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THE ASTRO-NOMOS: ON INTERNATIONAL LEGAL PARADIGMS AND THE LEGAL STATUS OF THE WEST BANK

ORNA BEN-NAFTALI
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ABSTRACT

The continuous Israeli occupation of the Palestinian territory may well have exhausted the international community and exasperated the Palestinians, but it still stimulates the Israeli legal imagination. In 2012, the Israeli government established an expert committee to examine the status of Jewish construction in the West Bank. The committee's report concluded that from an international legal perspective, the West Bank is not occupied territory; the law of belligerent occupation is not applicable to the area; the "prevailing view" is that Jewish settlements are lawful; and that Israel has a valid claim to sovereignty over the territory. This Article, combining a doctrinal analysis with both Cover's notion of 'Nomos and Narrative' and Kuhn's 'Structure of Scientific Revolutions,' posits that the report is epistemologically groundless and ethically blemished. The committee's reading of international law substitutes an ideology for professionalism. The ideology, resurrecting the long discredited colonialist/Orientalist paradigm, reflects an idiosyncratic utopian vision, one that is simultaneously hegemonic and insular. Consequently, its legal position is methodologically extraneous to the structure of international law, substantively at odds with the compelling commitment of the international community to self-determination, and ethically dystopian.

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I. INTRODUCTION: ON A DIALOGUE CONCERNING THE TWO CHIEF WORLD
SYSTEMS¹

“Think left and think right and
think low and think high.
Oh, the thinks you can think up
If only you try”

—Dr. Seuss, OH, THE THINKS YOU CAN THINK!²

Imagine that a devout government is displeased with the worldwide acceptance by the scientific community of the Copernican paradigm. Deeply convinced of the inherent truth reflected in the idea that “The sun also ariseth, and the sun goeth down, and hasteth to his place where he arose”³ and ergo that “the world also shall be established that it shall not be moved”,⁴ yet aware that in the 21st century it is expected to ground this conviction in scientific evidence, it decides, against the protest of its chief scientist, to set up a committee of like-minded experts entrusted with the task of supplying it with this evidence. A committee headed by Mr. Ptolemy, a retired member of its National Scientific Council and comprising two other scientists who retired from prestigious positions in the public service is established. Imagine further that the dedicated work of the Ptolemy Committee generates a report concluding, albeit on the basis of anecdotal evidence, that there is no doubt that from a scientific perspective the entire universe circles around the earth and asserts that this indeed is the prevailing view of the relevant scientific community. This

1. GALILEO GALILEI, THE DIALOGUE CONCERNING THE TWO CHIEF WORLD SYSTEMS (Stillman Drake ed. & trans., Modern Library 2001) (1632).

2. DR. SEUSS, OH, THE THINKS YOU CAN THINK! (1975).

3. *Ecclesiastes* 1:5 (King James).

4. *Psalms* 96:10 (King James).

unequivocal conclusion seems to have exceeded even the high expectations of the government. Weary of the reaction of heathen governments and the global community of less creative scientists, and much to the dismay of some of its sanctimonious ministers, it has opted, at least for the time being, for a deferral of the official adoption of the report.

Looking at life through the wrong end of the telescope, much like being nostalgic for the future, may well have its rewards. At times, it may even transcend individual self-deception and become a political force driving a backward-looking revolution. Scientific revolutions, however, do not develop anachronistically.⁵ There is a happy distinction to be maintained between science and “the science of things that aren’t so.”⁶ The latter, characterized primarily by a claim of great accuracy substantiated by little more than wishful thinking and sloppy method, is colloquially known as “junk science.”⁷ Junk science is an epistemic vice. When it is ideologically motivated, it is also an ethical vice.⁸

The genesis and the report of the imaginary Ptolemy Committee provide a paradigmatic example of such vices. The genesis and the report of the real-life Committee to Examine the Status of Building in Judea and Samaria, known, after the name of its chairman, Edmond Levy, as the Levy Committee Report (LCR),⁹ obviate the need for imagined scenarios, but deserve the same assessment.

On February 13, 2012, Israeli Prime Minister Benjamin Netanyahu and then Minister of Justice, Professor Yaakov Neeman, decided to establish a committee to examine the legal status of Israeli construction in the Judea and Samaria (a.k.a. “the West Bank”).¹⁰ The decision, taken despite the opposition of the Attorney General, was a response to both public and legal pressures: in the legal arena, numerous petitions requesting the

5. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

6. Irving Langmuir, *Pathological Sciences*, 42 *PHYSICS TODAY* 36 (1989).

7. See generally Peter W. Huber, *On Law and Sciosophy*, 24 *VAL. U. L. REV.* 319 (1990).

8. Jeffrey D. Kovac, *Science, Law and the Ethics of Expertise*, 67 *TENN. L. REV.* 397, 407 (1999–2000) (citing John Hardwig, *Towards an Ethics of Expertise*, in *PROFESSIONAL ETHICS AND SOCIAL RESPONSIBILITY* 83, 95 (Daniel E. Wueste ed., 1994)).

9. REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA (2012) [hereinafter the LCR], available at <http://www.pmo.gov.il/Documents/doch090712.pdf> [Hebrew]. An English translation of the conclusions and recommendations is available at <http://unispal.un.org/UNISPAL.NSF/0/D9D07DCF58E781C585257A3A005956A6>, and at <http://elderofziyon.blogspot.cz/2012/07/english-translation-of-legal-arguments.html#.VjYsRvkrLIV>

10. Power resorts to manipulation of language to direct thinking and affect its range. The territory known as “the West Bank” in international legal language, is referred to, in official Israeli language, as “Judea and Samaria,” connoting the link between the State of Israel and the Promised Land. See letter from the committee members to Netanyahu and Neeman attached to the LCR, *supra* note 9.

Israeli High Court of Justice (HCJ) to order the State to demolish, or implement demolition orders against illegal construction by Israeli settlers in outposts in the West Bank or otherwise order the evacuation of unauthorized such outposts, were pending. In the public arena, right wing elements wanted to establish a legal foundation for existing and planned Jewish constructions in the West Bank and, in the process, refute a 2005 report commissioned, and subsequently approved, by then Prime Minister Ariel Sharon and then Attorney-General Menachem Mazuz, which concluded that the construction of unauthorized Jewish outposts in the West Bank was illegal (the Sasson Report).¹¹

The composition of the committee is noteworthy: Justice Levy was the only judge in a panel of eleven judges who accepted a petition submitted by the Gaza Coast Regional Planning against the Government's decision to disengage from the Gaza Strip and evacuate the settlers from the area. In this context, he determined as follows:

Prior to the entry of the State of Israel, there was no sovereign in the area of Judea, Samaria and the Gaza Strip recognized in accordance with international law. Conversely, the State of Israel, which now holds these territories, does so not by virtue of being an 'occupying power', but by virtue of the fact that on the one hand it replaced the Mandate government, and on the other hand, it is the representative of the Jewish people. As such it enjoys not only the historical right to hold and settle in these areas, about which it is not necessary to speak at length but simply to study the Bible, but also a right enshrined in international law.¹²

The two other members were Judge Tchia Shapira and Ambassador Alan Baker, a former Israeli ambassador to Canada who resides in a settlement and whose standing on matters relevant to the mandate of the Levy

11. TALIA SASSON, INTERIM REPORT ON THE SUBJECT OF UNAUTHORIZED OUTPOSTS (2005), available at <http://www.pmo.gov.il/SiteCollectionDocuments/PMO/Communication/Spokesman/sason2.pdf> [Hebrew]. An English summary of the report is available at <http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/summary%20of%20opinion%20concerning%20unauthorized%20outposts%20-%20Talya%20Sason%20adv.aspx>. On the backdrop of the establishment of the Levy Committee, see generally UNPRECEDENTED: A LEGAL ANALYSIS OF THE REPORT OF THE COMMITTEE TO EXAMINE THE STATUS OF BUILDING IN JUDEA AND SAMARIA [THE WEST BANK] ("THE LEVY COMMITTEE")—INTERNATIONAL AND ADMINISTRATIVE ASPECTS (Jan. 2014), [http://www.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Chasar%20Takdim%20English%20-%20Web%20%20\(1\).pdf](http://www.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Chasar%20Takdim%20English%20-%20Web%20%20(1).pdf) [hereinafter UNPRECEDENTED].

12. HCJ 1661/05 Gaza Coast Regional Council v. The Israeli Knesset 59(2) PD 481 [2005], ¶ 14 of the dissenting judgment. Unless otherwise mentioned, all translations from Hebrew are ours, OBN & RR.

Committee prior to his appointment was no secret. For instance, he is on record stating that the “Geneva Convention provisions regarding transfer of populations cannot be considered relevant in any event to the Israeli-Palestinian context.”¹³ Judge Shapira, daughter of the late Rabbi Shlomo Goren, former Chief Military Rabbi and Chief Rabbi of Israel, who served in the Tel-Aviv District Court prior to her retirement, has not written on such matters. Indeed, her patrimonial lineage is ostensibly irrelevant were it not for the following public comment made by a senior member of the Likud Party who formerly served as Minister of Finance and Minister of Foreign Affairs:

Did the Prime Minister not know who Edmond Levy is, when he appointed him? Edmond Levy was the deputy Mayor of Ramla representing the Likud Party. He was a Likud man . . . Do we not know who Alan Baker is? The legal adviser to the Ministry of Foreign Affairs during my tenure . . . Do we not know who the daughter of Rabbi Goren is? It is clear that this threesome was not expected to deliver a Talia Sasson kind of report . . .¹⁴

Expert knowledge is based on trust. This is the nexus between epistemology and ethics. It is for this reason that the choice of experts should be based on their relevant qualifications, not on their *weltanschauung* (worldview). Selecting experts because s/he who makes the selection knows they will support a desired outcome is worse than an epistemic vice. It is an ethical one.¹⁵

The Levy Committee submitted their report on June 21, 2012. The essence of their conclusion is twofold: first, from an international legal perspective, there is no belligerent occupation of the West Bank. Ergo, the law of occupation does not apply and accordingly, there is “no doubt” that the Jewish settlements are not illegal.¹⁶ Second, from the perspective of Israeli public law, the establishment of the outposts has enjoyed implied governmental consent and is thus legal. This Article focuses solely on the first conclusion. This conclusion received scant and generally derisive

13. Alan Baker, *The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (Jan. 5, 2011), <http://jcpa.org/article/the-settlements-issue-distorting-the-geneva-convention-and-the-oslo-accords>. This article is referred to in the LCR, *supra* note 9, ¶ 5. Ambassador Baker is currently the director of the Institute for Contemporary Affairs at the Jerusalem Center for Public Affairs.

14. Joshua Breiner, *Minister Shalom Admits: The Justice was Appointed Because He is a Likud Man*, WALLA! (Dec. 10, 2012), <http://news.walla.co.il/?w=9/2595047> [Hebrew].

15. John Hardwig, *Towards an Ethics of Expertise*, in PROFESSIONAL ETHICS AND SOCIAL RESPONSIBILITY 83, 97 (Daniel E. Wueste ed., 1994); Kovac, *supra* note 8, at 407.

16. The LCR, *supra* note 9, ¶ 9.

reaction from the international legal community.¹⁷ This reaction is understandable insofar as the LCR was dismissive of this community, but fails to appreciate not only the political ramifications the LCR may have,¹⁸ but also, and more generally, the epistemological and ethical challenges such ‘expert committees’ present.

Our main proposition is three-fold: first, the LCR’s construction of the law of belligerent occupation purports to introduce a revolution in the discipline: given that there is an overwhelming (and rare) international legal consensus that the territories are occupied, that the law of belligerent occupation applies and that the settlements are illegal and indeed constitute a grave breach of the Fourth Geneva Convention, the LCR’s conclusion purports to advance a paradigmatic shift in international law.¹⁹

Second, the government’s attempt to justify the occupation is tantamount to a scientific proposition that the sun revolves around the earth and equally fails to meet the essential requirements for the

17. International legal scholars reacted to the LCR immediately, albeit briefly after its publication in an overwhelmingly critical, even scathing manner. *See, e.g.*, Joseph H. H. Weiler, *Editorial—Differentiated Statehood? ‘Pre-States’? Palestine@the UN*, 24 EUR. J. INT’L L. 1, 1 (2013) (the LCR attempted to “kosh the pig”); Iain Scobbie, *Justice Levy’s Legal Tinsel: The Recent Israeli Report on the Status of the West Bank and Legality of the Settlements*, EJIL: TALK!—BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Sept. 6, 2012), <http://www.ejiltalk.org/justice-levys-legal-tinsel-the-recent-israeli-report-on-the-status-of-the-west-bank-and-legality-of-the-settlements> (the LCR’s arguments are “perverse” and, quoting Jeremy Bentham, “nonsense on stilts”); David Kretzmer, *Bombshell for the settlement enterprise in Levy report*, HA’ARETZ (July 10, 2012), <http://www.haaretz.com/opinion/bombshell-for-the-settlement-enterprise-in-levy-report-1.450170> (noting that the report adopts “old, tired and universally rejected arguments”); Kretzmer, *Undoing the State of Israel*, JERUSALEM REPORT (July 24, 2012), <http://www.jpost.com/Jerusalem-Report/Israel/Undoing-the-State-of-Israel>; Aeyal Gross, *If there are no Palestinians, there’s no Israeli occupation*, HA’ARETZ (July 10, 2012), <http://www.haaretz.com/news/diplomacy-defense/if-there-are-no-palestinians-there-s-no-israeli-occupation-1.449988> (“appears to be living in colonial times”); Nathaniel Berman, *San Remo in Shilo: The Settlements and Legal History*, THE TIMES OF ISRAEL BLOG (July 19, 2012), <http://blogs.timesofisrael.com/san-remo-in-shilo-the-settlements-and-legal-history> (“The Commission’s report operates in something of a parallel legal-historical universe, one in which legal evolution stopped sometime in the 1920s”); Yuval Shany & Ido Rosenzweig, *Groundless*, 17 ORECH HADIN (THE ATTORNEY) 18, 22 (Oct. 2012) (adopting the LCR would “break the rules of the game”) [Hebrew]; Frances Raday & Ido Rosenzweig, *The Status of the West Bank Settlements Under International Law: A Review of the Conclusions of the Levy Committee*, THE ISRAEL DEMOCRACY INSTITUTE (Aug. 2, 2012), <http://en.idi.org.il/analysis/articles/the-status-of-the-west-bank-settlements-under-international-law> (the LCR is “unconvincing”); Eliav Lieblich & Shiri Krebs, *The Outposts Report: War is Peace, Occupation is Freedom*, THE ISRAEL DEMOCRACY INSTITUTE (July 25, 2012) (equating the LCR, as their title suggests, with Orwell’s ‘newspeak’) [Hebrew].

18. *See, e.g.*, the Australian Foreign Minister Julie Bishop during a recent visit to Israel appeared to be citing from the LCR when she said: “I would like to see which international law has declared them [settlements] illegal”, Raphael Ahren, *Australia FM: Don’t call settlements illegal under international law*, THE TIMES OF ISRAEL (Jan. 15, 2014), <http://www.timesofisrael.com/australia-fm-dont-call-settlements-illegal-under-international-law>.

19. The position of Israel on these matters has been far less equivocal and far more indeterminate, *see infra* text and notes 76–80.

generation of a paradigmatic shift: the arguments advanced by the LCR reflect, individually and *in toto*, a colonialist/Orientalist paradigm that has been discarded to the dust-bin of history and replaced with a paradigm that rests on the right of peoples to self-determination. It is the latter which currently enjoys the overwhelming support of the members of the international legal community. “The very existence of science,” as Khun observed, “depends upon vesting the power to choose between paradigms in the members of a special kind of community.”²⁰ The members of the Levy Committee attempt to initiate a backward looking revolution that rejects the ‘*nomos*,’ the normative universe which we inhabit, a universe comprised of law and narrative and held by interpretive commitments regarding what the law means.²¹ This rejection explains the LCR’s failure to engage with the vast majority of the members of the international legal community. It does not follow that the latter cannot engage with the former. This engagement is the business of this Article.

Third, the LCR’s rejection of the *nomos* inhabited by the international community also explains why it does not advance international legal arguments as an apology for power. The latter operates within the structure of the international legal discourse, not outside it.²² What the LCR does advance is a particularly idiosyncratic type of a utopian vision that is simultaneously hegemonic and insular: its politics are hegemonic and reflect the political position of the Israeli government; its “nomic insularity”²³ does not. Indeed, Israel has found that working within the structure of international law has thus far served its capacity to translate this very vision into a reality rather than curtailing it. It is quite likely that the Israeli government has not adopted the LCR for this instrumental reason. This is a poor reason for its dismissal; the LCR should not merely be dismissed, it should be rejected: advancing the right of peoples to self-determination signifies the compelling general interest of the normative universe which we inhabit. It is this interest which resonates the

20. KUHN, *supra* note 5, at 167.

21. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 24–25 (1983–1984). Cover’s pluralistic jurisprudence is of particular relevance to international law, see Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2007).

22. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006) (focusing on the methodology of the discipline, Koskenniemi doomed its epistemological foundation: vacillating between the need to verify law’s content by reference to a concrete practice and interest of states and the need to impartially determine and apply that very law regardless of the practice and interests of states, that is, between apology and utopia, we are already always, arguing a political preference).

23. Cover, *supra* note 21, at 28–29.

transformative, even redemptive, spirit of the international legal project.²⁴

In order to substantiate this proposition, Part 2 presents the thesis advanced by the LCR, inclusive of its substantive and methodological bases. Part 3 engages with this thesis: it offers a critical analysis of both its substantive and methodological grounds and proceeds to assess them in the light of the structural requirements for a paradigmatic shift in, and the interpretative commitments of the *nomos* which we do inhabit. Part 4 concludes.

II. THE *NOMOS* THE LEVY COMMITTEE INHABITS

“You are a slow learner, Winston.”

“How can I help it? How can I help but see what is in front of my eyes?”

Two and two are four.”

“Sometimes, Winston. Sometimes they are five. Sometimes they are three.

Sometimes they are all of them at once.

You must try harder. It is not easy to become sane.”

—George Orwell, 1984²⁵

“[T]he status of the Judea and Samaria Areas from the perspective of international law” is the focus of paragraphs 3-9 of the LCR.²⁶ The discussion generates the following inter-related assertions: first, Israel is not a belligerent occupying power in the areas.²⁷ Second, and alternatively, even if its control over the territories were subject to the law of belligerent occupation, Article 49 paragraph 6 of the Fourth Geneva Convention (GCIV) is irrelevant to the Jewish settlements in the area.²⁸ Third, there is a legal basis for Israel’s sovereignty over the territory.²⁹ The inevitable conclusion is that there is “no doubt that from the perspective of international law, the establishment of Jewish settlements in Judea and

24. This part of the proposition adopts, *mutatis mutandis*, Cover’s ‘redemptive’ *nomos*, *id.* at 33–35, 65.

25. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 206–07 (1961).

26. The LCR, *supra* note 9. In paragraph 3 the LCR presents the views on the matter submitted to it by representatives of various peace and human rights organizations. In paragraph 4 it presents the views of representatives of settlers. Paragraphs 5–9 consist of the Levy Committee’s analysis, essentially embracing the latter.

27. *Id.* ¶ 5.

28. *Id.* ¶¶ 5–6.

29. *Id.* ¶¶ 5, 8.

Samaria is not illegal. . .”³⁰ What are the substantive and methodological bases for this three-fold thesis?

The assertion that the West Bank is not occupied territory is based on the following two propositions. First, the law of belligerent occupation is premised on a relatively short duration. Israel’s presence in and hold over the territories, however, has been lasting for decades and “no one can foresee when or if it will end. . .”³¹ Second, laws of belligerent occupation are applicable only to territories taken from a sovereign state.³² Given that the annexation of the area by Jordan lacked a legal basis and Jordan since withdrew its claim to sovereignty over the area, the West Bank does not qualify as territories taken from a sovereign state.³³ The LCR provides no legal authorities in support of either of these propositions.

The above assertion obviates the need to consider the application of Article 49 paragraph 6 of the GCIV, which provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”³⁴ The LCR nevertheless decided to posit as an alternative ground for the legality of the Jewish settlements in the West Bank, what it considers to be “the prevailing view” regarding the interpretation of this provision.³⁵ This interpretation posits that the prohibition on the settlements of citizens of the occupying power in occupied territories “was intended to respond to the difficult reality imposed on some of the nations during the Second World War, when some of their residents were deported and forcibly transferred to the territories they had conquered.”³⁶ Read in this light, the LCR concludes that the provision is inapplicable to “those who sought to settle in Judea and Samaria, who were neither forcibly ‘deported’ nor ‘transferred,’ but who rather chose to live there based on their ideology of settling the Land of Israel.”³⁷ Methodologically, five sources are cited in support of the assertion that this interpretation constitutes “the prevailing view”: the

30. *Id.* ¶ 5. Compare the English translation of the conclusions in the LCR (¶ 65), *supra* note 9, which reads: “Therefore and according to international law, Israelis have the lawful right to settle in Judea and Samaria . . . and the establishment of settlements cannot in and of itself be considered to be illegal.”

31. *Id.* ¶ 5.

32. *Id.*

33. *Id.*

34. Geneva Convention Relative to the Protection of Civilian Persons in the Time of War art. 49, ¶ 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

35. The LCR, *supra* note 9, ¶ 5.

36. *Id.*

37. *Id.* ¶ 6.

ICRC Commentary to the GCIV;³⁸ a short communication published by Eugene Rostow in the ‘Notes and Comments’ section of the 1990 *American Journal of International Law*;³⁹ a 2009 piece in the *Commentary*, written by David Phillips and citing Julius Stone, albeit without a reference;⁴⁰ a 2012 piece written by Alan Baker, a member of the Levy Committee and published on the website of the Jerusalem Center for Public Affairs;⁴¹ and a 1987 decision of the Israeli HCJ.⁴²

The third leg of the LCR’s conclusion relative to the status of the territories under international law grounds Israel’s claim to sovereign rights therein in an historical narrative unfolding along the following milestones: (a) the 1917 Balfour Declaration; (b) the reiteration, *mutatis mutandis*, of the Balfour Declaration in the 1920 San Remo Conference, and (c) Articles 2 and 6 of the 1922 Mandate for Palestine granted to Great Britain by the League of Nations.⁴³ Methodologically, the LCR assigns no legal significance to the first two documents other than precursors to the Mandate. According to the LCR, the latter established that Palestine is the national home of the Jewish people and granted only civil and religious rights to non-Jewish communities in the area.⁴⁴

The subsequent milestones comprising the narrative include: (a) the 1947 General Assembly Resolution 181 (i.e., the partition plan),⁴⁵ which, according to the LCR, lacks validity on two grounds. First, it was taken *ultra-vires* in the light of Article 80 of the UN Charter, which provides that nothing in the Charter shall alter the rights of states and peoples as recognized under mandates.⁴⁶ Second, it was rejected by the Arab States and subsequently overwhelmed by the reality of the 1948 war and the occupation of the Gaza Strip by Egypt and of the West Bank by Jordan;⁴⁷ (b) the 1949 armistice lines, as stated in the LCR, were not intended to constitute boundaries given the standing of the Arab states;⁴⁸ and (c) the

38. JEAN S. PICTET, COMMENTARY—IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 283 (1958).

39. Responding to Adam Roberts, *Prolonged Military Occupations: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44 (1990).

40. David M. Phillips, *The Illegal-Settlements Myth*, 128 COMMENTARY 32, 36–37 (Dec. 1, 2009), available at <http://www.commentarymagazine.com/article/the-illegal-settlements-myth>. Note that the LCR cites the year as 2010.

41. Baker, *supra* note 13.

42. HCJ 785/87 Afu v. Commander of IDF Forces in the West Bank, 42(2) PD 4 [1988].

43. The LCR, *supra* note 9, ¶ 7.

44. *Id.*

45. The Partition Plan, G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

46. The LCR, *supra* note 9, ¶¶ 7–8.

47. *Id.* ¶ 8.

48. *Id.*

1950 illegal annexation of the West Bank by Jordan which, when coupled with its subsequent waiver of any claim to sovereign rights over the area, has restored, as stated in the LCR, “the original legal status of the territory”: the Jews, who had a ‘right of possession’ which they could not exercise in view of the result of a war imposed on them and Jordanian rule, have returned to their land.⁴⁹

This narrative leads to the conclusion that Israel has a valid claim to sovereignty over the area; that all Israeli governments have taken this position and that the only reason Israel refrained from annexing the area was “to enable peace negotiations with the representatives of the Palestinian people and the Arab states.”⁵⁰ Indeed, asserts the LCR, Israel never regarded itself as an occupying power “in the classic sense of the term” and ergo never committed itself to apply the GCIV, settling merely for a declaration that it would voluntarily apply its humanitarian provisions.⁵¹ The inescapable conclusion is that its policy has been to allow its citizens to reside in the area out of their own free will, subjecting their continuous presence to the result of the political negotiations process.⁵²

The Levy Committee inhabits a normative universe: its understanding of international law is inseparable from a narrative.⁵³ That narrative unfolds a deep conviction in the exclusive right of the Jewish people to sovereignty over the land of Mandatory Palestine. This conviction, indeed vision, informs its construction of international law. Transported to the normative world, this vision posits a revision of international law.

Given that alternative visions do exist and that the normative world provides the bridge between vision and reality, any attempt to advance a revisionist interpretation requires an engagement with alternative visions and the meaning they invest in the normative world. Such engagement, as tense and wrought with conflicts as it surely is, is nevertheless a *sine qua non* condition for sharing a *nomos*. An insular vision that fails to be thus engaged and insists on living “an entirely idiosyncratic normative life would be quite mad.”⁵⁴ This is not a fruitful vantage point from which to advance a revision of our normative universe. It does not follow that change is impossible. It simply requires that its introduction relate to the

49. *Id.*

50. *Id.* ¶ 9.

51. *Id.*

52. *Id.*

53. Cover, *supra* note 21.

54. *Id.* at 10.

“disciplinary matrix of concepts, assumptions, basic laws, proven methods and other objects of commitment common to the practitioners of a particular discipline or specialty. . . .”⁵⁵ In the case at hand, this requirement should have led the members of the Levy Committee to pay a visit to the *nomos* the international legal community actually inhabits. Their failure to do so is discussed in the following part.

III. THE *NOMOS* THE INTERNATIONAL LEGAL COMMUNITY ACTUALLY INHABITS

“I see nobody on the road”, said Alice.
 “I only wish I had such eyes”,
 the king remarked with a fretful tone.
 “To be able to see nobody! And at that distance too!”

Lewis Carroll, *THROUGH THE LOOKING GLASS*⁵⁶

The mandate of the Levy Committee did not require it to visit the international legal terrain.⁵⁷ It chose to travel that road. This choice is meritorious: international law provides the relevant normative framework for the determination of the status of a territory and the means and methods by which it may be lawfully acquired.⁵⁸ The LCR’s application of that normative framework to the status of the West Bank, however, defies as it ignores the disciplinary matrix it ostensibly employs. This section substantiates this assessment.

The LCR’s proposition that the West Bank does not qualify as a territory under belligerent occupation rested on two beliefs. The first is that the international legal regime of belligerent occupation is premised on a short duration, whereas the Israeli control over the area has no end in sight.⁵⁹ Neither doctrine nor principle supports this line of reasoning.

55. Christopher G. A. Bryant, *Kuhn, Paradigms and Sociology*, 26 *BRIT. J. SOC.* 354, 354 (1975) (emphasis omitted) (referring to KUHN, *supra* note 5, at 181–87).

56. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 206 (Bodley Head, 1974).

57. The Levy Committee’s mandate is to recommend “actions to be taken in order to regularize the construction [of settlements], if possible—or to remove it,” and to “promise a due process to the investigation of real estate issues in the territory, in accordance with principles of justice and decency of the Israeli legal and administrative system.” See the LCR, *supra* note 9, ¶ 1. Translation has slightly different wording, “Actions to be taken where possible to legalize or remove construction—all in accordance with the aforementioned policy.”

58. UNPRECEDENTED, *supra* note 11, part A.1. In the context of regulating the acquisition of territory, UNPRECEDENTED properly refers to ROBERT YEWDALL JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (1963).

59. See *supra* text between notes 30–31.

It is undoubtedly true that the regime is premised on a relatively short duration. It is equally true that the indefinite duration of the Israeli control over the territory defies that premise.⁶⁰ It does not follow, however, that the mere duration of a regime (a political phenomenon) transforms its normative classification and affects the applicable legal framework.⁶¹ The suggestion that it does belongs to the alchemy of law and falls outside the matrix of the discipline. It is little wonder that no legal authority was advanced by the LCR to support it. There is none.

Within the applicable normative matrix, the notion that an occupation is a temporary form of control that may not generate permanent results is undisputed and indeed underlies its two other tenets: the principle that occupation does not confer title⁶² and the conservation principle.⁶³ The law of occupation does provide for the provisional status of the regime but fails to set time limits on its duration.⁶⁴ Article 6 of the GCIV is the only provision that addresses directly the issue of the duration of an occupation, providing for the continued applicability of only some of the Convention's provisions.⁶⁵ Reflecting the drafters' premise that an occupation would normally be of a short duration, this provision may generate counter-productive results in cases of prolonged occupation. Once it became clear that this premise was defied by reality, this provision was abrogated: Article 3(b) of the First Additional Protocol (API) provides for the

60. Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 597–605 (2005).

61. Even if it were determined that the occupation is illegal, the applicable legal framework would continue to apply. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 52 (June 21). There are various views relative to the question when does an occupation end, but an indefinite duration is not one of them. See, e.g., Int'l Comm. of the Red Cross (ICRC), *Expert Meeting: Occupation and other Forms of Administration of Foreign Territory* 26–33 (Tristan Ferraro ed., 2012), available at <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>.

62. The prohibition on annexation of an occupied territory is the normative consequence of this principle. See, e.g., SURYA PRAKASH SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 148 (1997).

63. The conservation principle, precluding the occupying power from introducing major systemic changes in the occupied territory, is articulated in the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, and further detailed in GCIV, *supra* note 34, art. 64. This preclusion highlights the distinction between temporary occupation and sovereignty. See, e.g., Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for "Interim Occupations,"* 51 N.Y.L. SCH. L. REV. 496, 498–99 (2006–2007).

64. This lacuna is discussed in Orna Ben-Naftali, *Belligerent Occupation: A Plea for the Establishment of an International Supervisory Mechanism*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 538, 546–48 (Antonio Cassese ed., 2012).

65. According to the text of GCIV, *supra* note 34, art. 6, if an occupation lasts longer than one year after the general close of military operations, 9 of the 32 articles comprising section III of the convention (arts. 47–78) cease to apply: arts. 48, 50, 54–58, 60, 78.

application of the law of occupation *in toto* until the termination of the occupation.⁶⁶ Indeed, even the Israeli HCJ applies the provisions of the GCIV otherwise precluded by Article 6.⁶⁷

Prolonged belligerent occupations are rare. They are an anomaly attesting to the failure of political processes. A political anomaly is not to be confused with a legal anomaly. Prolonged occupations do not vitiate the relevant normative paradigm, and indeed call for extra vigilance in its application.⁶⁸

The applicability of the law of belligerent occupation to prolonged occupations has never been questioned by any known primary or secondary source of international law. It is particularly instructive that not only international judicial, quasi-judicial and political institutions⁶⁹ but also Israeli authorities resort to it as a matter of course. The argument of the LCR was never made by any Israeli authority responding to petitions emanating from the OPT. This argument was advanced in the petition of the Gaza Coast Regional Council and unequivocally rejected by the Court:

The petitioners deny the claim that the area is under temporary belligerent occupation. They argue that the Israeli settlement in the area relied on a continuous representation of the Israeli governments, that it is a permanent settlement in one of the grounds of the land of Israel [. . . However,] the normative reality is eviction

66. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 3(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. It should further be noted in the context of the Occupied Palestinian Territory (OPT), that even the answer to the question whether the military operations have ended is disputed: the commentary cites the Rapporteur of Committee III as defining the “general close of military operations” as “when the last shot has been fired.” PICTET, *supra* note 38, at 62. Given that the vicious cycle of violence in the OPT perpetuates shots being fired, it may well be argued that ‘the general close of military operations’ is yet to dawn.

67. *E.g.*, article 78 of the GCIV was applied by the HCJ in HCJ 7015/02 Ajuri v. Commander of the IDF in Judea and Samaria 56(6) PD 352 [2002]. Note that while Article 78 provides less for the obligations and more for the rights of the Occupying Power, endowing it with the power to subject protected persons to assigned residence and to internment, the fact remains that the Court applied this provision, regardless of Article 6.

68. If anything, prolonged occupation underscores the need to interpret specific provisions in a manner that would ensure that the rights of the occupied population provided for within the normative framework are not further jeopardized. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 61, ¶ 111; Ben-Naftali, Gross & Michaeli, *supra* note 60, at 612; Orna Ben-Naftali, ‘*A La Recherche Du Temp Perdu*’: *Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, 38 ISR. L. REV. 211, 216 (2005); Roberts, *supra* note 39, at 53–56.

69. *See, e.g.*, Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Construction of the Wall]; G.A. Res. 55/132, U.N. Doc. A/RES/55/132 (Dec. 8, 2000); *infra* notes 97–98, 100–02.

from an area of belligerent occupation. The nature of such an area is that Israelis' presence in it is temporary . . . the possibility of eviction occurring one day hangs over the Israeli's head at all times.⁷⁰

The notion that a prolonged occupation vitiates the law of belligerent occupation is not merely unfounded in terms of doctrine but also turns principle on its head; in attempting to transform a political anomaly into a legal justification, the LCR posits that a wrong can and does make a right⁷¹ and further responds in the positive to the otherwise incredulous biblical question: "*Hast thou killed, and also taken possession?*"⁷²

It should finally be noted that the above-cited judicial decision was made pursuant to a political decision to withdraw from the Gaza Strip and dismantle the settlements. Up to that decision, Israeli authorities equated the 'temporary' with the 'indefinite'.⁷³ The interplay between the 'temporary' and the 'indefinite' violates one of the basic tenets of the regime, impacts negatively its other tenets and may indeed render the whole regime illegal, but this illegality is an effect of the applicable legal paradigm, not of its absence.⁷⁴

The second leg on which the LCR's proposition rests is a certain reading of common Article 2 of the Geneva Conventions, according to which the West Bank does not qualify as a territory under belligerent occupation. This reading is inspired by a narrative that posits Jewish ownership of the land since time immemorial and attempts to turn the vision into a normative reality. This view has long been rejected by the international legal community.⁷⁵

70. Gaza Coast, *supra* note 12, ¶¶ 28, 115.

71. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 29 (1978) (analyzing the case of *Riggs v. Palmer*, 115 N.Y. 506 (1889) in which the court of appeals of New York ruled that a man may not inherit his grandfather's estate after murdering him in order to hasten the inheritance).

72. 1 *Kings* 21:19 (King James). In a similar vein, the HCJ ruled that the Israeli use of quarries in the West Bank is included in the occupying force's obligation to the development of the territory, due to the prolonged duration of the occupation. H CJ 2164/09 Yesh Din—Volunteers for Human Rights v. Commander of IDF Forces in the West Bank et al., (Dec. 26, 2011), Published in Nevo, ¶ 10. For a critique see Aeyal Gross, *Israel is Exploiting the Resources of the Occupied West Bank*, HA'ARETZ (Dec. 28, 2011), <http://www.haaretz.com/print-edition/news/israel-is-exploiting-the-resources-of-the-occupied-west-bank-1.403988>.

73. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980* 13, 43 (Meir Shamgar ed., 1982).

74. See Ben-Naftali et al., *supra* note 60.

75. See, e.g., Construction of the Wall, *supra* note 69, ¶ 95; Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 *FORDHAM INT'L L.J.* 943–46 (2002–2003).

The first paragraph of Common article 2 provides that “. . . the present Convention shall apply to all cases of declared war or of any other 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.” The second paragraph provides that “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁷⁶

The notion that the GCIV is inapplicable to the areas conquered in 1967 is based on a cumulative reading of the two paragraphs and posits that since Jordan was not a lawful sovereign in the West Bank (and that Egypt never claimed sovereign title over the Gaza Strip), the territories were not taken from “a High Contracting Party” and ergo, Israel is not obligated to apply the GCIV.⁷⁷

Israel’s official position embraced this interpretation and maintained that it is under no obligation to apply the GCIV to the territories,⁷⁸ but that it would unilaterally undertake to observe its humanitarian provisions.⁷⁹ This position is more nuanced than the position of the LCR in that it refers solely to the applicability of the GCIV and does not deny that the territory is subject to the customary laws of belligerent occupation—laws which apply with respect to territories that were not taken from “a High Contracting Party”—primarily the provisions of part C of the 1907 Hague Regulations.⁸⁰ The Israeli H CJ, while routinely applying both The Hague

76. GCIV, *supra* note 34, art. 2.

77. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Shamgar, *supra* note 73, at 33–34. The LCR fails to refer to these authorities.

78. Initially, the territory included the West Bank (except East Jerusalem which was annexed, *see infra* note 176) and the Gaza Strip. Following the unilateral withdrawal of Israel from the Gaza Strip in 2005 (the “Disengagement Plan”, *see Gaza Coast, supra* note 12, ¶ 16) there is an ongoing debate whether or not it is still under effective control. *See, e.g.,* Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68 (2008); Solon Solomon, *Occupied or Not: The Question of Gaza’s Legal Status after the Israeli Disengagement*, 19 CARDOZO J. INT’L & COMP. L. 59 (2011).

79. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 117, 266 (1971). The LCR, ¶ 9, reiterates this point and refers to a few judgments of the H CJ which support it, upon concluding its discussion of the international legal perspective on the legality of the settlements.

80. Note that given that it is generally accepted that the Geneva Conventions enjoy customary status, the distinction Israel draws between The Hague and the Geneva Law seems to generate no normative effect. On the customary status of the Geneva Convention *see, e.g.,* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES* (reprinted with corrections 2009); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1966 I.C.J. 226, 257–58 (July 8). The LCR’s observation, in ¶ 9, that Israel did not incorporate the GCIV into its internal legislation, implies that the GCIV is not customary

and the Geneva Law, has nevertheless refrained from determining the applicability de jure of the GCIV.⁸¹ Yet, even this position was rejected by the relevant institutions of the international community,⁸² including the ICJ,⁸³ the ICRC,⁸⁴ and by the vast majority of international legal scholars.⁸⁵ The LCR is silent about the rejection of its position, the grounds on which it is based and the scope and nature of its sources.

The major—though not the only—reason for the less than splendid isolation of the Israeli position (and *a fortiori* albeit implicitly the rejection of the LCR's argument) is that the reading of the first two paragraphs of common article 2 as providing alternative rather than cumulative conditions for the Conventions' application advances the humanitarian objectives of the Conventions. Given that the main impetus for the Geneva law was to advance greater humanitarian protection than hitherto provided, an interpretation which supports this objective is preferred to one that does not. Israel's counter-argument that the GCIV is designed not only to protect the humanitarian interests but also the interests of the ousted sovereign,⁸⁶ fails to distinguish between the primary and the secondary purposes of the law and to give preference to the former. Indeed, given the major changes Israel introduced in the area, primarily due to the "settlement enterprise,"⁸⁷ its concern over the conservation principle can hardly be perceived as reflecting good faith. The fact that its position omits the Palestinian claim to sovereignty over the territory underscores the point.

law. It fails to mention the overwhelming support of the international legal community for the opposite view.

81. For a summary of the Israeli stand see Gaza Coast, *supra* note 12, ¶¶ 4–5.

82. *E.g.*, G.A. Res. 32/91 [A-C], U.N. Doc. A/RES/32/91 [A-C] (Dec. 13, 1977); S.C. Res. 237, U.N. Doc. S/RES/237 (June 14, 1967); *infra* notes 97–102.

83. Construction of the Wall, *supra* note 69, ¶ 101, states as follows: "Israel and Jordan were parties to that convention when the 1967 armed conflict broke out. The Court accordingly finds that that convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories".

84. PICTET, *supra* note 38, at 22.

85. *See, e.g.*, Roberts, *supra* note 39, at 64; ESTHER R. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982 53 (1985); *infra* note 103.

86. Shamgar—*Observance*, *supra* note 79, at 265–66.

87. The "settlements enterprise" is a common coinage in Hebrew to connote the organized manner in which Jewish citizens of Israel are relocated to settlements in the Occupied Palestinian Territory. It is also being used in English, *see, e.g.*, Eliezer Don-Yehiya, *Jewish Messianism, Religious Zionism and Israeli politics: The Impact of Gush Emunim*, 23 MIDDLE EASTERN STUDIES (1987); Alon Ben-Meir, *The Settlement Enterprise has Run its Course*, THE WORLD POST (Sept. 27, 2010), http://www.huffingtonpost.com/alon-benmeir/the-settlement-enterprise_b_740710.html; Jodi Rudoren, *1,500 Units to be Added in Settlements, Israel says*, N.Y. TIMES (Oct. 30, 2013), <http://www.nytimes.com/2013/10/31/world/middleeast/israel-approves-1500-new-apartments-in-east-jerusalem.html>.

Finally, had the LCR's argument been accepted, the question of where the authority of the military commander, representing the occupying power, derives from would have to be addressed. There are two possible answers to this question: he has been acting ultra-vires or Israel is the lawful sovereign. In the *nomos* inhabited by the members of the Levy Committee, the latter is the answer. This reading of the law is informed by a strong narrative grounded in the divine promise of the land to the Jewish people. That very narrative was presented to the HCJ in the 1979 landmark case⁸⁸ known as *Elon Moreh*.⁸⁹ The Court, in rejecting the authority of the military commander to requisite land in order to establish a settlement on grounds other than military needs, refused to impregnate the law with this narrative. It determined that had the argument that the law of belligerent occupation does not apply been accepted, the inescapable conclusion would be: the military commander acted without authority and the land should be returned to its lawful Palestinian owners.⁹⁰ In hundreds of judgments since, the HCJ unequivocally held that the sole source of the legal authority of the military commander is the law of belligerent occupation.⁹¹ In the *nomos* inhabited by the international community, inclusive of the HCJ, the applicable legal paradigm is the law of belligerent occupation. It is into this alternative *nomos*⁹² that the Levy Committee felt compelled to step in hoping to put to rest any legal challenge to the Jewish settlements⁹³ in the West Bank.

Even if the GCIV were to apply, posits the LCR, the 'prevailing view' is that Article 49 paragraph 6 providing that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies,"⁹⁴ is inapplicable to the Jewish settlers in the West Bank.⁹⁵ This is so because the settlers are "persons who sought to settle in Judea and Samaria not because they were 'deported' or 'exiled' thereto by force,

88. Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 LAW & SOC'Y REV. 781 (1990).

89. HCJ 390/79 Dweikat et al. v. Government of Israel et al., 34(1) PD 1 [1979].

90. *Id.* at 12. See also David Kretzmer, *Bombshell for the Settlement Enterprise in Levy Report*, HA'ARETZ, July 10, 2012, available at <http://www.haaretz.com/opinion/bombshell-for-the-settlement-enterprise-in-levy-report-1.450170>.

91. UNPRECEDENTED, *supra* note 11, annex A, lists more than 60 examples [Hebrew].

92. As noted at *supra* text and accompanying text 34–42, the LCR offers an interpretation of the GCIV, art. 49(6), as an alternative to its main proposition regarding the inapplicability of the entire law of belligerent occupation.

93. Note further that much like that famous rose that would still be a rose even if called by any other name, under the international law of belligerent occupation a settlement is still a settlement even if it is called an outpost.

94. GCIV, *supra* note 34, art. 49(6).

95. See *supra* text between notes 33–37.

but because of their worldview—the settlement of the Land of Israel”.⁹⁶ The leap from this ‘worldview’ to the ‘prevailing view’ in international law reflects little more than wishful thinking. The ‘prevailing view’ of the Security Council,⁹⁷ the General Assembly,⁹⁸ the International Court of Justice,⁹⁹ all of the United Nations Expert Committees, including the Human Rights Committee,¹⁰⁰ the Committee on Economic, Social and Cultural Rights¹⁰¹ and the Committee on the Elimination of Racial Discrimination,¹⁰² and the overwhelming majority of international legal experts¹⁰³ is that the settlements signify the transfer of residents of the occupying power to the occupied territory, a transfer which the provision

96. The LCR, *supra* note 9, ¶ 6.

97. *See, e.g.*, S.C. Res. 465, U.N. Doc. S/RES/465 (Mar. 1, 1980).

98. *See, e.g.*, G.A. Res. 2253 (ES-V), U.N. Doc. A/RES/2253 (ES-V) (July 4, 1967) from 1967, through G.A. Res. 67/229, U.N. Doc. A/RES/67/229 (Apr. 9, 2013) of 2013. A full list of over 200 decisions is provided in UNPRECEDENTED, *supra* note 11, appendix B.

99. Construction of the Wall, *supra* note 69, ¶ 120.

100. Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/CO/78/ISR (Aug. 5, 2003); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/C/ISR/CO/3 (Sep. 10, 2010).

101. Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, U.N. Doc. E/C.12/1/Add.27 (Dec. 4, 1998); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, U.N. Doc. E/C.12/1/Add.90 (May 23, 2003); U.N. Doc. E/C.12/ISR/CO/3 (Dec. 16, 2011).

102. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, U.N. Doc. A/49/18, ¶¶ 73–91 (Aug. 19, 1994); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, U.N. Doc. CERD/C/304/Add.45 (Mar. 30, 1998); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, U.N. Doc. CERD/C/ISR/CO/13 (June 14, 2007); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, U.N. Doc. CERD/C/ISR/CO/14-16 (Mar. 9, 2012).

103. *See*, Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, 3 PALESTINE Y.B. INT’L L. 13 (1986); Roberts, *supra* note 39, at 83–86; Joseph H. H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, in ISRAEL AMONG THE NATIONS 381 (Alfred E. Kellermann et al. eds., 1998); James Crawford, *Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, TUC (Jan. 2012), <http://www.tuc.org.uk/tucfiles/342/LegalOpinionIsraeliSettlements.pdf>; EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2d ed., 2012); Yoram Dinstein, *The International Legal Status of the West Bank and the Gaza Strip—1998*, 28 ISR. Y. B. HUM. RTS. 37 (1999); ORNA BEN-NAFTALI & YUVAL SHANY, INTERNATIONAL LAW BETWEEN WAR AND PEACE (2006) [Hebrew]; DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002). *See also* Scobbie; Kretzmer—*Undoing the State of Israel*; Gross; Raday & Rosenzweig; Lieblich & Krebs, *supra* note 17.

prohibits regardless of its motive. This prohibition is customary¹⁰⁴ and is thus applicable even if the international legal community were to accept, miraculously, the LCR's position concerning the inapplicability of the GCIV.¹⁰⁵

The LCR, alas, fails to mention, let alone engage with any of these sources. It does cite the ICRC commentary as a source supporting its interpretation of article 49.¹⁰⁶ The commentary, however, offers no such support and indeed, in the light of the conservation principle,¹⁰⁷ regards any demographic changes as prohibited.¹⁰⁸

In this context too, the LCR weaves a self-serving temporal web: in tracing the roots of the prohibition to Nazi *Judenrein* policies it seeks to suggest the audacity of a comparison between the latter and Jewish settlements in the OPT.¹⁰⁹ The commentary, however, clarifies that the prohibition on such practices predates the Second World War, and indeed was considered customary before the Geneva Conventions came into force.¹¹⁰ It further sheds light on its meaning and scope: its application is not restricted to forced transfer or deportation; the words 'transfer' and 'deport' "do not refer to the movement of protected persons but to the nationals of the occupying Power", and the paragraph "provides protected persons with a valuable safeguard".¹¹¹

A proper reading of the provision in the light of the commentary, generated already in 1967 the advice given by the then legal adviser to the Israeli Ministry of Foreign Affairs, Theodore Meron, clarifies the following: (a) "civilian settlement in the administered territories

104. Rule 130 of the ICRC's guide to customary IHL states that "States may not deport or transfer parts of their own civilian population into a territory they occupy," HENCKAERTS & DOSWALD-BECK, *supra* note 80, at 462.

105. See Scobbie, *supra* note 17.

106. The LCR, *supra* note 9, ¶ 5.

107. The conservation principle is articulated in art. 43 of the Hague Regulations, *supra* note 63, vesting the occupying power with the authority "to take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (emphasis added). The conservation principle thus imposes on the occupying power the duty to respect the existing legal, economic and socio-political institutions in the territory. This principle has its origins in the preservation of the sovereignty of the ousted authority. For discussion, see, e.g., Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005); Ben-Naftali—*Belligerent Occupation*, *supra* note 64, at 544–46.

108. PICTET, *supra* note 38, at 283.

109. See the LCR's reference to Julius Stone, *supra* note 9, ¶ 5.

110. PICTET, *supra* note 38, at 279. See also GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 227 (1968); Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 480, 482–85, 500 (1993–1994).

111. PICTET, *supra* note 38, at 283.

contravenes explicit provisions of the Fourth Geneva Convention”; (b) the prohibition on such settlement is ‘categorical’, that is, “not conditional upon the motives for the transfer or its objectives”; and (c) “Its purpose is to prevent settlement in occupied territory of citizens of the occupying state.”¹¹² This position was hushed and ignored.

Two later legislative developments signify the importance the international community attaches to the prohibition, in the process shedding a dim light on both the Jewish settlement in the OPT and on the LCR’s interpretation: the first is reflected in article 85(4)(a) of API,¹¹³ which has transformed a violation of this prohibition from a breach of the GCIV into a ‘grave breach’ thereof. This transformation was deemed necessary, according to the ICRC Commentary “because of the possible consequences for the population of the territory concerned from a humanitarian point of view.”¹¹⁴ The second development is articulated in article 8(2)(b)(viii) of the Statute of the International Criminal Court (ICCSt). It designates as a war crime, “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.”¹¹⁵ While concerned with individual responsibility, it does not, as noted by the International Law Commission, “relieve a state of any responsibility[es] under international law for an act or omission attribut[ed] to it.”¹¹⁶ The difference in the wordings of these two provisions is significant: in the provision in the ICCSt, the words “willfully and in violation of the Convention or the Protocol” were omitted and the words “directly or indirectly” were inserted

112. Memorandum from Theodore Meron, Legal Adviser, Ministry of Foreign Affairs, to Mr. Adi Yafeh, Political Secretary to the Prime Minister, *Settlement in the administered territories* (classified as “top secret”, Sept. 18, 1967), available at <http://www.soas.ac.uk/lawpeacemideast/resources/file48485.pdf>. This memorandum was brought to the attention of the committee by the Association for Civil Rights in Israel. Tamar Feldman, *The Position of the Association for Civil Rights in Israel (ACRI)* (Apr. 19, 2012), <http://www.acri.org.il/en/wp-content/uploads/2012/04/ACRI-position-outposts-190412-ENG.pdf>.

113. API, *supra* note 66, art. 85(4) reads: “[T]he following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.”

114. CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1000 (Yves Sandoz et al., eds., 1987).

115. Rome Statute of the International Criminal Court, art. 8(2)(b)(viii), July 17, 1998, U.N. Doc. A/CONF. 183/9, 2187 U.N.T.S. 90.

116. Henckaerts, *supra* note 110, at 488 (citing the Draft Code of Crimes Against the Peace and Security of Mankind, G.A. Res. 95(I), U.N. Doc. A/RES/95(I) (Dec. 11, 1946)).

to clearly express that indirect transfer policies are also covered . . . such as confiscation laws, military or other protection of unlawful settlements, as well as economic and financial measures such as incentives, subsidies, exoneration of taxes and permits issued on a discriminatory basis . . . the perpetrator does not need any particular motive or special intent other than the intent of transferring parts of the population of the Occupying Power into the occupied territory.¹¹⁷

Israel is neither a party to the API nor to the ICCSt in large measure due to these provisions.¹¹⁸ The ICCSt, however, clearly indicate the “prevailing view” of international law. The LCR could have engaged with this view from a critical position.¹¹⁹ Instead, it chose to reverse it.

It is in this light that one should read the concluding paragraph of the LCR’s exposé of the international legal perspective. The Committee, reiterating Israel’s unilateral commitment to apply the humanitarian provisions of the GCIV without thereby admitting any legal obligation to do so, proceeds to state that “consequently Israel had adopted a policy that allows Israelis to live in the area out of their own free will according to the rules established by the Israeli government and subject to the review of the Israeli legal system.”¹²⁰ This conclusion alludes to the prohibition imposed on the occupying power to “transfer directly or indirectly”¹²¹ parts of its population to the occupied area, and appears to posit that the case of the

117. Michael Cottier, *Article 8(2)(b)(viii)*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 362, 369 (Otto Triffterer ed., 2d ed., 2008).

118. Israel’s opposition to, *inter-alia*, art. 85(4)(a) of API, *supra* note 66, should probably be construed as persistent objection. See Christopher Greenwood, *Terrorism and Humanitarian Law: The Debate over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187 (1989); Christopher C. Burris, *Comment: Re-examining the Prisoner of War Status of PLO Fedayeen*, 22 N. C. J. INT’L L. & COM. REG. 943, 976 (1997). On its position regarding the ICCSt, see Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT’L L. 73 (2010–2011); Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities*, 8 J. INT’L CRIM. CT. 3 (2010); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT’L CRIM. CT. 329 (2010).

119. See, e.g., Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 413 (Antonio Cassese et al. eds., 2002); Ariel Zemach, *Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute*, 41 COLUM. J. TRANSNAT’L L. 895 (2002–2003); Ayelet Levy, *Comments: Israel Rejects Its Own Offspring: The International Criminal Court*, 22 LOY. L.A. INT’L & COMP. L. REV. 207 (1999–2000).

120. The LCR, *supra* note 9, ¶ 9. This point resonates the LCR’s dismissal of the relevance of art. 49(6) of GCIV, *supra* note 34, *inter-alia* on the grounds that the settlers were motivated to settle there “because of their world-view—the settlement of the land of Israel.” The LCR, *supra* note 9, ¶ 6.

121. Art. 8(2)(b)(viii) of the Rome Statute, *supra* note 115; see also rule 130 of the ICRC’s guide to customary IHL, *supra* note 80.

settlements involves neither kind: from each settler's point of view, the decision to reside in a settlement is but an expression of free will.

There is no dispute that Israel did not force its citizens to settle in the West Bank. Yet, the dialectical relationship between consciousness and experience tends to draw a very thin line between being coerced and being coaxed. In the case at hand, the text of "individual free will" is to be read in the context of material governmental intervention.

There are currently over 550,000 settlers living in the West Bank (including approximately 200,000 in East Jerusalem and its surrounding areas).¹²² Some of them surely gravitated to the territory on ideological grounds and would probably have done that without governmental incentives. These incentives, however, explain the attraction of the area to the vast majority of Jews residing in the West Bank: coming from the lower socio-economic strata,¹²³ the lure of subsidized housing located not too far from urban centers, new infrastructure coupled with better public education, health and welfare services that in Israel proper are undergoing privatization, and lower taxes, is a major consideration for settling in the occupied territory.¹²⁴ This data suggests that where the LCR sees free will in pure form, a critical examination discloses a disciplinary matrix of law, ideology and political economy.

The construction of a legal status for the settlements is the *raison d'être* of the Levy Committee. It explains not only its reading of article 46 paragraph 6 of the GCIV but also its determination regarding the irrelevance of the international law of belligerent occupation to the West Bank. However, both are but specific indicators of an "entire constellation of beliefs, values, techniques and so on shared by members of a given

122. The figures vary depending on their source, and range between 500,000 and 650,000. See Central Intelligence Agency, *The World Factbook—Middle East: The West Bank*, https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_we.pdf. The numbers are slightly higher according to the Israeli Central Bureau of Statistics, but its report does not contain specific data for East Jerusalem. See *Statistical Abstract of Israel 2013* 138, http://www1.cbs.gov.il/reader/shnaton/templ_shnaton.html?num_tab=st02_19x&CYear=2013.

123. Danny Gutwein, *Comments on the Class Foundations of the Occupation*, 24 *THEORY & CRITICISM* 203 (2004) [Hebrew].

124. *Id.* at 206. See also ARIELLA AZOULAY & ADI OPHIR, *THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE* 81 (Tal Haran trans., 2013). Various mechanisms facilitate these economic benefits, including the classification of numerous settlements as "national high priority area," a category traditionally intended for the socio-economic periphery within the green line in numbers. See <http://www.haaretz.co.il/st/inter/Hheb/images/adifut2013.pdf>. See also The Association for Civil Rights in Israel, *Situation Report: The State of Human Rights in Israel and the OPT 2012*, 77–83 (Dec. 2012), <http://www.acri.org.il/en/wp-content/uploads/2012/12/ACRI-Situation-Report-2012-ENG.pdf>.

community.”¹²⁵ Lurking behind the LCR’s reading of the law is a vision. The vision is of an international law that vindicates Israel’s exclusive sovereignty over the area. That international law, which ostensibly recognized the Jewish people’s right to self-determination in Palestine, and only its right, is found in quasi-legal and legal documents from the early 1920s, primarily the 1922 Mandate for Palestine.¹²⁶ The clock, it would seem, has not just stopped ticking for the Palestinians; from the LCR’s perspective of international law, it has actually turned back to the era of colonialism, and, given the specificity of the chronotopy,¹²⁷ of “Orientalism.”¹²⁸ This is the context which illuminates the text of the Balfour Declaration, the San Remo Resolution and the British Mandate.

Noblesse oblige: The Balfour Declaration was made in a letter written by one nobleman, Lord Arthur James Balfour, then Foreign Secretary of Great Britain, to another, Baron Walter Rothschild, son of the first Jewish peer in England. It is perhaps no coincidence that the paradigmatic example Edward Said uses to explain the specific juxtaposition of knowledge and power that constitutes the Orientalist *nomos* is a lecture given by the very same Lord Balfour to justify the need for Britain to continue to exercise control over Egypt.¹²⁹ The then dominant international legal paradigm, that “Gentle Civilizer of Nations,”¹³⁰ provided the colonialist enterprise with a seemingly objective, scientific apology for “the continuing subjugation of various regions of the world.”¹³¹ Within the Orientalist paradigm, the indigenous population of Palestine, not European Jewry, was construed as the “other.” The recognition of the latter’s right to build “a national home in Palestine,” simultaneously preserving their political rights in Europe,¹³² was not perceived as an anomaly.

125. KUHN, *supra* note 5, at 175.

126. See *supra* text between notes 42–44.

127. See generally MIKHAIL M. BAKHTIN, *Forms of Time and of the Chronotope in the Novel*, in THE DIALOGIC IMAGINATION: FOUR ESSAYS 84, 84 (Michael Holquist ed., Michael Holquist & Caryl Emerson trans., 1981).

128. See generally EDWARD W. SAID, *ORIENTALISM* (Penguin Classics 2003).

129. *Id.* at 32.

130. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2004).

131. Jean Allain, *Orientalism and International Law: The Middle East as the Underclass of the International Legal Order*, 17 LEIDEN J. INT’L L. 391, 391 (2004), cited in Victor Kattan, *Palestine and International Law: An Historical Overview*, in THE PALESTINE QUESTION IN INTERNATIONAL LAW 3 (Victor Kattan ed., 2008).

132. The Balfour Declaration, San Remo Resolution and Mandate for Palestine all incorporate approximately the same phrase: “[I]t being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine.” See

Yet, even then, there was a whiff of change. The demise of the colonial project is attributable to a myriad of factors, including unease with the gap between self-proclaimed Western values of self-determination and equality and the dispossession and subjugation of the rest of the world. Europe remained the center of gravity, but it could no longer retain the identification of the European order with the international one. Membership in the League of Nations, which for the first time included non-European states on a footing of equality with European states, is one indicator that an alternative paradigm was emerging. In this context, the success of the Zionist movement to secure recognition in “the historical *connection* of the Jewish People with Palestine” and in the “establishment *in* Palestine of a national home for the Jewish people,”¹³³ should be read against its failure to substitute the term “title” for “connection” and to secure Palestine as *the* national home of the Jewish people.¹³⁴ The interpretation offered by then Secretary of State for the Colonies, Winston Churchill, in his White Paper further signifies this change: the Balfour Declaration, he clarified, never contemplated that “Palestine as a whole should be converted into a Jewish National Home, but that such a Home should be founded *in Palestine*.”¹³⁵ This 1922 reading of the meaning of the Mandate and its antecedent documents, as understood by the Mandatory Power, should have caused the members of the Levy Committee to at least pause before marshaling Article 80 of the UN Charter as a ground for invalidating the Partition Plan.¹³⁶ Later developments relative to the colonialist paradigm should have propelled

Mandate for Palestine, League of Nations Doc. C.529M.314 1922 VI (Aug. 12, 1922), available at <http://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB>; Lord Arthur James Balfour, Foreign Office, *The Balfour Declaration* (photo. reprint), (1917), in THE ARAB-ISRAELI CONFLICT READINGS AND DOCUMENTS 884, 885 (John Norton Moore ed., 1977), available at <http://www.icsresources.org/content/primarysources/BalfourDeclaration.pdf>; *The San Remo Resolution*, COUNCIL ON FOREIGN RELATIONS (Apr. 25, 1920), <http://www.cfr.org/israel/san-remo-resolution/p15248>.

133. See *Mandate for Palestine*, *supra* note 132.

134. See *Proposals for Palestine Mandate*, Mar. 20, 1919, U.K. National Archives F.O. 608/100 (emphasis added), cited in Victor Kattan, *Palestine and International Law: An Historical Overview*, in THE PALESTINE QUESTION IN INTERNATIONAL LAW xxxii (Victor Kattan ed., 2008)

135. See COLONIAL OFFICE, ENCLOSURE IN NO. 5: BRITISH POLICY IN PALESTINE, 1922, Cmd. 1700, at 18. See generally Kattan, *supra* 131, at xxv.

136. See *supra* text between notes 44–46. Paragraph 1 of article 80 of the U.N. Charter provides: “Except as may be agreed upon in individual trusteeship agreements . . . nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.” For an additional critique of the LCR’s reading of the Partition Plan, see *infra* text between notes 143–50.

them to rethink the validity of their own *astro-nomos*. In such rethinking, alas, they have not engaged.

The noble of a by-gone *nomos* often becomes the ignoble of later years. Loss of faith in the colonialist paradigm led to the consideration of alternatives,¹³⁷ and eventually to its complete denunciation. The current membership in the United Nations attests to the overwhelming acceptance of the new paradigm, revolving around the core principles of sovereign equality, self-determination and non-intervention.¹³⁸ It is not without significance to recall that given that these principles have not been inscribed on a *tabula rasa*, “alien occupation,” i.e., the exercise of effective control by a foreign military force over a territory over which it has no title and without the volition of the sovereign,¹³⁹ echoes the soggy saga of the discarded paradigm. It is for this reason that the disciplinary matrix of international law groups belligerent occupation together with colonial domination, racist regimes¹⁴⁰ and related practices of “subjugation, domination and exploitation.”¹⁴¹ A new international legal order has replaced the Eurocentric legal order. The LCR remains deeply rooted in the latter.

The LCR’s anachronistic reading of the international legal matrix, in terms of both the epistemic method used and its ontological consequences, is the Ariadne’s thread that is woven into its construction of the invalidity of the 1947 Partition Plan; the indeterminacy of the 1949 armistice lines and Jordan’s 1988 waiver of a claim to sovereignty over the West Bank,¹⁴² in a manner that generates the foregone conclusion that Israel has a valid claim to sovereignty over the area. This claim, asserts the LCR, has been upheld by successive Israeli governments, which refrained from realizing it through annexation only because of their wish to “enable peace negotiations.”¹⁴³

The legal validity of General Assembly Resolution 181 (II) (which partitioned Mandatory Palestine between the Arab and Jewish communities in the area and approved the establishment of two States with

137. See generally KUHN, *supra* note 5, at 77.

138. U.N. Charter art. 2, ¶¶ 1, 3, 4, 7 & art. 55, available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>; International Covenant on Civil and Political Rights, art. 1, ¶ 1, Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171.

139. BENVENISTI, *supra* note 103, at 4.

140. API, *supra* note 66, art. 4.

141. See the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625, at 122, 124 (Oct. 24, 1970).

142. The LCR, *supra* note 9, ¶ 8. See *supra* text between notes 46–49.

143. The LCR, *supra* note 9, ¶ 9. See *supra* text between notes 49–50.

economic union within these borders with Jerusalem and Bethlehem as *corpus separatum*),¹⁴⁴ was subject to some debate at the time but not for the reasons advanced in the LCR. The debate focused on the competence of the General Assembly: on the one hand, it is not a legislative body, and it is empowered merely to make recommendations;¹⁴⁵ on the other hand, the General Assembly succeeded the Council of the League of Nations and the latter was competent to make binding decisions regarding Mandate territories.¹⁴⁶ The rejection of the Resolution by Arab States, posited in the LCR as a ground for its invalidity,¹⁴⁷ reflected their sense that the partition was inequitable and that the proposed Arab State would not be economically viable.¹⁴⁸ This stand was surely significant politically, but not legally. By contrast, Israel's embrace of the Resolution, which the LCR is silent about, carries a normative impact: given that its 1948 Declaration of Independence incorporates a paragraph from the Resolution,¹⁴⁹ Israel is arguably estopped from arguing against the Resolution's validity.¹⁵⁰

The LCR is equally silent about the 1988 Palestinian Declaration of Independence, which also accepted the Resolution as providing international legitimacy to the "right of the Palestinian Arab people to

144. The Partition Plan, *supra* note 45, at 133, 135, 139, 146.

145. U.N. Charter arts. 10–14.

146. This was the position of then Secretary-General Trygve Lie, *see* PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS, VOL. 1: TRYGVE LIE, 1946–1953 106–15 (Andrew W. Cordier & Wilder Foote eds., 1969). *See also*, Richard J. Tyner, *Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories*, 5 YALE STUD. WORLD PUB. ORD. 234, 265 (1978–1979); Alan Levine, *The Status of Sovereignty in East Jerusalem and the West Bank*, 5 N.Y.U. J. INT'L L. & POL. 485, 486 (1972). On the General Assembly as successor to the Assembly of the League of Nations in matters pertaining to mandate territories, *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 61, ¶¶ 55–72.

147. The other ground advanced in the LCR to invalidate G.A. Resolution 181 was the U.N. Charter art. 80, a point already addressed, *see supra* text and notes 135–36.

148. *See, e.g.*, Kattan, *supra* note 131, at xxxiii–xxxviii.

149. Declaration of establishment of state of Israel from May 14, 1948, *available at* <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>. The Declaration refers to G.A. Res. 181 as "*calling for the establishment of a Jewish State in Eretz-Israel . . . This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.*"

150. On estoppel under international law, *see generally*, The Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6, 22–26 (June 15); Phil C.W. Chan, *Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited*, 3 CHINESE J. INT'L L. 421 (2004). The ICJ revisited the case in 2013, following the Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment (Nov. 11, 2013), *available at* <http://www.icj-cij.org/docket/files/151/17704.pdf>. *See* Simon Chesterman, *The International Court of Justice in Asia: Interpreting the Temple of Preah Vihear Case*, 5 ASIAN J. INT'L L. 1 (2015).

national sovereignty and independence.”¹⁵¹ Finally, in the words of the ICJ, “the responsibility of the United Nations” in matters relative to the Israeli-Palestinian conflict, “has its origin in the Mandate and the Partition Resolution concerning Palestine . . .”¹⁵² Having been referred to in numerous later resolutions, including the resolution which requested the ICJ to render an advisory opinion on the legality of the construction of the wall in the OPT,¹⁵³ it reflects the universally accepted basis for the establishment in the land of Mandatory Palestine of “two independent States, one Arab, the other Jewish.”¹⁵⁴

The road leading the Levy Committee to its destination regarding exclusive Jewish sovereignty over Mandatory Palestine passes through two additional signposts: the 1949 armistice lines and the 1988 Jordanian waiver of sovereignty over the West Bank. The armistice lines were drawn in various agreements, pursuant to Security Council Resolution 62 (1948).¹⁵⁵ The Rhodes agreement of April 1949 between Israel and Jordan, fixed the demarcation line known as the “Green Line.”¹⁵⁶ The latter was never officially designated as a final boundary and indeed the agreement itself allows for revisions by mutual consent.¹⁵⁷ It does not, however, follow that the Green Line is devoid of legal meaning, let alone that Israel has a sovereign right in the OPT. Quite the opposite: so long as such consent has not been reached, and given the principle of non-acquisition of territory by force, “the Palestinian territories east of the Green Line”, in the words of the ICJ, “are occupied.”¹⁵⁸ By the same token, Jordan’s waiver of its claim to sovereignty over the West Bank does not generate the LCR’s conclusion that said waiver “has restored the original legal status of the territory,” that is, Jewish sovereignty.¹⁵⁹ It does not because under the prevailing international legal paradigm, the original legal status

151. Palestine National Council, Nov. 15, 1988, *available at* <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook7/Pages/396%20Palestinian%20National%20Council%20political%20stateme.aspx>.

152. Construction of the Wall, *supra* note 69, ¶ 49.

153. G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003). *See also* Construction of the Wall, *supra* note 69, ¶ 1.

154. *Id.* ¶ 76.

155. S.C. Res. 62, U.N. Doc. S/1080 (Nov. 16, 1948).

156. Hashemite Jordan Kingdom—Israel: General Armistice Agreement, U.N. Doc. S/1302/Rev.1 (Apr. 3, 1949), adopted by the Security Council in S.C. Res. 72, U.N. Doc. S/RES/72 (Aug. 11, 1949). The term “Green Line” refers to the armistice line, “owing to the color of the ink used for it on maps” during the armistice talks, *see* Construction of the Wall, *supra* note 69, ¶ 72.

157. Armistice Agreement, *supra* note 156, art. IX.

158. Construction of the Wall, *supra* note 69, ¶¶ 78, 101.

159. The LCR, *supra* note 9, proviso of ¶ 8, *see also supra* text between notes 46–49.

of the territory was not, and was not intended to be, under Jewish sovereignty.¹⁶⁰

The *nomos* inhabited by the members of the Levy Committee consists of entirely different terrains and shades of visibility. In it, there is no Palestinian people vested with a right to self-determination; the West Bank is *terra nullius*,¹⁶¹ an empty space; “a land without people” still awaiting to be restored “to a people without a land;”¹⁶² a land over which Jews have always had a right of possession; a land promised once by the good Lord and once again by another Lord representing the British Empire; indeed; a land impregnated with Jewish sovereignty. In the *nomos* inhabited by the rest of the international community, there is a right to self-determination. That right exists *erga omnes*.¹⁶³ That right “was the ultimate objective of the mandate system.”¹⁶⁴ That right stems from a principle enshrined in the UN Charter.¹⁶⁵ The Palestinian people enjoy this right, and thus have a claim to sovereignty over the territory. Israel is under an obligation to respect this right.¹⁶⁶ The admission of Palestine as a Member State to various international governmental organizations,¹⁶⁷ coupled with Palestine’s accession to the Rome Statute,¹⁶⁸ has not settled the debate

160. Israel itself accepted this normative position. *See infra* text between notes 170–74.

161. *See* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶¶ 79–80 (Oct. 16) (“[T]he State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius* . . . the acquisition of sovereignty was not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title but through agreements concluded with local rulers”).

162. This phrase, attributed to British writer Israel Zangwill, was first used in the writings of nineteenth century Evangelical writers. On its genesis *see* Diana Muir, *A Land Without People for a People Without a Land*, XV MIDDLE EAST QUARTERLY 55 (2008).

163. Construction of the Wall, *supra* note 69, ¶ 155; Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 61, ¶ 126; East Timor (Port. v. Austl.), 1995 I.C.J. 90, ¶ 29 (June 30, 1995).

164. Construction of the Wall, *supra* note 69, ¶ 88.

165. U.N. Charter, art. 1, ¶ 2, art. 55.

166. *Id.*

167. Palestine was admitted as a member state at UNESCO in 2011. UNESCO G.C., 36th Sess., 36 C/PLEN/DR.1 (Oct. 29, 2011), *see also* Larry D. Johnson, *Palestine’s Admission to UNESCO: Consequences Within the United Nations?*, 40 DENV. J. INT’L L. & POL’Y 118 (2011–2012); Palestine was upgraded to non-member observer state status in the U.N. in 2012. G.A. Res. 67/19, U.N. Doc A/RES/67/19 (Nov. 29, 2012), *see also* Dapo Akande, *Palestine as a UN Observer State: Does this Make Palestine a State?*, EJIL: TALK!—BLOG OF THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Dec. 3, 2012), <http://www.ejiltalk.org/palestine-as-a-un-observer-state-does-this-make-palestine-a-state>.

168. *See* the ICC press releases of Jan. 7, 2015, “The State of Palestine accedes to the Rome Statute”, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.aspx, and of Jan. 16, 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx.

whether or not it meets the criteria of statehood,¹⁶⁹ but it surely attests to the overwhelming view of the international community on the right of the Palestinians to exercise self-determination in the form of a Palestinian State in the OPT.

There can be little doubt that Israel's actual display of respect for the Palestinian claim to sovereignty over the OPT leaves a lot to be desired. From a normative perspective however, and contrary to the assertion of the LCR, since the early 1990s, successive Israeli governments did recognize this claim and they continue to do so.

In the various agreements constituting the Oslo Accords¹⁷⁰ signed by then Prime Minister Yitzhak Rabin, Israel recognized the PLO for the first time as the representative of the Palestinian people, acknowledged the reciprocal political rights of both parties, and specifically recognized the Palestinian's people right to acquire sovereignty over much of the OPT.¹⁷¹ Indeed, this recognition, as the LCR should have but failed to acknowledge, severed any possible nexus between the former Jordanian rule in the West Bank and the question of Israel's sovereignty over the territory.¹⁷² Neither the second *intifada*, nor the governments formed later by a Likud-led coalitions invalidated these agreements.¹⁷³ Even Prime Minister Netanyahu accepted, in his 2009 *Bar Ilan* speech, that the final political solution must include a Palestinian State, "side by side with the Jewish State."¹⁷⁴

169. See, e.g., Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L L. 301 (1990) (arguing that Palestine is de facto a state, since all four elements that constitute one, according to the Montevideo convention, are already fulfilled: territory, population, government and the capacity to enter into relations with other states); James Crawford, *The Creation of the State of Palestine: Too Much Too soon?*, 1 EUR. J. INT'L L. 307 (1990) (claiming that these conditions are yet to be realized). See also JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE* (2010) (the main thrust of the book is the proposition that Palestine has long met the international legal criteria for statehood, especially when compared to other entities accepted as States, such as Kosovo, Micronesia, The Marshall Islands and Palau); Weiler, *supra* note 17.

170. These include the Declaration of Principles on Interim Self-Government Arrangements (Sept. 13, 1993), http://www.knesset.gov.il/process/asp/event_frame.asp?id=37; Agreement on the Gaza Strip and the Jericho Area (May 4, 1994), http://www.knesset.gov.il/process/asp/event_frame.asp?id=38; the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sept. 28, 1995), http://www.knesset.gov.il/process/docs/heskemb_eng.htm; Protocol Concerning the Redeployment in Hebron (Jan. 15, 1997), http://www.knesset.gov.il/process/asp/event_frame.asp?id=45; and the Wye River Memorandum (Oct. 23, 1998), <http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/The%20Wye%20River%20Memorandum.aspx>.

171. Declaration of Principles on Interim Self-Government Arrangements, *supra* note 170.

172. See, e.g., Jean Salmon, *Declaration of the State of Palestine*, 5 PAL. Y.B. INT'L L. 56, 57 (1989).

173. See UNPRECEDENTED, *supra* note 11, part A.3.3.2.

174. Full text of the speech is available at <http://www.haaretz.com/news/full-text-of-netanyahu-s-foreign-policy-speech-at-bar-ilan-1.277922>.

The odyssey undertaken by the Levy Committee requires it to explain why Israel, as the lawful sovereign of the West Bank, did not simply annex it. The explanation, according to the LCR, is Israel's wish "to enable peace negotiations."¹⁷⁵ This policy assessment may well qualify as an apology for power, but it is neither a legal argument, nor is it convincing in view of the *de jure* annexation of Jerusalem,¹⁷⁶ surely a major issue in the peace negotiations. Indeed, it serves to obfuscate rather than illuminate the puzzle. Could it not be that Israel did not annex the territories because it has, at least thus far, gained more than it lost by keeping its current form of control over the OPT? The ontology of this occupation, suggests that indeterminacy is its determinate feature, and offers an alternative explanation.¹⁷⁷ According to this suggestion,

Israel acts in the territory as a sovereign insofar as it settles its citizens there and extends to them its laws on a personal and on a mixed personal/territorial bases, yet insofar as the territory has not been formally annexed and insofar as this exercise of sovereignty falls short of giving the Palestinian residents citizenship rights, Israel is not acting as a sovereign. In this manner, Israel enjoys both the powers of an occupant and of a sovereign in the OPT, while Palestinians enjoy neither the rights of an occupied people nor the rights of citizenship. This indeterminacy allows Israel to avoid accountability in the international community for having illegally annexed the territories, while pursuing the policies of "greater Israel" in the West Bank without jeopardizing its Jewish majority.¹⁷⁸

The policies of 'Greater Israel' in the West Bank advance a hegemonic vision. The structural indeterminacy inherent in the application of the international legal paradigm of the law of belligerent occupation by Israeli

175. The LCR, *supra* note 9, ¶ 9.

176. Israel initially objected to the use of the term 'annexation' to describe its imposing of Israeli law and administration on East Jerusalem, claiming it was done for purely municipal and administrative reasons. The Basic Law: Jerusalem, The Capital of Israel, 34 LSI 209 (1980), put this objection to rest. From an international legal perspective the annexation of East Jerusalem (expanding gradually its boundaries from 6.5 to 71 square kilometers) is illegal. This illegality was affirmed by both the Security Council and the General Assembly and the ICJ. *See* S.C. Res. 478, U.N. Doc. S/RES/478 (Aug. 20, 1980); G.A. Res. 35/169E, U.N. Doc. A/RES/35/169E, (Dec. 15, 1980); S.C. Res. 673, U.N. Doc. S/INF/46 (Oct. 24, 1990); Construction of the Wall, *supra* note 69, ¶ 122.

177. Ben-Naftali, Gross & Michaeli, *supra* note 60, at 609–12. Note that the interplay between the temporary and the indefinite, *supra* text and notes 59–72, and between occupation / non occupation (as attested to by the application of the GCIV by the HCJ while never acknowledging that it is under an obligation to do so), *supra* text and notes 74–81, operates in the context of annexation / non-annexation as well.

178. *Id.* at 610–11 (footnotes omitted).

governmental and judicial authorities to the territory has served as an apology for power, which has facilitated the piecemeal realization of this vision. The LCR steps out of the structural confinements of the discipline. It does not present an argument *intra-legem*. It is, quite simply, *contra-legem*. It reflects an insular vision of power and destiny that that requires no apology.¹⁷⁹

IV. CONCLUDING THOUGHTS

“Don Quixote’s misfortune is not his imagination,
But Sancho Panza”

—FRANZ KAFKA, THE BLUE OCTAVO NOTEBOOKS¹⁸⁰

The profession of faith is not to be confused with a profession. The deep conviction shared by the members of the Levy Committee in the sovereign right of the Jewish people to the entire land of Mandatory Palestine is not shared, as posited above, by the community comprising the international legal profession. The failing of the LCR is not, however, to be attributed to the mere fact that its reading of the relevant international legal paradigm differs from the prevailing view. The position maintained by a majority is not necessarily closer to the truth than the position espoused by the few. It is not a quantitative but a qualitative blemish, consisting of both epistemological and ethical elements, that stains the LCR.

In epistemic terms, inhabiting a *nomos* in an engaged, productive way, much like working creatively within a disciplinary matrix may well require the poetic imagination of Don Quixote but also the pragmatic bookkeeping of Sancho Panza. The disciplinary straightjacket is the mantle of the creative scientist.¹⁸¹ The members of the Levy Committee appeared, initially, to have willingly donned this mantle.¹⁸² Appearances, alas, are notoriously deceiving:¹⁸³ their international legal mantle has been woven from the same fabric used for the making of the emperor’s new clothes. The Levy Committee did not merely offer an interpretation of the prevailing international legal paradigm different from that shared by the

179. Gross, *supra* note 17, makes a somewhat similar point when he observes that the Levy Committee’s conclusions are “helpful in piercing the veil of legal hypocrisy behind Israeli control in the territories.”

180. FRANZ KAFKA, THE BLUE OCTAVO NOTEBOOKS 15 (2004).

181. KUHN, *supra* note 5, at 144–45.

182. See *supra* text between notes 57–58.

183. In reference to the language used by Judge Krylov in his dissenting opinion *in* Conditions of Admission of a State to Membership in The United Nations, Advisory Opinion, 1948 I.C.J. 57, 107 (May 28).

majority of experts; it ignored them and advanced a paradigm they had discarded. Given that the old paradigm was not merely discarded but discredited, and given further that “the very existence of science depends upon the vesting of power to choose between paradigms in the members of a special kind of community,”¹⁸⁴ it is no wonder that the LCR’s attempt to change the rules of the game was met with little more than professional derision.¹⁸⁵ It does not follow that, at times, an out-of-date paradigm cannot be resurrected “as a special case of its up-do-date successor,” as Kuhn acknowledges, but “it must be transformed for the purpose.”¹⁸⁶ No trace of such transformation can be detected in any of the stale arguments of the LCR. From a disciplinary perspective the outcome is “just a research failure, one which reflects not on nature but on the scientist[s].”¹⁸⁷

A research failure is a matter internal to the professional community. A professional community, however, is more than a body of knowledge shared by its members. It is also engaged in a relationship with the society that expects to benefit from the knowledge, without being able to evaluate its professional merits.¹⁸⁸ It is for this reason that trust is the defining feature of this relationship. From this perspective, for an expert body, such as the Levy Committee, to give the impression that one’s views speak for the community of experts, when they do not, is not “just a research failure.” It is also an ethical obstruction.¹⁸⁹

The focus on the methodology employed in the LCR offers a critique of the epistemological and ethical foundations of its attempt to revise the prevailing international legal paradigm. Insofar as a move from paradigm to paradigm presents the question “where in this movement can one discern the ethical?,”¹⁹⁰ this critique also extends to the substantive objective of the LCR. The formal objective of the Levy Committee was to

184. KUHN, *supra* note 5, at 167.

185. “The group’s members as individuals and by virtue of their shared training and experience,” says Kuhn, “must be seen as the sole possessors of the rules of the game.” *Id.*, at 168. For the reaction of the professional community *see supra* note 17.

186. *Id.* at 103.

187. *Id.* at 35. On the ideological bent of the members of the Levy Committee, *see supra* text and notes 11–14. It should be noted that the ethical problem with the Levy Committee is traced to the reason for its creation (i.e., to ‘legalize’ the outposts, and extends to the choice of its members: “Selecting an expert who you think will likely support your position is an epistemic vice . . . selecting an expert because you know she will support your position is a form of deception (or of self-deception) and hence an ethical vice.” Kovac, *supra* note 8, at 407, quoting Hardwig, *supra* note 15, at 97).

188. Kovac, *supra* note 8, at 397–98.

189. *Id.* at 406 (relying on John Hardwig, *The Role of Trust in Knowledge*, 88 J. PHIL. 693 (1991)).

190. Charles Carroll, *Nuremberg: Judgment and Challenge—The Rediscovery of the Law Above the Statutory*, 6 U.S. A.F. ACAD. J. LEGAL STUD. 205, 207 (1995–1996).

legalize the outposts. The text of the LCR discloses a far more ambitious *telos*: to offer a legal framework for the extension of Jewish sovereignty to the West Bank.¹⁹¹

The offering of an organizing principle for a community to adopt is the essence of utopian thinking. Insofar as a real place is experienced by a community as no place (outopia) generating a wish to reach a good place (eutopia),¹⁹² there is nothing wrong with such thinking. There is also nothing wrong in impregnating legal texts with a meaning that reflects a particular vision shared by a minority. Indeed, in pluralistic communities, such as the international community, a majority is not ipso facto right. The question of right or wrong depends on the nature of the utopian vision, as determined by the relevant community in a discursive process. A nomic insularity that does not engage in this process renounces it. The members of the Levy Committee inhabited such an “enclosed nomian island.”¹⁹³

The relevant community relative to the real place defined as the Mandatory land of Palestine is the international community, as represented by the United Nations, as reiterated by its main judicial organ.¹⁹⁴ That community, comprising of international legal experts and non-experts alike, has determined that the right to self-determination in the form of sovereignty over the land is granted to both the Jewish and the Palestinian peoples.¹⁹⁵ The realization of that right only by the Jewish people is generally viewed as regressive, and the paradigmatic move advanced by the LCR as ethically dystopian. Its realization by both is progress. The prevailing international legal paradigm is designed to facilitate this progress, not to jeopardize it.¹⁹⁶ Between the design and its implementation, however, lay the indeterminacy of the discipline and the

191. Justice Levy passed away on March 11, 2014. Immediately thereafter, some commentators called on the government to pay due tribute to his legacy by adopting the LCR. *See, e.g.*, Gali Ginat, *Supreme Court Justice Edmond Levy dies at 72*, WALLA! (Mar. 11, 2014), <http://news.walla.co.il/?w=/10/2728436> (quoting Deputy Minister of Religious Services Eli Ben-Dahan: “It would be an act of memorial to a great judge, if the report that carries his name would be approved by the government”) [Hebrew]; Ofer Aderet & Revital Hovel, *Former Supreme Court Justice Edmond Levi Dies*, HA’ARETZ (Mar. 11, 2014), <http://www.haaretz.co.il/news/law/1.2267213> (quoting Deputy Minister of Foreign Affairs Ze’ev Elkin: “The Israeli government should adopt the LCR without delay, as a final moral imperative Justice Levi left us”) [Hebrew].

192. Thomas More’s ‘Utopia’ is a pun of the original Greek terms ‘outopia’ and ‘eutopia’. THOMAS MORE, *UTOPIA* (Paul Turner trans., Penguin Books 1965) (1516); Martin Parker, *Utopia and the Organizational Imagination: Eutopia*, in *UTOPIA AND ORGANIZATION* 217 (Martin Parker ed. 2002).

193. Cover, *supra* note 21, at 36 (describing the Garrisonian abolitionist in the anti-slavery battle).

194. *See* Construction of the Wall, *supra* note 69, ¶ 49.

195. *See supra* text and notes 128–38, 160–69.

196. “Viewed from within any single community” notes Kuhn, “whether of scientists or of non-scientists, the result of successful creative work *is* progress.” *See* KUHN, *supra* note 5, at 162.

relative weakness of its authority structure, allowing Israel to speak the law as it advances the very vision of the Levy Committee.¹⁹⁷ The LCR provides it with no incentive to discontinue this practice. But the compelling interest of the international community in eradicating such practices should. That interest has been disclosed in the arduous struggle for self-determination and substantiated in the *nomos* that has transformed it from a political aspiration into a right *erga omnes* and a core principle of the community.¹⁹⁸ The international legal project is about such transformations.

197. See *supra* text and notes 174–79.

198. See *supra* text and notes 160–70.