

**Legal status of Israeli football clubs located in the  
occupied Palestinian territory and ensuing legal  
consequences for FIFA**

Expert opinion by

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## **Legal status of Israeli football clubs located in the occupied Palestinian territory and ensuing legal consequences for FIFA**

### **- Executive summary -**

1. There are at least six football clubs affiliated to the Israel Football Association ('IFA') based in occupied Palestinian territory ('Israeli settlement clubs'). Both the IFA and the Palestinian Football Association ('PFA') are members of the Fédération Internationale de Football Association ('FIFA').
2. At issue, therefore, is how international law and the FIFA Statutes regulate FIFA's conduct towards those Israeli settlement clubs.
3. Under international law, the whole of the West Bank and East Jerusalem, including Area C (as well as Gaza), constitutes occupied Palestinian territory. This was reaffirmed, time and again, by the overall international community represented in the United Nations ('UN') Security Council, the UN General Assembly, and was also confirmed by the International Court of Justice ('ICJ') and the International Criminal Court ('ICC').
4. Absent a final status agreement between Palestine and Israel, the applicable border is the so-called Green Line, *i.e.* the demarcation line predating the 1967 Six-Day War.
5. The transfer of Israeli nationals into occupied Palestinian territory by way of creating and enlarging Israeli settlements in the West Bank violates Art. 49 para. 6 of the 4<sup>th</sup> Geneva Convention, as confirmed by the UN Security Council, the UN General Assembly, as well as by the States Parties of the 4<sup>th</sup> Geneva Convention. This has also been confirmed by the ICJ. Such transfers also constitute war crimes for purposes of the Rome Statute of the ICC. The Israeli settlement clubs constitute an inherent part of these violations.
6. The jurisprudence of the Court of Arbitration for Sport ('CAS'), and FIFA's own practice, establish that territory under FIFA Statutes is defined by reference to international law. Accordingly, Israeli settlement clubs playing on occupied Palestinian territory without PFA's consent violate Art. 72, para. 2 FIFA Statutes. Furthermore, FIFA's tolerance of settlement clubs implicitly recognizes Israeli settlements, and thus violates FIFA's duty to respect the Palestinians' right to self-determination under Art. 3 FIFA Statutes.

## **Legal status of Israeli football clubs located in the occupied Palestinian territory and ensuing legal consequences for FIFA**

### **A. Introduction and factual background**

The following legal opinion on the legal status of Israeli football clubs located in the West Bank, and on possible ensuing consequences for the position to be taken by FIFA vis-à-vis the IFA and IFA-affiliated clubs is partly based on two articles previously written by the author of this expert opinion in his capacity as an independent academic<sup>1</sup> and provides an analysis of both, the underlying situation under international law, in particular international humanitarian law, as well as under applicable rules of FIFA itself, as applied in its practice, and as further developed in the jurisprudence of the CAS.

There are currently six Israeli football clubs located in Israeli settlements in the West Bank, all of which are playing in Israeli football leagues under the auspices of the IFA, namely in the settlements of Oranit, Ariel (two clubs), Givat Ze'ev, Ma'ale Adumim and Tomer. In addition, there are two football clubs with an official address in the settlements that play their matches inside Israel proper, and one football club based in West Jerusalem (Hapo'el Katamon Yerushalayim), but playing some of its home matches in the settlement of Ma'ale Adumim. As part of the Israeli league competitions, a number of other clubs from inside Israel play their matches with the settlement clubs on football pitches in settlements.<sup>2</sup>

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<sup>1</sup> A. Zimmermann, 'Palestine v. Fifa: 1:0? Palestine, Israel and FIFA: What are the Laws of the Game? Part I' (EJIL: Talk!, 25 June 2015) <<https://www.ejiltalk.org/palestine-v-israel-10-palestine-israel-and-fifa-what-are-the-laws-of-the-game-part-i/>> accessed 20 April 2017 and A. Zimmermann, 'Palestine v. Fifa: 1:0? Palestine, Israel and FIFA: What are the Laws of the Game? Part II' (EJIL: Talk!, 25 June 2015) <<https://www.ejiltalk.org/palestine-v-israel-1-0-palestine-israel-and-fifa-what-are-the-laws-of-the-game-part-ii/>> accessed 13 April 2017.

<sup>2</sup> Human Rights Watch, 'Israel/Palestine: FIFA Sponsoring Games on Seized Land' (25 September 2016) <<https://www.hrw.org/news/2016/09/25/israel/palestine-fifa-sponsoring-games-seized-land>> accessed 27 April 2017.

## B. International law background

### I. Status of the West Bank, East Jerusalem and Gaza under international law

#### 1. General considerations

In order to determine possible legal consequences, for FIFA, of those above-mentioned Israeli football clubs located in the West Bank, playing in Israeli football leagues, one has to first determine the legal status of that area (*i.e.* the West Bank under international law. It ought to be noted, that while this opinion only deals in more detail with the legal status of the West Bank (given that there are no Israeli football clubs located in occupied East-Jerusalem, nor indeed in Gaza, both, East-Jerusalem and Gaza also form part of Palestinian territory.

It ought to be also noted that this determination, as subsequently outlined, is based on the well-established view of the international community at large, rather than on the view of either of the two parties (*i.e.* Israel or Palestine), nor even less based on the view of individual academic writers, nor of that of the author of this very opinion.

It is undisputed that Israel came into being as a sovereign State in 1948 and was admitted as such to the United Nations.<sup>3</sup> It is also beyond doubt that ever since 1949 the control of Israel was limited to the area west of the 1949 armistice line (*i.e.* the so-called ‘Green Line’). Put otherwise, neither the West Bank nor East Jerusalem, nor indeed the Gaza Strip, did form part of Israeli territory at the time of the creation of the State of Israel. Accordingly, since the creation of the State of Israel, and at least prior to 1967, the jurisdiction of the IFA did not encompass any clubs located in either the West Bank.

As a consequence of the armed conflict that erupted in 1967 (*i.e.* the so-called ‘Six-Day War’) Israel gained *de facto* control over the Gaza Strip, the West Bank and East Jerusalem. Hence, Israel became the occupying power of the area within the meaning of international humanitarian law, a fact acknowledged *inter alia* by the Israeli Supreme Court itself.<sup>4</sup> It goes without saying, however, that this belligerent occupation did not grant Israel title to territory.<sup>5</sup> Rather, any such occupation merely provided Israel as the occupying

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<sup>3</sup> See generally S. M. Akram and M. Lynk, ‘Arab-Israeli Conflict’ in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn., OUP 2011).

<sup>4</sup> HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel*, para. 57; HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, para. 23.

<sup>5</sup> E. Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn., OUP 2012) *passim*.

power with certain specific rights under international humanitarian law. Put otherwise, the territory beyond the Green Line (*i.e.* the West Bank and East Jerusalem, as well as the Gaza Strip) did not, by virtue of such occupation, become Israeli territory either.

This result is confirmed, if there was need, by UN General Assembly resolution 2625 (XXV), *i.e.* the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ adopted by consensus (and hence also accepted by Israel itself as forming part of that consensus) by the UN General Assembly in 1970. The said instrument *inter alia* provides that

‘[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal’

*i.e.* even if the use of force leading to the occupation was not illegal under international law.

In this regard, it is important to note that, according to the International Court of Justice, the Friendly Relations Declaration reflects customary international law.<sup>6</sup> It is also worth noting that the UN Security Council has, on frequent occasions stressed, specifically concerning the West Bank and East Jerusalem, the inadmissibility of the acquisition of territory by force.<sup>7</sup> Accordingly, Israel’s *de facto* annexation of East Jerusalem by virtue of the ‘Basic Law on Jerusalem’ is null and void, as confirmed by UN Security Council resolution 478 (1980).

This fact that, accordingly, under applicable rules of international law, the West Bank (and also, but of lesser relevance for purposes of this opinion, Gaza and East Jerusalem) constitute occupied Palestinian (rather than Israeli) territory was confirmed, time and again, by the UN General Assembly, the UN Security Council, as well as by various international judicial pronouncements, including those by the International Court of Justice, the principal judicial organ of the United Nations, as well as, most recently, by the International Criminal Court.

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<sup>6</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Reports 403, para. 80.

<sup>7</sup> Security Council resolution 242 (1967) preambular para. 2; Security Council resolution 478 (1980) preambular para. 2; Security Council resolution 2334 (2016) preambular para. 2.

It ought to be noted that the only State that, for obvious political reasons, has taken a different position, and has not joined the international consensus that the area concerned constitutes occupied Palestinian territory is Israel itself, but that position has remained completely isolated within the international community.

## **2. Statements by the United Nations General Assembly**

The UN General Assembly represents the international community of States at large, including all States whose national football associations are represented in FIFA. It ought to be noted that the General Assembly has, already in 1988, *i.e.* long before the PFA was admitted to FIFA in 1998, starting with the adoption of UN General Assembly resolution 43/176, developed a long-standing and consistent practice of referring to the territory in question as

‘Palestinian territory occupied since 1967, including Jerusalem’.<sup>8</sup>

To provide one more of the numerous, and indeed frequent, examples, UN General Assembly resolution 67/120 (2013) refers to

‘Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem’.

These statements confirm that the area where the Israeli football clubs, which form the subject-matter of this expert opinion, are located, indeed constitutes occupied Palestinian (rather than Israeli) territory. As a matter of fact, the said resolution refers to the territory in question as ‘Occupied Palestinian Territory, including East Jerusalem’ twelve times. Similarly, most recently UN General Assembly resolutions 71/23 (2016) and 70/15 (2015) call for

‘[t]he withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem’.

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<sup>8</sup> General Assembly resolution 43/176 (1980) paras. 3 and 4.

This practice of the UN General Assembly stands in line with that of the UN Security Council.

### 3. Statements by the Security Council of the United Nations

Most notably and most recently, on 23 December 2016, the Security Council *unanimously* adopted Security Council resolution 2334 (2016) with only one abstention, the United States thus *not* vetoing the draft resolution. In the said resolution, the UN Security Council, when dealing specifically with the issue of the Israeli settlements in the West Bank, referred to that area as

‘Palestinian territory’,

respectively in the French version of the resolution to as

‘territoire Palestinien’,

and in the Spanish version as

‘territorio Palestino’.

This already implicitly assumes that it is the position of the UN Security Council, and that of its members, that *all* of the territory beyond the Green Line forms part and parcel of Palestinian territory,<sup>9</sup> rather than allegedly constituting ‘disputed territory’, as is Israel’s official position<sup>10</sup>.

This is further confirmed by preambular paragraph 5, but also especially operative paragraph 3, of Security Council resolution 2334 (2016). In preambular paragraph 5 of Security Council resolution 2334 (2016), the UN Security Council specifically refers to the

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<sup>9</sup> A. Zimmermann, ‘Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited’ (EJIL: Talk!, 20 January 2017) <<https://www.ejiltalk.org/security-council-resolution-2334-2016-and-its-legal-repercussions-revisited/>> accessed 10 April 2017.

<sup>10</sup> Israel Ministry of Foreign Affairs, ‘Disputed Territories - Forgotten Facts About the West Bank and Gaza Strip’ (1 February 2003) <<http://mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We.aspx>> accessed 27 April 2017.



‘(...) Palestinian Territory occupied since 1967, including East Jerusalem (...)’

while in operative paragraph 3 the UN Security Council

‘*[u]nderlines* that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations’.<sup>11</sup>

It ought to be also noted that the French version of the Security Council resolution on various occasions refers to

‘les frontières de 1967’

respectively

‘aux frontières du 4 juin 1967’,

thus further confirming the legal relevance of the Green line.<sup>12</sup> Similarly, preambular paragraph 5 of UN Security Council resolution 2334 (2016), in its Spanish version, refers to

‘las fronteras de [the boundaries of] 1967’.

It was thus the considered position of the UN Security Council, when adopting without any single negative vote, resolution 2334 (2016) in the exercise of its primary responsibility for the maintenance of international peace and security, that the ‘Green Line’ does constitute the border between Israeli territory on the one hand, and occupied Palestinian territory on

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<sup>11</sup> Emphasis in the original.

<sup>12</sup> A. Zimmermann, ‘Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited’ (EJIL: Talk!, 20 January 2017) <<https://www.ejiltalk.org/security-council-resolution-2334-2016-and-its-legal-repercussions-revisited/>> accessed 10 April 2017.

the other. Any claim that this territory, *i.e.* the West Bank and East Jerusalem, allegedly constitutes merely ‘disputed territory’, rather than occupied Palestinian territory, is thus blatantly incompatible with this determination made by the Security Council, when adopting Security Council resolution 2334 (2016).

It ought to be also noted that under Art. 24 of the UN Charter, the UN Security Council, when carrying out its duties under the Charter, acts on behalf of the general membership of the United Nations, and thus represents the view of the international community at large.

#### 4. International Court of Justice

Similarly, the International Court of Justice, the principal judicial organ of the United Nations, in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* referred to the territory in question as ‘Occupied Palestinian Territory’ a number of times. For example, the Court stated in its dispositive of its opinion that

‘[t]he construction of the wall being built by Israel, the occupying Power, in the *Occupied Palestinian Territory, including in and around East Jerusalem*, and its associated régime, are contrary to international law’.<sup>13</sup>

In that regard, it ought to be also noted, *first*, that the advisory opinion was adopted with an overwhelming majority of 14:1 judges voting in favor on all but one issue.<sup>14</sup> As a matter of fact, even the sole dissenting judge, *Judge Buergenthal*, did not question this legal qualification, but only dissented on mere procedural grounds, himself still referring to the territory in question as ‘Occupied Palestinian Territory’.<sup>15</sup>

What is more is that, *second*, the UN General Assembly, as well as the UN Security Council, have on various occasions made reference to the Court’s Advisory Opinion,<sup>16</sup>

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<sup>13</sup> [2004] ICJ Reports 136, para. 163 (*Wall Advisory Opinion*) (emphasis added).

<sup>14</sup> With regard to legal consequences for other States (duty of non-recognition) the vote was 13:2.

<sup>15</sup> [2004] ICJ Reports 136, 240 (Declaration of Judge Buergenthal).

<sup>16</sup> Security Council resolution 2334 (2016) preambular para. 3; General Assembly resolution 71/23 (2016) para. 20; General Assembly resolution 70/15 (2015) para. 19.

further confirming its authoritative character. Once again, Israel remains the sole State questioning the relevance of the Court's holding on the matter.

## 5. International Criminal Court

More recently, this result was, once again, further confirmed by the practice of the International Criminal Court ('ICC'). After the UN General Assembly had adopted its resolution 67/19 (2012), granting Palestine the status of a non-member observer State to the United Nations, Palestine became a contracting party of the Rome Statute of the ICC. This led both, the Prosecutor of the ICC, as well as the United Nations Legal Counsel to the conclusion that the admission of an entity [*i.e.* Palestine] as a non-member observer State for purposes of the United Nations provides conclusive evidence of Palestine's statehood under international law<sup>17</sup> with the obvious consequence that it possesses a territory of its own despite currently being subject to Israel's belligerent occupation.

As a result of UN General Assembly resolution 67/19 (2012), the State of Palestine on 1 January 2015 lodged a declaration under Art. 12, para. 3 of the Rome Statute accepting the Court's jurisdiction for crimes committed

'in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014',

and thereafter formally acceded to the Rome State on 2 January 2015. It ought to be noted in that regard that Israel is currently not a contracting party of the Rome Statute (while it had signed the Rome Statute at one point), and that, under Art. 12 Rome Statute, the ICC may only exercise jurisdiction as far as crimes are concerned that have been committed on the *territory of a contracting State* or by its nationals.

It is thus significant that the Prosecutor, as part of her preliminary examination, *inter alia* investigates possible crimes allegedly committed by Israeli nationals in the West Bank, including East Jerusalem, and namely the war crime of transferring Israeli nationals into

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<sup>17</sup> OTP, 'Report on Preliminary Examination Activities 2012' (November 2012) para. 202; UN Legal Counsel, 'Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations' (21 December 2012) para. 15 <<http://palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf>> accessed 10 April 2017.

occupied Palestinian territory.<sup>18</sup> Given the limited territorial jurisdiction of the ICC, and further given that, as mentioned, Israel, unlike Palestine, is not a party of the Rome Statute, this presupposes that the territory in question where the concerned Israeli football clubs are located indeed constitutes occupied Palestinian territory.

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On the whole, therefore, there is a uniform position taken by the international community at large that the territory in question does not constitute Israeli territory, but rather occupied Palestinian territory, which should then also inform, as will subsequently be shown, the practice of FIFA.

In that regard it ought to be already noted that FIFA has already in the past consistently followed the practice of the organs of the United Nations, even where there was – contrary to the situation prevailing in the case at hand – much less of a consensus within the international community as to the underlying legal situation under international law.

In particular, in 1976 the South African Football Association was formally expelled from FIFA after the Credentials Committee of the General Assembly of the United Nations had determined that the then minority government of South Africa was not representative of the overall population of South Africa. FIFA did so despite the fact that many member States of the United Nations had then considered this decision of the General Assembly to be controversial, as not being compatible with the Charter of the United Nations, and as circumventing the prerogatives of the Security Council under Arts. 5 and 6 the Charter.

This stands in contrast to the situation at hand where *all* main organs of the United Nations, *i.e.* the Secretary General, the General Assembly, the Security Council, as well as the International Court of Justice, have, as shown, unanimously taken the position that the territory in question constitutes occupied Palestinian territory. It accordingly stands to reason that there are even better reasons for FIFA to *once again* follow the practice of the

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<sup>18</sup> OTP, 'Report on Preliminary Examination Activities 2016' (14 November 2016) paras. 109-145.

United Nations, as being representative of the view of the by far overwhelming majority of its members.

## II. Oslo Agreements and the international legal status of Area C

This result that the whole of the West Bank (as well as East Jerusalem despite its attempted annexation, and Gaza), constitute occupied Palestinian territory is not challenged in any way whatsoever by the Oslo Agreements.

As is well known, under the 1995 Interim Agreement concluded between Israel on the one hand, and the PLO on the other, the West Bank is divided into three ‘areas’, namely Area A, which is under full civil and security control by the Palestinian Authority, Area B with Palestinian civil control and joint Israeli-Palestinian security control, and finally Area C with full civil and security control by Israel.<sup>19</sup> The various football clubs here under consideration are all located in Area C.

It has to be stressed, however, that the recognition of certain jurisdictional powers of Israel in Area C does not change the international legal status of Area C. This is *inter alia* made abundantly clear by Art. XXXI (Final Clauses), para. 6 of the Interim Agreement itself which provided that:

‘Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP [Declaration of Principles]. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.’

Accordingly, the Oslo Agreements were only meant to constitute interim steps towards an implementation of a final status agreement, which might then eventually make changes to the pre-existing territorial situation. As a matter of fact, the parties had envisaged that even within the interim period, pending a final agreement, further transfer of responsibilities in favor of the Palestinian side would eventually take place.

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<sup>19</sup> Interim Agreement on the West Bank and the Gaza Strip (Israel-PLO) (28 September 1995) (1997) 36 ILM 551 (‘Oslo II Accord’) Art. XI, para. 3; see also OTP, ‘Report on Preliminary Examination Activities 2016’ (14 November 2016) para. 117.

This mere interim character of the Oslo Agreements is further confirmed by paragraph 5 of the very same provision, which stipulates that future permanent status negotiations shall cover the remaining issues, including *inter alia* the status of Jerusalem and border issues.

Besides, one ought to also mention, once again, recent UN Security Council practice on the matter, which, in its resolution 2334 (2016), stated that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those ‘agreed by the parties through negotiations’. *E contrario* this further confirms, if ever there was need, that the parties have not yet reached any such agreement, and that even those parts of the West Bank that ever since 1995 form part of ‘Area C’ (as well as East Jerusalem), have retained their status as Palestinian territory, despite being occupied by Israel since 1967.

For purposes of international law, the territory in question (including Area C of the West Bank and East Jerusalem) therefore continues to form part of the territory of Palestine, the conclusion of the Oslo Agreements notwithstanding.

### **III. Legal status of the Israeli settlements and Israeli footballs clubs in such settlements under international law**

Under international humanitarian law, and namely under Art. 49, para. 6 4<sup>th</sup> Geneva Convention, Israel being a High Contracting Party of the 4<sup>th</sup> Geneva Convention, the transfer of parts of the population of the occupying power into occupied territory constitutes a violation of international humanitarian law.

Under Art. 85, para. 4 lit. a) Additional Protocol I of 1977 to the Geneva Conventions, as being reflective of customary international law, such transfers constitute serious violations of international humanitarian law, *i.e.* so-called ‘grave breaches’, and therefore war crimes. Finally, under Art. 8, para. 2 lit. b) (viii) Rome Statute (which applies to the occupied Palestinian territory by virtue of Palestine having ratified the Rome Statute),

‘the transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies’<sup>20</sup>

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<sup>20</sup> Emphasis added.

also constitutes a war crime subject to the jurisdiction of the ICC.<sup>21</sup>

The International Court of Justice confirmed in its *Wall* Advisory Opinion that Israeli settlements in the occupied Palestinian territory have indeed been established in violation of international humanitarian law, and in particular have been established in violation of Art. 49, para. 6 4<sup>th</sup> Geneva Convention to which Israel is a State Party. The Court specifically stated:

‘(...) Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6 [4<sup>th</sup> Geneva Convention] (...) The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.’<sup>22</sup>

As the International Court of Justice clarified, this provision not only prohibits World War II-style deportations, but also measures by an occupying power that merely encourage transfers of parts of its population. As the Court put it:

‘[Art. 49, para. 6] prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize *or encourage* transfers of parts of its own population into the occupied territory.’<sup>23</sup>

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<sup>21</sup> See also Article 264d(1)(h) of the Swiss Criminal Code:

‘d. Prohibited methods of warfare

The penalty is a custodial sentence of not less than three years for any person who, in connection with an armed conflict (...): as a member of an occupying power, transfers parts of its own civilian population into the territory it is occupying or deports all or parts of the population of the occupied territory within or outside that territory.’

<sup>22</sup> *Wall* Advisory Opinion, para. 120.

<sup>23</sup> *Wall* Advisory Opinion, para. 120 (emphasis added).

As a matter of fact, the UN Security Council,<sup>24</sup> the UN General Assembly,<sup>25</sup> as well as the UN Human Rights Council<sup>26</sup>, all have a long standing record of condemning the Israeli settlement activities as a violation of the 4<sup>th</sup> Geneva Convention.

What is more is that in 2014, the Conference of High Contracting Parties to the 4<sup>th</sup> Geneva Convention, with its universal membership, reaffirmed the illegality of the Israeli settlements in the occupied Palestinian territory.<sup>27</sup>

In this regard, it is particularly noteworthy that UN Security Council resolution 2334 (2016), in its preambular paragraph 4, condemned the transfer of Israeli settlers and the resulting change in demographic composition as a

‘violation of international humanitarian law’.

This necessarily implies that the Security Council, too, considers ‘indirect transfers’ to be encompassed by the prohibition contained in Art. 49, para. 6 4<sup>th</sup> Geneva Convention by which Israel is bound as a matter of treaty law. The more recent express criminal prohibition of ‘transfer[s], directly or indirectly, by the Occupying Power’ contained in Art. 8, para. 2 lit. b) (viii) Rome Statute is thus merely declaratory in nature, and fully in line with the content of Art. 49, para. 6 4<sup>th</sup> Geneva Convention.<sup>28</sup>

Accordingly, the transfer of Israeli nationals and the creation of Israeli settlements throughout the occupied Palestinian territory do not only constitute ‘simple’ violations of international humanitarian law, but also constitute war crimes. Besides, the expropriation of private land for purposes of the illegally transferred population of the occupying power constitutes a further violation of international humanitarian law as per the rule of customary international law embodied in Art. 46 of the Hague Regulations Respecting the Laws and Customs of War on Land and Art. 53 4<sup>th</sup> Geneva Convention.

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<sup>24</sup> See e.g. already resolution 446 (1979).

<sup>25</sup> See e.g. resolution 70/89 (2015).

<sup>26</sup> See e.g. resolution 28/26 (2015).

<sup>27</sup> ‘Declaration of 17 December 2014 adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention’ (9 January 2015) UN Doc. A/69/711-S/2015/1, Annex, para. 8.

<sup>28</sup> A. Zimmermann, ‘Security Council Resolution 2334 (2016) and its Legal Repercussions Revisited’ (EJIL: Talk!, 20 January 2017) <<https://www.ejiltalk.org/security-council-resolution-2334-2016-and-its-legal-repercussions-revisited/>> accessed 10 April 2017.



What is more is that the creation and maintenance of sports facilities in such illegal settlements obviously improves the quality of life in those illegal settlements to the advantage of their sustainability. Such settlement clubs therefore contribute to the further transfer of nationals of the occupying power into the occupied territory, *i.e.* the continued transfer of Israeli nationals into Israeli settlements located in Area C of the West Bank. Accordingly, the respective Israeli football clubs constitute an inherent part of the overall set of violations of international humanitarian law outlined above.

Besides, it was again the UN Security Council which, in operative paragraph 1 of its resolution 2334 (2016) reconfirmed that

‘the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity’.

In that context it is particularly striking that the representative of the United States herself, *Ambassador Power*, despite the United States abstaining, had stated that by adopting the said resolution the Security Council had reaffirmed the

‘established consensus that settlements have no legal validity.’<sup>29</sup>

Put otherwise, the United States, despite its abstention, shared the legal position of the other members of the UN Security Council, and of the Security Council at large, as to the illegality of the Israeli settlements, and as to the legal irrelevance of their set-up.

### **C. Implications for FIFA**

#### **I. Areas of jurisdiction of the Israeli Football Association (‘IFA’) and of the Palestinian Football Association (‘PFA’) respectively (Art. 72, para. 2 FIFA Statutes)**

As demonstrated earlier, the delimitation of ‘Area C’ solely prescribes areas with differing Israeli and Palestine responsibilities, but does not affect the status of the whole of the West

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<sup>29</sup> UNSC ‘7853rd meeting’ (23 December 2016) UN Doc. S/PV.7853 at 5.

Bank as constituting occupied Palestinian territory. Besides, this demarcation between Areas A and B versus Area C was only conceived as an interim step towards a final peace and status agreement to be concluded between the two sides. Accordingly, this demarcation does not, in any way, provide for sovereignty of Israel over Area C *in toto*, or even parts thereof unless a final status agreement freely agreed between the parties were to eventually provide otherwise.

Besides, as also shown, any attempted annexation, by Israel, of parts of the occupied Palestinian territory can have no legal effect under international law as evinced by the customary principle embodied in the Friendly Relations Declaration, Art. 41, para. 2 of the Articles on State Responsibility (reflecting customary international law) and numerous Security Council resolutions on the matter.<sup>30</sup> Consequently, the Green Line constitutes the applicable boundary between Israel and Palestine, absent a negotiated final status agreement.

This in turn has legal consequences for FIFA itself, given that pursuant to Art. 72, para. 2 FIFA Statutes

‘[m]ember associations and their clubs may not play on the territory of another member association without the latter’s approval.’

It has been contended elsewhere that territory for purposes of the FIFA Statutes means jurisdiction, and that there is ‘nothing in the FIFA Statutes that equates “territory” with sovereign territory (...) because the FIFA is not a border demarcation body.’<sup>31</sup>

For several reasons, this view is wrong, and the notion and concept of ‘territory’, as contained in Art. 72, para. 2 FIFA Statutes, follows the public international law understanding. This in turn has the ensuing effect that Israeli football clubs playing in occupied Palestinian territory under the auspices of the IFA violate Art. 72, para. 2 FIFA Statutes absent PFA’s consent.

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<sup>30</sup> Security Council resolution 2334 (2016) preambular para. 2 and the material cited in part B I 1.

<sup>31</sup> E. Kontorovich, ‘The Palestinians’ unsporting and illegal “football war” against Israel’ (The Volokh Conspiracy, 26 September 2016) <[https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/26/the-palestinians-unsporting-and-illegal-football-war-against-israel/?utm\\_term=.e23ee2f28ed7](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/26/the-palestinians-unsporting-and-illegal-football-war-against-israel/?utm_term=.e23ee2f28ed7)> accessed 7 April 2017.

In *Football Association of Serbia v. UEFA*, the CAS interpreted Art. 5, para. 1 UEFA Statutes as follows:

‘[W]hatever constitutes an independent state or country *within the meaning of public international law should be regarded as a “territory”* eligible for membership according to Art. 5(1) UEFA Statutes.’<sup>32</sup>

The CAS did so in order to align the interpretation of the UEFA Statutes, and namely the concept of ‘territory’, with the definition section of the FIFA Statutes and with Art. 30, para. 1 of the 2015 Olympic Charter. Both, FIFA and the IOC in turn define country as ‘an independent state recognised by the international community’. And that terminology, according to the CAS, was to be understood as a direct reference to general international law.<sup>33</sup>

If, however, already Art. 5, para. 1 UEFA Statutes is to be interpreted by reference to international law, this applies with even greater force to the FIFA Statutes, which explicitly and directly refer to international law by defining country as ‘an independent state recognised by the international community’.

Accordingly, sports organizations such as UEFA, the IOC or FIFA all have a common understanding following the international law definition of ‘territory’.<sup>34</sup> There is no reason why this approach, applied by the CAS for admission purposes, should not also govern other rules, such as, in particular, Art. 72, para. 2 FIFA Statutes with its usage of the international law *terminus technicus* of ‘territory’.

As a matter of fact, interpreting ‘territory’ in Art. 72, para. 2 FIFA Statutes by reference to public international law accords with the definition of ‘country’ in the FIFA Statutes. Furthermore, Art. 72, para. 2 FIFA Statutes is based on the overarching principle of one country – one association that governs the FIFA Statutes.

As confirmed by the jurisprudence of the CAS, there are also sound reasons of judicial policy to follow the, as shown, generally accepted international community’s

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<sup>32</sup> CAS 2016/A/4602 *Football Association of Serbia v. UEFA*, para. 123 (emphasis added).

<sup>33</sup> CAS 2016/A/4602 *Football Association of Serbia v. UEFA*, para. 130.

<sup>34</sup> F. Latty, *La Lex Sportiva: Recherche Sur Le Droit Transnational* (Martinus Nijhoff 2007) 681-682.

definition of Palestinian territory since international law provides clear guidance more easily than a specific understanding in the sporting community on questions of territory and statehood.<sup>35</sup>

In this regard, the practice of the IOC is also particularly significant. In 1993, when the Palestine NOC was admitted by the IOC, the Olympic Charter did not yet refer to international law for questions of territory and statehood. Art. 34, para. 1 of the 1992 Olympic Charter, as it then stood, defined ‘country’ as

‘any country, state, territory or part of territory which the IOC in its absolute discretion considers as the area of a recognized NOC’.

Nevertheless, although the then 1992 Olympic Charter, contrary to today, did not directly refer to international law, as early as in 1993, the IOC Legal Commission already followed international law with regard to Palestine:

‘Pour la Commission juridique, *la reconnaissance par les Nations Unies est un élément important, mais non déterminant. L’essentiel est la reconnaissance par la Communauté internationale. Or, la Palestine a été proclamée comme Etat souverain il y a cinq ans et reconnue par une centaine d’Etats avant même les récents événements* [la signature des accords de paix israélo-palestiniens]. La Commission juridique est d’avis qu’au cas où la Palestine répondrait à toutes les conditions exigées par la Charte olympique, rien ne s’opposerait à ce que la Commission exécutive reconnaisse le Comité National Olympique Palestinien.’<sup>36</sup>

In the same vein, the fact that the international community at large, as shown, generally takes the position that the West Bank *in toto*, as well as East Jerusalem and the Gaza Strip, constitutes Palestinian territory must similarly govern the position to be taken by FIFA and its organs, when interpreting Art. 72, para. 2 FIFA Statute.

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<sup>35</sup> CAS 2016/A/4602 *Football Association of Serbia v. UEFA*, para. 123.

<sup>36</sup> Quoted in F. Latty, *La Lex Sportiva: Recherche Sur Le Droit Transnational* (Martinus Nijhoff 2007) 682 (emphasis added).

The fact that international football associations, such as UEFA or FIFA, follow the international law definition of territory is also evident from the practice in the case of Crimea. As is well known, in August 2014, the UEFA Emergency Panel decided that UEFA would not recognize any matches by Crimean clubs organized under the auspices of the Russian Football Union. From January 2015 onwards, UEFA banned Crimean clubs from taking part in competitions organized by the Russian Football Union. Since August 2015, a separate league has been established in Crimea with the backing of UEFA.

UEFA's stance on the matter is even more significant for the case at hand since, with regard to Crimea, it was only UN General Assembly resolution 68/262 (2014) that had called upon States not to recognize the change of Crimea's territorial status. Besides, it ought to be also noted that this UN General Assembly resolution was adopted with only 100 votes (out of the 193 members of the United Nations) against 11 votes with 58 abstentions, while 24 UN members States did not participate in the vote. Put otherwise, 93 out of 193 member States of the United Nations did not vote in favor of the said resolution. At the same time, the UN Security Council has not taken a position on the international legal status of Crimea. Put otherwise, there was no unequivocal statement ever by the international community on the territorial status of Crimea.

With regard to Palestine, in contrast, both the UN General Assembly *and* the UN Security Council, as well as the International Court of Justice, as shown, all consider the territory in question to constitute Palestinian territory, with the majority in the UN General Assembly being almost unanimous, while there was a unanimous vote in the UN Security Council on the matter with only one abstention. Besides, given that the UN Security Council has the primary responsibility for international peace and security under the UN Charter, its statements carry significant additional weight. Accordingly, there is all the more reason for FIFA to follow the joint determination of the UN Security Council and the UN General Assembly in the case of Palestine, which in any case is supported by a far larger majority within the UN General Assembly, as compared to the situation concerning Crimea, where UEFA nevertheless took action.

Both, CAS jurisprudence and organizational practice therefore establish that 'territory' in terms of Art. 72, para. 2 FIFA Statutes denotes 'territory' as recognized by the international community for purposes of international law. As explained above, under international law, it is however beyond question that the West Bank (as well as East

Jerusalem and the Gaza Strip) are Palestinian territory. The fact that Israeli settlement clubs have played and continue to play on occupied Palestinian territory under the auspices of the IFA without approval of the PFA therefore violates the right of the PFA under Art. 72, para. 2 FIFA Statutes.

What is more is that UN Security Council resolution 2334 (2016) contains a call

‘to distinguish, in (...) relevant dealings, between the territory of the State of Israel and the territories occupied since 1967’.

While this call is not addressed to FIFA as such, it at the very least demonstrates that it is the clear position of the UN Security Council that the occupied Palestinian territory ought not to be considered Israeli territory. Besides, one must also recall FIFA’s own practice in the case of Yugoslavia. In 1992, the UN Security Council had adopted resolution 757 (1992), with 13 votes in favor and two States, *i.e.* China and Zimbabwe, abstaining, deciding that:

‘(...) *all States* shall (...) [t]ake the necessary steps to prevent the participation in sporting events (...) of persons or groups representing the Federal Republic of Yugoslavia (Serbia and Montenegro)<sup>37</sup>’

It must be noted that UN Security Council resolution 757 (1992), *mutatis mutandis* like UN Security Council resolution 2334 (2016) as far as the Israeli settlements on occupied Palestinian territory are concerned, was addressed to States only.

FIFA (as well as UEFA in parallel) nevertheless reacted by way of a decision of its Emergency Committee and suspended FIFA (as well as UEFA) membership of the national soccer association of the Federal Republic of Yugoslavia (Serbia and Montenegro). What is brought out by FIFA’s own previous practice is thus that FIFA has been following guidance from the UN Security Council regardless of not being the formal addressee of a UN Security Council resolution in order to bring its own practice in line with international law generally.

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<sup>37</sup> Security Council resolution 757 (1992) para. 8 lit. b (emphasis added).

It therefore stands to reason that FIFA, in order to be coherent, ought to now also follow the path foreseen in UN Security Council resolution 2334 (2016) and should thus, as the UN Security Council put it in its resolution, distinguish, in its dealings between the territory of the State of Israel and the territories occupied since 1967.

It has been argued elsewhere that the admission of certain national football associations refutes the conclusion that FIFA membership follows the public international law understanding of territory.<sup>38</sup> While the issue of Israeli football clubs in Palestine is obviously not a membership issue, some words are in order to demonstrate that this argument is misleading.

First of all, it must be noted that sports organizations only recently adopted references in their founding instruments to international law as far as issues of statehood and territory. *Inter alia*, the Olympic Charter changed its definition of the term ‘country’ in 1996 only as meaning ‘an independent State recognized by the international community’ (Art. 34, para. 1 of the 1996 Olympic Charter). FIFA included its definition of country as an ‘an independent state recognized by the international community’ in its Statutes sometime after the IOC change. In 2001, UEFA Statutes changed as well. Admission to membership is now restricted to associations in countries which are recognized by the UN as an independent State.<sup>39</sup>

Besides, FIFA has followed the development of international law even before it expressly incorporated the international law understanding of statehood.<sup>40</sup>

Admittedly, clubs located in Western Sahara seem to play in the Moroccan soccer league, Western Sahara constituting a non-self-governing territory under international law.<sup>41</sup> However, this situation is materially different from Israeli football clubs in Palestinian territory. This is because the Sahrawi Football Federation, unlike the PFA, is *not* a FIFA member; instead, it merely is a member of the so-called ‘Confederation of Independent

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<sup>38</sup> E. Kontorovich, ‘The Palestinians’ unsporting and illegal “football war” against Israel’ (The Volokh Conspiracy, 26 September 2016) <[https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/26/the-palestinians-unsporting-and-illegal-football-war-against-israel/?utm\\_term=.e23ee2f28ed7](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/26/the-palestinians-unsporting-and-illegal-football-war-against-israel/?utm_term=.e23ee2f28ed7)> accessed 7 April 2017.

<sup>39</sup> CAS 2002/O/410 *Gibraltar Football Association v. UEFA*, para. 6.

<sup>40</sup> A. Zimmermann, ‘Palestine v. Fifa: 1:0? Palestine, Israel and FIFA: What are the Laws of the Game? Part II’ (EJIL: Talk!, 25 June 2015) <<https://www.ejiltalk.org/palestine-v-israel-1-0-palestine-israel-and-fifa-what-are-the-laws-of-the-game-part-ii/>> accessed 13 April 2017.

<sup>41</sup> UNSC ‘Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council’ (12 February 2002) UN Doc. S/2002/161.

Football Associations' (ConIFA).<sup>42</sup> Consequently, no Art. 72, para. 2 issue arises in this context, and hence the example of Western Sahara is of no relevance for the issue here under consideration.

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On the whole, therefore, IFA's practice of accepting settlement clubs to play under its umbrella clearly violates Art. 72, para. 2 FIFA Statutes.

## II. Israeli settlement clubs and Art. 3 FIFA Statutes

Under Art. 3 FIFA Statutes, FIFA

'is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.'

The wording of Art. 3 commits FIFA to respecting all universally recognized human rights. In addition, FIFA shall strive to promote the protection of these rights. The different language used for the '*respect*' respectively for the '*promotion*' of human rights is significant. According to the Oxford English Dictionary Online, to 'commit' means to '[t]o obligate or bind (oneself) to a particular course of action' and to 'strive' means to '[t]o endeavour vigorously, use strenuous effort'. The language used therefore indicates that FIFA's commitment to respecting human rights was indeed meant to be mandatory in nature.

This is further confirmed by the fact that Art. 3 FIFA Statutes, as amended, seems to be inspired by the 2011 UN Guiding Principles on Business and Human Rights, the so-called 'Ruggie Principles'. This is first confirmed by the identical language used in Art. 3 FIFA Statutes on the one hand, and by the UN Guiding Principles on Business and Human Rights on the other. As a matter of fact, Principle 11 of the UN Guiding Principles on Business and Human Rights states that business 'should respect human rights'. Principle 12 in turn defines human rights as 'internationally recognized human rights'. And it is this

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<sup>42</sup> ConIFA, 'Western Sahara' <<http://www.conifa.org/en/members/western-sahara/>> accessed 10 April 2017.



language – ‘respect for internationally recognized human rights’ – that is mirrored in Art. 3 FIFA Statutes.

Secondly, this is confirmed by subsequent practice of FIFA as it commissioned *John Ruggie*, *i.e.* the author of the UN Guiding Principles on Business and Human Rights, to submit a report on FIFA and Human Rights (published in 2016). Both facts make clear that Art. 3 FIFA Statutes constitutes the vehicle for transforming the non-binding ‘Ruggie Principles’ into a binding commitment by incorporating them into the FIFA Statutes.

Art. 3 FIFA Statutes was adopted by the Extraordinary FIFA Congress in Zurich on 26 February 2016. The newly introduced commitment to human rights was explained as follows:

‘Art. 3 of the newly proposed FIFA Statutes stipulates FIFA’s *commitment to respect* all internationally recognised human rights. In addition, FIFA shall strive to *promote the protection* of these rights.’<sup>43</sup>

A follow-up report stated that

‘FIFA considers its efforts to uphold human rights (...) in *all its activities* as an on-going and continuous process.’<sup>44</sup>

Accordingly, FIFA itself interprets Art. 3 FIFA Statutes so as to apply to all of FIFA’s activities. This includes FIFA’s relationship and actions towards member associations.

On the whole, the wording, historical context and regulatory context of Art. 3 FIFA Statutes therefore leaves no doubt that the provision was not meant as a simple declaration of intent. Rather, Art. 3 embodies FIFA’s binding obligation to respect universally recognized human rights.

This includes the right of self-determination enshrined in common Art. 1 of both, the International Covenant on Civil and Political Rights, and the Covenant on International

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<sup>43</sup> FIFA, ‘Statutory reforms FAQ – Extraordinary FIFA Congress’ (27 January 2016) 5 (emphasis added).

<sup>44</sup> FIFA, ‘One Year On’ (23 February 2017)

<[https://resources.fifa.com/mm/document/affederation/generic/02/86/79/92/oneyear\\_extraordinarycongress\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/generic/02/86/79/92/oneyear_extraordinarycongress_neutral.pdf)> accessed 7 April 2017 (emphasis added).

Covenant on Economic, Social and Cultural Rights. The International Court of Justice has described the right to self-determination as

‘one of the essential principles of contemporary international law’

possessing an *erga omnes* character.<sup>45</sup>

In the *Wall* Advisory Opinion, the International Court of Justice further concluded that the Israeli wall and its associated regime violates international law, including *inter alia* the Palestinian people’s right to self-determination.<sup>46</sup> If, however, the wall, the geographical location of which to a large extent is meant to facilitate the transfer of Israeli nationals into occupied Palestinian territory,<sup>47</sup> already violates the right to self-determination of the Palestinian people, then any *de facto* or *de jure* annexation of Palestine, in whole or in part, by transferring significant parts of its own population into the area, *a fortiori* violates that right. As *Judge Higgins* rightly put it

“‘[p]eoples’ necessarily exercise their right to self-determination within their own territory.’<sup>48</sup>

Put otherwise without territory there is no self-determination. Yet, FIFA’s so far undisputed recognition of Israeli settlement clubs in the occupied Palestinian territory calls into question Palestinian rights over their territory in that such Israeli football clubs in illegal Israeli settlements further foster the overarching Israeli settlement policy.

What is more is that this implicit recognition of Israeli settlement clubs so far, by FIFA, amounts to an implicit recognition that those Israeli settlements are legal under international law since FIFA, contrary to the position of the international community, thereby implicitly takes the position that the territory in question constitutes Israeli territory in disregard to the right of the Palestinian people to self-determination. FIFA thereby aids and abets the overall settlement enterprise which in turn *de facto* deprives Palestinians of

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<sup>45</sup> *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Reports 90, para. 29.

<sup>46</sup> *Wall* Advisory Opinion, paras. 120-122.

<sup>47</sup> Cf. *Wall* Advisory Opinion, para. 119.

<sup>48</sup> [2004] ICJ Reports 136, 207, para. 31 (Separate Opinion of Judge Higgins).

their internationally recognized territory, something that is essential for realizing their right to self-determination. The current situation, accordingly, violates Art. 3 FIFA Statutes, and FIFA is under a legal obligation, under Art. 3 FIFA Statutes, to take action to remedy that violation.

#### **D. Conclusions**

As shown, Israeli settlement clubs violate Art. 72, para. 2 and Art. 3 FIFA Statutes. Yet, under Art. 14, para. 1 lit. a) FIFA Statutes, the IFA must fully comply with the FIFA Statutes, and thus also comply with Art. 72, para. 2 FIFA Statutes, as well as with Art. 3 FIFA Statutes. According to Art. 14, para. 2 FIFA Statutes, violations of these obligations by the IFA may be sanctioned, including by the possibility of suspension (Art. 16) or expulsion (Art. 17). Although FIFA enjoys a degree of discretion with regard to disciplinary sanctions, it is important to note that the question of Israeli settlement clubs does not concern complex factual issues, the question whether IFA violates Art. 72, para. 2 and Art. 3 FIFA Statutes being a purely legal one. Accordingly, FIFA's discretion on the matter is considerably reduced, to say the least.

In light of these considerations, it is submitted that FIFA would abuse its discretion if it were to allow the status quo to continue given the ongoing violations of Art. 72, para. 2 and Art. 3 FIFA Statutes by the IFA.

At the same time, while there is a clear legal basis for FIFA to impose disciplinary measures on IFA, any continuation of the status quo opens FIFA to litigation before the CAS. As a matter of fact, the PFA has a legally protected right under Art. 72, para. 2 and Art. 3 FIFA Statutes that no other association play matches on its territory absent its consent.

There is obviously an important inherent value in keeping politics out of sports. Yet, any decision by FIFA *not* to follow the international community's recognition of the West Bank and East Jerusalem as occupied Palestinian territory, and to disregard the illegality of the Israeli settlements under international law, would itself be quintessentially political and would contribute to the continued violation of international law. By not taking action, it would be *FIFA* that would take a political decision.

In contrast, following the lead of the international community, and namely that of the organs of the United Nations including the Security Council, by taking positive action

against the Israeli settlement clubs would leave politics where it is supposed to be, namely within such political organs and the international community at large

Potsdam, 29 April 2017



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