settlements%20in%20the%20West%20B.aspx [https://perma.cc/4JUT-CM9D] (Isr.).

[154] *See, e.g.*, U.N. Secretary-General 2016 Report, *Israeli Settlements*, *supra* note 36, ¶ 3; S.C. Res. 452 (July 20, 1979) (condemning the "policy of Israel in establishing settlements in the occupied Arab territories").

[155] *See, e.g.*, ISR. MINISTRY OF FOREIGN AFF., *supra* note 151.

[156] *Id*. *See also* BENVENISTI, *supra* note 9, at 240 (citing the Israeli section of the INTERNATIONAL COMMISSION OF JURISTS, THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL 54-5 (1981)) (quoting the Israeli construction of Article 49(6) as irrelevant to "the voluntary movement of individuals . . . not as a result of State transfer but of their own volition and as an expression of their personal choice").

involuntary transfers,[157] Israel's contention that its settlers are all voluntary is not only factually contentious, but it evades the true purpose of Article 49(6).[158] The text of Article 49(6) makes no reference to the voluntariness of the transfers, indicating that the law does not distinguish or require that the transfers be forcible in order to be unlawful. Even if such a distinction were relevant to the legal prohibition of settlements, many accounts indicate that the Israeli government directly and indirectly encourages settlement activity in a manner that suggests the transfers are not purely voluntary. Several U.N. reports have detailed how the Israeli government provides monetary funding to settlers and settlement villages, designates land for settlement use or Israeli state territory, and subsidizes settlement construction.[159] Given that "both the Israeli government and the military commanders were heavily involved in the settlements project[s]" in one form or another, the movement of settlers into Palestine cannot therefore be described as "voluntary."[160]

If viewing the population transfers as heavily state-encouraged, it necessarily follows that the settlement constructions are properly attributable to the Israeli government. The movement of settlers is a direct result of state-driven subsidization and planning, so functionally, the settlements are attributable to Israel's government, even if the Israeli government has not formally taken ownership of the settlements. More important than taking a literal interpretation of "voluntary" is enforcing the spirit of the Geneva Conventions by assessing whether or not the settlements have the *effect* of government transfer.[161] The Israeli government's active role in building and financing the settlements thus renders the settlements unlawful, as Israel's subsidization and political encouragement effectively amount to an illegal

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[157] *See, e.g.*, DINSTEIN, *supra* note 76, at 240-41. *See generally supra* text accompanying notes 131-137.

[158] *See* BENVENISTI, *supra* note 9, at 240.

[159] UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 22 (noting that "[a] governmental scheme of subsidies and incentives. . ." in the form of housing and education subsidies, and direct incentives for industry, agriculture, and tourism ". . . has been put in place to encourage Jewish migrants to Israel to move to settlements and to boost their economic development"). *See also* U.N. Secretary-General 2016 Report, *Israeli Settlements*, *supra* note 36, ¶ 4 ("Population growth in Israeli settlements is also encouraged by providing benefits and incentives in the areas of housing, education and taxes.").

[160] BENVENISTI, *supra* note 9, at 240 (citing HCJ 1661/05 *Regional Council, Coast of Gaza v Knesset of Israel*, 59(2) PD 481 (2005), ¶ 12)).

[161] *See* Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 62 ("[A]bove all, the entrenched and unaccountable occupation – through its denial of territorial integrity, genuine self-governance, a sustainably economy and a viable path to independence – *substantively* violates, and undermines, the right of Palestinians to self-determination . . . ") (emphasis added).

transfer of Israeli citizens into Palestine.[162]

Such an interpretation is consistent with state practice and *opinio juris*, as explained by the U.N.'s International Law Commission (ILC) in its commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 11 of the ILC's Draft Articles state that "[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."[163] While the Draft Articles are not *de jure* binding on States, the Commentary to the Draft Articles indicates that the Articles reflect customary international law, meaning they are binding on all States regardless of a State's adoption of the text.[164] Accordingly, given that Israel openly acknowledges and encourages the relocation of settlers into Palestine, as previously established, the activity can properly be attributed to Israel as "an act of that State," independent of whether Israel has incorporated laws consistent with Article 11.[165]

Israel's second argument for why the Geneva Conventions do not govern is rooted in a belief that Article 49(6) does not "prohibit the movement of individuals to land which was not under the legitimate sovereignty of any state and which is not subject to private ownership."[166] Israel has maintained this position for many generations and was considerably influenced by Israeli legal expert Yehuda Blum and former Chief Justice Meir Shamgar, who theorized that occupation only occurs after a legitimate sovereign is ousted.[167] According to Blum and Shamgar's "missing reversioner" theory, Jordan's status as the former sovereign of the West Bank is historically disputed, so the occupied territory of Palestine had never been under the sovereignty of a High Contracting Party to the Geneva Conventions. If the Palestinian territory never belonged to a party to the Geneva Conventions, then the treaty is "inapplicable *de jure*"[168] under Article 2(2) of the Fourth

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[162] Geneva Convention IV, *supra* note 6, at art. 49(6).

[163] Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, at art. 11 (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Draft Articles].

[164] *See id.* at 31 ¶ 1 (explaining that the draft articles are intended to codify "the basic rules of international law concerning the responsibility of States for their internationally wrongful acts").

[165] *Id.* at art. 11.

[166] ISR. MINISTRY OF FOREIGN AFF., *supra* note 151.

[167] *See* Meron, *supra* note 3, at 361-62 (describing the Blum-Shamgar thesis).

[168] *Id.* at 362.

Geneva Conventions because read strictly, the treaties only apply to "cases of partial or total occupation of the territory of a *High Contracting Party*."[169]

The weight of authority does not support this view. As the ICJ noted in the *Wall* opinion—and as supported by the Security Council, the General Assembly, and numerous legal experts[170]—the Fourth Geneva Convention applies to the Palestinian territories pursuant to Article 2(1), which states that the Convention "shall apply to all cases of . . . armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[171] Under Article 2(1), the applicability of the Convention does not turn on Israel's formal recognition of the conflict. Instead, it turns on two elements: first, the existence of an armed conflict, and second, whether the conflict arose between two contracting parties.[172] Both prongs are met in the Palestinian context, rendering the Geneva Conventions applicable to Israel pursuant to Article 2(1). Thus, the Convention and its terms—including *ipso facto* Article 49(6) and its prohibition against settlements—are binding upon Israel, which has violated said terms through its persistent settlement activity in Palestine.

2. Tibet.

In contrast to the Palestinian case study, the overarching question of whether the transfer of Han Chinese civilians into Tibet is lawful turns on the threshold issue of whether the term "settlements" is an appropriate way to characterize the migration of Han Chinese into Tibet. Although the phenomenon of Chinese civilians moving to Tibet is widely documented, as previously described, it remains an open question whether such activity constitutes settlement activity, particularly as prohibited by the Fourth Geneva Convention. Unlike in the Palestinian example, there is no widely-held consensus among States, intergovernmental bodies, or scholars that China is settling its citizens in Tibet, much less occupying Tibet. It is therefore necessary to first establish the existence of an occupation in

[169] Geneva Convention IV, *supra* note 6, at art. 2(2) (emphasis added). *See also* ICJ Wall Advisory Opinion, *supra* note 18, ¶ 93.

[170] *See, e.g.*, *id.*; S.C. Res. 2334 (Dec. 23, 2016); G.A. Res. 71/96, ¶ 1 (Dec. 23, 2016); Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 25 (summarizing that the U.N. Security Council has affirmed the proposition that Israel has occupied Palestine since June 1967, rendering the Fourth Geneva Convention applicable "in full"); INT'L COMM. OF THE RED CROSS, THE CONFERENCE OF HIGH CONTRACTING PARTIES TO THE FOURTH GENEVA CONVENTION OF 17 DECEMBER 2014, at 1119 (2015); Meron, *supra* note 3, at 362-64; Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 96-100 (2003).

[171] Geneva Convention IV, *supra* note 6, at art. 2(1).

[172] *See id.*

Tibet.[173]

Under the 1907 Hague Conventions, territory is considered occupied "when it is actually placed under the authority of the hostile army."[174] Using this definition, China's governance of Tibet would readily constitute occupation, as Tibet was actually placed under the authority of the Chinese military when it entered Lhasa in 1950 and took over. The ICRC's updated Commentary to the First Geneva Convention similarly defines occupation as "exist[ent] as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory."[175] The Commentary lays out a three-part test to understand when an Occupier's "effective control" gives rise to an occupation: first, a State's armed forces are physically present in a foreign territory without the local government's consent; second, the local government is or has been rendered incapable of exerting its own powers; and third, that the State's forces are in a position of exercising authority over the territory in lieu of the local government.[176] China's military takeover when it stormed into Lhasa in 1950 readily meets these three criteria, as the Tibetan government did not consent to the occupation and was powerless to fight back, paving the way for the Chinese government to exercise control thereafter.

However, although Chinese officials acknowledge their 1950 military takeover resulted in maintaining effective control over Tibet, it is possible to "recognize China's de facto effective control over Tibet without . . . indulging the fiction of its de jure sovereignty and legitimacy."[177] Thus, in addition to requiring effective control or a hostile army takeover, the legal existence of an occupation in Tibet also depends on whether Tibet was independent prior to the Chinese government takeover in 1950.[178] While

[173] *See* GROSS, *supra* note 34, at 123-24 (summarizing that the debate over whether Tibet can be considered occupied "rests on the question of whether Tibet had previously been an independent state").

[174] Hague Conventions IV, *supra* note 74, at art. 42.

[175] ICRC 2016 COMMENTARY TO THE FIRST GENEVA CONVENTION, *supra* note 33, ¶ 324. *See also id.* ¶ 301-02 (concluding that "'effective control' is the main characteristic of occupation as there cannot be occupation of a territory without effective control exercised over it by hostile foreign forces").

[176] *Id.* ¶ 304. It should also be noted that although the ICRC Commentaries are not binding on States, they are considered authoritative interpretations of the drafters' intent. *See* Meron, *supra* note 3, at 364.

[177] Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 185-86; VAN WALT VAN PRAAG, *supra* note 42, at 185 (casting doubt "on the *degree* of effectiveness or control of China's regime in Tibet," but nevertheless establishing that the Chinese military and government held control over Tibet) (emphasis added).

[178] GROSS, *supra* note 34, at 115-16 ("[I]n order to prove that Tibet is occupied, what

some maintain that China was the recognized sovereign of Tibet in 1950, the Chinese government heavily contests this view. Chinese officials maintain that Tibet has been an "inseparable" part of Chinese territory ever since Ancient times, so "the issue of resuming exercise of [Tibetan] sovereignty does not exist."[179] However, the majority of independent scholars agree that, at least from 1911 to 1950, Tibet maintained *de facto* independence prior to the Chinese takeover in 1950.[180] Indeed, British diplomat Hugh Edward Richardson concluded in 1951, the year after the takeover, that "since 1912 Tibet has enjoyed complete *de facto* independence."[181] From a factual standpoint, it would thus seem that Tibet was sovereign prior to the Chinese occupation in 1950.

Tibet's legal sovereignty is a more difficult question. Scholar Barry Sautman disputes both the factual and legal conclusion that Tibet is an "occupied" territory, as he argues that Tibet lacked statehood at the time of occupation.[182] Because other States did not recognize Tibet as an independent State on the eve of China's invasion, he argues, Tibet cannot be thought of as *internationally* occupied.[183] Furthermore, without independent statehood, Sautman contends that Tibet could not be engaged in an *international* armed conflict, rendering international humanitarian law inapplicable.[184]

This theory is not only premised on factually inaccurate contentions, but is also legally unsound, as Tibet was legally sovereign pre-1950 under well-accepted tenets of international law. The Montevideo Conventions, largely considered to be the "touchstone" for the definition of a state under international law,[185] defines a state as having: (1) a permanent population,

was needed was to show that Tibet had been independent.").

[179] *Regional Ethnic Autonomy in Tibet*, PERMANENT MISSION OF CHINA TO THE U.N. OFF. AT GENEVA & OTHER INT'L ORGS. IN SWITZ., http://www.china-un.ch/eng/bjzl/t168663.htm [https://perma.cc/Y2VV-GR6R] (last visited Mar. 2, 2018).

[180] *See* Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 131, 136, 146 (asserting that, by the author's count, "all politically independent analysts agree that from 1913 to 1950 Tibet enjoyed de facto independence and statehood"); Michael C. Davis, *Tibet*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 5 (2007); Rubin, *supra* note 45, at 133. *See generally* VAN WALT VAN PRAAG, *supra* note 42.

[181] H.E. Richardson, *The State of Tibet*, 38 J. ROYAL CENT. ASIAN SOC'Y 112, 112 (1951).

[182] *See e.g.*, Barry Sautman, *Tibet's Putative Statehood: and International Law*, 9 CHINESE J. INT'L L. 127 (2010); Barry Sautman, *Is Tibet China's Colony?: The Claim of Demographic Catastrophe*, 15 COLUM. J. ASIAN L. 81 (2001).

[183] Sautman, *Tibet's Putative Statehood*, *supra* note 182, at 131-32.

[184] Sautman, *Is Tibet China's Colony?*, *supra* note 182, at 108.

[185] Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 416 (1999).

(2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.[186] Tibet enjoyed all of these elements prior to 1950: it had a discernible populace and territory, as well as a government that exercised control over said territory free from other State influence.[187] It conducted its own foreign relations with other States, including, for example, an agreement in 1914 with Britain and China that affirmed Tibet would "remain in the hands of the Tibetan Government at Lhasa."[188] In this treaty, known as the Simla Accord of 1914, China also notably vows "not to convert Tibet into a Chinese province," a promise it has not upheld.[189]

Sautman argues that the Simla Accord of 1914 does not establish Tibet's legal sovereignty because in the treaty, Britain recognized that Tibet was under China's "suzerainty," which he argues clearly demonstrates that Tibet was not sovereign, but rather under China's authority.[190] However, this argument is deficient for several reasons. First, the term "suzerainty" was never defined, although it was understood to mean some type of control or authority. Whatever its precise definition, historical evidence shows that the drafters did not intend to equate "suzerainty" with complete Chinese sovereignty over Tibet, because one of the British drafters sought to ensure some sort of distance was kept between Tibet and China in case Britain itself wanted to become more involved in Tibet.[191] Second, putting aside the contents of the treaty, Sautman's view overlooks the obvious fact that Tibet was a signatory party to this treaty, which is alone sufficient to meet the fourth Montevideo criteria that the territory have "the *capacity* to enter into relations with other states."[192] Not only did Tibet have the capacity to enter into relations by having a government of its own that liaised with other

[186] Montevideo Convention on the Rights and Duties of State art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

[187] Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 147 (quoting LEGAL INQUIRY COMMITTEE ON TIBET, INTERNATIONAL COMMISSION OF JURISTS, TIBET & THE CHINESE PEOPLE'S REPUBLIC 5-6 (1960)). *See also* Rubin, *supra* note 45, at 133-136 ("[B]y the time of the fall of the Nationalist Government of mainland China in 1949, relations between Tibet and China seemed to have involved complete *de facto* autonomy for the Lhasa government").

[188] Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 148 n.147.

[189] Convention Between Great Britain, China Respecting Tibet (Simla Accord) art. 2, Gr. Brit.-China-Tibet, July 3, 1914 [hereinafter Simla Accord].

[190] Sautman, *Tibet's Putative Statehood*, *supra* note 182, at 130. *See also* Rubin, *supra* note 45, at 127 (concluding that the Simla Accords did not confer statehood to Tibet, even though "[t]he legal ingredients of independence" are present).

[191] Rubin, *supra* note 45, at 114-15.

[192] Montevideo Convention, *supra* note 186, at art. 1.

foreign governments, but it also exercised this capacity by signing several international treaties, including the Simla Accords of 1914, and receiving foreign diplomats from British-controlled India, China, Nepal, and Bhutan.[193]

Finally, Sautman's view singularly focuses on the word "suzerainty" while ignoring the full context of the article, and the treaty as a whole. Immediately following the clause that states "Tibet is under the suzerainty of China," the treaty continues on to state that Britain is "recognising also the autonomy of [Tibet]."[194] Read together, these two clauses indicate that although China was to maintain some oversight over the territory, its suzerainty was over an *autonomous* Tibet, meaning Tibet was to govern itself subject to some Chinese supervision.[195] This interpretation is bolstered by the fact that China and Britain further vowed in the treaty to "abstain from the interference in the administration of Outer Tibet" per the terms of the Accord.[196] The treaty's reference to autonomy free from Chinese and British interference thus confirm Tibet's sovereignty pre-1950.[197] As Tibet met all four Montevideo criteria and attained both *de facto* and *de jure* sovereignty prior to the Chinese takeover in 1950, any subsequent occupation by China was international in nature—and hence unlawful under the well-established principles of non-intervention.[198]

Although Tibet maintained both factual and legal sovereignty prior to 1950, there remains the question of whether Tibet's sovereignty was legally transferred to China through the signing of the Seventeen-Point Agreement in 1951. The Chinese government and other scholars have relied on the signing of the Seventeen Point Agreement as evidence that Tibet ceded

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[193] Rubin, *supra* note 45, at 132. In addition to the Simla Accords, Tibet also signed an agreement in 1908 between Britain, Russia, and China, as well as a treaty with Mongolia in 1913 and a treaty with Nepal in 1856, among others. *Id.* at 116, 123; Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 148 n.147.

[194] Simla Accord, *supra* note 189, at art. 2.

[195] A 1921 British cable sent to the Chinese corroborates this view, as it states that the British officially recognized Tibet "as an autonomous state under the suzerainty of China." Rubin, *supra* note 45, at 130.

[196] Simla Accord, *supra* note 189, at art. 2.

[197] Indeed, according to one scholar, "[t]he sole factor evincing statehood that Tibet lacked during this period was formal international recognition, meaning *political* recognition." Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 147-48 (internal quotations omitted). However, a lack of recognition from other states does not negate the "factual existence of a state and its right to independence." Rubin, *supra* note 45, at 127-28.

[198] *See* U.N. Charter art. 2(4).

autonomy to China after the invasion.[199] However, this position ignores the true dynamics and context behind the question of Tibet's statehood in 1951. When Tibet signed the Seventeen-Point Agreement, it did so largely out of duress rather than of its own free will. Under Article 52 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[200] When China presented the Tibetan delegation with the terms of the Seventeen-Point Agreement in Beijing, Chinese troops were at the same time in the midst of defeating the Tibetan army some thousand miles away in Tibet, capturing local towns and killing scores of Tibetan troops and civilians.[201] China threatened to use even more force against Tibet if its terms were not agreed to.[202] The Agreement is thus more accurately described as an ultimatum rather than a proper basis for negotiation, given the duress and threat of violence that surrounded the signing of the Agreement.

In addition to the threat of military violence, the Agreement itself was not legitimately procured or agreed to by the Tibetan delegation. The Agreement's terms heavily favored one party over another, and were unilaterally drafted by the Chinese five months before negotiation talks began.[203] Indeed, ten years after the Agreement was signed, the Dalai Lama recalled the signing of the agreement in a statement to the press:

> The agreement which followed the invasion of Tibet was [also] thrust upon its people and government by the threat of arms. It was never accepted by them of their own free will. The consent of the Government was secured under duress and at the point of the bayonet. My representatives were compelled to sign the Agreement under threat of further military operations against Tibet by the invading armies of China leading to utter ravage and ruin of the country. Even the Tibetan seal which was affixed to the Agreement was not the seal of my representatives in Peking, and [has been] kept in their possession ever since.[204]

Thus, in light of the coercion, concurrent use of military force, China's

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[199] *See* Tieh-Tseng Li, *The Legal Position of Tibet*, 50 AM. J. INT'L L. 394, 403-04 (1956).

[200] Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[201] VAN WALT VAN PRAAG, *supra* note 42, at 154.

[202] *Id.* at 155.

[203] *Id.* at 154.

[204] Tsering Shakya, *The Genesis of the Sino-Tibetan Agreement of 1951*, *in* THE TIBETAN HISTORY READER 609, 610 (Gray Tuttle & Kurtis Schaeffer eds., 2013).

threat of additional force if its terms were not met, and unauthorized signing by the Tibetan delegation, the Seventeen-Point Agreement is "null and void *ab initio*" under Article 52 of the Vienna Convention.[205] Once voided, the agreement is stripped of legal effect, and would leave Tibet's pre-1951 status as the *de facto* and *de jure* sovereign fully intact, which in turn renders China's current occupation unlawful.[206]

The illegality of the occupation also implicates the Chinese settlement of Han Chinese civilians into Tibet. As Article 49(6) of the Fourth Geneva Convention forbids an Occupying Power from transferring its own civilian population into the territory it occupies, China as the occupier cannot transfer its Han Chinese residents into Tibet.[207] The ethnic distinction between Tibetans and Han Chinese is key, given that the drafters of the Geneva Conventions feared transfers made "for political and racial reasons" that could "worsen[] the economic situation of the native population and endanger[] their separate existence as a race."[208] Tibetans do not consider themselves Chinese, nor do they consider Han Chinese to be Tibetans, as Tibetans have a distinct cultural, historical, religious, linguistic, and "national" identity that differs from the rest of China.[209] The Chinese share this sentiment, as one delegate in 1951 agreed that "Tibetans are different from the Hans [i.e., Chinese]."[210] The transfer of ethnically distinct Han Chinese civilians from the occupier into the occupied state therefore falls under Article 49(6)'s prohibition. As such, the Chinese settlements are *per se* unlawful under the Geneva Conventions, to which China is a party and thus bound.[211]

Like the Israeli government's argument in defense of its own settlement program, China relies on the supposed voluntariness of the transferred settlers as a defense in claiming the settlements do not violate Article

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[205] VAN WALT VAN PRAAG, *supra* note 42, at 165. *See generally* Vienna Convention, *supra* note 200, at art. 52.

[206] Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 153-54. For a discussion of the lack of recognition for Tibet's *de jure* sovereignty, see Rob Dickinson, *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT'L & COMP. L. 547, 558-59 & n.71, 574-75 (2009).

[207] Geneva Conventions IV, *supra* note 6, at art. 49(6).

[208] ICRC COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 115, at 283.

[209] Sloane, *Tibetan Diaspora in the Shadow of the Self-Immolation Crisis*, *supra* note 8, at 67. *See also* VAN WALT VAN PRAAG, *supra* note 42, at 194-95 ("Tibetans have throughout history considered themselves as one people, distinct from any of the neighboring peoples").

[210] VAN WALT VAN PRAAG, *supra* note 42, at 194.

[211] *See* INT'L COMM. OF THE RED CROSS, *supra* note 83.

49(6).[212] But as demonstrated in the Palestinian case study, voluntariness should more accurately be assessed by its functional effect rather than any formal admission by the Occupying Power. Formally, Chinese settlers may say their move to Tibet was "voluntary," but functionally they are encouraged and incentivized by the Chinese government to relocate and settle in Tibet. Moreover, the functional effect of the transfer is more important than formality because an Occupying State would not be so foolish as to vocalize that it is involuntarily transferring its civilians into another State, as that would be tantamount to a naked proclamation that it is violating the Geneva Conventions.[213] Deng Xiaoping—the Chinese political leader widely credited with transforming China into a formidable market economy in the 1980's—once publicly discussed that the population transfers, claiming "[t]here is no harm in sending Han into Tibet to help" develop the region economically, as "[t]he two million Tibetans are not enough to handle the task of developing such a huge region."[214] This informal statement aside, a lack of official statement taking responsibility for the settlements can be no defense, particularly given that China is notoriously opaque about many of its state policies.

Functionally, evidence about the Chinese migration largely suggests that the government actively encourages and offers incentives to Han Chinese to move into Tibet, a program that resounds in "a deep-seated Chinese sense of manifest destiny."[215] The settlement programs may also be part of a national security strategy to contain unrest and quell uprisings.[216] What is clear is that underlying these various theories is a government strategy to populate the occupied territory with ethnic nationals who are more likely to be loyal to

[212] Dreyer, *supra* note 62, at 139 ("Official sources repeatedly denied that Han were flooding into Tibet."). In addition to the Chinese government, Sautman and other scholars make this argument in rationalizing why "[t]he characteristics of migrants to Tibet. . .are radically different from those of 'settlers.'" Sautman, *Is Tibet China's Colony?*, *supra* note 184, at 108 (citing scholars who have "concluded that the vast majority of migrants to Tibet come at their own initiative"); Dreyer, *supra* note 62, at 136 (observing that the influx of Han Chinese "[did] not seem to have been the result of a conscious central government policy of ethnic swamping").

[213] Dajani, *supra* note 147, at 53 ("Excessive formalism . . . seems misplaced when assessing whether a state has manifested an intention to hold a territory 'under its dominion' with sufficient clarity to constitute an unlawful annexation.").

[214] Peter Hessler, *Tibet Through Chinese Eyes*, THE ATLANTIC (Feb. 1999), https://www.theatlantic.com/magazine/archive/1999/02/tibet-through-chinese-eyes/306395/ [https://perma.cc/W6VQ-XUYF].

[215] John Pomfret, *A Less Tibetan Tibet*, WASH. POST, Oct. 31, 1999, at A31.

[216] *Id.*

Beijing than the Dalai Lama.[217] Thus, although the Chinese government's conduct may not be explicitly attributable to the settlements in Tibet, its tacit acknowledgement and adoption of the conduct is sufficient to find attribution and responsibility under Article 11 of the ILC's Draft Articles.[218]

Certainly not all Han settlers were directly instructed or encouraged to move to Tibet. It is doubtless true that many Chinese settlers believe their decision to move was completely independent of the State, as they chose to leave home to seek better economic opportunities in Tibet. The cheap land, abundance of business and farming opportunities, and new accessibility made possible by the construction of the high-speed railway may have made it very enticing for Chinese migrants to settle in Tibet, particularly for poor Chinese from other low-income provinces.[219] However, many of these benefits and development programs were directly funded and constructed by the Chinese government through incentives like higher salaries and better access to health care, creating intentionally favorable conditions for Han Chinese to move and resettle in Tibet.[220] In fact, Chinese officials have acknowledged and applauded this byproduct of Han Chinese settlement from its revitalization efforts.[221] These indirect government incentives underscore the conclusion that under Article 11 of the ILC's Draft Articles, China can sufficiently be attributed to the resettlement program. Because China can be properly attributed with the settlement activity, the conduct is therefore considered to be done by the State, which in turn violates Article 49(6) for transferring occupier civilians into an occupied territory.

B. Settlements as De Facto Annexation

As the ICRC Commentary to the Geneva Conventions makes clear, the prohibition against settlements is intended to, in part, draw attention to the rights of the native population in the occupied territory, as settlements effectively deprive the local population of religious, economic, and ultimately human rights.[222] The influx of non-native populations, whether steady over time or all at once, engenders dramatic demographic change in territories lawfully belonging to its indigenous populations. What was once a territory of indigenous people becomes diluted as more migrants from the

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[217] *Id*.

[218] *See* ILC Draft Articles, *supra* note 163, at art. 11.

[219] Fletcher, *supra* note 47, at 135, 139.

[220] Michele L. Radin, *The Right to Development as a Mechanism for Group Autonomy: Protection of Tibetan Cultural Rights*, 68 WASH. L. REV. 695, 698 (1993); Clark, *supra* note 40, at 313-14, 320.

[221] *See* Wong, *supra* note 50.

[222] ICRC COMMENTARY ON THE GENEVA CONVENTION IV, *supra* note 115, at 283.

Occupying State move in, acquire property, and visibly engage or take over businesses, commerce, and politics.

The results of these demographic shifts from native to non-native people has the ultimate effect of hampering the native population's right to self-determination in its own territory.[223] Such an impairment has wide-ranging implications for the territory's sovereignty, and may also evince a more sinister intent by the Occupying State to cement its control and authority over the territory. Although occupation must be temporary per the rules of international law, an Occupying State could conceivably creep slowly to entrench its power by directly or indirectly sending its own civilians to live in the occupied territory. While an Occupying State may not have officially acquired another territory in *de jure* annexation, their actions and activities while in power may nevertheless amount to *de facto* annexation, as in the case of Palestine and Tibet.[224] The ICJ recognized this very concern in its Advisory Opinion concerning the former mandate territory of Namibia, in which the Court reiterated that the principle of non-annexation was of "paramount importance" when considering the occupation of Namibia.[225] Thus, while these transfers are presumptively unlawful under Article 49(6) of the Geneva Conventions, these settlements go beyond being simply *per se* illegal under occupation law—they amount to *de facto* attempts or actual realizations of annexation.

Again, it is highly unlikely that a modern State would announce its intention to officially annex or conquer a territory, as that would be tantamount to self-incrimination given the outright prohibition on annexation under international law.[226] A former Special Rapporteur of the U.N. Commission on Human Rights observed that "[l]anguage is a powerful instrument," which he cautioned was "why words that accurately describe a particular situation are often avoided."[227] On a trip to assess the wall separating Israel and the West Bank, the Special Rapporteur observed that Israelis, for instance, "obfuscate[d] the truth" by describing the wall as a

[223] *See id*. *See also* Dajani, *supra* note 147, at 53.

[224] Ben-Naftali et al., *supra* note 99, at 602-03 n.294.

[225] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶¶ 45, 83 (June 21).

[226] *See* U.N. Charter art. 2, ¶ 4.

[227] John Dugard (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories), *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶ 6, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003) [hereinafter Dugard, *Report of the Special Rapporteur*].

security necessity instead of admitting it was annexation.[228] Yet, he observed, Israel's words could not erase the fact that the wall presented "a visible and clear act of territorial annexation under the guise of security."[229] Thus, the legal requirement that annexation be intentional becomes obfuscated when an Occupying Power disguises the truth, yet engages in what one scholar has termed "creeping annexation."[230] In light of the goal to forbid annexation outright, requiring formalism thus "seems misplaced" when considering the explicitness of a State's intent to acquire through annexation.[231]

In the Palestinian context, many international organizations have likened Israel's settlements to annexation, including most notably the ICJ, which famously denounced Israel's construction of the wall bordering the West Bank. In 2003, the Court determined that the wall and its "associated regime" created a "*fait accompli*," one which "would be tantamount to *de facto* annexation."[232] The U.N. has also condemned the settlements and related activities as demonstrations of *de facto* annexation, including a Special Rapporteur of the U.N. Commission on Human Rights who reported that the settlements and the wall were "manifestly intended to create facts on the ground" of annexation.[233] While the settlements and construction of the wall were not official acts of annexation, the Special Rapporteur observed that the "effect is the same: annexation."[234]

Beyond a repetition of these statements from officials, though, it is necessary to explore how exactly settlements can amount to *de facto* annexation. Absent an official act to capture foreign territory, *de facto* annexation can be demonstrated by analyzing the character, scale, and duration of conduct to determine if such activity can bestow an inference of intent to annex.[235] In essence, the inquiry is whether or not the annexation

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[228] *Id.*

[229] *Id.*

[230] *See* Dajani, *supra* note 147, at 51 (defining it as when "a putative acquisition of territory is undertaken not in one fell sweep, but gradually through a pattern of oblique and sometimes informal measures"). Other international bodies have also adopted the phrase "creeping annexation" in relation to Israel's activities in Palestine. *See* UNHRC, *Report on Israeli Settlements*, *supra* note 14, ¶ 101; Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 47.

[231] Dajani, *supra* note 147, at 53.

[232] ICJ Wall Advisory Opinion, *supra* note 18, ¶ 121.

[233] Dugard, *Report of the Special Rapporteur*, *supra* note 227, ¶ 14.

[234] *Id.* The Special Rapporteur concluded that "[t]here may have been no official act of annexation of the Palestinian territory in effect transferred to Israel by the construction of the Wall, but it is impossible to avoid the conclusion that we are here faced with annexation of Palestinian territory." *Id.* ¶ 6.

[235] *See* Dajani, *supra* note 147, at 53. *See also* Ben-Naftali et al., *supra* note 99, at 602-

has *effectively* occurred, regardless of the formality of annexation.[236] In the Palestinian context, several factors suggest that Israel's settlement activity amounts to *de facto* annexation. The longevity of Israel's settlement program, for instance, is indicative of Israel's longstanding desire and intent to eventually acquire Palestine in full. Although the origin of Israeli settlements in the Palestinian territory is often disputed, many sources agree that at a minimum, every Israeli administration has overseen settlement growth since 1967.[237] Fifty years of occupation and settlement construction are surely a sufficiently long period for Israel to have simultaneously stripped land away from Palestinians while conferring it to its own citizens for settlement property. In the last ten years alone, the flurry of settlement construction has rapidly increased relative to the previous years, a statistic that is consistent regardless of which political party is in power.[238] One report estimates that in 2000 alone, 4,000 new settlement projects commenced, roughly increasing the population of West Bank settlers by 8%.[239] The enormous amounts of Israeli investment and construction resources spent on settlements in Palestine over the last fifty years are clearly indicative that, rather than "treating [Palestine] as a negotiation card to be returned in exchange for peace," Israel has "already effected a *de facto* annexation of a substantial part of the [Occupied Palestinian Territories]."[240]

Arguably, Israel has more than begun the process of annexing portions of Palestine, given that when the Israeli government cordons off areas for agriculture, national parks, or residential property in Palestine, it does so exclusively for the benefit of Israelis and not for native Palestinians.[241] Reports indicate, for instance, that Palestinians are forbidden from using certain roads that the Israeli government declared to be its own in settlement areas.[242] Israel justifies much of the expropriations through official military

03 n.294 (explaining that although Israel did not annex Palestine *de jure*, a *de facto* annexation was effected and "made visibly and materially clear by the planned path of the Wall").

[236] Dugard, *Report of the Special Rapporteur*, *supra* note 227, ¶¶ 14, 41 (concluding that the "continued expansion of settlements . . . have more to do territorial expansion, de facto annexation or conquest" rather than Israel's alleged justifications about security).

[237] Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 50 ("Every Israeli government since 1967 has left office with more settlers living in the occupied territory than when it assumed office.").

[238] Rudoren & Ashkenas, *supra* note 152.

[239] *Id.*

[240] Ben-Naftali et al., *supra* note 99, at 602-03.

[241] *See* U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 28, ¶¶ 10-17; Dajani, *supra* note 147, at 55.

[242] Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 47 (noting that settlers in Area C of the West Bank "live under Israeli law in Israeli-only settlements, drive on an Israeli-

orders, which have declared, for example, all lands not previously registered as "state lands."[243] While not all infrastructure in Palestine is this exclusive, the designation of much of the territory as "Israeli-only"—including, for example, by confiscating land for parks and designating it as literally national state property—sends an unmistakably clear message that the land belongs to Israel, not Palestinian natives.[244] The erection of a security wall in 2002 throughout the West Bank—along with its accompanying administrative regime that closed off certain areas to native residents—posed burdensome checkpoints and required Palestinians to present identity cards, while Israelis were allowed to freely come and go without a permit. This physical separation and discriminatory treatment further reinforces that Israel, not Palestinians, dictate how land is to be used in Palestine.[245] These recent exclusionary practices on what had been Palestinian land, along with the steady settlement construction over the last fifty years, accumulatively demonstrate a clear intent to annex territory.[246]

Another indication that Israel's activities result in effective annexation is the geographic placement of Israeli land vis-à-vis Palestinian land. Israeli settlements and state lands are contiguous in the West Bank, creating pockets of Israeli land throughout the Occupied Palestinian Territories that require Palestinians to traverse Israeli land in order to reach other parts of Palestinian-designated land. The map below visually depicts how much land has become *de facto* Israeli property.

only road system, and benefit greatly from the enormous sums of public money spent by Israel," little of which can be shared with Palestinians living in the area).

[243] Imseis, *supra* note 170, at 101-03.

[244] Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶ 47; U.N. Secretary-General 2017 Report, *Israeli Settlements*, *supra* note 28, ¶¶ 14-24.

[245] ICJ Wall Advisory Opinion, *supra* note 18, ¶¶ 80-85.

[246] Imseis, *supra* note 170, at 102-03 (". . . [Israel] has utilized a host of near identical military orders to expropriate a massive expanse of Palestinian land, resulting in the de facto annexation of the vast majority of the [Occupied Palestinian Territories], without having to absorb its large Palestinian population through the extension of its citizenship."). *See also* BENVENISTI, *supra* note 9, at 241 (finding that "the cumulative effect" of Israel's settlements "was in fact the extension of Israeli jurisdiction" and de facto annexation).

As depicted in this map, Area C, which is administered exclusively by Israel, appears to be dominant on the east side of the West Bank, bordering Jordan, and is more interspersed—albeit contiguous—as one goes west. The pockets of Area C in all corners of the West Bank, as well as the continuity of Israel's settlements throughout the West Bank, severs the Palestinian-only land, such that Palestinians cannot travel from one part of Area A to another without necessarily crossing a dangerous checkpoint into Israeli-governed Area C. Thus, while this scattered layout may not seem to give the Israeli government much of an obvious advantage, the expansion of Area C has in fact allowed Israel to discreetly acquire significant swaths of Palestinian land, swallowing Areas A and B and deepening the Israeli toehold in the West

Bank.

In total, Israel's piecemeal acquisitions have resulted in a large percentage of Palestinian territory that has been rendered off-limits to local Palestinians. One estimate reports, for instance, that settlement colonies, confiscated land adjacent to Palestinian land, bypass roads, and land designated for the military add up to a total of 59% of the total area of the West Bank.[247] Other sources indicate Israeli planners have "expressly targeted areas of the West Bank that are not already densely inhabited by Palestinians for acquisition" purposes.[248] Still other reports suggest that Israeli settlements are moving deeper into the West Bank, as to further entrench its footprint and slowly expand the occupation.[249] These settlements have slowly come to encircle Palestinian neighborhoods, further isolating native communities and disrupting their territorial roots.[250] Together with the long, sustained, and uninterrupted history of settlement construction over the last fifty years, the scale and scope of Israeli's settlement program are thus sufficiently sizeable to rise to the level of a *de facto* territorial annexation of Palestine.

Similar parallels are visible in Tibet, where an equally long and substantial history of settlement development has occurred at the hands of the Chinese government. The Chinese government had a similarly lengthy history of sending Han Chinese to Tibet, beginning from the inception of the Chinese occupation in 1950. Not long after invading Tibet, the Chinese government built roads with the intention of integrating Tibet with the rest of China, allowing Han Chinese to migrate there more conveniently.[251] While many of the Han Chinese who settled in Tibet were migrant laborers and only intended to stay temporarily, a substantial number also stayed in Lhasa, comprising 15% of the region's population.[252] Indeed, although the government's position was that any Han Chinese migration would last only as long as their employment contracts finished, many of these contracts lasted as long as ten years.[253] During a reformatory period from 1980 to 1987, an estimated 60,000 Han Chinese lived in Lhasa, comprising 50% of the city's total population.[254] Not only were Tibetans becoming a minority in their

[247] Imseis, *supra* note 170, at 105.

[248] Dajani, *supra* note 147, at 55.

[249] Rudoren & Ashkenas, *supra* note 152 (describing the clearance of land for projects "that would extend the settlement[s] even further east").

[250] ICJ Wall Advisory Opinion, *supra* note 18, ¶ 122.

[251] Dreyer, *supra* note 62, at 130.

[252] *Id.* at 136.

[253] *Id.* at 139.

[254] *Id.* at 134.

capital city, but a majority of the businesses and storefronts were run by Han Chinese, controlling the local economy while Tibetans were being deprived of job opportunities and means to make a living.[255] Another source corroborates the resettlement of Han Chinese in Tibet throughout the decades, with many noting a particular surge in the last thirty years during China's aggressive industrial development of Tibet.[256] Although done under the guise of economic development for an underdeveloped and societally "backwards" region, the Chinese government's sustained effort to send thousands of Han Chinese to Tibet every year for the last sixty years surely reflects a long-standing desire to acquire Tibet in eventual conquest.[257]

Geographically, the settlements in Tibet are more densely concentrated than are the settlements in Palestine. Rather than being interspersed in small communities around the entire province, most of the Han settlements are in urban areas, and in particular Lhasa, the largest city and regional capital.[258] Few settlers move to higher parts of the plateau or to more remote areas, in part because the harsh climate and underdeveloped economy of the rural areas make it undesirable to settle there.[259] Also in contrast to Palestine, the Chinese government has not designated significant territory as Chinese state property for national parks and other governmental use. However, the Chinese government continues to occupy Tibetan territory in order to build property for residential, business, and agricultural purposes, albeit less commonly for areas outside Lhasa and other larger cities.[260]

While this may suggest the settlements are unique to a specific city, and therefore less likely to indicate annexation of a whole territory, the settlement pattern in Tibet is almost certainly influenced by other geographical factors unique to Tibet. First, Tibet is the size of Western Europe, while the West Bank is 5,860 square kilometers, slightly smaller than

[255] *Id.* at 136.

[256] Ziemer, *supra* note 52, at 253. *See also* Dreyer, *supra* note 62, at 138 (describing how in the 1990's and 2000's, "Han [Chinese] were coming into the TAR in sizable numbers to assist in economic development." This transplant of settlers coincided with government policies restricting family planning for Tibetans, which led many to believe the "real motive behind family planning was genocide.").

[257] *See* Dreyer, *supra* note 62, at 139 (quoting a state-run newspaper article as explaining that having Han Chinese settlers was "absolutely crucial to economic development" because "unless [Tibetans] change their way of thinking, it will be very difficult for Tibet to enjoy development").

[258] Dreyer, *supra* note 62, at 139 ("Han became the majority of the population in Lhasa and in the TAR's second city, Xigaze.").

[259] Pomfret, *supra* note 215 (quoting a Western scholar of Tibet as saying, anecdotally, "[o]nce you get above 9,000 to 10,000 feet and outside the cities, there are just no Chinese").

[260] *See The Plateau, Unpacified*, *supra* note 65; Clark, *supra* note 40, at 319-20.

the size of Delaware.[261] Annexing or occupying all parts of Tibet would reasonably present more of a challenge than occupation of Palestine. Second, Tibet is far more remote and inhospitable in its climate than Palestine. Much of the land is non-arable for large-scale farming purposes, and the altitudes can be unbearable near the Himalayans. Consequently, the government has no reason to direct people to move there, given that it has fewer plans to farm, build, or inhabit these remote mountainous areas. Nonetheless, China's lack of settlement-building in the vast majority of Tibet does not indicate a lack of intent to settle Chinese there in the future. In fact, the settlement of Han Chinese primarily in Lhasa could exhibit a strategy to annex the economic linchpin that controls the whole province, a move that would cement China's economic and political power in the most influential parts of the Tibetan occupied territory. It follows, therefore, that China's settlement policy in urban centers of Tibet is effective enough to amount to *de facto* annexation of the territory it occupies.

V. CONCLUSION

The settlement programs in Palestine and Tibet are comparable in many ways, given that they share over one hundred combined years of occupation, wide-scale redevelopment at the expense of the native populations, and a sustained effort by their occupiers to inhabit and repopulate the territories with nationals of their own State. Although settlements are presumptively illegal under the laws of occupation, recharacterizing settlements as tantamount to *de facto* annexation offers an additional means of declaring the Israeli and Chinese occupations illegal under international law. Recognizing the settlements and occupations as annexation could spur third parties and international organizations into taking more action against Israel and China, given that the legal implications of annexation are much more severe than settlements. Additionally, critics often argue that settlements are only unlawful during belligerent occupation, allowing occupiers an easy path out of liability by simply refusing to call their activity "occupation."[262]Annexation, on the other hand, is manifestly illegal under international law, regardless of the *jus ad bellum* or *jus in bello* conduct of the Occupying State. Therefore, settlements as a form of *de facto* annexation can more strongly establish unlawful conduct under international law.

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[261] *The World Factbook: West Bank*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/we.html [https://perma.cc/EL8C-ZSYB].

[262] *Supra* notes 227-229 and accompanying text.

By reframing the Israeli and Chinese settlements as demonstrations of annexation as fact, if not by law, third party States may—and should—begin to take greater notice of the irreversible impact that settlements have in occupied territories. Third parties and international organizations have, to varying degrees, been soft in their condemnation of Israeli and Chinese settlements. There has been more vocal denunciation in the Palestinian context, bolstered by the ICJ's Advisory Opinion regarding the construction of the wall, while a fraction of that attention has been paid to Chinese settlements in Tibet.

Is it worth noting, briefly, why there is such great disparity between condemnation for Israel and condemnation for China. First, China has a permanent seat on the U.N. Security Council, which allows China to veto any resolution or action that comes before the Security Council.[263] This immense power contrasts greatly with Tibet's powerlessness—although there seems to be a cultural and spiritual fascination with Tibet in the Western hemisphere, this popularity has not translated into any actual political or economic power for Tibetans.[264] Second, while the Israeli government does not have the cleanest record when it comes to human rights, residents nevertheless enjoy relatively unencumbered freedom of speech and freedom of press. In contrast, China is an authoritarian state governed by the Communist Party, which singlehandedly controls the media, heavily censors news to the outside world, and silences critics by imprisoning or detaining anyone who voices opposition to the government.[265] Unsurprisingly, this iron rule extends to Tibet, where Tibetans have disappeared—including most prominently the eleventh Panchen Lama, the second highest ranking figure in the Tibetan Buddhism religion, who has been missing since 1995—been falsely imprisoned, arbitrarily detained, tortured, surveilled, and denied basic human rights.[266] Any citizen who dares to criticize the Chinese government for its settlement activities would surely be censored, and news of highlighting the plight of Tibetans would never reach the Western world.[267]

These are among the reasons that help explain why Israel has been denounced for its settlement activity, but not China. This is not to say that the

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[263] *Current Members*, U.N. SECURITY COUNCIL, https://www.un.org/securitycouncil/content/current-members [https://perma.cc/SRA8-2E2Z].

[264] *See* Sloane, *The Changing Face of Recognition in International Law*, *supra* note 46, at 161.

[265] U.S. STATE DEP'T, HUMAN RIGHTS REPORT, *supra* note 71, at 21-34.

[266] *Id.* at 76-79.

[267] In fact, the Chinese government rarely grants foreign journalists visitation rights to Tibet, essentially restricting journalists from reporting on current events or situations in Tibet. *Id.* at 81-82.

U.N. and other world powers rarely criticize China—on the contrary, international organizations and states frequently censure China for its repressive regime and grave human rights abuses. But this criticism, sharp as it may be, nevertheless turns out to be an empty threat because States and organizations like the U.N. are unable or unwilling to enforce these violations of international humanitarian law. China's economic and geopolitical supremacy in the global arena are too important to jeopardize, certainly in comparison to Israel, and as a result, the U.N. and states are unwilling to impose sanctions on, much less start a war over, human rights abuses in China.[268] By characterizing the settlements as *de facto* annexation, which carries a stronger perception of illegality than settlements, perhaps other States and international organizations will do more to condemn the activity in Palestine and Tibet, or else exercise their obligation not to recognize the illegal acquisition by force.[269]

Perhaps the most important benefit from this reframing is to highlight the underlying principles of international humanitarian law, namely that of protecting the human rights and dignity of the Palestinian and Tibetan native populations. By collectively failing to impede, or even criticize in the case of Tibet, the settlement activity in both occupied territories, other States have inadvertently allowed the local inhabitants in Palestine and Tibet to suffer territorial, financial, economic, and other personal losses. If occupation and settlements continue to be a strategy that Israel and China use in these territories, the ability to forge and maintain peace between the occupier and the occupied diminishes significantly.[270] More than fifty years after both settlement programs began, the reality on the ground in both Palestine and Tibet indicate that peace remains elusive.

[268] The U.S. government has a long history of recognizing human rights abuses occurring in China, but it rarely acts upon these reports. In the most recent report to the 115th Congress, the Congressional Research Service stated that the U.S. has imposed economic sanctions on China in response to human rights violations, but that they have been "limited and largely symbolic." THOMAS LUM, CONG. RESEARCH SERV., R44897, HUMAN RIGHTS IN CHINA AND U.S. POLICY: ISSUES FOR THE 115TH CONGRESS 49 (2017), https://fas.org/sgp/crs/row/R44897.pdf [https://perma.cc/F9XC-5UFP].

[269] Dajani, *supra* note 147, at 55.

[270] Lynk, *Report of the Special Rapporteur*, *supra* note 3, ¶¶ 4, 13.