

# Israel's Legal Case: A Guidebook

## A Jerusalem Center Anthology

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## **Foreword**

When critics charge Israel with "occupation," "apartheid," and "colonialism," Israel has good answers. When they claim Israel is building "illegal settlements" and a "separation wall," astute legal scholars have formulated well-reasoned responses to these charges.

As questions are raised over the legitimacy and morality of Israel's actions, the

authors in this volume see Israel's actions as firmly rooted in international law. The discussions in this volume by recognized experts from Israel and abroad outline Israel's legal case on key issues of international law often raised by Israel's critics.

Is Israel still an "occupier"? Lt.-Col. (res.) Avinoam Sharon, a former IDF Military Attorney for Judea, Samaria and Gaza, begins by asking, "Why Is Israel's Presence in the Territories Still Called "Occupation"? The term "occupation" is often employed politically, without regard for its legal meaning, as part of a general assault upon Israel's legitimacy.

Iraq was occupied by the Coalition forces from the spring of 2003 until June 28, 2004, at which time authority was handed over to the Iraqi Interim Government. At that point, although Coalition forces remained in Iraq until December 18, 2011, Iraq was no longer deemed occupied. If handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true for the establishment of the Palestinian Authority and Israel?

Amb. Dore Gold, who served as Israel's ambassador to the United Nations (1997-1999) and now heads the Jerusalem Center for Public Affairs, clarifies that the more correct term to describe the actual legal status of the territories is "disputed" rather than "occupied." He notes in "From 'Occupied Territories' to 'Disputed Territories'" that the politically-loaded term "occupation" seems to apply only to Israel and is hardly ever used when other territorial disputes are discussed. For example, the U.S. State Department refers to Kashmir as "disputed areas." Similarly, it describes the patch of Azerbaijan claimed as an independent republic by indigenous Armenian separatists as "the disputed area of Nagorno-Karabakh."

In territorial disputes from northern Cyprus, to the Kurile Islands, to Abu Musa in the Persian Gulf – in which the land in question was under the previous sovereignty of another state – the term "occupied territory" has not been applied to the territory that had come under one side's military control as a result of armed conflict.

Amb. Gold further notes that *no internationally recognized sovereign control previously existed* in the West Bank and Gaza; Israel took control of the West Bank as a result of a defensive war; under UN Security Council Resolution 242 Israel is not required to withdraw from "all the territories" captured in the Six-Day War of 1967; and that after the Oslo II Interim Agreement of September 1995, 98 percent of the Palestinian population in the West Bank and Gaza came under Palestinian jurisdiction.

Amb. Alan Baker, former Legal Adviser to Israel's Foreign Ministry and former Ambassador of Israel to Canada, participated in the negotiation and drafting of the various agreements comprising the Oslo Accords. In "The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords," he notes that some in the international community claim that Israeli settlements in the West Bank are a violation of the Fourth Geneva Convention, but both the text of that convention, and the post-World War II circumstances under which it was drafted, clearly

indicate that it was never intended to refer to situations like Israel's settlements.

A special regime between Israel and the Palestinians is set out in a series of agreements negotiated between 1993 and 1999 that are still valid – that govern all issues between them, settlements included. In this framework there is no specific provision restricting continued construction by either party. Baker notes that the Palestinians cannot now invoke the Geneva Convention regime in order to bypass previous internationally acknowledged agreements.

Jeffrey S. Helmreich, a graduate research fellow in the Program on Negotiation at Harvard Law School and PhD candidate in philosophy and law at UCLA, discusses additional "Diplomatic and Legal Aspects of the Settlement Issue." Helmreich concludes that while one may legitimately support or challenge Israeli settlements in the disputed territories, they are not illegal, and they have neither the size, the population, nor the placement to seriously impact upon the future status of the disputed territories and their Palestinian population centers.

Amb. Dore Gold takes on "The Myth of Israel as a Colonialist Entity," seeing it as an instrument of political warfare to delegitimize the Jewish state. Modern Israel's roots preceded the arrival of the British to the Middle East. In that sense Britain was not Israel's mother-country, like France was for Algeria. Indeed, the Jews were already re-establishing their presence independently in their land well before the British and French dismantled the Ottoman Empire. As time went on, the British Empire was the main obstacle to Israel's re-birth. Ironically, most of the Arab states owe their origins to the entry and domination of the European powers.

Dr. Robbie Sabel, former Legal Adviser to the Israel Ministry of Foreign Affairs, looks at "The Campaign to Delegitimize Israel with the False Charge of Apartheid," noting that the comparison of Israel to South Africa under white supremacist rule has been utterly rejected by those with intimate understanding of the old Apartheid system. Israel is a multi-racial and multi-colored society, and the Arab minority actively participates in the political process.

The accusation is made that the very fact that Israel is considered a *Jewish* state proves an "Apartheid-like" situation. Yet the accusers have not a word of criticism against the tens of liberal democratic states that have Christian crosses incorporated in their flags, nor against the Muslim states with the half crescent symbol of Islam.

Israel's security fence in the West Bank, called by its detractors the "Apartheid Wall," is recognized as having saved countless lives as its construction helped break the back of the Palestinian suicide bombing campaign against Jewish civilians during the Second Intifada. Laurence E. Rothenberg, a fellow at the Center for Strategic and International Studies in Washington, D.C., and the former editor-in-chief of the *Harvard International Law Journal*, and Abraham Bell, a member of the Faculty of Law at Bar-Ilan University, discuss "Israel's Anti-Terror Fence: The World Court Case," noting that the security fence is a necessary and proportional response to a campaign of genocide, crimes against humanity, and war crimes by Palestinians.

They point out that it was at the insistence of Syria, Egypt, and Jordan that each of the armistice agreements of 1949 specified that the ceasefire lines from 1949 bounding the West Bank – the "green line" – were not borders. This is solely a defunct military line demarcating the extent of the Transjordanian invasion of Israel in 1948.

Dr. Robbie Sabel follows with a critique of "The ICJ Opinion on the Separation Barrier: Designating the Entire West Bank as 'Palestinian Territory'." He notes that while the International Court of Justice (ICJ) in The Hague in its advisory opinion on the legality of Israel's separation barrier uncritically adopted the UN General Assembly phrase "Palestinian territories" as applying to all the territories, the General Assembly is not a global legislature that creates international law through its resolutions.

Israel's basic legal rights in the Land of Israel under international law are the focus of Amb. Yehuda Z. Blum, Professor Emeritus of International Law at the Hebrew University of Jerusalem, in his discussion of "The Evolution of Israel's Boundaries." He presents a legal foundation that begins with the League of Nations adoption of the Palestine Mandate on July 22, 1922, which in its preamble incorporated the Balfour Declaration of November 2, 1917. It further stated that "recognition has thereby been given to the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country."

Finally, Israel Prize recipient Prof. Ruth Lapidoth, former legal adviser to Israel's Foreign Ministry and member of Israel's negotiating team, analyzes the way in which Israel's rights are being consistently negated through "The Misleading Interpretation of UN Security Council Resolution 242." Resolution 242 does not request Israel to withdraw from all the territories captured in the 1967 Six-Day War and does not recognize that the Palestinian refugees have a right to return to Israel.

The establishment of secure and recognized boundaries requires a process in which the two states involved actually negotiate and agree upon the demarcation of their common boundary. The UN Security Council did not regard Israel's presence in the territories as illegal.

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The Gaza war of 2008-2009 highlighted Israel's right to self-defense under international law. See the companion volume [\*Israel's Right of Self-Defense: International Law and Gaza\*](#).

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*Occupation*

# Why Is Israel's Presence in the Territories Still Called “Occupation”?

(2009)

Avinoam Sharon(1)

## Executive Summary

- When an armed force holds territory beyond its own national borders, the term “occupation” readily comes to mind. However, not all the factual situations that we commonly think of as “occupation” fall within the limited scope of the term “occupation” as defined in international law. Not every situation we refer to as “occupation” is subject to the international legal regime that regulates occupation and imposes obligations upon the occupier.
- The term “occupation” is often employed politically, without regard for its general or legal meaning. The use of the term “occupation” in political rhetoric reduces complex situations of competing claims and rights to predefined categories of right and wrong. The term “occupation” is also employed in the context of the Israeli-Palestinian conflict to advance the argument that Israel bears ultimate responsibility for the welfare of the Palestinians, while limiting or denying Israel's right to defend itself against Palestinian terror, and relieving the Palestinian side of responsibility for its own actions and their consequences. The term is also employed as part of a general assault upon Israel's legitimacy, in the context of a geopolitical narrative that has little to do with Israel's status as an occupier under international law.
- Iraq was occupied by the Coalition forces from the spring of 2003 until June 28, 2004, at which time authority was handed over to the Iraqi Interim Government. At that point, Coalition forces remained in Iraq, but Iraq was no longer deemed occupied. If handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true for the establishment of the Palestinian Authority and Israel?
- Under the Interim Agreement between Israel and the Palestine Liberation Organization of September 28, 1995, it would seem that at least those areas placed under the effective control of the Palestinian Authority, and from which Israel had actually withdrawn its military forces, could no longer be termed “occupied” by Israel. Moreover, since the continued presence of Israeli troops in the area was agreed to and regulated by the Agreement, that presence should no longer be viewed as an occupation.
- The withdrawal of all Israeli military personnel and any Israeli civilian presence in the Gaza Strip, and the subsequent ouster of the Palestinian

Authority and the takeover of the area by a Hamas government, surely would constitute a clear end of the Israeli occupation of Gaza. Nevertheless, even though Gaza is no longer under the authority of a hostile army, and despite an absence of the effective control necessary for providing the governmental services required of an occupying power, it is nevertheless argued that Israel remains the occupying power in Gaza.

*“For false words are not only evil in themselves, but they infect the soul with evil.” Plato, Phaedo*

There is a joke that is currently making the rounds about an Israeli going through passport control at JFK. The immigration officer asks: “Occupation?” The Israeli says: “No. I’m just visiting.” The joke is premised upon a general perception of Israel as an occupier. That perception is so pervasive in regard to Israel and Israel alone, that the joke will not work if you substitute any other nationality.(2) But does that perception accurately portray Israel, even after all the regional developments brought by the peace process? And if it is not accurate, why does it persist so tenaciously? In order to address those questions, we must first examine the meaning of the term “occupation.” When an armed force holds territory beyond the borders of its own nation, “occupation” is the term that most readily comes to mind. It may be difficult to think of a more felicitous term to describe the factual situation.(3) But not all the broad spectrum of factual situations that we commonly think of as “occupation” fall within the limited scope of the term “occupation” as defined in international law. Not every situation we refer to as “occupation” is subject to the international legal regime that regulates occupation and imposes obligations upon the occupier.

*If handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true in regard to the establishment of the Palestinian Authority and Israel?*

A striking example of this dual usage of the term “occupation” is provided by the Army of Occupation Medal. In 1946, the United States War Department issued a medal bearing the words “Army of Occupation” to recognize soldiers who had served in post-war Germany and Japan. Yet, neither Germany nor Japan was deemed to be occupied territory subject to the international law of occupation.(4) Indeed, when Iraqi President Jalal Talibani stated: “Iraq is not occupied, but there are foreign forces on its soil, which is different,”(5) he correctly expressed an often-misunderstood distinction.

The distinction was also made by the International Committee of the Red Cross (ICRC) in regard to Iraq. As Swiss jurist Daniel Thurer has explained, Iraq was occupied by the Coalition forces from the spring of 2003 until June 28, 2004, at which time authority was handed over to the Iraqi Interim Government.(6) At that point, Coalition forces remained in Iraq, but Iraq was no longer occupied. While this maintains the distinction between our casual use of the term “occupation”

and its strict legal sense, it raises an interesting question. The Coalition occupation of Iraq would not seem substantively different from the Allied occupation of Germany or the American occupation of Japan, which are generally not deemed to have constituted occupation under international law. On its face, the same reasoning that supports the prevailing opinion that neither Germany nor Japan was occupied should support the view that Iraq was not occupied in the legal sense of the term.(7) Even if that were not the case, if handing over authority to a Coalition-appointed interim government ended the occupation of Iraq, would the same not hold true in regard to the establishment of the Palestinian Authority and, a fortiori, following the Palestinian general election in 1996? Why would the same distinction not apply to Israel?

## **The Foundations of the Law of Occupation**

Historically, occupation was conquest. "In former times, enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants."(8) But the concept of occupation underwent fundamental change in the nineteenth century.(9) With the growing acceptance of the idea that occupiers were subject to legal limitations came the need both to define those limitations and to define the situations to which they applied. The initial internationally accepted legal framework defining and regulating occupation is found in the Hague Regulations (Hague II), 1899.(10) Articles 42 and 43 of those Regulations, which are identical to Articles 42 and 43 of the Hague Regulations (Hague IV), 1907,(11) set out the conditions that constitute "occupation":

### *Article 42*

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

### *Article 43*

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the 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.

These articles clearly recognize three preconditions for deeming an area to be occupied in the sense of being subject to rules of international law. First, the area is under the actual control of the hostile army. Second, the area was previously the sovereign territory of another state. Third, the occupier holds the area with the purpose of returning it to the prior sovereign. This third precondition would seem to be the underlying idea for respecting the laws in force, and for the other articles of the Convention that require maintenance of the status quo ante bellum. Thus, Oppenheim states: "As the occupant actually exercises authority, and the legitimate Government is prevented from exercising its authority, the



occupant acquires a temporary right of administration over the territory and its inhabitants; and all legitimate steps he takes in the exercise of this right must be recognised by the legitimate Government after the occupation has ceased.”(12)

The idea that occupation is a temporary state during which foreign control suspends the sovereignty of the legitimate government may be said to express the essential difference between the conception of occupation as it was understood prior to the nineteenth century, and the conception of occupation that grounded its treatment in international law. Acceptance of the principle that sovereignty cannot be alienated by force distinguishes occupation from conquest, and stands at the basis of the Hague Regulations. “The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force....From the principle of inalienable sovereignty over a territory spring the constraints that international law imposes upon the occupant. The power exercising effective control within another sovereign's territory has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign.”(13)

In light of the fundamental premises of the law of occupation, the problem in defining the Allied presence in post-war Germany and the American presence in post-war Japan becomes clear. As Kelsen explains:

The principle that enemy territory occupied by a belligerent in the course of war remains the territory of the state against which the war was directed, can apply only as long as this community still exists as a state within the meaning of international law. This is hardly the case if, after occupation of the whole territory of an enemy state, its armed forces are completely defeated so that no further resistance is possible and its national government is abolished by the victorious state. Then the vanquished community is deprived of one of the essential elements of a state in the sense of international law: an effective and independent government, and hence has lost its character as a state. If the territory is not to be considered a stateless territory, it must be considered to be under the sovereignty of the occupant belligerent, which – in such a case – ceases to be restricted by the rules concerning belligerent occupation. This was the case with the territory of the German Reich occupied in the Second World War after the complete defeat and surrender of its armed forces.(14)

Gerhard von Glahn has explained that belligerent occupation “as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government, of the occupied territory, is at war with the government of the occupying forces.”(15) And as Yehuda Blum has explained:

This assumption of the concurrent existence, in respect of the same territory, of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which,

while recognising and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign.(16)

The law of occupation as envisaged by the Hague Regulations was widely disregarded in the course of World War I, and the need for reconsideration and adjustment was already clear before the onset of World War II. By the end of World War II, the situation was even worse. This led Benvenisti to conclude, “[t]he poor record of adherence to this law compromised the status of the Hague Regulations as customary law. Indeed, there is sufficient ground to claim that in light of the recurring disregard of the law of occupation, the Hague Regulations had lost their legal authority by the end of the war.”(17) This provided the background for the drafting of the Fourth Geneva Convention to supplement the Hague Regulations.

It is important to note that while the Fourth Geneva Convention marks a significant change in focus, it does not purport to change the definition of occupation. Rather, it would appear that the Convention employs the term “occupation” in accordance with its definition under customary law, as declared in the Hague Regulations. But whereas international law had traditionally focused upon the obligations of states toward other states, the Geneva Convention appears to shift the emphasis to the obligations of belligerent states toward the population of the occupied territory rather than toward the sovereign of that territory. Nevertheless, it should be borne in mind that Part I, Article 2 of the Fourth Geneva Convention specifically states:

In addition to the provisions which shall be implemented in peacetime, 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 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.

The references to High Contracting Parties would appear to reinforce the conclusion that, although the Convention was drafted with a clear recognition of the changing perceptions of the role of states, and with a view toward shifting emphasis from preserving the rights of sovereigns to protecting populations,(18) nevertheless, the underlying political nature of the conflict giving rise to the situation of occupation remains unchanged. This should not come entirely as a surprise given that, unlike the Hague Regulations, which declared in the Preamble the purpose “to revise the laws and general customs of war, either with the view of defining them more precisely, or of laying down certain limits for the purpose of modifying their severity as far as possible,”(19) and is thus primarily a declaratory restatement of customary law, the Geneva Convention was drafted as conventional law in order to address the deficiencies in customary law made apparent as a result of the two World Wars. Indeed, as the Introduction to the

ICRC commentary to the Fourth Geneva Convention states: “The Convention does not invalidate the provisions of the Hague Regulations of 1907 on the same subjects but is supplementary to them (see Article 154 of the Convention).”

As far as the Convention is concerned, occupation remains occupation in its customary sense. The Convention addresses the treatment of civilians in occupied territory as made necessary in light of the deficiencies of international law made apparent in the course of the World Wars, deficiencies that were, at least in large measure, the result of the fact that international law, as it evolved in the nineteenth century, was primarily concerned with the rights of states and their obligations towards one another. The issue of the treatment of civilians that was ancillary to that purpose is primary to the purpose of the Geneva Convention.

In sum, as Glahn points out: “Conventional international law recognizes only one form of military occupation: belligerent occupation, that is, the occupation of part or all of an enemy's territory in time of war; this is the type of occupation covered by the Hague Regulations and the Fourth Geneva Convention of 1949.”(20) And as earlier noted, according to Glahn: “Belligerent occupation, as discussed up to this point and as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government, of the occupied territory, is at war with the government of the occupying forces.”(21)

It is against this background that we may proceed to examine the usage of and ensuing developments in the definition of “occupation.”

## **The Israeli Occupation – 1967**(22)

### **Occupation in the Absence of Prior Sovereignty**

In June 1967, in the aftermath of the Six-Day War, Israeli military forces held territories beyond its pre-war borders.(23) These territories comprised the Sinai Peninsula, Gaza Strip, Golan Heights, and the West Bank. Under customary law, the Israeli military presence in the Sinai Peninsula and the Golan Heights clearly constituted occupation in the legal sense.(24) The Sinai Peninsula had been under Egyptian sovereignty and the Golan Heights had been under Syrian sovereignty.(25) The situation was not as clear in regard to the Gaza Strip, over which Egypt did not claim sovereignty and which it held under a military government,(26) and the West Bank, over which the Jordanian assertion of sovereignty did not gain international recognition.(27) The status of these two areas has been the source of much debate both in Israel and in the international community.

Upon the assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of “occupation” inasmuch as a fundamental premise of the law of occupation – a prior legitimate sovereign – was lacking.(28)

*In June 1967, in the aftermath of the Six-Day War, under customary law, the Israeli military presence in the Sinai Peninsula and the Golan Heights clearly constituted occupation in the legal sense. The Sinai Peninsula had been under Egyptian sovereignty and the Golan Heights had been under Syrian sovereignty.*

Israel's argument concerning the *de jure* application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provisions of the Fourth Geneva Convention, or from adhering to those rules in practice.(29) This intention seems consistent with the view of Blum:

The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.(30)

Under the circumstances, one might reasonably ask why Israel insisted upon making the distinction between the *de jure* force of the Fourth Geneva Convention and its *de facto* application. There would appear to have been a number of political considerations that argued in favor of making the distinction, and arguing against the automatic application of the Fourth Geneva Convention. First, as Shamgar points out:

[A]utomatic application of the Fourth Convention would create unintentionally a change in the political status quo by according to Egypt and Jordan, which had occupied the Gaza Strip and the West Bank respectively in consequence of the invasion of 1948, the standing of an ousted sovereign whose reversionary rights have to be respected and safeguarded. Since the whole idea of the restriction of powers of the military government by the Convention is based upon the assumption that there is a sovereign who was ousted and that he has been a legitimate sovereign, the automatic and unqualified application of the Convention could have enhanced the legal rights of Egypt and Jordan, and this, paradoxically, from the date of the *termination* of their military government.(31)

*From a legal standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of "occupation" inasmuch as a fundamental premise of the law of occupation – a prior legitimate sovereign – was lacking.*

Second, saying that the territories were occupied by Israel "could conceivably be interpreted as a renunciation of sovereign rights by Israel to the areas. After all, one does not 'occupy' one's own territory, and one most certainly is not bound therein by the International Law of Belligerent Occupation."(32) Third, in light of

the above, saying the territories were occupied by Israel could be construed as acceptance of the 1949 ceasefire lines as international borders.

Thus, the primary difference of opinion between Israel and the International Committee of the Red Cross (ICRC) concerning the Fourth Geneva Convention centered on the question of formal applicability. Interestingly, the ICRC's argument for the applicability of the Fourth Geneva Convention did not rely upon a rejection of Israel's legal interpretation of the definition of "occupation" in customary law. Rather, the position of the ICRC focused entirely on the interpretation of Article 2, which reads:

In addition to the provisions which shall be implemented in peacetime, 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 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.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

As Shamgar explains:

The Article apparently refers to three alternative situations: (a) Peacetime; (b) Cases of armed conflict; (c) Cases of occupation. The first question is whether the first and second paragraphs of Article 2 are concurrent and complimentary or disjunctive, namely, whether the first paragraph lays down the *lex generalis* in relation to the extent of the application, which impliedly refers not only to all possible forms of an armed conflict but also to all secondary results and developments and *inter alia* to military occupation, comprising *ex abundante cautela* the one described *expressis verbis* in the second paragraph; or whether, alternatively, there is no linkage between the two paragraphs and each has to be read and interpreted separately and independently, the first paragraph dealing with armed conflicts, except military occupation, and only the second paragraph referring to the occupation of territory.

If the paragraphs are independent and not of a cumulative effect, and only the second paragraph defines the extent of the application to occupied territory, the one and only conclusion arising is that the Convention applies merely to the occupation of the territory of a High Contracting Party and not generally to territories held under military occupation. It seems, as a *prima facie* corollary, that not each and

every occupation of territory turns it into territory to which the Convention applies.(33)

In other words, it was and remains the view of the ICRC that the Fourth Geneva Convention applies to all forms of armed conflict, and the question of whether or not a particular territory is “occupied” in the legal sense is irrelevant to the question of the application of the Convention's provisions.(34)

Indeed, there is much to be said in favor of the interpretation advanced by the ICRC.

Primarily, the view that the Fourth Geneva Convention applies to all conflicts is consistent with the shift in focus from states to people. If the purpose of the Convention is to protect people, the legal status of the source of the threat to their safety and well-being should not make any difference.

Of course, that statement is far too broad, and it is unlikely that the community of nations would accept a statement of obligation that threatens so severe an infringement of sovereignty. While limiting that broad protection only to persons threatened by a conflict of an international character may appear to resolve the issue of a threat to sovereignty, Israel's concerns in regard to the question of sovereignty over the West Bank and Gaza demonstrate that the issue is not so easily resolved. It is not, I think, easy to maintain the argument that a state will agree to the automatic assumption of the political obligations imposed under international law toward a belligerent party in a conflict over territory that the state claims as its sovereign territory.

Moreover, we must bear in mind that to the extent that we are not concerned with the application of customary law, but rather with the construction of a provision of conventional law, care must be taken to respect the intention of the parties. In regard to the second paragraph, the ICRC itself admits: “The wording of the paragraph is not very clear, the text adopted by the Government Experts being more explicit.”(35) But more explicit language was not adopted. While the ICRC's opinion may be persuasive, it is neither definitive nor constitutive.

Ultimately, the parties to a convention cannot be expected to assume obligations beyond those originally contemplated by them.

In ratifying a convention, a state does not relinquish its sovereign power to the ICRC. Moreover, in the absence of any example of a state actually acting in accordance with the interpretation of the ICRC in this regard, the ICRC's view, however laudable in theory, is not the view accepted by the community of nations in practice.

A similar view to that of the ICRC is expressed by Bothe: “The unclear status of an occupied territory does not prevent the applicability of the rules of belligerent occupation. The application of humanitarian law cannot be made to depend on such legal niceties as the recognition of legal titles to territory.”(36) As high sounding and convincing as these statements may appear at first glance, it is worrisome that anyone might think that a source of conflict, wars and bloodshed can be swept away as “legal niceties.” But even if we ignore the unfortunate

choice of words, the statement remains problematic. Its acceptability is largely dependant upon what is meant by the notoriously slippery term “humanitarian law.” If the author's intention is to say that the humanitarian provisions of the Fourth Geneva Convention should be applied to all conflicts, then the Israeli case provides a supporting precedent for this view. However, if by humanitarian law we mean something broader, e.g., the rules of international law deriving from the Hague and Geneva Conventions, or the international law of armed conflicts, or even the Fourth Geneva Convention in its entirety, then arguably, the “legal niceties” may present a serious stumbling block to the acceptance of a view that might impose international standards and political obligations upon what a state may deem as a purely internal matter.

As opposed to the approach that seeks to broaden the application of the Fourth Geneva Convention by extending it to all *de facto* situations of occupation, and on that basis argues for the *de jure* application of the Convention to the territories administered by Israel, others have challenged Israel's *de jure* position that it is not an occupier. The basis of this approach is similar to that of the ICRC in that it focuses upon the issue of hostilities and deems the question of sovereignty to be irrelevant, but it differs in a fundamental way. While the view of the ICRC is that the question of sovereignty is irrelevant inasmuch as humanitarian concerns should not be contingent upon whether a situation constitutes an occupation, this approach argues that the question of sovereignty is not relevant to the definition of occupation. The problem with this approach is twofold: First, it seeks to define occupation without regard for its underlying premise. Second, it seeks to redefine a concept of customary law without regard for the actual customs and usages of nations. Thus, although the commonly accepted view would seem to be that Israel became the belligerent occupant of the West Bank and Gaza in June 1967, maintaining that view seems to require redefining the customary concept of occupation without regard for custom.

As opposed to this, some authors refer to Israel's presence in the territories as conferring upon Israel a status “no more than,” “no better than,” or “at the very least,”(37) that of a belligerent occupant, or not conferring “any status beyond”(38) that of a belligerent occupant. This approach is employed in the context of the question whether or not Israel is obligated to apply the Fourth Geneva Convention, and in refutation of a potential Israeli claim to sovereignty. In the former case, it is, in essence, a moral argument that the issue of prior sovereignty should not be relevant to the granting of humanitarian protection to the civilians affected by hostilities or under military rule, and is not unlike the ICRC's argument. The latter case concerns the premise that sovereignty over territory cannot be acquired by force of arms, and concerns the issue of whether the non-existence of a prior lawful sovereign bestows upon a belligerent party any greater claim to sovereignty vis-a-vis the territory by virtue of the lack of a competing claim. Neither of these approaches concerns the question of whether or not Israel is an “occupier.”

When examined solely in terms of the meaning of the term “occupation” in international law, it would appear that Israel never occupied the West Bank or

Gaza. It is another question entirely whether this means that the Fourth Geneva Convention does not automatically apply, or whether this consideration is irrelevant to the application of the Convention. Regardless of the answer to that question, it would appear that the West Bank and the Gaza Strip are erroneously referred to as “occupied territory” as a result of their capture in the Six-Day War, and their subsequent administration by Israel.

## **Occupation and the Peace Process**

### **Occupation in the Absence of Prior Authority**

If we were to assume, nevertheless, that Israel had occupied the West Bank and Gaza in June 1967, the question would then arise as to what would bring about the end of that occupation. That question is of particular interest in light of the peace process that began with the signing of a peace treaty between Israel and Egypt in 1979, and the continuing claim that the West Bank and Gaza are under Israeli occupation.

Inasmuch as Egypt never asserted any claim of sovereignty over Gaza, that treaty would not appear to be of any consequence in regard to Israel's status as an occupier. The same cannot immediately be said in regard to the 1994 Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan.

Article 3 of the Israeli-Jordanian Peace Treaty established the international boundary between the two states. In so doing, it would seem – at the very least – that two issues relevant to the occupation of the West Bank were affected.

Article 3(2) of the Treaty states:

The boundary, as set out in Annex I (a), is the permanent, secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.

On the face of it, the “without prejudice” statement would seem to make the statement irrelevant to our discussion. However, the Article does bear at least two unavoidable implications for Israel's presence in the West Bank. First, it settles the question of any Jordanian claim of sovereignty. Second, regardless of the “status of the territories,” it deprives the 1949 ceasefire line – the Green Line – of any but historical significance. With the permanent international boundary established, the pre-existing ceasefire line is of no further importance to the former belligerents. If occupation is a temporary state of affairs meant to protect and preserve the *status quo ante bellum*, then even if one were to argue that the legal status of the former government is not decisive but rather only its factual presence is important (i.e., “where territory under the authority of one of the parties passes under the authority of an opposing party”),<sup>(39)</sup> then arguably, even under such a broad conception of occupation, an occupation would cease to exist following the withdrawal of all claims by the previous government, due to the lack of any further interest in protecting or preserving its prior status or interests. As for the Palestinian residents of the area, the historical significance of



the Green Line appears to be assumed, although its legal significance is far from clear. Nevertheless, the legal literature appears to attach no significance whatsoever to the Treaty in all that concerns Israel's alleged status as occupier.

*The 1994 Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan settles the question of any Jordanian claim of sovereignty in the West Bank. It also deprives the 1949 ceasefire line – the Green Line – of any but historical significance since the pre-existing ceasefire line is of no further importance to the former belligerents.*

### **Occupation in the Absence of Effective Control**

Although one might imagine that the Interim Agreement<sup>(40)</sup> between Israel and the Palestine Liberation Organization would mark an important development in terms of Israel's status in the territories, this would not appear to be the generally accepted view. *Inter alia*, the Agreement provided for the transfer of authority from the Israeli military government to a Palestinian self-governance body – the Palestinian Authority – and for the withdrawal of Israeli forces from designated areas. On the face of it, it would seem that at least those areas placed under the effective control of the Palestinian Authority, and from which Israel had actually withdrawn its military forces, could no longer be termed “occupied” by Israel. Although Israel retained certain overall authority even in regard to those areas, it no longer maintained a military presence there, and it no longer exercised day-to-day control over their governance. It might further be argued that having redeployed its forces in accordance with an international agreement with the Palestinian Authority, its troops no longer constituted an occupying force in any part of the West Bank or the Gaza Strip. Rather, since the continued presence of Israeli troops in the area was agreed to and regulated by the Agreement, that presence could no longer be viewed as an occupation.

*On the face of it, it would seem that at least those areas placed under the effective control of the Palestinian Authority, and from which Israel had actually withdrawn its military forces, could no longer be termed “occupied” by Israel. Since the continued presence of Israeli troops in the area was agreed to and regulated by the Agreement, that presence could no longer be viewed as an occupation.*

Of course, this view can be countered with the argument that, unlike the Coalition presence in Iraq, for example, the Palestinian Authority continued to view Israel as an occupying power, and in the absence of its agreement, Israel's status remains unchanged. But it is not clear that the declarations of the parties should govern their status. Indeed, if the status of the parties is to be decided on the basis of their subjective declarations rather than upon an assessment of the facts, then it might be argued that the Palestinian Authority's repeated claim in U.S. courts that it constitutes a “foreign state” and that it is protected by

sovereign immunity(41) might be taken as an official Palestinian affirmation that Israel is no longer an occupier, unless it is the contention of the Palestinian Authority that it is a government in exile within its own territory, or that the agreements under which it was established are void.

In summing up Israel's post-Agreement status in the territories, Yoram Dinstein has written:

The quintessence of Article 6 [of the Fourth Geneva Convention] is that the continued (albeit partial) application of the Geneva Convention is contingent on the exercise of the functions of government in the occupied territories. Since, pursuant to the agreements with the PLO, Israel has relinquished most powers of government in the bulk of the Gaza Strip and in significant segments of the West Bank (in addition to some powers elsewhere in these territories), the provisions of the Convention can no longer be deemed automatically binding on Israel in the affected areas. Having transferred its authority, Israel (although it has retained responsibility for defence against external threats and is possessed with some other marginal powers) cannot possibly be held accountable under the Convention for what is happening beyond its control, where Palestinians wield their own powers. The transfer of authority to the Palestinian Council denotes also the transfer of responsibility over what transpires, once governmental functions have been handed over.(42)

If Israel is to be deemed an occupier of those areas directly under Palestinian control, it could be deemed so only if the term "occupation" is extended so that it comprises an area under the control of another government, and in the absence of a military presence and effective control, and this by reason of the agreed presence of the occupier in other areas that are the subject of negotiations between the parties pursuant to the agreement.

While the facts on the ground would argue for a reassessment of Israel's position as an occupying power in Judea and Samaria, the International Court of Justice, for example, has held that the changing conditions and developments "have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of Occupying Power."(43) In contrast, Iraq is no longer deemed to be under occupation, even though the factual conditions of occupation have remained essentially unchanged, solely due to the political decision to recognize the sovereignty of the interim government in Security Council Resolution 1546.(44) It is troubling that people who – in terms of the objective facts – may be in a situation that justifies their protection under international humanitarian law might be deprived of that protection solely on the basis of political interests and declarations that effect no actual change in the situation on the ground, while changing conditions that may make such protection unnecessary or unjustified may be afforded no legal recognition.

*The withdrawal of all Israeli military personnel and any Israeli*

*civilian presence in the Gaza Strip, and the subsequent ouster of the Palestinian Authority and the takeover of the area by a Hamas government surely would constitute a clear end of the Israeli occupation of Gaza. Even the International Court of Justice admits that “territory is considered occupied when it is actually placed under the authority of the hostile army.”*

### **Occupation in Absentia**

The next stage in the Israeli situation that might have affected the issue of occupation was the withdrawal of all Israeli military personnel and any Israeli civilian presence in the Gaza Strip, and the subsequent ouster of the Palestinian Authority and the takeover of the area by a Hamas government. Surely this would constitute a clear end of the Israeli occupation of Gaza.(45) Indeed, even the International Court of Justice admits that “territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.”(46)

Surprisingly, it is nevertheless argued that Israel remains the occupying power in Gaza. This argument is made on the basis of a variety of assertions, for example, that the bulk of “Palestinian territory” remains under Israeli control, and in the absence of a viable state in the West Bank, the residents of the Gaza Strip are deprived of fundamental political rights, that the Palestinian areas lack contiguity, and that Israel exercises absolute control over the borders.(47) A particularly interesting argument is presented by Bashi and Mann.(48) Their argument is that Israel continues to control Gaza by an “invisible hand,”(49) on the basis of their definition of the term “occupation” as exclusively measured in terms of control, without regard for questions of sovereignty, military presence, effective governance by the occupier, or the existence of an alternative effective and independent government in the territory. Thus, they put forward the proposition that even a total withdrawal from Gaza constitutes merely a change in degree rather than in substance.(50)

The arguments advanced for viewing Israel as an occupier in Gaza present a number of difficulties. First among them is that they have no basis in the customary definition of occupation. Beyond that, if Israel's control of Gaza's borders constitutes an element of its effective control of Gaza, then arguably, that control is entirely contingent upon Egypt's control of its border with Gaza. If Egypt were to open its border to the free flow of people and goods, Israel's control would be rendered largely ineffective. Does this mean that Gaza is under Egyptian occupation, or under a joint Israeli-Egyptian occupation? Moreover, given that under the current situation, the establishment of an independent Palestinian state in the West Bank would not automatically place the Hamas-led Gaza Strip under the control of that state, does the end of Israeli occupation depend upon the outcome of a Palestinian resolution of the issue of the governance of Gaza?

*If Israel's control of Gaza's borders constitutes an element of its effective control of Gaza, then arguably, that control is entirely contingent upon Egypt's control of its border with Gaza. Does this mean that Gaza is under Egyptian occupation, or under a joint Israeli-Egyptian occupation?*

Ultimately, it would seem that, under the definitions currently advanced for “occupation,” Israel lacks the power to end its occupation. Rather, having once attained the status of occupier, that status continues until such time as the occupied territory attains international recognition of sovereignty. As we have seen in the case of Iraq, such international recognition need not be dependant on any actual change in the factual circumstances that constitute an occupation or that justify the application of humanitarian law. Until such time as the community of nations shows itself willing to accept a sovereign Hamas-led Gaza into its midst, or Gaza reverts to the effective control of the Palestinian Authority, it would seem that the Israeli occupation that may never have begun, cannot ever be brought to an end.

## **Conclusion**

In terms of the definition of “occupation” in customary law, as understood at least since the drafting of the Brussels Code of 1874, Israel has never occupied the West Bank and the Gaza Strip. Developments since 1967 raise questions that further undermine viewing Israel as an occupying power under the customary definition. Nevertheless, rather than re-examine the questionable use of the term “occupation” to define Israel's status vis-a-vis the territories, primary effort has been devoted to redefining the terms and parameters of occupation to fit the changing circumstances. At the same time, care has been taken to avoid or limit the use of the term “occupation” in regard to other conflicts.(51)

*In terms of the definition of “occupation” in customary law, as understood at least since the drafting of the Brussels Code of 1874, Israel has never occupied the West Bank and the Gaza Strip.*

A number of explanations can be offered for this phenomenon in its various manifestations. The first, most obvious, is that the term is frequently employed loosely as a convenient description of a situation in which a military force controls territory beyond the sovereign borders of its own country. It is in this sense that we can understand the Medal of Occupation, or references to the Army of Occupation in Germany and Japan. While this casual description of a factual situation can explain much of the use of the term in regard to Israel's presence in the territories following the Six-Day War, it does not adequately explain its continued use in regard to areas that were handed over to Palestinian control, and is entirely inapplicable to Israel's relationship to Gaza. It also does not explain the studious avoidance of the term “occupation” in describing other

situations of military control of foreign or disputed territory.

Unfortunately, it would appear that this casual use of the term “occupation” sometimes influences its use in circumstances where more caution is expected. On occasion, even legal scholars seem to assume that the existence of an Israeli occupation is self-evident and no longer requiring the rigorous examination that they would normally require in other cases. Indeed, in some cases, this commonly known “fact” of Israeli occupation is offered as a proof of the existence of some proposed principle or as proof of Israel's alleged status as occupier itself.(52)

As opposed to the above, the evolving definition of the term “occupation” in scholarly literature often reflects what would seem to be an honest concern for the ineffectiveness of customary paradigms and conventional models in applying international humanitarian law to real situations, and the sense that legal lacunae should not translate into legal vacuums in the real world.(53) This desire to prevent legal vacuums is not primarily directed at preventing the possibility that a geographic area might be “lawless,” nor is it related to the historical concern of international law for protecting sovereign rights. Rather, it is an expression of the growing trend toward extending the law of armed conflict to encompass areas of human rights law that has its origins in the shift in focus from state actors to individuals that began with the adoption of the Fourth Geneva Convention. This trend is also marked by the growing preference for the term “international humanitarian law” to refer to the law of war.

But broadening the term “occupation” in order to expand the incidence of international law in the fear of a legal vacuum is problematic. Redefining custom in the absence of real precedent in order to apply it to new or *sui generis* circumstances cannot be justified merely by a perceived moral imperative. Novel constructions of conventional law that do not reflect the contemplation of the contracting parties are not made legitimate by virtue of their internal consistency or perceived desirability. Broadening the scope of concepts like “occupation” and inventing subclasses of occupation to embrace every unforeseen development and every *sui generis* set of circumstances makes the scope of incidence vast beyond reason, and the ridiculous is easily ignored. Not surprisingly, the legal community's attempts at redefining “occupation” have mainly succeeded in reinforcing and refining the customs and usages of non-compliance.

The scholarly world may well be disappointed that reality does not meet the standards of an idealized law. But rather than attempt to redefine without authority, it might be more fruitful to study that inadequate reality, and examine the many forms that “occupation” has taken in practice in order to arrive at a body of precedent – both positive and negative. The Israeli experience in this context can be of particular value inasmuch as it represents the only comprehensive attempt to apply international humanitarian law to a situation of military administration without regard for the question of whether or not that administration constitutes occupation or is *sui generis*.(54) It is of further interest because the attempt has been carried out with civilian review under the watchful eye of the Israeli Supreme Court, a court that has earned the esteem of the

international legal community.

Particularly noteworthy in this regard is the approach developed by the Supreme Court that views the armed forces as a state agency subject to the state's administrative law even when operating outside the state's sovereign territory. This approach imposes standards of civilian review of military conduct not common in other jurisdictions, and grants standing to persons affected by the military regime, even though such persons (whether or not viewed as residents of an "occupied territory," or as "protected persons," or as "unlawful combatants") would not enjoy such standing to challenge military decisions under international law. It has also enabled the Court to apply human rights standards to military conduct by virtue of the army's obligation – as an agent of the state – to act reasonably and in accordance with Israeli domestic law.(55)

This approach has produced a large corpus of legal precedent that can be studied, appraised and mined for application to other instances of alleged occupation, and particularly to the more common cases of military administration that deem themselves *sui generis*, exceptional or otherwise unbound by international law. Inasmuch as no other state has systematically applied the Fourth Geneva Convention and the law of occupation to territory under its control to the extent that they have been applied by Israel,(56) or subjected its application of the law to the scrupulous review of its civilian courts,(57) Israel provides a valuable and unique precedent. It is regrettable that in the main, the scholarly literature seems to prefer measuring this legal corpus against the criteria of theoretical ideals applied to conceptual models of occupation that deviate from customary international law of armed conflicts, rather than evaluating its actual efficacy in providing workable responses to an increasingly complex political reality.

Another possible explanation is that the term "occupation" is employed politically, without regard for its general or legal meaning. The use of the term "occupation" in political rhetoric can be useful in simplifying debate. It reduces complex situations of competing claims and rights to clear-cut, predefined categories of right and wrong. The possibility of using the term "occupation" as a pejorative to vilify or delegitimize a party to a conflict rather than confront the legal, military and humanitarian issues is also not easily discounted.(58)

*The term "occupation" is employed politically, without regard for its general or legal meaning. The use of the term "occupation" in political rhetoric reduces complex situations of competing claims and rights to clear-cut, predefined categories of right and wrong.*

The use of the terms "occupation" and "occupier" in the context of the Israeli-Palestinian conflict also serves to advance the argument that Israel bears ultimate responsibility for the welfare of the Palestinians, while limiting or denying Israel's right to defend itself against Palestinian terror,(59) and while relieving the Palestinian side of responsibility for its own actions and decisions and their consequences. This purposeful use of the term "occupation" would appear to be

an important factor motivating the reinterpretation and expansion of the concept of occupation.

The use of the term "occupation" to maintain Israel's responsibility for the fate of the Palestinians also serves the agenda of those who question the legitimacy of the State of Israel or who view Israel as an American or Western proxy. This political abuse of the term "occupation" to demonize Israel as part of a general assault upon the West, or upon Israel's legitimacy, underlies the continued use of the term in regard to Israel as part of a geopolitical narrative that has little to do with Israel's status as an occupier under international law.

Unfortunately, political use and misuse of the term "occupation" has a detrimental effect upon the law and, potentially, upon the people deserving its protection. Making the definition of "occupation" subject to political interests and influence rather than to the formal requirements of international law erodes the power of the law to govern conflicts. While a criticism of "legalism" and "formalism" in the application of international law may serve the agendas of those seeking to broaden or contract the applicability of legal norms, it is legalism and formalism that provide the necessary degree of certainty that actors in the international arena require no less than individuals. The fundamental principles of law and legality should not be sacrificed to a momentary purpose no matter how noble, particularly bearing in mind how often in history noble purpose has proven to be evil in disguise.

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## **From "Occupied Territories" to "Disputed Territories"** (2002)

**Dore Gold**

### **"Occupation" as an Accusation**

At the heart of the Palestinian diplomatic struggle against Israel is the repeated assertion that the Palestinians of the West Bank and Gaza Strip are resisting "occupation." Speaking recently on CNN's Larry King Weekend, Hanan Ashrawi hoped that the U.S. war on terrorism would lead to new diplomatic initiatives to address its root "causes." She then went on to specifically identify "the occupation which has gone on too long" as an example of one of terrorism's sources.(1) In other words, according to Ashrawi, the violence of the intifada emanates from the "occupation."

Mustafa Barghouti, president of the Palestinian Medical Relief Committees and a frequent guest on CNN as well, similarly asserted that: "the root of the problem is Israeli occupation."(2) Writing in the *Washington Post* on January 16, 2002,

Marwan Barghouti, head of Arafat's Fatah PLO faction in the West Bank, continued this theme with an article entitled: "Want Security? End the Occupation." This has become the most ubiquitous line of argument today among Palestinian spokesmen, who have to contend with the growing international consensus against terrorism as a political instrument.

This language and logic have also penetrated the diplomatic struggles in the United Nations. During August 2001, a Palestinian draft resolution at the UN Security Council repeated the commonly used Palestinian reference to the West Bank and Gaza Strip as "occupied Palestinian territories." References to Israel's "foreign occupation" also appeared in the Durban Draft Declaration of the UN World Conference Against Racism. The Libyan ambassador to the United Nations, in the name of the Arab Group Caucus, reiterated on October 1, 2001, what Palestinian spokesmen had been saying on network television: "The Arab Group stresses its determination to confront any attempt to classify resistance to occupation as an act of terrorism."(3)

Three clear purposes seem to be served by the repeated references to "occupation" or "occupied Palestinian territories." First, Palestinian spokesmen hope to create a political context to explain and even justify the Palestinians' adoption of violence and terrorism during the current intifada. Second, the Palestinian demand of Israel to "end the occupation" does not leave any room for territorial compromise in the West Bank and Gaza Strip, as suggested by the original language of UN Security Council Resolution 242 (see below).

Third, the use of "occupied Palestinian territories" denies any Israeli claim to the land: had the more neutral language of "disputed territories" been used, then the Palestinians and Israel would be on an even playing field with equal rights. Additionally, by presenting Israel as a "foreign occupier," advocates of the Palestinian cause can delegitimize the Jewish historical attachment to Israel. This has become a focal point of Palestinian diplomatic efforts since the failed 2000 Camp David Summit, but particularly since the UN Durban Conference in 2001. Indeed, at Durban, the delegitimization campaign against Israel exploited the language of "occupation" in order to invoke the memories of Nazi-occupied Europe during the Second World War and link them to Israeli practices in the West Bank and Gaza Strip.(4)

## **The Terminology of Other Territorial Disputes**

The politically-loaded term "occupied territories" or "occupation" seems to apply only to Israel and is hardly ever used when other territorial disputes are discussed, especially by interested third parties. For example, the U.S. Department of State refers to Kashmir as "disputed areas."(5) Similarly in its *Country Reports on Human Rights Practices*, the State Department describes the patch of Azerbaijan claimed as an independent republic by indigenous Armenian separatists as "the disputed area of Nagorno-Karabakh."(6)

Despite the 1975 advisory opinion of the International Court of Justice



establishing that Western Sahara was not under Moroccan territorial sovereignty, it is not commonly accepted to describe the Moroccan military incursion in the former Spanish colony as an act of "occupation." In a more recent decision of the International Court of Justice from March 2001, the Persian Gulf island of Zubarah, claimed by both Qatar and Bahrain, was described by the Court as "disputed territory," until it was finally allocated to Qatar.(7)

Of course each situation has its own unique history, but in a variety of other territorial disputes from northern Cyprus, to the Kurile Islands, to Abu Musa in the Persian Gulf – which have involved some degree of armed conflict – the term "occupied territories" is not commonly used in international discourse.(8)

Thus, the case of the West Bank and Gaza Strip appears to be a special exception in recent history, for in many other territorial disputes since the Second World War, in which the land in question was under the previous sovereignty of another state, the term "occupied territory" has not been applied to the territory that had come under one side's military control as a result of armed conflict.

## **No Previously-Recognized Sovereignty in the Territories**

Israel entered the West Bank and Gaza Strip in the 1967 Six-Day War. Israeli legal experts traditionally resisted efforts to define the West Bank and Gaza Strip as "occupied" or falling under the main international treaties dealing with military occupation. Former Chief Justice of the Supreme Court Meir Shamgar wrote in the 1970s that there is no *de jure* applicability of the 1949 Fourth Geneva Convention regarding occupied territories to the case of the West Bank and Gaza Strip since the Convention "is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign."

In fact, prior to 1967, Jordan had occupied the West Bank and Egypt had occupied the Gaza Strip; their presence in those territories was the result of their illegal invasion in 1948, in defiance of the UN Security Council. Jordan's 1950 annexation of the West Bank was recognized only by Great Britain (excluding the annexation of Jerusalem) and Pakistan, and rejected by the vast majority of the international community, including the Arab states.

*At Jordan's insistence*, the 1949 Armistice Line, that constituted the Israeli-Jordanian boundary until 1967, was not a recognized international border but only a line separating armies. The Armistice Agreement specifically stated: "no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either Party hereto in the peaceful settlement of the Palestine questions, the *provisions of this Agreement being dictated exclusively by military considerations*" (emphasis added) (Article II.2).

As noted above, in many other cases in recent history in which recognized international borders were crossed in armed conflicts and sovereign territory seized, the language of "occupation" was not used – even in clear-cut cases of aggression. Yet in the case of the West Bank and Gaza, *where no internationally recognized sovereign control previously existed*, the stigma of Israel as an

"occupier" has gained currency.

## **Aggression vs. Self-Defense**

International jurists generally draw a distinction between situations of "aggressive conquest" and territorial disputes that arise after a war of self-defense. Former State Department Legal Advisor Stephen Schwebel, who later headed the International Court of Justice in The Hague, wrote in 1970 regarding Israel's case: "Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title."(9)

Here the historical sequence of events on June 5, 1967, is critical, for Israel only entered the West Bank *after* repeated Jordanian artillery fire and ground movements across the previous armistice lines. Jordanian attacks began at 10:00 a.m.; an Israeli warning to Jordan was passed through the UN at 11:00 a.m.; Jordanian attacks nonetheless persisted, so that Israeli military action only began at 12:45 p.m. Additionally, Iraqi forces had crossed Jordanian territory and were poised to enter the West Bank. Under such circumstances, the temporary armistice boundaries of 1949 lost all validity the moment Jordanian forces revoked the armistice and attacked. Israel thus took control of the West Bank as a result of a *defensive war*.

The language of "occupation" has allowed Palestinian spokesmen to obfuscate this history. By repeatedly pointing to "occupation," they manage to reverse the causality of the conflict, especially in front of Western audiences. Thus, the current territorial dispute is allegedly the result of an Israeli decision "to occupy," rather than a result of a war imposed on Israel by a coalition of Arab states in 1967.

## **Israeli Rights in the Territories**

Under UN Security Council Resolution 242 from November 22, 1967 – that has served as the basis of the 1991 Madrid Conference and the 1993 Declaration of Principles – Israel is only expected to withdraw "from territories" to "secure and recognized boundaries" and not from "*the* territories" or "*all* the territories" captured in the Six-Day War. This deliberate language resulted from months of painstaking diplomacy. For example, the Soviet Union attempted to introduce the word "all" before the word "territories" in the British draft resolution that became Resolution 242. Lord Caradon, the British UN ambassador, resisted these efforts. (10) Since the Soviets tried to add the language of full withdrawal but failed, there is no ambiguity about the meaning of the withdrawal clause contained in Resolution 242, which was unanimously adopted by the UN Security Council.

Thus, the UN Security Council recognized that Israel was entitled to part of these territories for new defensible borders. Britain's foreign secretary in 1967, George Brown, stated three years later that the meaning of Resolution 242 was "that

Israel will not withdraw from all the territories."(11) Taken together with UN Security Council Resolution 338, it became clear that only negotiations would determine which portion of these territories would eventually become "Israeli territories" or territories to be retained by Israel's Arab counterpart.

Actually, the last international legal allocation of territory that includes what is today the West Bank and Gaza Strip occurred with the 1922 League of Nations Mandate for Palestine, which recognized Jewish national rights in the *whole* of the Mandated territory: "recognition has been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." The members of the League of Nations did not create the rights of the Jewish people, but rather recognized a pre-existing right, that had been expressed by the 2,000-year-old quest of the Jewish people to re-establish their homeland.

Moreover, Israel's rights were preserved under the United Nations as well, according to Article 80 of the UN Charter, despite the termination of the League of Nations in 1946. Article 80 established that nothing in the UN Charter should be "construed to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments." These rights were unaffected by UN General Assembly Resolution 181 of November 1947 – the Partition Plan – which was a non-binding recommendation that was rejected, in any case, by the Palestinians and the Arab states.

Given these fundamental sources of international legality, Israel possesses legal rights with respect to the West Bank and Gaza Strip that appear to be ignored by those international observers who repeat the term "occupied territories" without any awareness of Israeli territorial claims. Even if Israel only seeks "secure boundaries" that cover *part* of the West Bank and the Gaza Strip, there is a world of difference between a situation in which Israel approaches the international community as a "foreign occupier" with no territorial rights, and one in which Israel has strong historical rights to the land that were recognized by the main bodies serving as the source of international legitimacy in the previous century.

### **After Oslo, Can the Territories be Classified as "Occupied"?**

In the 1980s, President Carter's State Department legal advisor, Herbert Hansell, sought to shift the argument over occupation from the land to the Palestinians who live there. He determined that the 1949 Fourth Geneva Convention governing military occupation applied to the West Bank and Gaza Strip since its paramount purpose was "protecting the civilian population of an occupied territory."(12) Hansell's legal analysis was dropped by the Reagan and Bush administrations; nonetheless, he had somewhat shifted the focus from the territory to its populace. Yet here, too, the standard definitions of what constitutes an occupied population do not easily fit, especially since the implementation of the 1993 Oslo Agreements.

Under Oslo, Israel transferred specific powers from its military government in the

West Bank and Gaza to the newly created Palestinian Authority. Already in 1994, the legal advisor to the International Red Cross, Dr. Hans-Peter Gasser, concluded that his organization had no reason to monitor Israeli compliance with the Fourth Geneva Convention in the Gaza Strip and Jericho area, since the Convention no longer applied with the advent of Palestinian administration in those areas.(13)

Upon concluding the Oslo II Interim Agreement in September 1995, which extended Palestinian administration to the rest of the West Bank cities, Foreign Minister Shimon Peres declared: "once the agreement will be implemented, no longer will the Palestinians reside under our domination. They will gain self-rule and we shall return to our heritage."(14)

Since that time, 98 percent of the Palestinian population in the West Bank and Gaza Strip has come under Palestinian jurisdiction.(15) Israel transferred 40 spheres of civilian authority, as well as responsibility for security and public order, to the Palestinian Authority, while retaining powers for Israel's external security and the security of Israeli citizens.

The 1949 Fourth Geneva Convention (Article 6) states that the Occupying Power would only be bound to its terms "to the extent that such Power exercises the functions of government in such territory." Under the earlier 1907 Hague Regulations, as well, a territory can only be considered occupied when it is under the effective and actual control of the occupier. Thus, according to the main international agreements dealing with military occupation, Israel's transfer of powers to the Palestinian Authority under the Oslo Agreements has made it difficult to continue to characterize the West Bank and Gaza as occupied territories.

Israel has been forced to exercise its residual powers in recent months only in response to the escalation of violence and armed attacks instigated by the Palestinian Authority.(16) Thus, any increase in defensive Israeli military deployments today around Palestinian cities is the direct consequence of a *Palestinian decision* to escalate the military confrontation against Israel, and not an expression of a continuing Israeli occupation, as the Palestinians contend. For once the Palestinian leadership takes the strategic decision to put an end to the current wave of violence, there is no reason why the Israeli military presence in the West Bank and Gaza cannot return to its pre-September 2000 deployment, which minimally affected the Palestinians.

Describing the territories as "Palestinian" may serve the political agenda of one side in the dispute, but it prejudices the outcome of future territorial negotiations that were envisioned under UN Security Council Resolution 242. It also represents a total denial of Israel's fundamental rights. Furthermore, reference to "resisting occupation" has simply become a ploy advanced by Palestinian and Arab spokesmen to justify an ongoing terrorist campaign against Israel, despite the new global consensus against terrorism that has been formed since September 11, 2001.

It would be far more accurate to describe the West Bank and Gaza Strip as

"disputed territories" to which both Israelis and Palestinians have claims. As U.S. Ambassador to the UN Madeleine Albright stated in March 1994: "We simply do not support the description of the territories occupied by Israel in the 1967 War as occupied Palestinian territory."

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### *Israeli Settlements*

## **The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords**

(2011)

**Alan Baker**

- Palestinian representatives at the UN have prepared a draft resolution that will seek to declare that Israeli settlements are "illegal and constitute a major obstacle to the achievement of peace." The issue of the legality of Israel's settlements policy has long been a central issue on the agenda of the international community.
- It is claimed that settlements are a violation of the Fourth Geneva Convention Relative to the Protection of Civilians (1949). But both the text of that convention, and the post-World War II circumstances under which it was drafted, clearly indicate that it was never intended to refer to situations like Israel's settlements. According to the International Committee of the Red Cross, Article 49 relates to situations where populations are coerced into being transferred. There is nothing to link such circumstances to Israel's settlement policy.
- During the negotiation on the 1998 Rome Statute of the International Criminal Court, Arab states initiated an addition to the text in order to render it applicable to Israel's settlement policy. This was indicative of the international community's acknowledgment that the original 1949 Geneva Convention language was simply not relevant to Israel's settlements.
- The continued reliance by the international community on the Geneva Convention as the basis for determining the illegality of Israel's settlements fails to take into account the unique nature of the history, legal framework, and negotiating circumstances regarding the West Bank.
- A special regime between Israel and the Palestinians is set out in a series of agreements negotiated between 1993 and 1999 that are still valid – that govern all issues between them, settlements included. In this framework there is no specific provision restricting planning, zoning, and continued

construction by either party. The Palestinians cannot now invoke the Geneva Convention regime in order to bypass previous internationally acknowledged agreements.

Palestinian representatives at the UN have prepared a draft resolution dated December 21, that will seek to declare that Israeli settlements are "illegal and constitute a major obstacle to the achievement of peace." (1) The claim is not new. The issue of the legality of Israel's settlements and the rationale of Israel's settlements policy have for years dominated the attention of the international community. This has been evident in countless reports of different UN bodies, rapporteurs, and resolutions, (2) as well as in political declarations and statements by governments and leaders. In varying degrees, they consider Israel's settlements to be in violation of international law, specifically Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949. (3)

But apart from the almost standardized, oft-repeated, and commonly accepted clichés as to the "illegality of Israel's settlements," or the "flagrant violation" of the Geneva Convention, repeated even by the International Court of Justice, (4) there has been little genuine attempt to elaborate and consider the substantive legal reasoning behind this view. Yet there are a number of very relevant factors that inevitably must be considered when making such a serious accusation against Israel. These factors include:

- the text of the sixth paragraph of Article 49 of the Fourth Geneva Convention and the circumstances of, and reasons for, its inclusion in the Convention in December 1949;
- the unique circumstances of the territory and the context of the Israeli-Palestinian relationship that has developed since 1993 through a series of agreements between them. These agreements have created a *sui generis* framework that, of necessity, influences and even overrides any general determinations unrelated to that framework.

## **What Does Article 49 of the Fourth Geneva Convention Say?**

Immediately after the Second World War, the need arose to draft an international convention to protect civilians in times of armed conflict in light of the massive numbers of civilians forced to leave their homes during the war, and the glaring lack of effective protection for civilians under any of the then valid conventions or treaties. (5) In this context, the sixth paragraph of Article 49 of the Fourth Geneva Convention states:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. (6)

What is the exact meaning of this language? The authoritative and official commentary by the governing body of the International Red Cross movement,

the International Committee of the Red Cross, published in 1958 in order to assist "Governments and armed forces...called upon to assume responsibility in applying the Geneva Conventions,"(7) clarifies this provision as follows:

It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.

In other words, according to the ICRC commentary, Article 49 relates to deportations, meaning the forcible transfer of an occupying power's population into an occupied territory. Historically, over 40 million people were subjected to forced migration, evacuation, displacement, and expulsion, including 15 million Germans, 5 million Soviet citizens, and millions of Poles, Ukrainians and Hungarians.

The vast numbers of people affected and the aims and purposes behind such a population movement speak for themselves. There is nothing to link such circumstances to Israel's settlement policy. The circumstances in which Article 49(6) of the Geneva Convention was drafted, and specifically the meaning attached by the International Committee of the Red Cross itself to that article, raise a serious question as to the relevance of linkage to and reliance on the article by the international community as the basis and criterion for determining Israel's settlements as illegal. One may further ask if this is not a misreading, misunderstanding, or even distortion of that article and its context.

The international lawyer Prof. Eugene V. Rostow, a former dean of Yale Law School and Undersecretary of State, stated in 1990:

[T]he Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War - the mass transfer of people into and out of occupied territories for purposes of extermination, slave labor or colonization, for example....The Jewish settlers in the West Bank are most emphatically volunteers. They have not been "deported" or "transferred" to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.(8)

Ambassador Morris Abram, a member of the U.S. staff at the Nuremburg Tribunal and later involved in the drafting of the Fourth Geneva Convention, is on record as stating that the convention:

was not designed to cover situations like Israeli settlements in the occupied territories, but rather the forcible transfer, deportation or resettlement of large numbers of people.(9)

Similarly, international lawyer Prof. Julius Stone, in referring to the absurdity of

considering Israeli settlements as a violation of Article 49(6), stated:

Irony would...be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories judenrein, has now come to mean that...the West Bank...must be made judenrein and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6.)(10)

Article 49(6) uses terminology that is indicative of governmental action in coercing its citizens to move. Yet Israel has not forcibly deported or mass-transferred its citizens into the territories. It has consistently maintained a policy enabling people to reside voluntarily on land that is not privately owned. Their continued presence is subject to the outcome of the negotiation process on the status of the territory, and without necessarily prejudicing that outcome.

In some cases Israel has permitted its citizens who have for many years owned property or tracts of land in the territory, and who had been previously dispossessed and displaced by Jordan, to return to their own properties. The presence in these areas of Jewish settlement from Ottoman and British Mandatory times is totally unrelated to the context of, or claims regarding, the Geneva Convention.

Israel has never expressed any intention to colonize the territories, to confiscate land, nor to displace the local population for political or racial reasons, nor to alter the demographic nature of the area.

The series of agreements signed with the Palestinian leadership has in fact placed the entire issue of the status of the territory, as well as Israel's settlements, on the negotiating table – a factor that proves the lack of any intention to colonize or displace. The fact that Israel chose unilaterally to dismantle its settlements and remove its citizens from the Gaza Strip in 2005 is further evidence of this.

The status of the territory, including the rights of the parties therein and the Israeli settlements, are the central negotiating issues between the two sides. In this context, and pursuant to its obligations in Article XXXI (7) of the Israeli-Palestinian Interim Agreement of 1993,(11) Israel has not taken any step to alter the status of the territory, which is open for determination in the Permanent Status negotiations. Israel's settlement activity does not alter the status of the territory.

During the negotiation on the 1998 Rome Statute of the International Criminal Court,(12) Arab states initiated an alteration in the text of the Court's statute listing as a serious violation of the laws of armed conflict the war crime of "transferring, *directly or indirectly*, parts of the civil population into the occupied territory."(13) The deliberate addition of the phrase "directly or indirectly" to the original 1949 text was intended by them to adapt the original 1949 Geneva



Convention language in order to render it applicable to Israel's settlement policy. This in itself is indicative of the proponents' and the international community's acknowledgement of the fact that Article 49(6) as drafted in 1949 was simply not relevant to the circumstances of Israel's settlements.

## **The Unique Circumstances of the Territory and the Special Nature of the Israel-Palestinian Relationship**

There is a further and no less important reason why the Geneva Convention provisions regarding transfer of populations cannot be considered relevant in any event to the Israeli-Palestinian context.

The entirely unique and *sui generis* situation, history, and circumstances of the Israeli-Palestinian conflict regarding the territories, as well as the series of agreements and memoranda that have been signed between the Palestinian leadership and the Government of Israel, have produced a special independent regime – a *lex specialis* – that governs all aspects of the relationship between them, including the settlements issue.

As stated above, the settlements issue is one of the core issues determined by the parties to be negotiated in the Permanent Status negotiations,(14) and the Palestinian leadership has agreed and is committed to the fact that it does not exercise jurisdiction regarding such Permanent Status issues, settlements included, pending the Permanent Status negotiation.(15)

The special regime governing the relationship between Israel and the Palestinians is set out in the series of agreements and memoranda negotiated between 1993 and 1999 and still valid.(16) These documents cover all the central issues between them including issues of governance, security, elections, jurisdiction, human rights, legal issues, and the like. In this framework there is no specific provision either restricting planning, zoning and continued construction by either party, of towns and villages, or freezing such construction.(17)

Furthermore, the two sides agreed in the 1995 Interim Agreement,(18) signed and witnessed by the U.S., the EU, Egypt, Jordan, Russia, and Norway, on a division of their respective jurisdictions in the West Bank into areas A and B (Palestinian jurisdiction) and area C (Israeli jurisdiction). They defined the respective powers and responsibilities of each side in the areas they control. Israel's powers and responsibilities in Area C include all aspects regarding its settlements – all this pending the outcome of the Permanent Status negotiations. This division was accepted and agreed upon by the Palestinians, who cannot now invoke the Geneva Convention regime in order to bypass their acceptance of the Interim Agreement or their and the international community's acknowledgement of that agreement's relevance and continued validity.

In fact, during the course of the negotiations with Israel, the Palestinian delegation requested that a "side letter" be attached to the agreement, the text of which would be agreed upon, whereby Israel would commit to restricting settlement construction in area C during the process of implementation of the

agreement and the ensuing negotiations. Several drafts of this "side letter" passed between the negotiating teams until Israel indeed agreed to a formulation restricting construction activities on the basis of a government decision that would be adopted for that purpose. Ultimately, the Palestinian leadership withdrew its request for a side letter.

## **Conclusion**

The settlement issue is perceived in many quarters as the central and only problem obstructing the peaceful solution of the Middle East conflict, to the total exclusion of all other issues, including terror, incitement, Jerusalem, refugees, the Iranian threat, and the like.

The main proponent orchestrating the settlement issue over the years has been the Palestinian leadership, which has decided to isolate and take up the issue of settlements as an independent "*cause celebre*," despite the fact that it is among the agreed-upon items to be negotiated between Israel and the Palestinians in the Permanent Status negotiations.

The Palestinians chose to proceed with this policy in full awareness of the fact that in their agreements, Israel had not obligated itself in any way to refrain from, halt, or freeze construction in the settlements.

The Palestinians preferred to take the settlement issue outside the framework of the agreements with a view to opening a concerted international campaign to isolate Israel on this issue and turn it into the international issue that we are witnessing today. Furthermore, raising the settlement issue has succeeded in blocking any progress in the negotiating process, so much so that the Palestinian leadership is now holding any return to a negotiation mode as a hostage to a settlement freeze.

The international community is faced with ongoing and unceasing attempts by the Palestinian leadership to bypass the negotiating process and to directly lobby the international community, and to seek intervention by the UN Security Council in order to attain a more formalized, institutionalized, and concerted opinion as to the illegality of Israel's settlements.

The international community cannot seriously ignore the factors set out above, as well as the implications that any such new resolution or decision might have on the already agreed-upon, delicate structure of the peace process.

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**Diplomatic and Legal Aspects of the Settlement Issue**  
(2003)

## Jeffrey Helmreich

*One may legitimately support or challenge Israeli settlements in the disputed territories, but they are not illegal, and they have neither the size, the population, nor the placement to seriously impact upon the future status of the disputed territories and their Palestinian population centers.*

The outbreak of the Al Aqsa Intifada in the fall of 2000 began to erode the orthodoxy that settlements were driving Palestinian anger and blocking peace. *New York Times* foreign affairs analyst Thomas L. Friedman wrote in October 2000: "This war is sick but it has exposed some basic truths." In particular, Friedman wrote, "To think that the Palestinians are only enraged about settlements is also fatuous nonsense. Talk to the 15-year-olds. Their grievance is not just with Israeli settlements, but with Israel. Most Palestinians simply do not accept that the Jews have any authentic right to be here. For this reason, any Palestinian state that comes into being should never be permitted to have any heavy weapons, because if the Palestinian had them today, their extremists would be using them on Tel Aviv."

In recent months, however, the settlements have re-emerged as an explanation for the failure of nearly every ceasefire and diplomatic effort to quell the conflict. The Mitchell Report in 2001 and recent remarks by visiting U.S. senators have raised the question of settlements (though not directly blaming them for the conflict), and the UN General Assembly concluded its 2002 session with over 15 agenda items condemning "illegal" Israeli settlements. Settlements have also become a focal point in the Quartet's December 2002 "road map."

In fact, since their establishment nearly three decades ago, settlements have been the cause celebre of critics seeking to attribute the persistence of the conflict to Israeli policy. The criticism falls into two categories: moral/political arguments that settlements are "obstacles to peace," and legal claims that settlements are illegitimate or a violation of international norms. The pervasiveness of these claims masks the fact that, upon closer scrutiny, they are false, and they hide the true source of grievances and ideological fervor that fuel this conflict.

### **An Obstacle to Peace?**

1. **Settlements make up less than 2 percent of the West Bank.** According to Peace Now, which opposes Israeli settlement in the territories, the built-up areas of the settlements take up only 1.36 percent of the West Bank (*Foreign Affairs*, March/April 2000). B'Tselem, an Israeli human rights watchdog group, places the figure slightly higher, at 1.7 percent. The much larger numbers often used to describe the land comprising Israeli settlements are reached only by including roads and adjacent areas, as well as land between settlements or between settlements and roads, nearly all of which is unpopulated. In truth, settlements

simply do not comprise enough land to be serious obstacles to any political or geographic eventuality in the area, be it a Palestinian state or a continuation of the Oslo process.

**2. Settlements do not block the eventual establishment of a contiguous Palestinian entity.** Some critics charge that settlements prevent peace by blocking the potential for a contiguous Palestinian state in the West Bank, which is proposed in most peace plans. This claim ignores certain basic realities.

A. The settlers would not block a peace agreement. Most Jews living in the West Bank express a deep love of the land and an attachment borne over two millennia when Jews yearned, prayed, and at times sought to return to their ancestral homeland. This natural bond has led to the view, popular in some Western circles, that these Jews prefer land to life, and would sacrifice the blood of Palestinians and fellow Jews on the alter of their biblical vision. This image – while dramatic and a neat counterpart to the image of Islamic fundamentalism – is simply untrue of the settlers today.

A majority of the settlers have already indicated a willingness to relocate if a final agreement should require it, according to a poll taken by Peace Now (Agence France Presse, July 31, 2002). Even if such polls are disputed by opponents of Peace Now, such data indicates a far more pragmatic approach on the part of large numbers of settlers than has been allowed them by their critics.

Recall that the residents of Yamit in the Sinai were relocated as a result of the peace agreement with Egypt. Thousands of Israelis were involved in this operation. The Yamit community was removed by none other than Israel's Prime Minister Ariel Sharon when he served as minister of defense in the second Begin government.

B. The overwhelming majority of settlers, close to 80 percent, live in communities such as Elkana, Maale Adumim, Betar, and Gush Etzion, located close to, if not contiguous with, pre-1967 Israel, and which can be connected geographically to the "Green Line" without involving Palestinian population centers. For separate reasons, the settlements in the strategic Jordan Valley do not impede the contiguity of the main Palestinian population centers, or prevent their expansion – the Jordan Valley is, after all, sparsely populated by Palestinians, with the exception of Jericho, which is today under full Palestinian control.

C. Most settlements are concentrated in a few areas that, for security reasons, Israel cannot afford to cede. For example, the settlement of Ofra is located next to Baal Hatzor, the highest point in the West Bank and the location of the main early warning station for the Israeli air force. It was from high points along the West Bank hill ridge that neighboring Arab armies twice invaded Israel's low-lying heartland, in 1948 and in 1967, which was then nine miles wide and completely exposed.

The late Prime Minister Yitzhak Rabin, architect of the Oslo Peace agreements, coined the term "security settlements" to describe those communities, in order to emphasize those settlements located on strategic terrain essential to Israel's

security interests. And yet, as noted above, these areas make up barely two percent of West Bank territory and nearly all of them do not encroach upon Palestinian population centers or block their contiguity. Moreover, Israel cannot, in any event, afford to withdraw from these small but strategic points even if they were entirely unpopulated. Thus, the presence of settlements in such locations is not the reason Israel remains in these areas.

## **Settlements are Not Illegal**

1. **The settlements are not located in "occupied territory."** The last binding international legal instrument which divided the territory in the region of Israel, the West Bank, and Gaza was the League of Nations Mandate, which explicitly recognized the right of Jewish settlement in all territory allocated to the Jewish national home in the context of the British Mandate. These rights under the British Mandate were preserved by the successor organization to the League of Nations, the United Nations, under Article 49 of the UN Charter.

2. The West Bank and Gaza are *disputed*, not occupied, with both Israel and the Palestinians exercising legitimate historical claims. There was no Palestinian sovereignty in the West Bank and Gaza Strip prior to 1967. Jews have a deep historic and emotional attachment to the land and, as their legal claims are at least equal to those of Palestinians, it is natural for Jews to build homes in communities in these areas, just as Palestinians build in theirs.

3. The territory of the West Bank and Gaza Strip was captured by Israel in a defensive war, which is a legal means to acquire territory under international law. In fact, Israel's seizing the land in 1967 was the only legal acquisition of the territory this century: the Jordanian occupation of the West Bank from 1947 to 1967, by contrast, had been the result of an offensive war in 1948 and was never recognized by the international community, including the Arab states, with the exception of Great Britain and Pakistan.

## **The Settlements are Consistent with Resolution 242**

Many observers incorrectly assume that UN Security Council Resolution 242 requires a full Israeli withdrawal from the land Israel captured in the 1967 Arab-Israeli War. Some may have a hidden agenda aimed at depriving Israel of any legal rights whatsoever in the disputed areas. In either case, they use this misinterpretation to conclude that settlement activity is unlawful because it perpetuates an "illegal" Israeli occupation.

The assumption and the conclusion are deeply flawed. Resolution 242 calls for only an undefined withdrawal from a portion of the land – and only to the extent required by "secure and recognized boundaries." Israel has already withdrawn from the majority of the land it had captured, and nearly all of the areas in which it retains communities are essential to "secure and recognized boundaries." The specific location of Israeli settlements was determined by Israel's Ministry of

Defense over the last 30 years, not by the settlers themselves, and they were set up in order to strengthen Israel's presence in those few areas from which it cannot, militarily, afford to withdraw.

## **Settlements are Consistent with the Geneva Conventions**

In three recent emergency special sessions of the UN General Assembly, Israeli settlement was cited as a violation of the 1949 Fourth Geneva Convention. These international humanitarian instruments, forged in the ashes of the Holocaust to prevent future genocidal brutality and oppression, were never invoked in 50 years until the case of condominium construction in Jerusalem during 1998. Was such construction – any settlement construction – a violation of the Geneva Convention?

No. The relevant clause, Article 49, prohibits the "occupying power" from transferring population into the "occupied territory." Aside from the fact that the territory is not occupied, but disputed, Morris Abrams, the U.S. Ambassador to the UN in Geneva, had pointed out that the clause refers to the forcible transfer of large populations. By contrast, the settlements involve the voluntary movement of civilians. The U.S. Department of State, accordingly, does not view Article 49 of the Fourth Geneva Convention as applicable to settlement activity in the West Bank and Gaza Strip. For that reason, the official U.S. position has been over the years that settlements are legal, even though successive administrations have criticized them on political grounds. (Only the Carter administration for a short time held that settlements were illegal; this position was overturned by the Reagan administration.)

## **Settlement Growth Never Violated Oslo**

Although certain Palestinian negotiators demanded a settlement freeze, the peace agreement ultimately reached by Israel and the Palestinians at Oslo, along with the Interim Agreement of 1995, allow settlement growth as well as the growth – and creation – of Palestinian communities in the disputed territories. The Palestinians acquired planning and zoning rights in Area A, while Israel retained the same rights in Area C where the settlements were located. Indeed, their legal status was to be addressed and decided only in the final status negotiations which, unfortunately, never took place. Until this point is reached, settlement growth remains within the legal scope of the Oslo Agreements.

At the October 5, 1995, session of the Knesset at which the Interim Agreement was ratified, the late Prime Minister Yitzhak Rabin proclaimed that we "committed ourselves before the Knesset, not to uproot a single settlement in the framework of the interim agreement, and not to hinder building for natural growth" (Israel Foreign Ministry, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00te0>). On the basis of this understanding of Oslo II, the Knesset voted to approve the Agreement.

## Conclusion

One may legitimately support or challenge Israeli settlements in the disputed territories, but they are not illegal, and they have neither the size, the population, nor the placement to seriously impact upon the future status of the disputed territories and their Palestinian population centers.

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*Colonialism*

### **The Myth of Israel as a Colonialist Entity**

(2012)

**Dore Gold**

The argument that Israel is a colonialist entity is often marshaled to undermine the Jewish state's very legitimacy. It lays at the head of Edward Said's polemical treatment of the Arab-Israel conflict, entitled *The Question of Palestine*, which was published in 1992. The theme has certainly permeated Western academia, almost uncritically. For decades, it has been employed against Israel in one international forum after another.

For example, in 1973, the UN General Assembly gave initial momentum to this idea when it condemned the “unholy alliance between Portuguese colonialism, South African racism, Zionism, and Israeli imperialism.” Two years later the Organization of African Unity adopted a resolution at its meeting of heads of state saying that “the racist regime in occupied Palestine and the racist regime in Zimbabwe and South Africa have a common imperialist origin.”

That association of Israel with colonialist regimes set the stage in 1975 for the most insidious resolution ever adopted in the General Assembly against Israel, which stated that Zionism was a form of racism. It helped cement the Afro-Asian bloc behind the resolution and provided momentum for the beginnings of the movement to delegitimize Israel. Even when, in 1991, the General Assembly finally overturned the resolution, comparisons between Zionism and colonialism persisted, arguably becoming even more strident.

The Palestinian Authority's Ministry of Information published a book in 2012 entitled *Terminology in Media, Culture and Politics* which stresses that Palestinians should use the term “colonialism” as part of their verbal arsenal in dealing with Israel. The book warns that using the political lexicon of Israel “turns the essence of the Zionist endeavor from a racist, colonialist endeavor into an endeavor of self-definition and independence for the Jewish people.”(1)

The Palestinian Authority text specifically instructs its Palestinian readers never

to use the name of “Israel” by itself, but rather the term “Israeli colonialism.” In short, the charge of Israel being a “colonialist state” has evolved in recent years into an instrument of political warfare to be used by Palestinians who seek to employ language that they hope will undercut the legitimacy of the Jewish state.

Unlike the charges of apartheid and racism, the tag “colonialist” cannot be refuted simply by looking around modern Israel, where courts, hospitals, and universities serve both Arabs and Jews. It is a historical charge about how Israel came to exist: in effect, it amounts to the claim that Israel was established as an outpost of another distant power imposing itself by grafting an “alien” Jewish population on the territory and its native inhabitants.

In an essay he originally wrote in 1966, before the Six-Day War, that was later published as a book in 1973 entitled *Israel: A Colonial-Settler State?*, the French-Marxist historian Maxime Rodinson drew analogies between the Jews in Israel and the French settlers in Algeria as well as the whites in South Africa.(2) But was it a legitimate argument to say that the Jews who returned to their ancient homeland were as alien in their territory as the Europeans who were transplanted and came to settle in Africa and Asia in order to serve the interests of the French British Empires?

## **What Was the Role of the European Colonial Powers in Israel's Establishment?**

The fact is that while modern Israel was born in the aftermath of the British Mandate for Palestine, which called for a Jewish national home, its roots preceded the arrival of the British to the Middle East. In that sense Britain was not Israel's mother-country, like France was for Algeria. Indeed, the Jews were already re-establishing their presence independently in their land well before the British and French dismantled the Ottoman Empire. For example, the Jewish people had already recovered their majority in Jerusalem by 1863.(3)

Decades later, Britain and the rest of the League of Nations considered Jewish rights in Palestine beyond their power to bestow because those rights were already there to be accepted. Thus in the mandate document, the League of Nations gave recognition to “the historical connection of the Jewish people with Palestine.” In other words, it recognized *a pre-existing right*. It did not create that right. It also called for “reconstituting” the Jewish people's national home. And the rights recognized by the League of Nations were preserved by its successor organization, the United Nations, which in Article 80 of its charter acknowledged all rights of states and peoples that existed before 1945.

Rather than seeing the Jewish people acquiring their status with respect to the territory that was to become Israel because of Britain, the historian Elizabeth Monroe once observed that it was the British who “climbed on the shoulders of the Zionists in order to get British Palestine.”(4) What she meant was that Britain might not have received the territory of the Palestine Mandate, which could have become French or part of an international zone, had Britain not backed Jewish



national revival, which was an independent force and not a colonial invention. As time went on, it became clear that the British Empire was not the handmaiden of Israel's re-birth, but rather its main obstacle. Moreover, in the years that followed the issuance of the Balfour Declaration confirming Jewish rights to a national home in Palestine, the British systematically scaled back many of the initial rights of the Jewish people which previously had been recognized, putting the Jews in an increasingly conflictual relationship with London.

This change was exemplified first in 1922, with the British decision to remove the territory of Transjordan from the area of Palestine that had been allocated for the Jewish national home. It continued to the 1939 White Paper, which significantly curtailed Jewish immigration into Palestine. Ultimately, the British faced an armed rebellion of the Jewish population of British Mandatory Palestine, first led by Etzel and Lehi and then later joined by the Haganah, which would become the basis for the Israel Defense Forces, after Israel's independence.

## **The Colonialist Origins of the Arab State System**

The accusation that Israel has colonialist roots because of its connection to the British Mandate is ironic, since most of the Arab states owe their origins to the entry and domination of the European powers. Prior to World War I, the Arab states of Iraq, Syria, Lebanon, and Jordan did not exist, but were only districts of the Ottoman Empire, under different names. They became states as a result of European intervention, with the British putting the Hashemite family in power in two of these countries, Iraq (until 1958) and Jordan.

Saudi Arabia and the smaller Gulf states, meanwhile, emerged from treaties that their leaders signed with British India, which sought to exclude Britain's rivals from acquiring any strategic position in the Persian Gulf, and later access to its oil resources. By means of those treaties, the British recognized the legitimacy of local Arab families to rule what became states like Kuwait, Bahrain, and Qatar.<sup>(5)</sup> A similar British treaty with the al-Saud family in 1915 set the stage for the eventual emergence of Saudi Arabia in 1932.

Moreover, during Israel's War of Independence, Arab armies benefited directly from European arms and training – and even manpower. As the Arab states became independent, Britain reached special treaties with them, which guaranteed its forces access to a system of bases in Iraq and Egypt, while serving as the basis for supplying weapons and advisors to Arab armies. The Arab Legion initially fought in Jerusalem with British officers, while the skies of Egyptian Sinai were protected from the Israeli Air Force by the Royal Air Force. Indeed, Israeli and British aircraft clashed in 1949.

William Roger Louis, one of the foremost historians of British imperial strategy, uncovered an extremely revealing document from the British Foreign Office that puts into perspective Israel's relationship with the European colonial powers at its birth. In his 1984 book, *The British Empire in the Middle East, 1945-1951*, he describes a meeting on July 21, 1949, of senior British officials at the end of

Israel's War of Independence.

Thus, Sir John Troutbeck, head of the British Middle East Office, said, "We were in a position to control the Arab governments but not Israel." He then expressed fear that "the Israelis might drag the Arab States into a neutral bloc and even attempt to turn us out of Egypt." The original Foreign Office document also expressed concern that the British would lose their airbases in Iraq. In 1956, Israel briefly made common cause with Britain and France against Nasser's Egypt, but this could not alter the fact that, for the imperial powers, Israel was an obstacle, not an outpost.

## **Denying Jewish Historical Roots in the Land**

Nevertheless, in recent years, the effort to portray Israel as a colonialist entity has expanded. For many Palestinian spokesmen, in particular, it became important to deny the historical ties of the Jewish people to their land and to portray them as recent colonialist arrivals to the region – in contrast to the Palestinians, who were portrayed as the authentic native population.

This effort reached an audacious peak when Yasser Arafat denied that the Temple had ever existed in Jerusalem at the end of the July 2000 Camp David Summit with President Clinton. Many of his deputies – from Saeb Erekat to Mahmoud Abbas – have since picked up the same theme. Speaking on November 12, 2008, at a UN General Assembly "Dialogue of Religions and Cultures," the Palestinian prime minister, Salam Fayyad, addressed the historical connections of Islam and Christianity to Jerusalem, but noticeably did not say a single word about Judaism's ties to the Holy City.

In a similar vein, Arafat used to tell Western audiences that the Palestinians are descendants of the Jebusites, with ancient roots in the land. But in Palestinian society, one establishes one's status by claiming to be a relative latecomer, whose ancestors were from the Arabian families that accompanied the Second Caliph Umar bin al-Khattab when he conquered and colonized Byzantine Palestine in the seventh century.

No less than Mahmoud Abbas, Arafat's successor, has admitted that the Christian presence in the Holy Land preceded the arrival of the ancestors of the present Palestinian leadership. Thus in criticizing Hamas for attacking Christian institutions, Abbas declared in 2007: "One of our oldest churches in Palestine, which stood *long before our arrival* [in the region], was looted and set on fire [emphasis added]." Thus, the argument that the Palestinians are descendants of the ancient inhabitants of what is today modern Israel was even rejected by Abbas himself.(6)

## **The Jewish People as Indigenous**

Even at the time of the Arab conquests, the Jews were still a plurality – and, perhaps along with the Samaritans, a majority – in the land, six hundred years

after the Romans destroyed their ancient Temple and dismantled the Second Jewish Commonwealth. This emerges from Professor Moshe Gil's monumental 800-page *A History of Palestine: 634-1099*.<sup>(7)</sup> There is a common misconception that following the Great Revolt against the Roman Empire in 70 CE, and especially after the Bar Kochba Revolt in 135 CE, the Jews were exiled and their presence was negligible.

Gil's work clearly refutes this misunderstanding of Jewish history. He not only quotes Christian and other sources establishing that a substantial Jewish population remained, his research leads him to conclude that "The Jewish population residing in the country consisted of the direct descendants of the generations of Jews who had lived there since the days of Joshua bin Nun, in other words for 2,000 years."<sup>(8)</sup>

The Jewish population in Palestine began to diminish in response to severe laws established by its new Islamic rulers who imposed special taxes like the *jizya* (poll tax placed on non-Muslim individuals) and the *kharaj* (land tax) that made land ownership impossible. But much of the physical destruction of significant numbers of the remnant of the Jewish community occurred, according to Gil, as a result of the First Crusade in 1099 and the European occupation of Palestine in the decades that followed.

Nevertheless, the attachment of the Jewish people to their historic homeland continued and they made every effort to return over the centuries. After the defeat of the Crusader Kingdom, three hundred rabbis from Britain and France immigrated to Palestine in 1211. The pace of Jewish immigration from Spain and Italy increased to such an extent that Pope Martin V (1363-1431) forbade ship owners and sea captains from transporting Jews to the Holy Land in 1428.

With the Spanish Inquisition in 1492, a whole wave of Jewish immigration followed to the Ottoman Empire, in general, and to Palestine, in particular, after the Ottomans conquered it in 1517. There was a revival of Jewish life in Safed and Tiberias in the sixteenth century, symbolized by the grant given to Don Joseph Nasi by Sultan Suleiman the Magnificent to settle Jews in Tiberias and in surrounding villages in 1561. A study of the Ottoman census figures found that there were thousands of Jews living in the villages of the Galilee in the early sixteenth century, while by 1567, Jews constituted the majority of the population of Safed. There were still a few families that could trace their origins to the Second Temple period.<sup>(9)</sup>

By the early nineteenth century, new waves of Jewish immigrants returned to their land, often motivated by strong messianic beliefs rather than by any colonialist theories. There was a shared belief among many Jews in the diaspora that the Hebrew year 5600 (1840) was to be the date of Israel's redemption. It is not surprising to find that according to several reports, the Jewish community in Palestine doubled between the years 1808 and 1840.<sup>(10)</sup>

In a transparent publicity stunt in February 2010, foreign activists went to the West Bank village of Bil'in and convinced Palestinian demonstrators to paint themselves blue so that they would look like the colonized people from the

popular science-fiction film *Avatar*, thereby reinforcing the Palestinian narrative before the mass media that the Israeli-Palestinian conflict was between an indigenous Arab people and recent Jewish arrivals.

Yet, ascertaining the truth has never been the objective of those trying to paint Israel with a colonialist brush. The restoration of the Jewish population to what became Israel was a historical process that began centuries before the British arrived. The purveyors of this narrative have been determined simply to conclude that the Jews came as an alien force to British Mandatory Palestine, to advance European imperial interests, rather than see them as a people recovering their historical homeland, where they had deep, indigenous roots.

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\* \* \* \* \*

*Apartheid*

## **The Campaign to Delegitimize Israel with the False Charge of Apartheid**

(2009)

**Robbie Sabel**

### **Executive Summary**

- If Israel's detractors can associate the Jewish movement for self-determination with the Apartheid South African regime, they will have done lasting and maybe irreparable damage. Yet the comparison of Israel to South Africa under white supremacist rule has been utterly rejected by those with intimate understanding of the old Apartheid system.
- Israel is a multi-racial and multi-colored society, and the Arab minority actively participates in the political process. There are Arab parliamentarians, Arab judges including on the Supreme Court, Arab cabinet ministers, Arab heads of hospital departments, Arab university professors, Arab diplomats in the Foreign Service, and very senior Arab police and army officers. Incitement to racism in Israel is a criminal offence, as is discrimination on the basis of race or religion.
- The accusation is made that the very fact that Israel is considered a *Jewish* state proves an "Apartheid-like" situation. Yet the accusers have not a word of criticism against the tens of liberal democratic states that have Christian crosses incorporated in their flags, nor against the Muslim states with the half crescent symbol of Islam. For a Western state, with Jewish and Muslim minorities, to have Christmas as a national holiday is

permissible, but for Israel to celebrate Passover as a national holiday is somehow racist. For various Arab states to denote themselves as Arab Republics is not objectionable.

- Zionism is perhaps the only national movement that has received explicit support and endorsement both from the League of Nations and from the United Nations. It was the League of Nations that approved the mandate for Palestine with its ringing endorsement of “the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.”
- The real goal behind the Apartheid campaign is the denial of the legitimacy of the State of Israel and the determination that the only status the Jewish population in Israel can hope for is that of a “protected” ethnic minority in an Arab Palestinian state.

## **How to Respond to a Lie**

It is always a dilemma for an individual or a nation as to how to react to the publication of a calumny. By definition, a calumny is a deliberately malicious misrepresentation of the facts about a particular matter in order to ruin the reputation of whomever is its target. To ignore the calumny may be interpreted as an admission or as a partial admission of the lie and it leaves the arena open for the lie to spread unhindered. To respond puts the responder in the invidious position of having to prove his innocence and to engage in a dialogue on the subject, a dialogue which by its very nature may serve to spread the calumny.

Attempts to smear Israel with the abhorrent phenomenon of racism and Apartheid have reached the level where I believe Israel must react notwithstanding the above dilemma. International law blogs on the subject are proliferating(1,2) and one organization has published a 300-page treatise by prominent lawyers “proving” that Israel is applying Apartheid.(3) If Israel's detractors can somehow, by analogy, associate the Jewish movement for self-determination with the Apartheid South African regime, they will have done lasting and maybe irreparable damage. Analogy to something odious is a very effective tool. It diverts attention from the reality of the subject, in this case Jewish self-determination and Israel, to a regime that is universally detested.

*The comparison of Israel to South Africa under white supremacist rule has been utterly rejected by those with intimate understanding of the old Apartheid system.*

The comparison of Israel to South Africa under white supremacist rule has been utterly rejected by those with intimate understanding of the old Apartheid system. Benjamin Pogrund, a former deputy editor of the *Rand Daily Mail* in Johannesburg, and an anti-Apartheid activist, responded to a 2006 report in *The Guardian* charging Israel with practicing Apartheid. He remarked that after he went through surgery in an Israeli hospital in Jerusalem, he noted that the

doctors, nurses, and patients around him were both Arabs and Jews. He concluded: "What I saw in the Hadassah Mt Scopus hospital was inconceivable in the South Africa where I spent most of my life, growing up and then working as a journalist who specialized in Apartheid."(4)

In contemporary South Africa itself, the false equation between Israel and the former Apartheid regime appears to have become popularized largely after the 2001 UN Durban Conference with the infamous anti-Israel declaration made by the NGOs that attended.(5) Indeed, at the time, South Africa's Deputy Foreign Minister Aziz Pahad issued a statement after the "disgraceful events" at the NGO meeting criticizing the way it had been "hijacked and used by some with an anti-Israel agenda to turn it into an anti-Semitic event."(6) Nonetheless, the Apartheid accusation against Israel has persisted and even gained a broader international following.

## History of the Apartheid Campaign Against Israel

The genesis of the campaign to try and equate Zionism, the Jewish national movement, with racism and consequently Apartheid came from the coalition between the Arab states and the Soviet Union with their allies in the non-aligned movement in the 1970s. They used their automatic majority in the UN General Assembly to pass the 1975 resolution which defined Zionism as a form of racism. (7) This resolution was widely condemned by Christian leaders as anti-Semitic. Cardinal Terence Cooke of New York declared: "We must reject anti-Semitism just as much when clothed with seeming legality at the United Nations as when crudely exhibited on a neighborhood street corner." The U.S. National Catholic Conference for Interracial Justice declared that "This resolution is anti-Semitism at its worst." The presiding bishop of the U.S. Episcopal Church, John M. Allin, decried the UN action as "an inexcusable offense against those legitimate aspirations of the Jewish people for a homeland which the UN itself certified back in 1947."(8) The resolution was subsequently rescinded by the General Assembly in 1991,(9) apparently the first time that the UN General Assembly has taken such a step, but nevertheless the poisonous calumny had been planted.

The UN's World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in September 2001, gave the Israel Apartheid calumny new force in international circles. The Declaration of the NGOs at the Durban meeting openly stated: "We declare Israel as a *racist, Apartheid* state in which Israel's brand of *Apartheid* as a crime against humanity has been characterized by separation and *segregation, dispossession, restricted land access, denationalization, 'bantustanization' and inhumane acts*" (emphasis in original text). The Durban NGO declaration set off a global campaign against Israel that included an "Israel Apartheid Week" initiative across Canadian college campuses and at some U.S. universities as well.

Then in 2006, former President Jimmy Carter published his bestselling book, *Palestine: Peace Not Apartheid*.(10) Although he wrote at the end of his book that the situation in Israel "is unlike that in South Africa," in subsequent public

appearances he stressed the comparison between Israel and Apartheid South Africa.(11) Carter chose to use the term “Apartheid” in his title to create controversy. His book gave the defamation of Israel as an Apartheid state new traction. Indeed, in reviewing the book for the *New York Review of Books*, Joseph Lelyveld, the former executive editor of the *New York Times*, asserted that Carter could have taken the calumny much further and should have done so. (12)

## What Apartheid Really Means

Apartheid has been defined as a “social and political policy of racial segregation and discrimination enforced by white minority governments in South Africa from 1948 to 1994.”(13) A dictionary definition is “racial segregation; specifically: a former policy of segregation and political and economic discrimination against non-European groups in the Republic of South Africa.”(14) It was a situation where the black majority of the population was segregated, discriminated against, and denied the right to vote in the general elections and participate in the government.(15)

Among the prominent features of South African Apartheid policies were:

- Prohibition of marriages between white people and people of other races. (16)
- Prohibition of extra-marital sex relations between white and black people. (17)
- Forced physical separation between races by creating different residential areas for different races.(18)
- Prohibiting a black person from performing any skilled work in urban areas except in those sections designated for black occupation.(19)
- Prohibiting colored persons from voting in general elections.(20)
- Requiring all black persons to carry a special pass, at all times. No black person could leave a rural area for an urban one without a permit from the local authorities.(21)
- Prohibiting strike action by blacks.(22)
- Establishing a Black Education Department. Verwoerd (then Minister of Native Affairs, later Prime Minister) stated that its aim was to prevent Africans from receiving an education that would lead them to aspire to positions they wouldn't be allowed to hold in society.(23) Black students were banned from attending major white universities.(24)
- The so-called “petty segregation” in all public amenities, such as restaurants, swimming pools, and public transport. “Europeans Only” and “Non-Europeans Only” signs were put up to enforce this legislation.(25)

## The Nature of Israeli Society

Israel suffers from all the internal strains and tensions that every immigrant society endures. The continuous security threats facing Israel add to the tension. The presence of the Arab minority, some of whom have strong family and cultural bonds to their kinsmen in hostile Arab states, is another unsettling factor. However, no objective observer could claim that there is Apartheid in Israel.

*No objective observer could claim that there is Apartheid in Israel. There are Arab parliamentarians, Arab judges including on the Supreme Court, Arab cabinet ministers, Arab diplomats in the Foreign Service, and very senior Arab police and army officers.*

Israel is one of the more open societies in the world.(26) Jews comprise some 80 percent of the population, but it is a multi-racial and multi-colored society. Israel has universal suffrage with free elections and an independent and effective judiciary. The Arab minority actively participates in the political process. There are Arab parliamentarians, including Arabs as Deputy Speakers of the Knesset. There are Arab judges including on the Supreme Court, Arab cabinet ministers, Arab heads of hospital departments, Arab university professors, Arab diplomats in the Foreign Service, and very senior Arab police and army officers.(27)

Incitement to racism in Israel is a criminal offence.(28) A number of Israeli towns have mixed Arab-Jewish populations. In the past, when a private cooperative village instituted a membership selection process that was seen to discriminate against Arabs, it was declared by Israel's Supreme Court to be discrimination and hence illegal.(29) It is a crime under Israeli law for any public body to discriminate on the basis of race or religion.

The Israel Supreme Court has ruled that “the rule prohibiting discrimination between persons on grounds of race, sex, national group, community, country of origin, religion, beliefs or social standing is a basic constitutional principle, intertwined and interwoven into our basic legal concepts and forming an integral part of it.”(30)

The law prohibiting discrimination in public places(31) has been interpreted broadly by the courts as applying to even private places, including schools, libraries, pools, and stores serving the public. A law from the year 2000 bans any form of discrimination concerning the registration of students by governmental and local authorities or any educational institution. It is not surprising that after examining the false analogy between Israel and Apartheid South Africa, Rhoda Kadalie, a South African anti-Apartheid activist, concludes in an analysis, co-authored with Julia Bertelsmann, that:

Israel is not an Apartheid state. . Arab citizens of Israel can vote and serve in the Knesset; black South Africans could not vote until 1994. . Whereas Apartheid was established through a series of oppressive laws that governed which park benches we could sit on, where we could go to school, which areas we were allowed to live in, and even



whom we could marry, Israel was founded upon a liberal and inclusive Declaration of Independence. . Israeli schools, universities and hospitals make no distinction between Jews and Arabs. An Arab citizen who brings a case before an Israeli court will have that case decided on the basis of merit, not ethnicity. That was never the case for blacks under Apartheid.(32)

Thus, it is difficult to visualize a society less akin to South Africa under Apartheid.

## **The Accusation that Since Israel Is a Jewish State, This Means Apartheid**

Since accusations of actual Apartheid in modern Israel lack credence, the accusation is made that the very fact that Israel is considered a *Jewish* state proves an “Apartheid-like” situation.(33) One website writes that “Apartheid began and is rooted in the very establishment of the colonial Jewish state, both in law (de jure) and in the implementation of its goals on various levels (de facto)”(34) and that “the establishment of a 'Jewish People' is a construct and tool of the Zionist project to legitimize it and to define the very real target of its racism.”(35) One “learned” study concludes: “The system Israeli Zionism resembles is that operative in the Union, later Republic of South Africa between 1948 and (at the latest) 1994.(36)

*Israel's accusers have not a word of criticism against liberal democratic states that have Christian crosses incorporated in their flags, nor against the Muslim states with the half crescent symbol of Islam or Arab states that denote themselves as Arab Republics.*

The crux of the accusation against Israel is encapsulated in the often-repeated charge that the racism of Israel “is symbolized most clearly in Israel's Jewish flag, anthem and state holidays.”(37) The accusers have not a word of criticism against the tens of liberal democratic states that have Christian crosses incorporated in their flags, nor against the Muslim states with the half crescent symbol of Islam. For a Western state, with Jewish and Muslim minorities, to have Christmas as a national holiday is permissible, but for Israel to celebrate Passover as a national holiday is somehow racist. For various Arab states to denote themselves as Arab Republics is not objectionable, but a Jewish state is racism and Apartheid. As one of the most active websites promoting the calumny puts it: “The Zionist project is a European construct, born out of European nationalism expressed in nation-statehood during the era of colonialism. The Palestinian struggle for liberation is in essence an anti-colonial struggle. Inherent within any colonial project is a racist, Euro-centric worldview.”(38) In other words, the Palestinian national movement is legitimate, but the Jewish national movement is Apartheid.(39) One website equating Zionism with Apartheid explains the analogy on the grounds that Israeli law requires that “Palestinians' political participation inside Israel is expressly conditional upon the acceptance of the Jewish exclusivity of the state.”(40) The authors neglect to quote the full text

of the law which in fact makes no reference to “exclusivity,” but denies a political list the right to participate in elections if it calls for:

- Negation of the existence of the State of Israel as a Jewish and democratic state;
- Incitement to racism;
- Support for armed struggle by a hostile state or a terrorist organization against the State of Israel.(41)

A law outlawing racism is not Apartheid.

Another website accuses Israel of Apartheid since: “military veteran benefits are awarded mostly only to Jews.”(42) The website fails to mention that Arabs are not subject to compulsory military service and hence can study or work during the three-year period when other 18-year-olds are doing their compulsory service. The website also fails to mention that those Arabs who do join the Army receive the identical military veteran benefits.(43) It would appear that any country that grants military veteran benefits, such as the U.S. GI Bill of Rights, is guilty of Apartheid in the eyes of such websites.

Despite massive propaganda over the years by Arab states and by hate-mongers from both the extreme Left and the extreme Right, the overwhelming majority of people living in democratic societies have shown support for the principle that the Jewish people were exercising a legitimate right to self-determination in creating Israel. It is against this massive show of solidarity with Israel that the specter of association with Apartheid has been raised. It is an attempt to delegitimize the Jewish national movement. It is perhaps all the more pernicious in that it is not raised as an argument against any specific issue of Israel's foreign policy but against the very legitimacy of a Jewish national movement.

*Zionism is perhaps the only national movement that has received explicit support and endorsement both from the League of Nations and from the United Nations. The Mandate for Palestine gave recognition “to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.”*

## **International Legal Endorsement of the Jewish National Movement**

Needless to say, none of the accusations against Zionism as being a form of Apartheid point out that it is perhaps the only national movement that has received explicit support and endorsement both from the League of Nations and from the United Nations. It was the League of Nations that approved the Mandate for Palestine with its ringing endorsement in the Preamble that: “Whereas recognition has thereby been given to the historical connection of the Jewish

people with Palestine and to the grounds for reconstituting their national home in that country.”(44) The Mandate interestingly also called on the Mandatory Power to “facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency..., close settlement by Jews on the land, including state lands and wastelands not required for public purposes.”(45) It was the United Nations that in 1947 called for the establishment of “Independent Arab and Jewish States.”(46) Here again, presumably, the call for an independent Arab state is legitimate, but the call for an independent Jewish state is somehow racism. It was the United Nations that in 1949 by a two-thirds majority declared that the Jewish state was a “peace-loving state” and accepted Israel as a full member of the UN.(47)

### **The Peace Process as a Form of Apartheid?**

Another track to try and associate Israel with the South African Apartheid regime is to claim that the Middle East Peace Process is somehow a manifestation of Apartheid.(48) Chomsky writes of the “administration put into the hands of a corrupt and brutal Palestinian authority, playing the role of indigenous collaborators under imperial rule such as the Black leadership of South Africa's Bantustans.”(49) Professor Francis Boyle described the Oslo process as “akin to the Bantustans that the Apartheid Afrikaner regime had established for the Black People in the Republic of South Africa.(50) One writer states that “in the name of security: Israel sets up Apartheid zones.”(51) Learned NGOs have held workshops on the subject.(52)

The Peace Process has had its detractors, but it is surely strange to ignore that the process has given hope for a lasting peace settlement. It gained its protagonists three Nobel Peace Prizes and the support, in democratic elections, of the majority of the population of Israel and of the Palestinians in the West Bank. The Israel-Palestinian Oslo Declaration of Principles, as part of the Madrid peace process,(53) was signed as an act of support by the United States and by the Russian Federation. The Interim 1995 Israeli-Palestinian Agreement, also part of the Madrid process,(54) was signed as an act of support by representatives of the United States, the Russian Federation, Egypt, Jordan, the European Union, and Norway. The Middle East “Roadmap,”(55) incorporating the Madrid principles, has been repeatedly endorsed by the UN Security Council.(56) The United Nations General Assembly has endorsed these Israeli-Palestinian agreements;(57) they have even been mentioned with approval by the International Court of Justice.(58) This is hardly “Bantustans,” puppet regimes that were not supported by a single state other than South Africa which unilaterally created them. The virulent criticism would seem to derive from those who are not interested in any peaceful resolution.

### **The “Wall” as Apartheid**

The most popular use of the word “Apartheid” in relation to Israel appears to be

in connection with Israel's security fence. The Israeli Army has explained the need for the fence: "Between Israel and the areas of the Palestinian Authority there is no border or natural obstacles, which, to date, enables the almost unhindered entry of terrorists into Israel. The security fence that exists along the Gaza Strip has proven its defensive robustness and the vast majority of infiltration attempts through it were discovered and thwarted."(59)

Those criticizing the construction tend to use the word "wall" and call it a separation wall though in fact "only a tiny fraction of the total length of the barrier (less than 3 percent or about 10 miles) is actually a thirty-foot-high concrete wall."(60) Any border fence in fact serves to separate areas and one may hope for a world with no borders. However, as long as Israel has to face terrorist acts, it is legitimate for it, as it is for other states, to erect a barrier to prevent terrorist attacks and illegal crossings.(61) Those calling the fence the "Apartheid wall" make frequent reference to the advisory opinion of the International Court of Justice on the issue.(62) They fail to point out that in its opinion on the wall the International Court of Justice at no time made any analogy or reference to Apartheid or referred to an "Apartheid wall." Furthermore, although the International Court criticized the route of the "wall" as being beyond the 1949 "Green" Armistice Line,(63) the court was careful not to deny Israel's right in principle to build such a security fence.

*The International Court of Justice at no time made any analogy or reference to an "Apartheid wall" and was careful not to deny Israel's right to build a security fence.*

## **The "Occupied Territories" and Settlements as Apartheid?**

Some exponents of the "Israel Apartheid" thesis, aware that they have a problem with branding Israeli society as an Apartheid society, limit themselves to claiming that the Israeli administration and Israeli settlements in the West Bank are a manifestation of Apartheid.(64)

Exponents of the Israel-Apartheid campaign claim that eastern Jerusalem is subject to an Apartheid regime and argue that "Since the illegal annexation by Israel in 1967, all successive Israeli governments have made great efforts to reduce significantly the number of Palestinians residing in eastern Jerusalem, to assure Israeli sovereignty, [and] a Jewish majority."(65) This is a very strange accusation. The Arab population of Jerusalem was 68,000 in 1967, comprising 25 percent of the total population. In 2007 the Arab population of Jerusalem was 260,000, comprising 35 percent of the total population of the city.(66)

The existence of some roads in the West Bank where, for security reasons, Israeli and Palestinian traffic is separated is also presented as proof of Apartheid.(67) This claim completely ignores the very real security threat to Israeli road traffic and incidentally also ignores the fact that "Israeli traffic" includes the vehicles of the more than one million Arabs who are Israeli citizens, and who also have been subject to terrorist attacks.

A major theme of the “Israel applies Apartheid to the territories” campaign is that Israeli law, with all its built-in safeguards of individual rights, applies to Israeli settlers but not to the local Palestinian population who are subject to Israeli military administration. Such criticism ignores two major facts. The first is that since 1993, as part of the peace process, it is the Palestinian Authority that has jurisdiction over the overwhelming majority of Palestinians in the West Bank. Hamas, which splintered off from the Palestinian Authority, has jurisdiction over the whole population of the Gaza Strip. The vast majority of Palestinians in the West Bank and Gaza are hence subject neither to the Israeli military administration nor to regular Israeli law. Their laws, courts, police, prisons, taxes, etc., are Palestinian and Israel has no jurisdiction over them.

*As for the claim of Apartheid in the territories, as a result of the Oslo Accords it is the Palestinian Authority that has jurisdiction over the overwhelming majority of Palestinians in the West Bank, while Hamas has jurisdiction over the whole population of Gaza.*

The other issue the criticism ignores is that any attempt to apply internal Israeli law to the few local Palestinians who are still under temporary Israeli military administration would be met by vehement world opposition. According to international law, temporary military administration is the norm to be applied to territories that are not under the sovereignty of a state. Israel is damned if it does and damned if it doesn't. What Israel has done is to allow all Palestinians within its jurisdiction access to the Israel Supreme Court to petition against the Israeli army and government. This is apparently the only time a state has allowed such access to persons under its military administration.

The issue of settlements in the West Bank is a matter of debate in the international community as well as within Israel society. What is clear, however, is that it will be resolved if Israel and the Palestinians can agree on a boundary. When that boundary is fixed, any Israeli settlement on the Palestinian side of the future boundary can only continue to exist with the agreement of the Palestinians. The issue is one of boundaries between Israel and a future Palestinian state. It is not an Apartheid system of a minority controlling a majority, but a border dispute that hopefully will be negotiated peacefully in the near future.

## **Conclusion**

The Apartheid campaign against Israel has another revealing feature. It rarely deals with the massive abuse of human rights or cases of real Apartheid elsewhere in the world. In other words, it singles out Israel with a false accusation. For example, President Carter has spoken about Israeli Apartheid but is careful about how he describes the conflict in Darfur, where Sudan's Arab regime has been slaughtering black Muslims with the backing of many Arab states.(68) The campaign against Israel is not based on a concern with the universal application of human rights, but on something else. This treatment of

Israel is nothing less than an effort to delegitimize the Jewish state, by attributing to it the most heinous crimes. Michael Ignatieff, the head of Canada's Liberal Party who served as a professor of human rights policy at Harvard University in previous years, made this very point in March 2009: "International law defines 'Apartheid' as a crime against humanity. Labeling Israel as an 'Apartheid' state is a deliberate attempt to undermine the legitimacy of the Jewish state itself."(69)

Perhaps the most chilling indication of the real purpose behind the "Israel is Apartheid" campaign is revealed in one of the most active websites behind the campaign. They write that among the goals of "prosecution for the crime of Apartheid is to force Israel to –

(4) Enable the true majority to return to power over their own lands, while protecting the rights of ethnic minorities."(70)

In other words, the real goal behind the Apartheid campaign is the denial of the legitimacy of the State of Israel and the determination that the only status the Jewish population in Israel can hope for is that of a "protected" ethnic minority in an Arab Palestinian state.

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*The Security Fence*

## **Israel's Anti-Terror Fence: The World Court Case (2004)**

**Laurence E. Rothenberg and Abraham Bell**

- The UN General Assembly (GA) resolution asking the International Court of Justice (ICJ) for an advisory opinion is actually a request for an endorsement of an already-stated political opinion of the GA. The ICJ lacks jurisdiction over the case because the GA has dictated the desired result. The court is not authorized to make endorsements of the GA's political opinions dressed in legal garb.
- The security fence is a necessary and proportional response to a campaign of genocide, crimes against humanity, and war crimes by Palestinians. If the fence were built along the 1949 armistice line (the "green line"), it would not achieve Israel's legitimate security goal of protecting its citizens.
- The "green line" from 1949 bounding the West Bank is solely a defunct military line demarcating the extent of the Transjordanian invasion of Israel in 1948. Indeed, at the insistence of Syria, Egypt, and Jordan, each of the armistice agreements of 1949 specified that the ceasefire lines were not

borders and that neither side relinquishes its territorial claims.

- The fence does not violate the Fourth Geneva Convention because the convention does not apply to the West Bank, a territory of disputed sovereignty to which Israel has the strongest claim, and which was not previously possessed by a legitimate sovereign.
- Even if the Convention applied, a fence that controls movement of civilians does not violate it; the Convention permits occupying states to take necessary and proportional steps for security purposes.
- The resort to the International Court of Justice by the PLO is itself a violation of the Oslo Accords. Under Oslo, any disputes must be resolved by negotiation between Israel and the Palestinians, by agreed-upon conciliation, or agreed-upon arbitration.

The International Court of Justice (ICJ, or World Court) is currently considering the legality of the Israeli security fence under construction to prevent terrorists from crossing into Israel and into Israeli towns from Arab areas in the West Bank. (1) The case was initiated by a request to the court from the United Nations (UN) General Assembly (GA), the political body that includes all the member-states of the UN.(2)

The GA asked the court to address the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around EastJerusalem...considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The court ordered legal briefs to be submitted by January 30, 2004, and scheduled oral arguments for February 23, 2004. It did not set a date for a decision, but the GA requested an answer to the question "urgently," so a decision can be expected by the second quarter of 2004.

Although the ICJ proceeding is, in reality, a political attack on Israel's right to self-defense, this essay addresses the legal issues involved. As will be demonstrated below, the security fence comports with international law because it is a necessary and proportional response to a campaign of terror against Israeli civilians, does not violate any provisions of the Fourth Geneva Convention of 1949 (if the convention can even be said to apply to the situation) or relevant UN resolutions, and is in accord with signed agreements between Israel and the Palestinians.

## **Why Israel is Building the Security Fence**

Since the early twentieth century, the Jewish community in what is now Israel has been subjected to terrorist attacks by Palestinian Arabs, attacks that

continued after the founding of the State of Israel in 1948. Terrorist attacks increased markedly in 1994, upon the entry of armed forces of the Palestine Liberation Organization (PLO) into the West Bank and Gaza, as part of the Israeli-Palestinian peace process. Palestinian terrorism then surged in 2000 with the outbreak of the current armed conflict, labeled the "al-Aksa intifada" by the Palestinians. The violence began in the aftermath of Yassir Arafat's rejection of an offer for a settlement of the Israeli-Palestinian conflict at Camp David in the summer of 2000. After a subsequent trip through Europe and Russia to rally support for a declaration of a Palestinian state failed, Arafat used the pretext of Ariel Sharon's visit to the Temple Mount in September 2000 to launch a sustained campaign of terror against Israelis.

Since September 2000, Israel has suffered 19,000 terrorist attacks, with 900 Israeli citizens killed and thousands wounded. Terrorist groups responsible for these attacks include the Fatah organization and its Al-Aksa Martyrs Brigade, the Popular Front for the Liberation of Palestine (PFLP), Palestine Islamic Jihad (PIJ), and Hamas. Throughout the West Bank and Gaza, as well as Israel proper, these organizations have sent suicide bombers to murder Israeli civilians in buses, cafes, and places of worship; they have used snipers to shoot at Israeli civilians in their homes and vehicles and even in baby carriages; and they have invaded homes and seminaries in order to carry out shooting sprees. These attacks have been fomented through propaganda disseminated in the Palestinian media, including in speeches by religious leaders broadcast on official Palestinian television.

Israel has taken various measures to deter and prevent such attacks, including full-scale re-deployment into areas previously evacuated as part of peace negotiations. For example, following a wave of Palestinian terror attacks that killed 120 people in March 2002, Israel initiated Operation Defensive Shield, which resulted in counter-terror operations in Nablus, Jenin, Ramallah, Tulkarm, Bethlehem, and Kalkilya. Construction of a security fence began shortly thereafter. The fence currently covers most of the northern and one-third of the western West Bank.

According to figures supplied by the Israeli government, the fence has undoubtedly saved lives. For example, between August 2001 and August 2002, 58 people were killed or wounded in the Israeli towns of Afula and Hadera, near the West Bank Arab towns of Jenin and Tulkarm. Since the fence went up in that area, only three Israelis have been killed. Similarly, there was a drop from 17 successful terror attacks launched from the northern West Bank into Israel from April to December 2002 down to only five attacks from the area during all of 2003, following construction of the fence. Furthermore, a fence has proved its utility in Gaza, where one has existed since 1996, resulting in few Gaza residents participating in terrorist attacks within Israel. The security fence, therefore, plays a crucial role in Israel's fight against the genocidal terror campaign against its citizens.



## **The Court's Jurisdiction to Address the Question**

The security fence has been challenged through the mechanism of the ICJ's advisory jurisdiction, which grants it the authority to issue opinions even though there is no actual case or controversy at hand.(3) The court is empowered under its statute and the UN Charter to issue opinions "on any legal question" referred to it by the Security Council, the General Assembly, or various UN agencies.(4) Such an opinion of the court is not binding on any states in a strict sense because it does not apply to a particular dispute, but nevertheless carries weight as an authoritative articulation of international law.

However, the advisory jurisdiction in this case has not been properly invoked, since the GA resolution purporting to request an advisory opinion is not really a request for a legal opinion at all, but, rather, a request for an endorsement of an already-stated political opinion of the GA. The very first paragraph of the resolution "reaffirm[s]" a resolution of six weeks earlier which stated that "construction of the wall...is in contradiction to relevant provisions of international law" and demanded that Israel stop and reverse construction.(5) While the ICJ is authorized to issue advisory opinions, it is not authorized to make endorsements of the GA's political opinions dressed in legal garb.

Moreover, even if the court has jurisdiction, it can decline to address a case. Under its own understanding of its authority, for example, the court can refuse to take jurisdiction for "compelling reasons."(6) A number of factors raise compelling reasons for declining to address the legality of the security fence.

First, and most importantly, the political bodies of the United Nations are already involved with the conflict between the parties to the alleged legal question. The latest plan for peace between the parties, for example, is the Road Map, which was signed by Secretary-General Kofi Annan on behalf of the UN and endorsed by him in public comments.(7)

Second, even ignoring the resolution in which it is contained, the request to the court is actually a political statement and not a legal request. For example, it refers to the West Bank as "occupied Palestinian territories" and to Israel as "the occupying power," even though the status of the territories is a legal question that the GA is not competent to decide. Likewise, the security fence is referred to as a "wall," although more than 97 percent of the planned length of the security barrier will be made of a chain-link fence.

Third, the request misstates the legal standards applicable to the conflict. For example, the request refers to the armistice lines of 1949 as if they demarcate lines of sovereignty, even though those lines have no status as boundaries in international law (as discussed in detail below). In fact, the request contradicts itself on the law, citing binding Security Council Resolutions 242 and 338, which require a negotiated settlement of the conflict and demarcation of final borders and recognize Israel's right to "recognized and secure boundaries," while also citing non-binding General Assembly resolutions that refer to the West Bank and Gaza as "occupied."

Fourth, the court would undermine its own legitimacy if it were to address the case. As the foregoing analysis demonstrates, this is not a legal question, but rather a political question in legal garb, motivated by political considerations rather than a genuine uncertainty about the law, and is part of a political strategy to delegitimize Israel that has been pursued relentlessly in the GA. Accepting jurisdiction would needlessly and perniciously involve the ICJ in this political dispute.

For all these reasons, the court should find that it lacks jurisdiction and decline to accept jurisdiction even if available.(8) Nevertheless, should the court accept jurisdiction, it should find that the fence does not violate international law, for the reasons described below.

### **The Security Fence is a Necessary and Proportional Response to Palestinian Terror**

All states possess an inherent right to self-defense in international law, as expressly recognized in Article 51 of the UN Charter. Actions taken in self-defense must nevertheless conform to customary international law principles of military necessity; that is, they must be directed at achieving a concrete military advantage over an enemy, and they must be in proportion to the threat.(9) Given the nature of the terrorist campaign against Israel, the fence definitely meets these requirements.

The terrorist campaign against Israeli civilians constitutes genocide, crimes against humanity, and war crimes. As stated in the Genocide Convention and in the statute of the International Criminal Court (ICC), genocide consists, in pertinent part, of murder or causing serious bodily or mental harm "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."(10) The extensive and on-going suicide bombings and other terrorist acts are committed with the requisite intent, as demonstrated in the exhortations to kill all Israelis and Jews broadcast on Palestinian television, and by public statements by key Palestinian figures. Crimes against humanity are similar acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."(11) Again, the terrorist acts committed by Palestinian forces are part of a continuous, organized campaign against Israeli non-combatants.(12) Finally, the attacks constitute war crimes, defined as intentional attacks against civilians during an armed conflict.(13) The legal status of Israel's "occupation" or of Israeli settlements in the West Bank and Gaza does not change this analysis. As Human Rights Watch has stated, "The illegal status [sic] of settlements under international humanitarian law does not negate the rights of the civilians living there. The fact that a person lives in a settlement, whether legal or not, does not make him or her a legitimate military target."(14)

In the face of the crimes described above, the security fence is clearly a necessary and proportionate use of force. First, the only effect of the fence is to control and, in some cases, limit the movement of the civilian population, both

necessary to prevent terrorist attacks. Palestinian terrorists routinely disguise themselves as civilians, including pregnant women, hide bombs in ambulances, feign injuries, and sequence bombs to kill rescue workers responding to an initial attack. The fence and associated checkpoints are therefore crucial to deterring and detecting terrorists among the civilian population.

Second, no less-intrusive construction, such as building the fence along the 1949 armistice line, can achieve Israel's legitimate military goals. A barrier along the armistice line would expose motorists along the main Jerusalem-Tel Aviv highway to Palestinian sniper fire near the Latrun salient and would recreate the division of Jerusalem that existed from 1949 to 1967, when Israeli civilians were repeatedly attacked by snipers from the Jordanian-controlled side of the line. Additionally, this would expose Israeli civilian aircraft landing and taking off from Israel's international airport in Lod to shoulder-launched missile attacks from Palestinian terrorists in the Benjamin region of the West Bank.

Third, the Palestinian claim that military necessity would be better served by expelling 320,000 Israeli civilians from their homes in east Jerusalem and the West Bank is not credible. Even if the Palestinians were correct that it is illegal for Israel to permit Jews to move to the West Bank and Gaza, nothing in international law imposes a death penalty upon settlers or requires evacuation of civilian targets of terrorists in preference to limiting the movement of suspected terrorists themselves.

Fourth, the fence as currently constructed already represents a substantial concession of Israel's security goals. As admitted by the UN Secretary-General, the planned fence places the vast majority – more than 80 percent – of West Bank and east Jerusalem territory on the "Palestinian side" of the fence.<sup>(15)</sup> In fact, numerous Israeli civilian residents of the West Bank, as well as Israeli civilian motorists in transit on West Bank roads, will remain exposed to Palestinian terror attacks. Since 2000, dozens of Israeli civilians have been killed by Palestinian terrorists in these areas on the "Palestinian side" of the line along where the fence is being built.

Finally, the fence is far less intrusive than security barriers used by other states in disputed and occupied territories. In order to block terrorist infiltrations, India is now building a barrier longer than Israel's security fence along the line of control separating Indian and Pakistani forces within disputed Kashmir. Importantly, this barrier is entirely within the disputed territory.<sup>(16)</sup> Smaller barriers to prevent movement of potential terrorists and irregular combatants have been employed by allied forces occupying Iraq and the former Yugoslavia, often entirely surrounding and cutting off towns and cities from the rest of the occupied territory.

In sum, the fence is the least restrictive way to accomplish Israel's legitimate military goals and is in fact far less intrusive than other measures Israel could legitimately adopt to combat terror.

## **Legal Status of the West Bank and Inapplicability of the Fourth Geneva Convention**

Both the GA resolution and the question accepted by the court for advisory adjudication make tendentious reference to the West Bank as "occupied Palestinian territory." On this basis, the Palestinians claim that the Fourth Geneva Convention's rules of occupation forbid Israel to erect the security fence, and, further, that erecting it constitutes an illegal annexation of Palestinians' territorial sovereignty. In fact, however, neither the General Assembly's characterization nor the Palestinian assertions have any basis in international law.

### **Israel Has the Strongest Claim of Sovereign Rights in the West Bank**

Sovereignty over the West Bank must be traced from the Ottoman Empire, which controlled the area encompassing territory now governed by Israel, the Palestinian Authority, Lebanon, Jordan, Syria, and Iraq, as well as parts of the Arabian peninsula until the end of the First World War. The Ottoman Empire and its successor, the Republic of Turkey, yielded these territories to League of Nations mandates supervised by Britain and France. The Mandate of Palestine, under British trusteeship, was a single territorial unit encompassing the territory now held by Israel and Jordan, including the West Bank and Gaza. The Mandate explicitly recognized that Palestine was to be the "national home" of the Jewish people and did not recognize political or sovereign rights of any other peoples in the territory.(17) The Mandate permitted abridgement of Jewish rights only in parts of Palestine east of the Jordan River, and, indeed, in 1922, Britain set up this eastern territory under separate administration as the Transjordan and cooperated with the Hashemite tribe of the Arabian peninsula in setting up Hashemite rule.

After the Second World War, Britain sought to terminate the Mandate, which, by terms of the Mandate itself, would lead to the sovereignty of the now-established Jewish homeland in the territory west of the Jordan River. Given strenuous Arab objections to the creation of any Jewish state, however, Britain asked the GA to resolve the situation. In GA Resolution 181 of November 29, 1947, the GA recommended that Britain and other states adopt and implement a partition plan, under which the western territory of the Mandate would be further divided into two states – one Jewish and one Arab – as well as a small international zone. (18) Jewish authorities in Palestine announced their acceptance of the plan and sought to implement it. Palestinian Arabs, however, rejected the plan and began attacks on Jewish civilian and military targets in mandatory territory.

Rather than implementing the partition, Britain simply withdrew its forces on May 15, 1948. Jewish authorities declared the creation of the new State of Israel, but no similar declaration of a state of Palestinian Arabs was announced. A coalition of Egyptian, Syrian, Lebanese, Transjordanian, and Iraqi troops invaded the territory of the former British Mandate with the declared intent of eliminating the Jewish state. At the war's conclusion in 1949, Syria remained in occupation of a small strip of territory of the former Mandate of Palestine on the eastern shore of

the Sea of Galilee. Egypt occupied Gaza. Transjordan seized most of the Judean Desert, Samaria, and parts of Jerusalem, renaming these territories the "West Bank," annexed them (an act recognized only by Britain and Pakistan), and finally renamed itself the Hashemite Kingdom of Jordan.

A series of armistice agreements between Israel and the invading Arab states in 1949 then created ceasefire lines that left the Arab aggressors with their territorial gains intact. The agreements did not, however, grant sovereignty to the Arab states. Quite the contrary, at the insistence of Syria, Egypt, and Jordan, each of the armistice agreements specified that the ceasefire lines were not borders and that neither side relinquished its territorial claims.(19)

No new Arab state arose in Palestine, and the Palestinian Arab leadership continued to reject both the partition proposal embodied in Resolution 181 and the very existence of the new Jewish state. When the PLO was eventually formed in 1964, its charter called for the destruction of Israel and its replacement with an Arab state of Palestine, while specifically disavowing "any territorial sovereignty over the West-Bank (region) of the Hashemite Kingdom of Jordan, the Gaza Strip, or the Himmah area."(20)

Israel took control of the West Bank in June 1967 as a result of the Six-Day War, which had been prompted by Egypt's expulsion of UN peacekeepers, mobilization of troops for an invasion of Israel, blockade of Israeli ports, and threats to destroy Israel by force of arms. During the war, Israeli counter-offensives placed the entirety of the West Bank in Israeli hands, as well as Gaza, Sinai, and the Golan. No new formal armistice agreement emerged; however, a new ceasefire line along the old administrative Palestine-Transjordan boundary replaced the 1949 armistice line. In 1994, a peace treaty between Jordan and Israel established the international border between Israel and Jordan, in relevant part, along the Jordan River, thus restoring the administrative boundary of the British mandatory era, and leaving the ultimate fate of the West Bank to Israeli-Palestinian negotiations. While the treaty specified that the new boundary was "without prejudice to the status of any territories that came under Israeli military government control in 1967,"(21) Jordan separately disavowed any claim of sovereignty over the West Bank.

Security Council Resolutions 242 and 338, adopted in the wake of the 1967 and 1973 Arab-Israeli wars, respectively, do not purport to change this situation. While 242 asserts the "inadmissibility of the acquisition of territory by war," it makes no statement about how this principle applies to the West Bank or any other specific territory.(22) It neither affirms nor denies Israeli or Jordanian sovereignty. It does call for a negotiated peace that would include "withdrawal of Israel armed forces from territories occupied in the recent conflict" and respect for the right of concerned states to "live in peace within secure and recognized boundaries," but it defines neither which boundaries nor which territories. This is particularly significant since some of the territories captured in 1967 were clearly outside the mandatory boundaries (such as Sinai) and therefore beyond an Israeli claim of sovereignty, while others (such as the West Bank) were within the boundaries of the Mandate and therefore within the scope of Israel's claimed

sovereign rights. Indeed, the only definite implication of the resolution is a Security Council endorsement of Israel's right to remain in possession of territories occupied in 1967 until the achievement of a negotiated peace.

The 1993-2000 Oslo Accords between Israel and the PLO, though creating a self-governing Palestinian Authority in the West Bank and Gaza, did not recognize any Palestinian sovereignty and specifically preserved the claimed rights of each of the parties.(23)

Thus, no international agreement has ever granted the "green line" (the 1949 armistice line demarcating the boundary of the West Bank) the status of an international border between sovereigns. Indeed, every Israeli peace treaty with a neighboring state, while basing itself on Resolution 242, has adopted the mandatory boundaries as the boundaries of Israel, rather than the 1949 armistice lines.(24) The "green line" bounding the West Bank is solely a defunct military line demarcating the extent of the Transjordanian invasion of Israel in 1948.

Additionally, Israel has the strongest claim to sovereignty over the West Bank of all possible claimants. Other than Jordan, Israel is the only existing successor to the British Mandate of Palestine established to facilitate the creation of a Jewish homeland, and Jordan, as an aggressor, never legally possessed the West Bank. Additionally, Jordan relinquished its claim of sovereignty. Israel, by contrast, came into possession of the West Bank in a war of defense, making its possession legal, and it has never waived its claim of sovereignty. Indeed, other than Israel, no recognized state claims sovereignty in the West Bank.

### **The Fourth Geneva Convention Does Not Apply to the West Bank**

As the state with the strongest claim to sovereignty in the West Bank, Israel cannot be held to be an occupying power obliged to follow the terms of the Fourth Geneva Convention. It would be a logical absurdity, and without textual foundation, to call a state an occupying power when it has taken territory over which no other state had recognized sovereign rights.(25) Moreover, even if Israel were not considered sovereign of the West Bank, the West Bank is not automatically to be considered occupied territory within the terms of the Fourth Geneva Convention. Article 2 of the Convention specifies that it applies in the cases of armed conflict between High Contracting Parties, or in the case of occupation of the territory of a High Contracting Party. While Israel is a party to the Fourth Geneva Convention, the nonexistent state of Palestine is not. In fact, in 1989, when the Palestine Liberation Organization informed the Swiss Federal Council (official registrar of the Convention) that it would adhere to the provisions of the four Geneva Conventions and their protocols, the Council refused to recognize the act as an accession to the treaty "due to the uncertainty...as to the existence or non-existence of a State of Palestine."(26) This conclusion is further amplified by Article 43 of the Fourth Hague Convention, which is the basis for the modern law of occupation. The article recognizes an occupation when "authority of the legitimate power" passes in fact "into the hands of the occupant." Thus, an occupation only arises where a legitimate power is dispossessed. Since Jordan was not the "legitimate power" in the West Bank, Israel cannot be considered an

occupant.

Israel has declared itself willing to be bound to humanitarian provisions of the Fourth Geneva Convention in the West Bank and Gaza as a matter of good will, as part of a larger Israeli willingness to withhold application of its full sovereign rights in order to hold the territory open for a negotiated peaceful solution to the Arab-Israeli conflict. However, this merely underscores the inapplicability of any provisions of the Fourth Geneva Convention that are designed to protect the sovereign rights of the true sovereign party whose territory is being occupied. Since "Palestine" is not sovereign, it has no sovereignty to defend, and it cannot claim the benefit of such provisions of the Fourth Geneva Convention that are designed to benefit the party whose sovereign territory is occupied.

## **Consistency of Israeli Actions with the Fourth Geneva Convention**

### **Building Security Barriers Does Not Violate the Convention**

Even if the Fourth Geneva Convention were applicable to the West Bank, nothing in Israel's actions would violate it. Other than the reiteration of the familiar prohibition upon "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" in Article 147, no provision in the Convention limits the occupying power's ability to create barriers, requisition property for security purposes, or take other necessary security measures. Indeed, Article 27 of the Convention explicitly permits occupying powers to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war." As noted previously, the security fence is fully justified by the military necessity of reducing the exposure of Israeli civilians to the Palestinian terrorist campaign.

### **Building Security Barriers Does Not Constitute Annexation**

Annexation under international law requires that the annexing state extend its power over the territory to be annexed with the intent of extending its sovereignty over that territory. As noted previously, Israel is the state with the best claim of sovereignty to the West Bank; as such, it cannot be held to be illegally annexing territory.

However, even if Israel is considered a mere occupier unable to annex the disputed territory, building a security barrier does not constitute annexation of any territory on the "Israeli side." First, Israel has repeatedly stated that it has no intention to alter the legal or political status of any territory with the barrier. Thus, Israel plainly lacks the intention necessary for an annexation to take place. Second, construction of a barrier does not in and of itself extend Israeli rule over any of the territory to a greater extent than Israel already controls those territories. Israel is not undertaking any other actions to manifest its power, such as implementing Israeli law in those territories. Thus, there is no new manifestation of power to constitute an annexation.

## **Palestinian Terrorism Should Not Be Rewarded**

One of the foremost principles of international law is *ex inuria ius non oritur* – one may not profit from one's lawbreaking. The Palestinian Authority, an instrument of the PLO, has violated its obligations under international law by collaborating with terrorist crimes against humanity. Both Israel and independent foreign media have reported that Yassir Arafat, chairman of the Palestinian Authority (as well as of the PLO and Fatah), has used Palestinian Authority funds to pay for terrorists' acquisition of materiel used in terror attacks, as well as to pay bounties for terror attacks. The Palestinian Authority has openly paid salaries to militants in the terrorist organizations and joined them to Palestinian police forces, while steadfastly refusing to prosecute Palestinians, including Palestinian police, for terror attacks on Israelis. Officials of the Palestinian Authority, and official Palestinian Authority media, including television and press, have called upon Palestinians to carry out terrorist attacks on Israelis. A number of the component organizations of the PLO, including Fatah, have carried out terrorist attacks and proudly taken responsibility for terror attacks. Fatah terrorists have acknowledged to foreign and domestic media that they respond to the commands of Yassir Arafat.

This Palestinian terror, in which the PLO is intimately involved, has created the necessity for a security barrier to block Palestinian terrorist infiltrations. In claiming that Israel may only build such a barrier outside of the West Bank, the PLO is essentially arguing that Israel must de facto cede all disputed territory to the PLO before it may combat terror. Thus, the PLO seeks to make territorial gains as a result of its campaign of genocide, crimes against humanity, and war crimes.

## **Consistency of Israeli Actions with Israeli-Palestinian Agreements**

From 1993 to 2000, Israel and the PLO signed a series of peace agreements known collectively as the Oslo Accords, under which Israel agreed to a partial and staged withdrawal from the West Bank and Gaza, the establishment of a Palestinian Authority with some forms of jurisdiction over the Palestinian population of these territories, and an undertaking to engage in further negotiations in order to determine the final status of these territories. For its part, the PLO agreed to end terror and all other forms of violence, to recognize the legitimacy of the State of Israel, and to resolve all further disagreements with Israel through peaceful negotiations. The security fence does not breach Israel's responsibilities in the Oslo Accords and, in fact, helps implement them.

First, as noted above, none of the Oslo Accords yielded any Israeli claim of sovereignty to, nor established any Palestinian sovereignty over, the West Bank. Rather, the Oslo Accords explicitly make Israel responsible for the security of Israelis, and acknowledge that Israel has "all the powers to take the steps necessary to meet this responsibility."(27) Importantly, Oslo makes explicit that Israel's security responsibilities include West Bank and Gaza settlements as well



as Israelis in Israel proper.(28) Thus, the agreements solemnize Palestinian acknowledgment of the Israeli right to undertake security measures in the West Bank and Gaza. Second, while Israel is required to preserve smooth movement of people, vehicles, and goods within the West Bank, this obligation is specifically subject to Israel's "security powers and responsibilities."(29) Third, even if Israel had yielded its authority to defend itself using barriers on the West Bank, it is not clear that the PLO could invoke such provisions of the peace agreements in light of its gross violations of nearly all its fundamental obligations under the Oslo Accords. Finally, the resort to the ICJ by the PLO is itself a violation of the Oslo Accords. Under Oslo, any disputes arising out of application or interpretation of the agreements must be resolved by negotiation between Israel and the Palestinians, by agreed-upon conciliation, or agreed-upon arbitration.(30) There is no provision for unilateral resort to the General Assembly, the ICJ, or other parties.

## **Conclusion**

Despite the fact that Israel has the better arguments regarding both the jurisdiction and merits, the World Court will most likely accept jurisdiction and declare that the fence - at least in its current route - is a violation of international law. The arguments outlined above will likely have little impact on the court, especially since it has previously stated that the political context or implications of an opinion would not affect its decision-making.(31)

All signs point in the direction that the court is as politicized and as hostile to Israel as the GA itself. For example, in a departure from all other previous practice, the court has allowed "Palestine," a state that does not exist and that is not a UN member-state but only an observer,(32) to submit comments to the court. Furthermore, two of the judges on the court have repeatedly demonstrated their anti-Israel bias. The Egyptian, Nabil Elaraby, has called for Arab states to sue Israel for genocide, and the Jordanian was a special rapporteur for the UN Human Rights Commission who concluded that the settlements are illegal. They have already decided key issues in the case and cannot be expected to examine impartially the evidence presented to the court and to apply the law fairly.

Unless it reverses course and declines jurisdiction or, indeed, affirmatively upholds Israel's right to self-defense against genocide, crimes against humanity, and war crimes, the court will undermine its legitimacy and become yet another international institution that has sacrificed its commitment to international law to an anti-Israel agenda.

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**The ICJ Opinion on the Separation Barrier: Designating the**

## **Entire West Bank as "Palestinian Territory"**

(2005)

**Robbie Sabel**

- The International Court of Justice in The Hague (ICJ) in its advisory opinion on the legality of Israel's separation barrier uncritically adopted the UN General Assembly phrase "Palestinian territories" as applying to all the territories.
- The UN General Assembly is a political body. It is not a global legislature that creates international law through its resolutions. Thus its designation of the whole of the West Bank as "Palestinian" is not a legal determination and should not have been adopted by the Court.
- The historical narrative set out in the ICJ Opinion was critically flawed and this was pointed out in the separate opinions of the minority judges.
- There has as yet been no legal definition of a future boundary between Israel and the territories of the Palestinian Authority. The 1949 Armistice line was not and is not a political boundary. Such a future boundary will have to be negotiated between the parties.

### **Use of the Term "Occupied Palestinian Territory" by the ICJ**

The UN General Assembly is a political body and it was in this political context that the Assembly adopted resolutions recognizing the right of the Palestinians to create a future Palestinian state. It is not a global legislature that creates international law through its resolutions. Thus its designation of the whole of the West Bank as "Palestinian" must be seen as a political act and not as a legal determination.

It was the UN General Assembly that sought an advisory opinion from the ICJ about the legality of Israel's security fence and in doing so it used the politicized language it had utilized in the past. The mandate of the ICJ is to apply international law, but in its opinion on the barrier it adopted the General Assembly's political language without attempting to resolve the legal dilemma of how the area could be defined as occupied "Palestinian" territory. The ICJ opinion confined itself to stating its conclusion:

The Court accordingly finds that that [the IVth] 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.(1)

The adoption by the Court of the UN General Assembly phrase "Palestinian territory" would appear to contradict the Court's statement as to "there being no need for any enquiry into the precise prior status of those territories."(2) Judge Pieter Kooijmans of The Netherlands, in a separate opinion, added, "The Court

has refrained from taking a position with regard to territorial rights and the question of permanent status."(3)

The designation of territory as belonging to an entity inherently implies that the entity concerned is a state or a subject of international law with its own territory and has the power "to exercise supreme authority over all persons and things within its territory."(4) The Palestinian Authority, although having some of the attributes of statehood, has not declared itself to be a state and does not comply with the recognized attributes of statehood.(5)

In 1988 the Palestine National Council declared a "State of Palestine," but this was clearly a fiction at the time.(6) Although the UN General Assembly acknowledged "the proclamation" and decided "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system,"(7) the Assembly did not however declare that it recognized Palestine as a state and "Palestine" has not been accepted as a member state by any non-Arab international organization. Indeed, at the time when the General Assembly changed the PLO's designation in the UN system to "Palestine," the resolution made clear that it was not altering the political status of the Palestinian delegation, which was that of an observer mission.

The UN General Assembly since 1967 had faced the dilemma as to how to designate the territories. From 1948 till 1967 the West Bank had been under Jordanian rule and the Gaza Strip under Egyptian control. The UN General Assembly however refrained from designating these territories as occupied Jordanian or occupied Egyptian territory, presumably since the majority of states, including the Arab states, had not recognized the West Bank as Jordanian territory and Egypt had not even claimed sovereignty over the Gaza Strip.

From 1967 till 1976 the UN General Assembly resolved the dilemma by referring to occupied "Arab" territories and often simply as "occupied territories." From 1976 onward, the increased political clout of the PLO at the UN led to a change. A 1976 UN General Assembly resolution referred to "the right of the Arab states and *peoples* whose territories are under Israeli occupation" (emphasis added).(8) From 1977 the reference becomes "Palestinian and other Arab territories."(9) In 1979 the UN Security Council adopted similar language.(10)

The change to the use of the phrase "Palestinian" territory by the UN was presumably based on repeated UN General Assembly resolutions recognizing a Palestinian right to self-determination in the territories. It was also based on the premise that these territories would be the territory of a future Palestinian state. The UN did not however attempt to resolve the dilemma of how the West Bank could be defined as occupied "Palestinian" territory of a future state when its status as occupied territory presumably derived from Israel's seizure of the area from Jordan, and a Palestinian state had never previously existed there, or anywhere.

Since Israel seized the West Bank from the Kingdom of Jordan in the 1967 Six-Day War, this territory has been essentially disputed land with the claimants being Israel, Jordan, and the Palestinians. Its ultimate status and boundaries will

require negotiation between the parties, according to UN Security Council Resolutions 242 and 338.

It is relevant to note in this context that in March 1994, U.S. Ambassador to the UN Madeleine Albright, in an explanation of a vote at the UN Security Council, stated, "We simply do not support the description of the territories occupied by Israel in the 1967 war as occupied Palestinian territory. In the view of my government, this language could be taken to indicate sovereignty, a matter which both Israel and the PLO have agreed must be decided in negotiations on the final status of the territories."(11)

## **The Historical Narrative of the Court**

In the historical narrative described by the Court, the paragraph describing the Armistice Agreement is followed immediately by a paragraph stating, "In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line)."(12) The Jordanian rule is not even mentioned, and needless to say there is no examination of the Jordanian status in the West Bank.(13) Judge Kooijmans, in a separate opinion, comments on this:

Nothing is said, however, about the status of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the occupation by Israel in 1967, in spite of the fact that it is a generally known fact that it was placed by Jordan under its sovereignty but that this claim to sovereignty, which was relinquished only in 1988, was recognized by three states only.

The strange result of the Court's reticence about the status of the West Bank between 1949 and 1967 is that it is only by implication that the reader is able to understand that it was under Jordanian control...without ever being explicitly informed that the West Bank had been placed under Jordanian authority.(14)

Indeed, by ignoring Jordan's previous position in the West Bank, the ICJ advanced a narrative that ignores the fact that in 1967 Israel entered this territory in self-defense when Jordanian forces opened fire on Israeli civilian positions. The uninitiated student of history might believe that, prior to 1967, there was a pre-existing Palestinian state, which Israel one day decided to invade.

Judge Rosalyn Higgins of the United Kingdom, in her separate opinion, and in what is perhaps an English understatement, comments: "I find the 'history' as recounted by the Court in paragraphs 71-76 neither balanced nor satisfactory."(15)

However, according to Judge Awn Shawkat Al-Khasawneh of Jordan:

The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of

establishing their present status as occupied territories and affirming the de jure applicability of the Fourth Geneva Convention to them, but also because the prior status of the territories would make no difference whatsoever to their present status as occupied territories except in the event that they were *terra nullius* when they were occupied by Israel.(16)

Judge Al-Khasawneh may have wished to avoid a full examination of the "prior status" of the West Bank, where Jordan's claims of sovereignty were not recognized by most of the world. Further historical investigation would reveal that the last legal sovereign over the West Bank was the Ottoman Empire, which however renounced its claims after the First World War. This complexity however would fly in the face of the effort to establish that the West Bank in its entirety was originally Palestinian territory.

Not only does the ICJ Opinion ignore the Jordanian presence in the territories, from 1948 till 1967, it studiously ignores the salient provisions of the 1922 League of Nations Mandate for Palestine. In paragraph 70 of the Opinion, the League of Nations Mandate for Palestine is recalled; however the ICJ says absolutely nothing about the fact that the League of Nations Mandate referred to "the establishment in Palestine of a national home for the Jewish people" and that this injunction was understood at the time by the League of Nations and by the British Mandatory Power as applying to the whole of Palestine west of the River Jordan, that is, including the present-day West Bank.

## **The Green Line**

The ICJ Opinion used the 1949 Armistice demarcation line, the so-called "Green Line," to determine the extent of the "occupied Palestinian territory." The Court made no reference to the fact that the Armistice Agreement that created the Green Line had terminated and that no Arab state had ever recognized the Green Line as an international boundary, nor had Israel given the line such recognition.

Basing itself on UN resolutions, the Court concluded that "occupied Palestinian territory" included East Jerusalem. The Court failed to examine by what authority the UN made such a determination. The Court failed to examine questions related to East Jerusalem as "occupied Palestinian territory," such as the status of the Jewish Quarter of the Old City, which the Jordanians occupied in 1948, or the status of Jewish suburbs of Jerusalem built since 1967 on previously barren hills.

## **The Court's Conclusions**

I believe that the Court's opinion was seriously flawed from the outset by the Court's unquestioning acceptance of the definition of all the area under discussion as "occupied Palestinian territory." The Court failed to examine

Jordan's status in the area. Nor did it determine how an area held by Jordan became "occupied Palestinian territory." Nor did it examine what effect such a transformation had on the laws of occupation.

The Court refrained from declaring that Israel's occupation of the West Bank was illegal, and this is particularly pertinent since one judge did make such a declaration in his separate opinion.(17) Israel may, perhaps, take some further comfort from the fact that, by implication, the ICJ Opinion invalidates objections by Arab states to the legitimacy of Israeli sovereignty on the Israeli side of the Green Line, including West Jerusalem – a result which, one would assume, was not foreseen by the sponsors of the application to the Court. Nevertheless, by slavishly following the use of UN General Assembly language, the Court has done a disservice to international law.

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\* \* \* \* \*

*Israel's Borders*

## **The Evolution of Israel's Boundaries**

(2008)

**Amb. Yehuda Z. Blum**

On July 22, 1922, the Council of the League of Nations adopted the Palestine Mandate which in its preamble incorporated the Balfour Declaration of November 2, 1917.(1) It further stated that "recognition has thereby been given to the historical connection of the Jewish people with Palestine and the grounds for reconstituting their national home in that country." The Council then entrusted Great Britain with the Palestine Mandate and with the responsibility for promoting the political, administrative, and economic conditions to secure the establishment of the Jewish national home (Article 2), as well as for facilitating Jewish immigration and encouraging close settlement by Jews on the land, including state lands and waste lands (Article 6).

While the United States did not become a member of the League of Nations, the two Houses of Congress, in joint resolution, on June 30, 1922, unanimously endorsed the Balfour Declaration, even before the League's approval of the Palestine Mandate. That joint resolution was then approved by President Warren Harding.

The Palestine Mandate did not provide for the boundaries of the new territorial entity specifically carved out for the purpose of establishing the Jewish national home therein. During the Ottoman period the territories that became Palestine had been included within various administrative districts (such as the sanjaks of Beirut and Damascus), with Jerusalem, due its religious significance, being

placed under the direct jurisdiction of Constantinople.

Thus, with the adoption of the Mandate, it became necessary to designate the boundaries of Palestine. The decisions reached at that time have shaped the boundary issues of Israel to the present day.

Zionist support for a British Palestine Mandate was a decisive factor in the League's decision (and was duly resented by France – Great Britain's imperial rival in the Middle East). While the interests of Great Britain and the Zionist movement initially converged in this regard, they were certainly not identical. Great Britain was interested primarily in securing for itself the hinterland of the Suez Canal, a land connection between Palestine and Mesopotamia (later renamed Iraq, also under British Mandate), and an oil pipeline from the Mosul-Kirkuk region to the Mediterranean.

By contrast, the Zionists were interested in the strategic and economic viability of their national home which they viewed as a forerunner of their future state. Accordingly, they asked for boundaries that would fit that bill, with their emphasis on the economic aspect: in the north the Litani River and Mount Hermon, the latter essential for the control of the headwaters of the Jordan; in the east a line to the west of the Hejaz railway, thus securing for Palestine, for future agricultural settlement, the fertile yet largely uninhabited Gilead, east of the Jordan River; in the south a line leading from Wadi El-Arish ("the Brook of Egypt") to Ras Mohammed, the southernmost point of Sinai, thus dividing it more or less evenly between Egypt and Palestine, or, as an alternative, a line leading from Wadi El-Arish to Taba on the Gulf of Aqaba.

The British, having secured for themselves the Palestine Mandate, gave less than half-hearted support to these Zionist demands. In the south they preferred the Rafah-Taba frontier of 1906, and in the east they opted for a Palestine border beyond the Transjordanian desert where it met Mesopotamia. This satisfied their main imperial interests and, in return, they were willing to meet French objections to the Zionist demands in the north.

While France's unfriendly attitude towards the Jewish national movement was partly a by-product of the strong anti-British sentiments that swept that country in the latter part of the 1920s, it also had deeper reasons.

Reporting to British Foreign Secretary Lord Curzon in November 1920, Robert Vansittart, a leading member of the British delegation to the Paris Peace Conference, wrote:

[T]he French refusal...was perhaps more fundamental than we understood, and...it was useless for me to put forward again the economic arguments to which they had often listened....They had agreed to a Jewish National Home, not to a Jewish State. They considered we were steering straight upon the latter, and the very last thing they would do was to enlarge that State for they totally disapproved our policy. Reduced to barest terms, the proposition is that the French are increasingly anti-Zionist. They mistrust and fear

our whole policy in Palestine....They believe that we are in a direct train of making an all Jewish State, as opposed to a national home....They...remain obstinately convinced that they are going to have a Bolshevik colony on their flank....The French are therefore determined that this "Bolshevik colony" shall be as small as possible, and conceive this necessary for their own safety....It is this fundamental view rather than any superficial desire to haggle about waters that has lain at the root of their attitude throughout the negotiations, and now emerges clearly.(2)

To this French attitude may be added also a "theological," or at least pseudotheological, motive. Colonel Richard Meinertzhagen (a member of the British delegation to the Paris Peace Conference) confides to his diary the following interesting entry:

[Zionist leader] Weizmann tells me that when he met Clemenceau with a view to enlisting his sympathy with the National Home, that he found him unsympathetic and remarked: "We Christians can never forgive the Jews for crucifying Christ," to which Weizmann remarked: "Monsieur Clemenceau, you know perfectly well that if Jesus of Nazareth were to apply for a visa to enter France, he would be refused on the grounds that he was a political agitator."(3)

With all the amusing and witty nature of this exchange, Clemenceau's remark (which may have been half-teasing and half-scolding) may also be indicative of some more deep-seated resentment against Zionism, as evidenced also by the attitude of the Catholic Church towards Zionism and the State of Israel.

Be that as it may, Great Britain wanted to avoid a confrontation with France and thus the Litani-Hermon line demanded by the Zionists was abandoned in favor of a line running from Ras Nakura eastward. Likewise, of the three main headwaters of the Jordan (Hazbani, Baniyas, and Dan), only the latter was included within the Palestine Mandate, largely because Lloyd George remembered from his Bible classes in Wales that the Holy Land extended from Dan to Beer Sheva, although he could not point out Dan on the map.

The frontier was to run in the middle of the Jordan River and of Lake Tiberias, with one exception: a triangular area on the Golan, with Quneitra at the head of the triangle, was included within Palestine.

However, even this Palestinian territory on the Golan was transferred to the French Mandate of Syria in 1923, to accommodate an influential sheikh residing in Syria whose lands were in Palestine. Weizmann, a political moderate by any standard, and a self-confessed Anglophile, called this "a wanton mutilation of the Palestine Mandate." The only silver lining of these developments was the fact that the Palestine-Syrian frontier was to run at a distance of at least fifty meters to the east of the Jordan, thus leaving the entire river within Palestine. Also, Lake Tiberias in its entirety was included within Palestine, with the border running ten meters from its eastern shore.



Thus France succeeded in crippling in advance the future Jewish state both economically (by depriving it of its natural water resources) and militarily, for the border in the north was virtually indefensible, with serious ramifications for Israel in the period between 1948 and 1967.

A no less serious blow to Zionism had already been built into the Mandate from the outset. Article 25 of the Mandate provided that Britain could, with the consent of the League Council, exclude, in the territories east of the Jordan River, from the scope of application of the Mandate such provisions as it deemed unsuited to local conditions. With the Council's consent, the Jewish National Home provisions of the Mandate were deemed to belong to this category, thus reducing the territory earmarked for the Jewish National Home to less than one-fourth of its original size.

Here again, this British move was motivated by the Anglo-French rivalry and by an attempt to avoid an Anglo-French confrontation. When the French ousted the Hashemite Feisal from Damascus in 1921, his brother Abdullah marched from the Hejaz to Feisal's aid. The British, fearing a collision with the French, stopped him around Amman and offered him an emirate in the eastern part of the Palestine Mandate, that is east of the Jordan River (Feisal was compensated with the crown of Iraq). Thus "Transjordan" came into being, albeit as an integral part of the Palestine Mandate until 1946 when, with the consent of the UN General Assembly, it was detached from the Mandate and made into the "Kingdom of Transjordan," subsequently changing its name in 1950 to "Kingdom of Jordan."

*In the 1920s, in a move motivated by Anglo-French rivalry, the British transformed more than three-fourths of the territory earmarked by the League of Nations for the Jewish National Home into the Arab emirate of "Transjordan," later the Kingdom of Jordan.*

The evolution of the Palestine Mandate boundaries was thus correctly summed up by Frischwasser-Ra'anán, some three decades later, in the following terms:

Not only did the...boundaries [of the Palestine Mandate] pay no attention whatsoever to the historical unit Palestine, as accurately described in the Bible, not only did they completely ignore the economic and strategic requirements of the new Jewish national home, they did not even approximate to a natural frontier in the purely geographic sense....In fact, those frontiers were not intended so much to shape the physical outline of a new national unit as to delimit the spheres of influence in the Middle East of the British and French Empires.(4)

Some twenty-five years after the determination of the Mandate boundaries, the UN General Assembly, in Resolution 181(II) of November 29, 1947, recommended the establishment, in the reduced Palestinian Mandate territory, of a Jewish state, an Arab state, and a *corpus separatum* in Jerusalem under UN

trusteeship. Although this partition plan, with the impossible jigsaw boundaries envisioned by it, amounted to a second mutilation of the Jewish National Home, the Zionist representatives agreed to it on condition of reciprocity, to ensure its peaceful implementation. However, the Arabs of Palestine, with the support of the neighboring Arab countries, decided to use force unlawfully to thwart the UN resolution.

Thus, when Israel was proclaimed on May 14, 1948, its Declaration of Independence made no reference to the new state's boundaries. Asked about this omission a few hours before the formal ceremony, David Ben-Gurion (Israel's first prime minister) explained that it was a deliberate decision to evade the issue of the boundaries. He told his colleagues that, since the UN had done nothing to implement its resolution, the boundaries recommended by the General Assembly no longer had any validity. Israel's boundaries, he went on to say, would be determined by the outcome of the military activities.(5)

In the event, in the course of the hostilities between Israel and the neighboring Arab countries, Israel brought under its control some 5,000 square km, in addition to the 15,500 square km allocated to the Jewish state under the partition resolution. (The territory of the former Palestine Mandate west of the Jordan River amounted to 27,000 square km.) Between February and July 1949 Israel concluded General Armistice Agreements with Egypt, Lebanon, Transjordan, and Syria, in that order. Since the Arab states persisted in their policy of non-recognition of Israel, they insisted that the agreements made it clear that the armistice lines were not to be considered as boundaries and that those lines were dictated exclusively by military considerations, even in those instances where the armistice lines were identical to the former Palestine boundary. Accordingly, provisions to this effect were indeed included in each of those agreements.(6) Transjordan, which had invaded what was to become known as the "West Bank," in 1950 formally annexed that region, in the process changing the country's name to "Kingdom of Jordan." This was in clear violation of the international law of belligerent occupation which prohibits the annexation by the occupier of occupied territory. It was not recognized by the international community – including the Arab states – except for Great Britain (which was the real power behind the Jordanian throne and which excluded eastern Jerusalem from the scope of its recognition) and Pakistan.

Egypt never purported to annex the Gaza Strip and placed it under a military administration while in control of that area before 1967.

*Between February and July 1949 Israel concluded General Armistice Agreements with Egypt, Lebanon, Transjordan, and Syria. Since the Arab states persisted in their policy of non-recognition of Israel, they insisted that the agreements made it clear that the armistice lines were not be considered as recognized boundaries.*

Even on the eve of the Six-Day War of June 1967, the Arab position was stated

in the Security Council by Jordan's representative in the following terms: "There is an Armistice Agreement. The Agreement did not fix boundaries....Thus I know of no boundary; I know of a situation frozen by an Armistice Agreement."(7)

The armistice regime was shattered by the Six-Day War and from then on Israel has had only "cease-fire lines" with its neighbors.(8) A return to the former armistice lines, as demanded by the Arabs and their supporters, was rejected by Israel. Then Foreign Minister Abba Eban termed those lines "Israel's Auschwitz borders"; they could only invite renewed aggression.(9)

In fact, in the north, as already indicated, Israeli villages in the Jordan Valley and along Lake Tiberias (about two hundred meters below sea level) had been constantly harassed between 1948 and 1967 from the Syrian-held Golan Heights (eight hundred to one thousand meters above sea level). In the coastal region, Jordanian guns were positioned in Kalkilya, at a distance of sixteen kilometers from Tel Aviv. The distance from the Jordanian-Israeli armistice line to the Mediterranean was even shorter in the Netanya sector (Israel's so-called "narrow waistline"), where Jordanian positions in hilly Samaria had dominated the coastal Sharon Valley and where Israel could have been cut in two within a matter of minutes. Likewise, Israel's main international airport was only three kilometers away from the Jordanian armistice line. The corridor linking Israel's capital Jerusalem to the rest of the country was only four kilometers wide in the immediate approach to the city.

In November 1967 the Security Council adopted its well-known Resolution 242, which called upon Israel to withdraw its armed forces from territories occupied in the Six-Day War to secure and recognized boundaries. Arab-Soviet attempts to have the resolution demand Israel's total withdrawal to the former armistice lines were rejected by the resolution's sponsors, who insisted that Israel's future internationally recognized boundaries would have to be negotiated, with a view to also securing their defensibility.

*In November 1967, Arab-Soviet attempts to have UN Security Council Resolution 242 demand Israel's total withdrawal to the former armistice lines were rejected by the resolution's sponsors who insisted that Israel's future internationally recognized boundaries would have to be negotiated, with a view to securing their defensibility.*

Following peace negotiations with Egypt, Israel concluded in 1979 a peace treaty with its southern neighbor, withdrawing in stages from the entire Sinai, conquered in 1967, to the Rafah-Taba border, first established in 1906, under British pressure, as the administrative boundary between Egypt and the Ottoman Empire. It then became Palestine's boundary with Egypt under the Mandate and the Israel-Egyptian armistice line between 1949 and 1967. Under Article II of the Israeli-Egyptian peace treaty, "[t]he permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine."(10)

In 1994 Israel concluded a peace treaty with Jordan under which the former boundary between Mandate Palestine and Transjordan became the international boundary between the two countries. The treaty provides that “[t]he international boundary between Israel and Jordan is delimited with reference to the boundary definition of the [Palestine] Mandate.” (Article 3[a]). While this boundary is termed “the permanent, secure and recognized international boundary between Israel and Jordan,” this is done “without prejudice to the status of any territories that came under Israeli military government control in 1967” (Article 3[b]).(11)

As will be recalled, under Article V(3) of the Israel-PLO Declaration of Principles, the determination of borders is one of the issues to be dealt with in the permanent status negotiations between the parties,(12) which are yet to be concluded. In the north of the country, in the absence of peace treaties between Israel and Syria and Lebanon, respectively, the current legal status of the lines separating Israel from its neighbors is still in the nature of cease-fire lines, even where those lines happen to coincide, as they do along the border with Lebanon, with the international boundary of the Mandate period and with the armistice demarcation line of the 1949–1967 period.

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## **The Misleading Interpretation of UN Security Council Resolution 242**

(2011)

**Ruth Lapidot**

Among the UN resolutions concerning the Middle East that are quite often mentioned and referred to is Security Council Resolution 242 (1967).(1) It has even been considered the building block of peace in the Middle East.(2) Unfortunately, however, it has often been misunderstood or misrepresented. This chapter will deal with two of these misleading interpretations. First, I will show that, contrary to certain opinions,(3) the resolution does *not* request Israel to withdraw from all the territories occupied in the 1967 Six Day War. Second, I will show that, contrary to certain opinions, the resolution does not recognize that the Palestinian refugees have a right to return to Israel. It will be shown that the resolution recommends that the parties negotiate in good faith in order to reach an agreement based on certain principles, including an Israeli withdrawal to recognized and secure (i.e., agreed) borders, and a just settlement of the refugee problem reached by agreement. The resolution also mentions several other principles that will not be dealt with in this chapter.(4)

### **Text of the Resolution**

Since not all readers of this chapter may remember the wording of the resolution,

it is here reproduced:

The Security Council,

*Expressing* its continuing concern with the grave situation in the Middle East,

*Emphasizing* the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

*Emphasizing further* that all Member States in their acceptance of the Charter of the United Nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;(5)

(ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) For guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.(6)



U.S. Ambassador to the United Nations Arthur Goldberg addresses the emergency session of the UN General Assembly in New York on June 19, 1967. (AP Photo)

## **The Legal Effect of the Resolution**

Although it is also authorized to adopt binding decisions, in particular when dealing with "threats to the peace, breaches of the peace, and acts of aggression" (under Chapter VII of the Charter), it is well known that in most cases the Security Council adopts resolutions in the nature of recommendations. The effect of this particular resolution was discussed by the UN Secretary-General in a press conference given on March 19, 1992. Replying to a question, the Secretary-General said that "[a] resolution not based on Chapter VII is non-binding. For your information, Security Council Resolution 242 (1967) is not based on Chapter VII of the Charter." In a statement of clarification it was said that "the resolution is not enforceable since it was not adopted under Chapter VII."<sup>(7)</sup>

Thus it would seem that the resolution was a mere recommendation, especially since in the debate that preceded its adoption the delegates stressed that they were acting under Chapter VI of the Charter. They considered themselves to be dealing with the settlement of a dispute "the continuance of which is likely to endanger the maintenance of international peace and security."<sup>(8)</sup> There is no doubt that by referring to Chapter VI of the Charter, the speakers conveyed their intention that the resolution was recommendatory in nature.

The contents of the resolution also indicate that it was but a recommendation. The majority of its stipulations constitute a framework, a list of principles, to become operative only after detailed and specific measures would be agreed

upon: "It states general principles and envisions 'agreement' on specifics; the parties must put flesh on these bare bones," commented Ambassador Arthur Goldberg, the U.S. Representative.<sup>(9)</sup> The resolution explicitly entrusted a "Special Representative" with the task of assisting the parties concerned to reach agreement and arrive at a settlement in keeping with its conciliatory spirit.

Had the intention been to impose a "binding decision," agreement between the parties would not have been one of its major preoccupations. In particular, the provision on the establishment of "secure and recognized boundaries" proves that the implementation of the resolution required a prior agreement between the parties. The establishment of secure and recognized boundaries requires a process in which the two states involved respectively on the two sides of the boundary, actually negotiate, come to terms, and agree upon the delimitation and demarcation of their common boundary. Anything less than that would not be in accordance with the requirements of the resolution. In addition, the use of the term "should" in the first paragraph ("which should include the application of both the following principles") underlines the recommendatory character of the resolution.

However, the question arises as to whether the extent of Resolution 242's legal effect was affected by later developments. In this context one must remember that at a certain stage the parties to the conflict expressed their acceptance of the resolution.<sup>(10)</sup> This acceptance certainly enhanced its legal weight and constituted a commitment to negotiate in good faith. But because the contents of Resolution 242 were only guidelines for a settlement as described above, the acceptance of the document did not commit the parties to a specific outcome.

It has been claimed that Resolution 338 (1973), which was adopted after the October 1973 war, added a binding effect to Resolution 242 (1967).<sup>(11)</sup> Indeed, there is little doubt that Resolution 338 reinforced 242 in various respects. First, it emphasized that the latter must be implemented "in all of its parts," thus stressing that all of its provisions are of the same validity and effect. Also, while Resolution 242 spoke of an agreed settlement to be reached with the help of the UN Secretary-General's Special Representative, Resolution 338 expressly called for negotiations between the parties.<sup>(12)</sup> There is no express statement in Resolution 338 that it was intended to be of a binding nature, but rather it reinforced the call to negotiate in accordance with the general guidelines of Resolution 242.

## **The Issue of Withdrawal**

Two provisions of the resolution are relevant to the issue of withdrawal. The first is in the preamble – the Security Council emphasized the "inadmissibility of the acquisition of territory by war." Does this mean that Israel's occupation of territories in 1967 was illegal? The answer is: no. There is a fundamental difference between occupation and acquisition of territory. The former does not entail any change in the territory's national status, although it does give the occupier certain powers as well as responsibilities and the right to stay in the

territory until peace has been concluded. Mere military occupation of the land does not confer any legal title to sovereignty.

Due to the prohibition of the use of force under the UN Charter, the legality of military occupation has been the subject of differing opinions. It is generally recognized that occupation resulting from a lawful use of force (i.e., an act of self-defense) is legitimate. Thus, the 1970 UN General Assembly "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States,"(13) and its 1974 "Definition of Aggression" resolution,(14) upheld the legality of military occupation provided the force used to establish it was not in contravention of the UN Charter principles. In the words of Prof. Rosalyn Higgins, "[t]here is nothing in either the Charter or general international law which leads one to suppose that military occupation pending a peace treaty is illegal."(15)

The preamble of this Security Council resolution denounces "the acquisition of territory by war," but does not pronounce a verdict on the occupation under the circumstances of 1967.(16) The distinction between the terms "acquisition" and "occupation" in terms of territory, is very significant in this context. "Acquisition" refers to gaining title, ownership, or sovereignty over the land or territory. "Occupation," on the other hand, refers to provisional presence, or holding of the territory pending negotiations on peace or any other agreed-upon determination as to the status, ownership, or sovereignty of the territory. The Security Council did not, in this preambular provision, denounce "occupation" as such. It is revealing to compare the version finally adopted with the formula used in the draft submitted by India, Mali, and Nigeria: there, the relevant passage read that "[o]ccupation or acquisition of territory by military conquest is inadmissible under the Charter of the United Nations."(17) It is, therefore, of some significance that the version of the preamble finally adopted, while reiterating the injunction against the acquisition of territory, offers no comment on military occupation. Consequently, it cannot be argued that the Security Council regarded Israel's presence in these territories as illegal. As an act of self-defense,(18) this military occupation was and continues to be legitimate, until a peace settlement can be reached and permanent borders defined and agreed upon.(19)

Other interpretations of the passage – suggesting, for example, that it was intended to denounce any military occupation – contradict not only its wording but also the established rules of customary international law. Its form, its place in the preamble rather than in the body of the resolution,(20) and a comparison with the subsequent passages all clearly indicate its concern with the implementation of existing norms rather than an attempt to create new ones.

The second provision that is relevant to the issue of withdrawal is to be found in paragraph 1(i): peace should include the application of the principle of "withdrawal of Israel armed forces from territories occupied in the recent conflict." While the Arabs insist on complete Israeli withdrawal from all the territories occupied by Israel in 1967,(21) Israel is of the opinion that the call for withdrawal is applicable in conjunction with the call for the establishment of secure and recognized boundaries by agreement.(22)



The Arab states base their claim on a combination of the abovementioned provision in the preamble about "the inadmissibility of the acquisition of territory by war" and the French version of the sentence which calls for "withdrawal," namely, "*retrait des forces armees israeliennes des territoires occupes lors du recent conflit.*" On the other hand, Israel's interpretation is based on the plain meaning of the English text of the withdrawal clause, which is identical with the wording presented by the British delegation. It is also supported by the rejection of proposals to add the words "all" and "the" before "territories."<sup>(23)</sup> Moreover, in interpreting the withdrawal clause, one must take into consideration the other provisions of the resolution, including the one mentioned above, on the establishment of "secure and recognized boundaries."

It seems that the resolution does not require total withdrawal for a number of reasons:

- As has already been discussed, the phrase in the preamble ("the inadmissibility of the acquisition of territory by war") merely reiterates the principle that military occupation, although lawful if it is the result of an act of self-defense, does not by itself justify annexation and acquisition of title to territory.
- The English version of the withdrawal clause requires only "withdrawal from territories," not from "all" territories, nor from "the" territories. This provision is clear and unambiguous. As Lord Caradon, the Representative of Great Britain, stated in the Security Council on November 22, 1967, "I am sure that it will be recognized by us all that it is only the resolution that will bind us, and we regard its wording as clear."<sup>(24)</sup> According to Prof. Eugene Rostow, who was at the time Undersecretary of State for Political Affairs in the U.S. Department of State: "For twenty-four years, the Arabs have pretended that the two Resolutions [242 and 338] are ambiguous....Nothing could be further from the truth."<sup>(25)</sup>
- The French version, which allegedly supports the request for full withdrawal, can perhaps *prima facie* be considered ambiguous, since the word "*des*" can be either the plural of "*de*" (*article indefini*) or a contraction of "*de les*" (*article defini*). It seems, however, that the French translation is an idiomatic rendering of the original English text, and possibly the only acceptable rendering into French.<sup>(26)</sup> Moreover, even Ambassador Bernard, the Representative of France in the Security Council at the time, said that "*des territoires occupes*" indisputably corresponds to the expression "occupied territories."<sup>(27)</sup>

If, however, the French version were ambiguous, it should be interpreted in conformity with the English text. Since the two versions are presumed to have the same meaning,<sup>(28)</sup> one clear and the other ambiguous, the latter should be interpreted in conformity with the former.<sup>(29)</sup>

Many varied opinions have been expressed on the question of what withdrawal the resolution envisaged. Some consider that the full withdrawal from Sinai in

pursuance of the 1979 peace treaty between Egypt and Israel should serve as a precedent that requires full withdrawal from further regions. Others have reached the opposite conclusion – namely, that by carrying out the considerable withdrawal from Sinai (1981) and from the Gaza Strip (in 2005), Israel has already fulfilled any withdrawal requirement. Some have claimed that the lack of a requirement for full withdrawal under the resolution allows Israel to carry out only minor border rectifications, while others have coined the slogan "land for peace." None of these attitudes can claim to represent the proper interpretation of Resolution 242. As mentioned, the resolution calls upon the parties to negotiate and reach agreement on withdrawal to agreed boundaries, without indicating the extent and the location of the recommended withdrawal.



Lord Caradon (left), Britain's ambassador to the UN in 1967, who drafted Resolution 242 with Ambassador Arthur Goldberg of the U.S. (AP Photo)

## Resolution 242 and the Refugee Issue

The problems concerning the refugees have been examined thoroughly in another chapter of this volume, and here I intend to discuss only the meaning of the relevant provision in Resolution 242. In this resolution the Security Council affirmed the necessity "for achieving a just settlement of the refugee problem" (paragraph 2(b)).

From the legal point of view, the refugee problem raises three questions: (1) Who should be considered a Palestinian refugee? (2) Do the Palestinian refugees have a right to return to Israel?(30) And (3) Do they have a right to compensation? Here the discussion will focus mainly on the second question: does Resolution 242 recognize that the Palestinian refugees have a right to return to Israel?

According to the Arab point of view, the answer is yes; according to the Israeli opinion it is no. The Israeli interpretation is based on a plain reading of the text, which speaks of a just settlement, without indicating what that settlement should be. The Arab interpretation, however, claims that Resolution 242 has, by implication, endorsed General Assembly Resolution 194(III) of 1948(31) which, in their opinion, has recognized a right of return for the refugees.

This interpretation is erroneous. If there had been an intention to incorporate GA Resolution 194(III), it should have been said expressly. One cannot read into a resolution something which is not mentioned nor hinted at in it. Moreover, GA Resolution 194(III) does not confer a right of return. Like most General Assembly resolutions, it is a recommendation. It says that "The General Assembly... *Resolves* that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return..." (paragraph 11). This is a very careful recommendation using the word "should" (not shall), and subjecting the recommended return to several conditions.

It follows that the Security Council has not recognized any "right" of return in Resolution 242. Moreover, the relationship between GA Resolution 194(III) and SC Resolution 242 (1967) is not one of incorporation, but rather of substitution – the leading UN provision is now in the Security Council text. The quest for a "just settlement" seems to imply a negotiated and agreed solution.

Interestingly, Resolution 242 has not limited the "just settlement" provision to Palestinian refugees. It may also have envisaged the many Jewish refugees from Arab countries who had to leave all their property behind. Most of them probably do not wish to return to their country of origin, but proper compensation may well be included in the "just settlement" of Resolution 242.



Eugene Rostow, former Dean of Yale Law School and Undersecretary of State for Political Affairs in the Johnson administration

## **Concluding Remarks**

A careful examination of the wording of the relevant provisions of Resolution 242 (1967) has led to the conclusion that the interpretation favored by the Arab states is misleading. By this resolution the Security Council has laid down several principles that should lead to a peaceful solution of the Arab-Israeli conflict. Among these principles are an Israeli withdrawal from territories occupied in 1967 to new secure and recognized boundaries, to be established by agreement, and the need for a just settlement of the refugee problem, without any reference to a right of return. The solution may include a right to settle in the Palestinian state after its establishment, settlement and integration in other states (Arab and non-Arab), and perhaps the return of a small number to Israel if compelling humanitarian reasons are involved, such as family unification.(32)

Negotiations with Egypt and with Jordan on the basis of Resolution 242 (1967) have already led to two peace treaties (1979 with Egypt, 1994 with Jordan). Let us hope that soon more peace treaties will follow.

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## Notes

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### Occupation – Avinoam Sharon

1. A.B. (Columbia), LL.B. (Hebrew U.), M.A. (JTS), Lt. Colonel (IDF res.), former IDF Military Attorney for Judea, Samaria and Gaza. This paper expands upon and updates ideas presented by the author in his article *Keeping Occupied: The Evolving Law of Occupation*, 1 *Regent J.L. & Pub. Pol'y* 145 (2009). The views expressed here are the author's, and do not necessarily represent the opinions of the Jerusalem Center for Public Affairs, the IDF, the State of Israel, or any of its agencies.
2. The joke would not work as well if we would say, for example, "Chinese" instead of "Israeli," although the Chinese control of Tibet has been defined by the U.S. Congress as an occupation (see *Foreign Relations Authorization Act*, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 355, 105 Stat. 647, 713 (1991), and *Foreign Relations Authorization Act*, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 536, 108 Stat. 382, 481 (1994), stating, inter alia, "Because Congress has determined that Tibet is an occupied sovereign country under international law"). Indeed, it is likely that the average person would be hard pressed to name other instances of occupation, since so few territorial disputes are referred to by that term. On the avoidance of the term "occupation" in regard to other conflicts, see Dore Gold, "From 'Occupied Territories' to 'Disputed Territories,'" <<http://jcpa.org/jl/vp470.htm>>, in this volume.
3. Thus, for example, in explaining that Germany was not subject to the law of occupation following the Second World War, Kelsen refers to the "un-occupied" territory administered by the Allies as: "The territory of the German Reich *occupied* in the Second World War after the complete defeat and surrender of its armed forces" [emphasis added – A.S.]. Hans Kelsen, *Principles of International Law* 76 (1952).
4. As Lauterpacht concluded, "the government of Germany by the Allied forces was not in the nature of belligerent occupation and was not subject to the customary and conventional rules of International Law relating to occupation of enemy territory." Oppenheim, *International Law*, vol. II, 436-37, H. Lauterpacht ed., 7th ed. (1952), 602; and see text *infra* at nn. 11-13.
5. "Talabani says time not ripe to seek US pullout from Iraq," Agence France Presse [Fr.] (May 9, 2005), <<http://ww2.epic-usa.org/Default.aspx?tabid=1006>>.
6. Daniel Thurer, "Current Challenges to the Law of Occupation," speech delivered by Professor Daniel Thurer, Member, International Committee of the Red Cross, 6th Bruges Colloquium, 20-21 October 2005, <<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/occupation-statement-211105?opendocument>>.
7. Indeed, as Robbie Sabel pointed out, "neither the US nor the UK has formally stated that they will be applying the IVth Geneva Convention to their administration of Iraq. In their joint letter to the UN Security Council of 8 May 2003, the two States affirmed that they 'will strictly abide by their obligations under international law including those relating to the essential humanitarian needs of the people of Iraq.' The Security Council, in the preamble to its subsequent Resolution of 22 May, designated the US and the UK as 'occupying powers,' but refrained from using the phrase 'occupying powers' in the operative part of the Resolution, which calls upon 'all concerned to comply fully with their obligations under international law including in particular the Geneva

Conventions of 1949 and the Hague Regulations of 1907.] Explicit mention of the relevant IVth Convention was lacking." (Robbie Sabel, "The Problematic Fourth Geneva Convention: Rethinking the International Law of Occupation," <<http://jurist.law.pitt.edu/forum/forumnew120.php>>.

8. Oppenheim, *International Law*, vol. II, 341-42, H Lauterpacht ed., 7th ed. (1952), 432.

9. For a review of the historical development of international law, and specifically the law of occupation, see Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (1949).

10. Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (II) Respecting the Laws and Customs of War on Land, 1899. The definition of occupation adopted by the regulations is that of the Brussels Code of 1874, see Graber, *ibid.*, 59-61.

11. Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, 1907. Although the English versions of Articles 42 and 43 appear slightly different in the English translations of Hague 1899 and Hague 1907, the French versions are identical:

*Article 42:* Un territoire est considere comme occupe lorsqu'il se trouve place de fait sous l'autorite de l'armee ennemie. L'occupation ne s'etend qu'aux territoires ou cette autorite est etablie et en mesure de s'exercer.

*Article 43:* L'autorite du pouvoir legal ayant pass ' de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dependent de lui en vue de retablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empechement absolu, les lois en vigueur dans le pays.

On the differences between Hague 1899 and Hague 1907, see Gerhard von Glahn, *The Occupation of Enemy Territory*, 296 (1957). For a comparison of the texts of Hague 1899, Hague 1907, and the Oxford, Brussels and Lieber Codes; see also the Appendix in Graber, *ibid.* 293ff.

12. Oppenheim, *International Law*, vol. II, H Lauterpacht ed., 6th ed. (1944), 341-42; Oppenheim, *International Law*, vol. II, H. Lauterpacht ed., 7th ed. (1952), 436-37. In this article, I refer to these editions of Oppenheim as they reflect the understanding of international law in the period leading up to and immediately following the adoption of the Fourth Geneva Convention.

13. Eyal Benvenisti, *The International Law of Occupation* 5-6, (1993).

14. Hans Kelsen, *Principles of International Law* 75-76 (1952).

15. Gerhard von Glahn, *The Occupation of Enemy Territory* 273 (1957).

16. Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," 3 *Is.L.Rev.* 279, 293 (1968).

17. Benvenisti, *supra* note 13, 59.

18. For a discussion of this shift in emphasis, see Benvenisti, *supra* note 13, chapter four.

19. Convention (IV) Respecting the Laws and Customs of War on Land, <<http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>>.

20. Glahn (1957), *supra* note 15, 27.

21. *Op. cit.*, 273.

22. This jump from 1949 to 1967 reflects an apparent lack of developments in the area of occupation during this period. This lack of development does not mean that there were no situations that might have warranted being termed "occupation." In the context of this study, it is interesting in light of the Egyptian presence in Gaza and the Jordanian presence in the West Bank during this entire period.

Indeed, these situations tend to receive little notice, if mentioned at all, in discussions of the

subject of occupation, even in the context of the Arab-Israeli conflict. Thus, for example, in his discussion of "Occupation after Armistice," Michel Bothe states: "Examples are the German occupation of parts of France after the armistices of 1871 and 1940, the Allied occupation of Italy after the armistice of 1943 and the occupation of Syrian (Golan Heights), Egyptian (Sinai Peninsula) and Jordanian/Palestinian (West Bank) territories by Israel after the ceasefire in 1967 and after the disengagement agreements following the Yom Kippur War in 1973." Michael Bothe, "Occupation after Armistice," in III *Encyclopedia of Public International Law*, 761 (1992). Indeed, although the Egyptian occupation of Gaza and the Jordanian occupation of the West Bank and East Jerusalem are mentioned (e.g., at p. 1483 and 1489) in Peter Malanczuk's comprehensive article "Israel: Status, Territory and Occupied Territories," we find statements like "The Gaza Strip, which had been *administered* by Egypt from 1948 to 1967 without raising any claim to title to the territory, has since remained under Israeli *military occupation*" (p. 1484) (emphasis added), and that the Al-Hammeh region was "then under Syrian *administration* and now under Israeli *occupation*" (p. 1485) (emphasis added). Peter Malanczuk, "Israel: Status, Territory and Occupied Territories," in II *Encyclopedia of Public International Law*, 1468 (1992). While it would not seem that the author intends any legal implication by this choice of words, it does appear to reflect the legal community's lack of interest in examining the legal nature of those "administrations." The then nine-year-old Egyptian occupation of Gaza and Jordanian occupation of the West Bank also receive no mention in Glahn (1957).

23. I refer to "pre-war borders" bearing in mind that the borders between Israel and the adjacent Arab states did not have the status of recognized international borders, but rather constituted ceasefire lines established between Israel and her neighbors under the 1949 Armistice Agreements between Israel and Egypt, Transjordan, Syria and Lebanon.

24. Farhy, "Current Trends in the Areas Administered by Israel," 113 *Mil.L.Rev.* 47, 50 (1986).

25. The questions related to the legal status of the extension of Israeli law to the Golan under the Golan Heights Law, 1981, and to the transfer of sovereignty over the Golan to Syria as a result of the Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, 1920, go beyond the limited scope of this article. For a discussion of the historical background, see Y. Meron, *The Golan Heights, in Meir Shamgar, ed., Military Government in the Territories Administered by Israel 1967-1980* (1982) 85.

26. See Carol Farhi, "On the Legal Status of the Gaza Strip," in Shamgar, *ibid.*, 61, 74 ff.

27. See, Malanczuk, *supra* n. 22, 1490; Blum, *supra* n. 16, 289-290.

28. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, in Shamgar, *supra* note 25, 13, 31 ff.; Blum, *supra* note 15, 289 ff.

29. Shamgar, *supra* note 25, 32; Farhy, *supra* n. 23, 50; Yoram Dinstein, "The International Legal Dimensions of the Arab-Israeli Conflict," in Kellerman, Siehr, Einhorn, eds., *Israel Among the Nations*, 137, 150-51 (1998). For a review of the official Israeli position on the application of the Hague Regulations and the Fourth Geneva Convention and the position of the Israeli Supreme Court, see Nissim Bar-Yaakov, "The Application of the Law of War to the Administered Territories," 18 *Mishpatim* 831 (1990) (the article is in Hebrew, however the statements of Israel's official position are quoted in English).

30. Blum, *supra* n. 16, 294.

31. Shamgar, *supra* note 28, 37.

32. David Yahav, ed., *Israel, the Intifada and the Rule of Law* (1993) 21.

33. Shamgar, *supra* note 28, 38.

34. See ICRC Commentary to Geneva Convention IV, 21-22 <<http://www.icrc.org/ihl.nsf/COM/380-600005?OpenDocument>>; and see, Gerhad von Glahn, *Law Among Nations*, 7th ed. (1996) 667.

35. ICRC Commentary, 22.

36. Bothe, *supra* note 22, 764.
37. E.g., Blum, *supra* note 16, 294.
38. E.g., Malanczuk, *supra* note 22, 1493.
39. ICRC Note to the Government of Israel of May, 24, 1968, cited in Malanczuk, *supra* note 22, 1495.
40. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed in Washington, D.C., on September 28, 1995, 36 I.L.M. 551 (1997). For a brief summary of the Interim Agreement and the events leading up to it, see *Efrat Ungar v. Palestine Liberation Organization et al.*, 402 F.3d 274 (1st Cir. 2005).
41. See, e.g., *Ungar*, *ibid.*
42. Yoram Dinstein, "The International Legal Dimensions of the Arab-Israeli Conflict," in Kellerman, Siehr, Einhorn, eds., *Israel Among the Nations*, 137, 153 (1998).
43. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 78 (Int'l Ct. Justice, July 9, 2004), 43 ILM 1009 (2004) <<http://www.icj-cij.org/docket/files/131/1671.pdf>>.
44. See Daniel Thurer & Malcolm Maclaren, "'Ius Post Bellum' in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law," in *Festschrift für Jost Delbrück* (Berlin, 2005), <<http://www.ivr.uzh.ch/istthuerer/forschung/FSDelbrueck.pdf>>.
45. See Yuval Shany, "Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement," 8 *Yearbook of Int'l Human. L.* 369 (2005); Dore Gold, "Legal Acrobatics: The Palestinian Claim that Gaza is Still "Occupied" Even After Israel Withdraws," <<http://www.jcpa.org/brief/brief005-3.htm>>.
46. *Supra*, n. 43.
47. See, e.g., Ariel Zeman, "Taking War Seriously: Applying the Law of War to Hostilities within an Occupied Territory," 38 *Geo. Wash. Int'l L. Rev.* 645 (2006).
48. Sari Bashi and Kenneth Mann, "Disengaged Occupiers: The Legal Status of Gaza," position paper by Gisha: Legal Center for Freedom of Movement, 2007, <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>; and cf. Yuval Shany, *supra* n. 45, and Yuval Shany, "Binary Law Meets Complex Reality: The Occupation of Gaza Debate," 41 *Is.L.Rev.* 68, 71-72 (2008).
49. Bashi and Mann, *ibid.*, p. 18.
50. *Ibid.*, pp. 64 ff. It should be noted that in making its assertion, the authors restate the Israeli government's understanding of the term "occupation" as solely based upon the question of the presence of troops. In other words, the authors represent "effective control" as the Israeli government's definition and then argue against the government's narrow understanding of that definition. This studiously inaccurate presentation of the Israeli position makes it easier for the authors of the paper to advance their counter claim. Be that as it may, the theoretical claim of effective control by an "invisible hand" is not easily reconciled with a lack of the actual physical presence necessary for the performance of an occupier's obligations towards the civilian population (see Shany, *supra* n. 45 at 380), nor is it easily reconciled with a reality of uncontrolled rocket and mortar fire from the allegedly controlled area.
51. See Sabel, *supra* n. 7.
52. An example of such circularity is provided by Rotem Giladi: "The Israeli-Palestinian context demonstrates that occupation exists even in the event the territory is taken from a state having no (*recognized!*) sovereign title over the territory" [emphasis original]. Rotem Giladi, "The Jus ad Bellum/Jus in Bello Distinction and the Law," 41 *Is.L.Rev.* 247, 287 (2008). Here, Giladi uses the mere assertion that Israel is an occupier in the absence of a prior sovereign as proof that occupation is possible in the absence of a prior sovereign. Another example is provided by Noemi



Gal-Or: "Belligerent occupation is normally considered a situation where the direct occupant (of the occupied population's territory) is a state, e.g., Germany following World War II, or Israel's occupation of foreign territories following June 1967." Noemi Gal-Or, "Suspending Sovereignty: Lessons from Lebanon," 41 *Is.L.Rev.* 247, 287 (2008), 302, 308 n. 25. Gal-Or replaces customary law's traditional requirement of a prior sovereign with the controversial concept of an "occupied population," apparently on the basis of an a priori belief that Israel is an occupier, and therefore, in the absence of a prior sovereign, occupation can only refer to the existence of an "occupied population." Her flawed reasoning also leads her to mistakenly present the Allied control of Germany following World War II as an example of a "normal" case of belligerent occupation (see text *supra* at nn. 11-13).

53. The ongoing debates on Guantanamo and Bagram are cases in point. Regardless of where one stands on the issues, it should be clear that the demands for *habeas corpus* and many of the allegations of human rights abuses represent attempts to judge international humanitarian law (IHL) by standards of human rights law. A finding that the Geneva Conventions are being observed, or that the claims and allegations are unsupported by the rules of IHL, does not address the questions raised, inasmuch as the questions are premised upon an assumption of the inadequacy of IHL. On the relationship between IHL and human rights law, see, e.g., Michelle A. Hansen, "Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict," 194 *Mil.L.Rev.* 1 (2007); Amichai Cohen, "Rules and Standards in the Application of International Humanitarian Law," 41 *Is.L.Rev.* 41 (2008); Grant T. Harris, "Human Rights, Israel, and the Political Realities of Occupation," 41 *Is.L.Rev.* 87.

54. Yuval Shany has described the Israeli presence in the territories as "the most conspicuous long-term occupation situation in which the occupier has accepted the applicability, at least *de facto*, of a significant part of the body of laws of occupation." Yuval Shany, "Forty Years After 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context," 41 *Is.L.Rev.* 6, 7 (2008).

55. In a recent decision concerning military operations in the Gaza Strip, Israel Supreme Court President Beinisch wrote for the Court: "According to the aforesaid, the normative arrangements that govern the State of Israel when it conducts combat operations in the Gaza Strip derive from several legal sources. These legal sources include international humanitarian law, which is enshrined mainly in the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907, and the regulations annexed thereto, whose provisions have the status of customary international law; the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, whose customary provisions constitute a part of the law of the State of Israel and have required interpretation by this court in several judgments...; and the first Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977 (hereafter – 'the First Protocol'), to which Israel is not a party, but whose customary provisions also constitute a part of Israeli law....In addition to international law, the fundamental rules of Israeli public law also apply....According to the rules of Israeli public law, the army is liable to act, inter alia, fairly, reasonably and proportionately, while properly balancing the liberty of the individual against the needs of the public and while taking into account security considerations and the nature of the hostilities occurring in the area." HCJ 201/09 *Physicians for Human Rights et al. v. The Prime Minister of Israel et al.*, para. 15, available in English at <[http://elyon1.court.gov.il/files\\_eng/09/010/002/n07/09002010.n07.htm](http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.htm)>. In an earlier decision, former Supreme Court President Barak wrote: "In a long line of judgments, the Supreme Court has determined the standards for the scope of judicial review of decisions and acts of the military commander in territory held under belligerent occupation.

This judicial review is anchored in the status of the military commander as a public official, and in the jurisdiction of the High Court of Justice to issue orders to bodies fulfilling public functions by law." HCJ 7957/04 *Mara'abe et al. v. The Prime Minister et al.* (the "Security Barrier" case) available in English at: <[http://elyon1.court.gov.il/Files\\_ENG/04/570/079/a14/04079570.a14.htm](http://elyon1.court.gov.il/Files_ENG/04/570/079/a14/04079570.a14.htm)>. Note that in the course of the decision, the Court employs the term "belligerent occupation" in regard to Israel, noting that inasmuch as Israel has *de facto* agreed to act as a belligerent occupant in applying the law, the Court need not address the *de jure* status of Israel's presence in

the territories. To date, the Israeli Supreme Court has not ruled on the *de jure* status of Israel's administration of the territories.

56. "With the exception of the Israeli occupation after the 1967 war, all other occupants after World War II refrained from resorting to the Hague Regulations or the Fourth Geneva Convention as the source of their authority or as a guide to their actions. The propensity to avoid the regime of occupation is particularly noticeable in the various occupations of the 1970s and early 1980s." Benvenisti, *supra* n. 17, 180.

57. Benvenisti, *supra* n. 17, 197-99; Tristan Ferraro, "Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities," 41 *Is.L.Rev.* 331, 352-54 (2008).

58. On the use of the term "occupation" as an accusation, see Dore Gold, *supra* n. 2.

59. The ICJ opinion on the security barrier represents just one example of politically motivated abuse of international law and the concept of occupation in this regard. On that decision, see, e.g., §23 of President Barak's opinion in HCJ 7957/04 *Mara'abe*, *supra* n. 55.

### "Disputed Territories" – Dore Gold

1. CNN Larry King Weekend, "America Recovers: Can the Fight Against Terrorism be Won?," November 10, 2001 (CNN.com/transcripts).

2. Mustafa Barghouti, "Occupation is the Problem," *Al-Ahram Weekly Outline*, December 6-12, 2001.

3. Anne F. Bayefsky, "Terrorism and Racism: The Aftermath of Durban," *Jerusalem Viewpoints*, no. 468, December 16, 2001.

4. See Bayefsky, *op. cit.* U.S. and European officials may use the term "occupation" out of a concern for the humanitarian needs of the Palestinians, without identifying with the PLO political agenda at Durban or at the UN.

5. U.S. Department of State, Consular Information Sheet: India (<http://travel.state.gov/india.html>) November 23, 2001.

6. *1999 Country Reports on Human Rights Practices: Azerbaijan*, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, February 25, 2000.

7. Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, March 15, 2001, Judgment on the Merits, International Court of Justice, March 16, 2000, paragraph 100.

8. The Japanese Foreign Ministry does not use the language of "ending the Russian occupation of the Kurile Islands," but rather resolving "the Northern Territory Issue." ([www.mofa.go.jp/region/europe/russia/territory](http://www.mofa.go.jp/region/europe/russia/territory)). U.S. Department of State "Background Notes" describe the Turkish Republic of Northern Cyprus as the island's "northern part [which is] under an autonomous Turkish-Cypriot administration supported by the presence of Turkish troops" – not under Turkish occupation.

9. Stephen Schwebel, "What Weight to Conquest," *American Journal of International Law*, 64 (1970):345-347.

10. Vernon Turner, "The Intent of UNSC 242 – The View of Regional Actors," in *UN Security Council Resolution 242: The Building Block of Peacemaking* (Washington: Washington Institute for Near East Policy, 1993), p. 27.

11. Meir Rosenne, "Legal Interpretations of UNSC242," in *UN Security Council Resolution 242: The Building Block of Peacemaking, op. cit.*, p. 31.

12. Under the Carter administration, Hansell's distinction led, for the first time, to a U.S. determination that Israeli settlement activity was illegal since it purportedly contravened Article 49

of the Fourth Geneva Convention which stated that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it is occupying." Subsequently, the Reagan and Bush administrations altered the legal determination of the Carter period, changed the U.S. voting pattern at the UN, and refused to describe Israeli settlements as *illegal*, even if American *political* objections to settlement activity continued to be expressed. One reason was that the Fourth Geneva Convention applied to situations like that of Nazi-occupied Europe, which involved "forcible transfer, deportation or resettlement of large numbers of people." This view was formally stated by the U.S. Ambassador to the UN in Geneva, Morris Abram, on February 1, 1990, who had served on the U.S. staff at the Nuremberg trials and, hence, was familiar with the legal intent behind the 1949 Fourth Geneva Convention.

13. Dr. Hans-Peter Gasser, Legal Adviser, International Committee of the Red Cross, "On the Applicability of the Fourth Geneva Convention After the Declaration of Principles and the Cairo Agreement," paper presented at the International Colloquium on Human Rights, Gaza, September 10-12, 1994. Gasser did not state that in his view the territories were no longer "occupied," but he did point out the legal complexities that had arisen with Oslo's implementation.

14. Foreign Minister Shimon Peres's Address at the Israeli-Palestinian Interim Agreement Signing Ceremony, Washington, D.C., September 28, 1995.

15. Ehud Barak, "Israel Needs a True Partner for Peace," *New York Times*, July 30, 2001.

16. The present intifada violence resulted from a strategic decision taken by Yasser Arafat, as admitted by numerous Palestinian spokesmen:

"Whoever thinks the intifada broke out because of the despised Sharon's visit to the Al-Aqsa Mosque is wrong....This intifada was planned in advance, ever since President Arafat's return from the Camp David Negotiations," admitted Palestinian Communications Minister 'Imad Al-Faluji (Al-Safir, March 3, 2001, trans. MEMRI). Even earlier, Al-Faluji had explained that the intifada was initiated as the result of a strategic decision made by the Palestinians (*Al-Ayyam*, December 6, 2000).

Arafat began to call for a new intifada in the first few months of the year 2000. Speaking before Fatah youth in Ramallah, Arafat "hinted that the Palestinian people are likely to turn to the intifada option" (*Al-Mujahid*, April 3, 2000).

Marwan Barghouti, the head of Fatah in the West Bank, explained in early March 2000: "We must wage a battle in the field alongside of the negotiating battle...I mean confrontation" (*Ahbar Al-Halil*, March 8, 2000). During the summer of 2000, Fatah trained Palestinian youths for the upcoming violence in 40 training camps.

The July 2000 edition of *Al-Shuhada* monthly, distributed among the Palestinian Security Services, states: "From the negotiating delegation led by the commander and symbol, Abu Amar (Yasser Arafat) to the brave Palestinian people, be ready. The Battle for Jerusalem has begun." One month later, the commander of the Palestinian police told the official Palestinian newspaper *Al-Hayat Al-Jadida*: "The Palestinian police will lead together with the noble sons of the Palestinian people, when the hour of confrontation arrives." Freih Abu Middein, the PA Justice Minister, warned that same month: "Violence is near and the Palestinian people are willing to sacrifice even 5,000 casualties" (*Al-Hayat al-Jadida*, August 24, 2000 – MEMRI).

Another official publication of the Palestinian Authority, *Al-Sabah*, dated September 11, 2000 – more than two weeks before the Sharon visit – declared: "We will advance and declare a general intifada for Jerusalem. The time for the intifada has arrived, the time for intifada has arrived, the time for Jihad has arrived."

Arafat advisor Mamduh Nufal told the French *Nouvel Observateur* (March 1, 2001): "A few days before the Sharon visit to the Mosque, when Arafat requested that we be ready to initiate a clash, I supported mass demonstrations and opposed the use of firearms." Of course, Arafat ultimately adopted the use of firearms and bomb attacks against Israeli civilians and military personnel. On September 30, 2001, Nufal detailed in *al-Ayyam* that Arafat actually issued orders to field commanders for violent confrontations with Israel on September 28, 2000.

## Settlements – Alan Baker

\* The author wishes to thank Adam Shay of the Jerusalem Center for Public Affairs for his assistance in researching UN resolutions and other material for this article.

1. Mohammed Daraghmeh, "Palestinians to Take Settlement Battle to UN," Associated Press, December 29, 2010. See <http://www.washingtontimes.com/news/2010/dec/29/palestinians-take-settlement-battle-un/>.
2. Extending from General Assembly Resolution A/RES/3005/(XXVII) of December 15, 1972, through Security Council Resolutions 446(1979), 452 (1979), 465(1980), to the most recent General Assembly resolution of December 10, 2010, A/RES/65/105.
3. United Nations, Treaty Series, vol. 75, No. 973, p. 287.
4. The International Court of Justice in its 2004 Advisory Opinion on Israel's Security Fence. See <http://www.icj-cij.org/docket/files/131/1671.pdf> at paragraph 120.
5. See *ICRC Commentary to the Fourth Geneva Convention*, edited by Jean S. Pictet (1958), at pages 3-9, for an extensive summary of the reasoning behind the drafting of the convention.
6. *Id.*, p. 278.
7. See the Foreword to the ICRC Commentary, at note 5 above.
8. *American Journal of International Law*, Vol. 84, 1990, p. 719.
9. Ambassador Morris Abram, in a discussion with Arab ambassadors in Geneva, February 1, 1990.
10. Quoted in Phillips, "The Illegal Settlements Myth," *Commentary*, 2010.
11. See note 14 supra
12. U.N. Doc. A/CONF.183/9\*
13. The relevant part of Article 8, paragraph 2(b)(viii), listing the various war crimes, reads as follows: "The transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies" (emphasis not in the original).
14. Israel-Palestinian Declaration of Principles on Interim Self-Government Arrangements of Sept. 13, 1993, Article V, para. 3, as well as Article XXXI, para. 5 of the Interim Agreement, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>.
15. See the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Sept. 28, 1995, at Article XVIII, para. 1, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.
16. Israel-Palestinian Declaration of Principles, September 13, 1993, Exchange of Letters between Prime Minister Rabin and Chairman Arafat of September 9-10, 1993, Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Interim Agreement between Israel and the Palestinians, September 28, 1995, Agreement on Temporary International Presence in Hebron, May 9, 1996, The Wye River Memorandum, October 23, 1998, The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, September 4, 1999, Protocol Concerning Safe Passage between the West Bank and the Gaza Strip, October 5, 1999. All these documents are referenced in <http://www.mfa.gov.il/mfa/peace%20process/reference%20documents/>.
17. Article 27 of Annex III (Civil Affairs Annex) to the 1995 Interim Agreement sets out the agreed terms for planning and zoning and construction powers in the territories, and places no limitation on either side to build in the areas under their respective jurisdictions. <http://www.mfa.gov.il/MFA/>

Peace+Process/Guide+to+the+Peace+Process/Gaza-Jericho+Agreement+Annex+II.htm.

18. Article IV (Land), see note 15.

## **The False Charge of Apartheid – Robbie Sabel**

1. For example, one international law website has an item titled: “The State of Israel has a formal system of discrimination set up which technically fits the official UN definition of Apartheid.” <http://www.geocities.com/savepalestinenow/internationallaw/studyguides/sgil3k.htm>.

2. For example, <http://www.geocities.com/savepalestinenow/internationallaw/studyguides/sgil3k.htm>.

3. “Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law,” Democracy and Governance Programme of the Human Sciences Research Council of South Africa; [http://www.hsrc.ac.za/Media\\_Release-378.phtml](http://www.hsrc.ac.za/Media_Release-378.phtml).

4. Benjamin Pogrund, “Why They Depict Israel as a Chamber of Horrors Like No Other in the World?” *The Guardian*, February 8, 2006.

5. Rhoda Kadalie and Julia Bertelsmann, “Franchising 'Apartheid': Why South Africans Push the Analogy,” Z-Word.com, March, 2008.

6. Benjamin Pogrund, “Israel Is a Democracy in Which Arabs Vote,” *Focus*, December 2005.

7. UN General Assembly Resolution 3379 (XXX) (1975).

8. All three quotes from Judith H. Banki, “The UN's Anti-Zionism Resolution: Christian Responses,” [http://www.ajcarchives.org/AJC\\_DATA/Files/740.pdf](http://www.ajcarchives.org/AJC_DATA/Files/740.pdf).

9. UN General Assembly Resolution 46/86 (1991). Adopted by a vote of 111 to 25.

10. Jimmy Carter, Palestine, *Peace Not Apartheid* (New York: Simon and Schuster, 2006).

11. Alan Dershowitz, *The Case Against Israel's Enemies: Exposing Jimmy Carter and Others Who Stand in the Way of Peace* (New York: John Wiley and Sons, 2008), p. 24.

12. Joseph Lelyveld, “Jimmy Carter and Apartheid,” *New York Review of Books*, March 29, 2007.

13. <http://www.africanaencyclopedia.com/apartheid/apartheid.html>. The Statute of the International Criminal Court defines apartheid as one of the crimes against humanity, being “inhumane acts... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime” (Article VII of the Statute of the ICC).

14. <http://www.merriam-webster.com/dictionary/apartheid>.

15. The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (1015 UNTS 243) extends the definition beyond the South African-type situation. The Treaty is regarded by many as obsolete and it has not been ratified by any Western European state or by any state member of NATO.

16. Prohibition of Mixed Marriages Act, Act No. 55 of 1949.

17. South African Immorality Amendment Act, Act No. 21 of 1950; amended in 1957 (Act 23).

18. South African Group Areas Act, Act No. 41 of 1950.

19. South African Bantu Building Workers Act, Act No. 27 of 1951.

20. South African Separate Representation of Voters Act, Act No. 46 of 1951 (as amended in 1956).

21. South African Natives (Abolition of Passes and Co-ordination of Documents) Act, Act No. 67 of 1952.
22. South African Native Labour (Settlement of Disputes) Act of 1953.
23. South African Bantu Education Act, Act No. 47 of 1953.
24. South African Extension of University Education Act, Act No. 45 of 1959.
25. South African Reservation of Separate Amenities Act, Act No. 49 of 1953.
26. The Freedom House report for 2009 places Israel as one of the 42 states in the world designated as "Free" out of a total of 193 states investigated.  
<http://www.freedomhouse.org/template.cfm?page=363&year=2009>.
27. Except for the Arab Druze population, Arabs do not have to do compulsory army service but can and do volunteer to serve in the army, notably the Bedouin Arabs.
28. Section 144A of the Penal Law, 1977, as amended in 1986 and 1992, provides for a penalty of up to five years' imprisonment for a person who incites to racism.
29. *Kaadan v. Israel Lands Administration et al.* HCJ 6698/95.
30. *Burkan v. Minister of Finance* HCJ 114/79 P.D. 32 (2) 800, 806.
31. Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000.
32. Kadale and Bertelsmann, op. cit.
33. "Israel Has Made Itself into a White Colonial Settler State, Mimicking South Africa before the End of Apartheid." Lisa Rofel, Anthropology, UC Santa Cruz, <http://www.arabicnews.com/ansub/Daily/Day/060609/2006060907.html>.
34. "The Palestinian Grassroots Anti-Apartheid Wall Campaign,"  
<http://www.stopthewall.org/downloads/pdf/4PageFactSheetOctober9.pdf>.
35. Ibid.
36. Daryl J. Glaser, "Zionism and Apartheid: a Moral Comparison," *Ethnic and Racial Studies*, vol. 26, no. 3, May 2003, pp. 403–421.
37. Ibid.
38. <http://www.stopthewall.org/downloads/pdf/4PageFactSheetOctober9.pdf>.
39. An interesting historical aside is that it was largely the Zionist movement that was the catalyst for the creation of Palestinian nationalism.
40. <http://electronicintifada.net/v2/article689.shtml>.
41. Basic Law: The Knesset (1958).
42. <http://www.geocities.com/savepalestinenow/internationallaw/studyguides/sgil3k.htm>.
43. See note 27 above.
44. Preamble, 1922 League of Nations Mandate for Palestine, LON Official Journal, August 1922, p. 1007.
45. Article 6, 1922 League of Nations Mandate for Palestine, LON Official Journal, August 1922, p. 1007.
46. Part B (I) (3) UN General Assembly Resolution 181(II) on the Future Government of Palestine, 29 November 1947 (GAOR, 2nd Session 1947, p. 131).
47. UNGA Resolution 273(III), 31 May 1949.
48. "Formalizing Apartheid Masked as a Peace Initiative," <http://www.zmag.org/znet/>

[viewArticle/14233](#).

49. Noam Chomsky, *Mid-East Realities*, 28 October 2000, <http://www.hartford-hwp.com/archives/51a/index-j.html>.

50. Francis A. Boyle, "The al-Aqsa Intifada and International Law," 17 December 2000, <http://www.hartford-hwp.com/archives/51a/091.html>.

51. Sara Flounders, "Occupied Palestine," *Workers World*, 6 June 2002, <http://www.hartford-hwp.com/archives/51a/089.html>.

52. Workshop entitled "Legal Analysis of the Applicability of the Apartheid Analogy to Israel and the Occupied Territories," organized by Avocats Sans Frontieres, Al-Ram, December 15-16, 2005.

53. 1993 Declaration of Principles on Interim Self-Government Arrangements, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>.

54. 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm>.

55. A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, <http://www.state.gov/r/pa/prs/ps/2003/20062.htm>.

56. For example, UN Security Council Resolution 1515, 19 November 2003; Resolution 1850 of 16 December 2008.

57. "Noting the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process" (ES-10114 adopted by the General Assembly of the United Nations on 8 December 2003).

58. "The Court is conscious that the 'Roadmap,' which was endorsed by the Security Council...constitutes the negotiating framework for the resolution of the Israeli-Palestinian conflict...A number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each Party." ICJ Advisory Opinion, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," 9 July 2004.

59. <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm>.

60. <http://www.jewishvirtuallibrary.org/jsource/Peace/fence.html>.

61. For examples of other democratic states that have built similar fences, see <http://www.jewishvirtuallibrary.org/jsource/Peace/fence.html>.

62. ICJ Advisory Opinion, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," 9 July 2004.

63. See this author's critique of the court's ruling on the issue: R. Sabel, "The International Court of Justice Decision on the Separation Barrier and the Green Line," *Israel Law Review*, vol. 38, no. 1-2 (2005), p. 316.

64. "Occupation, Colonialism, Apartheid?" see note 3 above.

65. <http://electronicintifada.net/v2/article689.shtml>.

66. *Statistical Yearbook for 2007/2008*, Jerusalem Institute for Israel Studies, [http://www.jiis.org.il/imageBank/File/shnaton\\_2007\\_8/shnaton%20C0406.pdf](http://www.jiis.org.il/imageBank/File/shnaton_2007_8/shnaton%20C0406.pdf).

67. "Separate but Unequal in Palestine: The Road to Apartheid," <http://www.bilin-village.org/english/articles/press-and-independent-media/Separate-but-Unequal-in-Palestine-The-Road-to-Apartheid>.

68. Dershowitz, p. 25.

69. Michael Ignatieff, "Israel Apartheid Week and CUPE Ontario's Anti-Israel Posturing Should Be Condemned," *National Post*, March 5, 2009.

70. <http://www.geocities.com/savepalestineno/internationallaw/studyguides/sgil3k.htm>.

### **The Myth of Israel as a Colonialist Entity – Dore Gold**

1. Itamar Marcus and Nan Jacques Zilberdik, "Official PA Terminology Guide: Instead of 'Terror' Say 'Resistance'," Palestinian Media Watch, June 19, 2012.

2. Maxine Rodinson, *Israel: A Colonial Settlers State?* (New York: Pathfinder, 1973). See also, Rashid Khalidi, "The Colonial Foundations of Israel," *Journal of Palestine Studies*, Vol. 3, No. 4, Summer 1974.

3. British Consular Report 1865, "Report on Commerce of Jerusalem during the Year 1863," Foreign Office Records, FO 195/808, British National Archives. See also Dore Gold, *The Fight for Jerusalem: Radical Islam, the West, and the Future of the Holy City* (Washington: Regnery, 2007) p. 290.

4. Elizabeth Monroe, *Britain's Moment in the Middle East* (London: Chatto and Wyman, 1963), p. 38.

5. Under these treaties, the Arab Gulf states surrendered their external sovereignty to the British government. The first such agreement was signed with the al-Khalifa of Bahrain on December 22, 1880. See Document 141, "Agreement Between Great Britain and the Shaykh of Bahrayn," J. C. Hurewitz, *The Middle East and North Africa in World Politics: A Documentary Record, Volume 1, 1535-1914* (New Haven: Yale University Press, 1975), p. 432.

6. "Abbas Speech: This Is a Struggle between the National Project and the Emirate of Darkness," *MEMRI*, Special Dispatch, June 22, 2007.

7. Professor Moshe Gil, *A History of Palestine: 634-1099* (Cambridge University Press, 1992).

8. Gil, p. 2.

9. In 1567-8 there were 14,376 residents in Safed, of which 5,451 were Muslims and 8,925 were Jews. See Harold Rhode, "The Administration and Population of the Sancak of Safed in the Sixteenth Century," submitted in partial fulfillment of the requirements for the Degree of Doctor of Philosophy in the Faculty of Political Science, Columbia University, 1979, p. 171. In the villages of the Galilee, as well as in Jerusalem, there were Jews known as *Must'arabim*, who lived in these areas prior to the influx of Jews from Spain and Portugal and were understood by rabbinic leaders to be descendants of the Jewish community from the time of the destruction of the Temple. See Minna Rozen, "The Position of the Musta'rabs in the Inter-Community Relationships in Eretz Israel from the End of the 15th Century," *Catherda*, (October 1980) Hebrew.

10. Arie Morgenstern, *Hastening Redemption Messianism and the Resettlement of the Land of Israel* (Oxford: Oxford University Press, 2006), p. 51.

### **Israel's Anti-Terror Fence – Laurence E. Rothenberg and Abraham Bell**

1. See "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (Request for Advisory Opinion).

2. Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, UNGA Res. A/ES-10/L.16.

3. Advisory jurisdiction is virtually unknown in Anglo-American common law systems, but is often granted to constitutional or supreme courts in continental European legal systems.



4. Charter of the United Nations, Art. 96 (1945); Statute of the International Court of Justice, Art. 65 (1946).
5. Resolution A/RES/ES-10/14 (A.ES-10/L.16) of December 8, 2003, affirming Resolution A/RES/ES-10/13 of October 27, 2003.
6. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, p. 16.
7. See "A Performance-Based Roadmap to a Permanent Two-State Solution to the Israel-Palestinian Conflict," April 30, 2003; "Secretary-General's Statement on the Road Map for Middle East Peace," April 30, 2003.
8. The court can also decline jurisdiction if it finds that the question requires a factual investigation that cannot be conducted without consent of the parties involved. In this situation, however, there are no "parties" per se because it is an advisory case and not a dispute between nations in which consent to the court's jurisdiction is an issue.
9. Proportionality also requires that inevitable civilian deaths are not out of proportion to the military advantage gained by an attack. That consideration is not relevant in this case, however. Likewise, a third requirement that attacks distinguish between civilians and military targets is not relevant here.
10. Convention on the Prevention and Punishment of the Crime of Genocide, Art. 2 (1949); Rome Statute of the International Criminal Court, Art. 6 (1998) [hereinafter, Rome Statute].
11. Rome Statute, *supra* note 9, at Art. 7.
12. See Human Rights Watch, "Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians" (Oct. 2002).
13. Rome Statute, *supra* note 9, at Art. 8(2). This principle applies no matter whether the armed conflict is defined as international or non-international in character.
14. *Id.* at IV.
15. Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/13 of October 21, 2003, A/ES-10/248.
16. For a recent press account, see Ranjit Devraj, "India Pursues Fence Construction in Kashmir," Inter Press Service, Dec. 5, 2003. Pakistan does not consider India to be sovereign over any part of Kashmir, on both sides of the line of control.
17. Mandate for Palestine Confirmed by Council of League of Nations, July 24, 1922, reprinted in Report to the General Assembly of the United Nations Special Committee on Palestine, Vol. II, Annexes, Appendix and Maps 18-22, U.N. Doc. A/364 Add. 1 (Sep. 9, 1947).
18. G.A. Res 181(II), U.N. Doc. A/519 (Jan. 8, 1948).
19. Israel-Egypt Armistice, Articles IV.3, V; Israel-Jordan Armistice, Article II.2; Israel-Syria Armistice, Articles II.2, V.1, V.5.
20. Palestine National Charter of 1964, Art. 24. No reconciliation is offered with Article 2 of the Charter, which asserts that "Palestine, within the boundaries it had during the period of the British Mandate, is an indivisible territorial unit."
21. Israel-Jordan Peace Treaty, Art. 3.3.
22. S/RES/242 of November 22, 1967. Resolution 338, often mentioned together with 242, simply calls upon the parties to implement 242 without adding any new demands. S/RES/338 (1973) of October 22, 1973.
23. Interim Agreement, Art. 31.6.
24. Israel-Egypt Peace Treaty, Article 2; Israel-Jordan Peace Treaty, Article 3.1 and Annex 1.
25. Britain, for example, was not an "occupying power" when it reconquered the Falkland Islands

from Argentina in 1982, nor was Kuwait when it and its allies reconquered its territory from Iraq in 1991.

26. Embassy of Switzerland, Note of Information Sent to States Parties to the Convention and Protocol, September 13, 1989.

27. Interim Agreement, Articles 10.4 and 12.1.

28. Interim Agreement, Article 12.1; Annex 1, Article 2.3.a.

29. Interim Agreement, Annex 1, Articles 1.2, 1.7, and 9.2.a.

30. Declaration of Principles, Article 15; Interim Agreement, Article 21.

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, pp. 16-17.

32. "Palestine" is the name given to the PLO observer delegation at the UN.

### **The ICJ Opinion – Robbie Sabel**

1. *ICJ Opinion*, at para. 101.

2. *ICJ Opinion*, opinion of the Court, at para. 101.

3. Separate Opinion of Judge Kooijmans, para. 30, available at [http://www.icj-cij.org/icjwww/idocket/imwp/imp\\_advisory\\_opinion\\_separate\\_Kooijmans.htm](http://www.icj-cij.org/icjwww/idocket/imwp/imp_advisory_opinion_separate_Kooijmans.htm).

4. *Oppenheims International Law*, Sir Robert Jennings and Sir Arthur Watts, eds. (London: Longman, 1996), vol. 1, 382.

5. See C.C. 2538/00 Jerusalem District Court, *Irena Litwak Nuritz et al v. The Palestinian Authority and Yasser Arafat* (62(2) P. M. 776).

6. See Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 5th ed., 2003), 222.

7. UNGA Resolution A/Res./43/177 of 15 December 1988. "The designation Palestine used within the UN system has no territorial connotation. General Assembly resolution 43/177 of 15 December 1988, which provided that the designation Palestine should be used in place of the designation Palestine Liberation Organization, emphasized that this was without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system." Right of Reply by Ambassador Arye Mekeel on Representation of the Occupied Palestinian Territory, including East Jerusalem, UNGA 17 December 2003, available at [http://www.israel-un.org/gen\\_assembly/me/mekeel\\_credentials\\_17dec2003.htm](http://www.israel-un.org/gen_assembly/me/mekeel_credentials_17dec2003.htm).

8. UNGA Resolution 186 (XXXI) of 21 December 1976.

9. UNGA Resolution 5 (XXXII) of 28 October 1977.

10. UN Security Council Resolution 446 (1979) 22 March 1979.

11. UN Security Council Official Records, 3351st Meeting, 18 March 1994, UN Doc. S/PV.335 p.12 (1994).

12. *ICJ Opinion*, at para. 73.

13. See Yehuda Zvi Blum, "The Juridical Status of Jerusalem," *Jerusalem Papers on Peace Problems* (Jerusalem: Leonard Davis Institute for International Relations, 1974), 21.

14. Separate Opinion of Judge Kooijmans, at para. 9, 10.

15. Separate Opinion of Judge Higgins, at para. 16.

16. Separate Opinion of Judge Al-Khasawneh, para. 8, available at <http://www.icj->

[icj.org/icjwww/idocket/imwp/imp\\_advisory\\_opinion\\_separate\\_AI-Khasawneh.htm](http://www.icj.org/icjwww/idocket/imwp/imp_advisory_opinion_separate_AI-Khasawneh.htm).

17. Separate Opinion of Judge Nabil Elaraby, Section III, available at [http://www.icj-cig.org/icjwww/idocket/imwp/imp\\_advisory\\_opinion\\_separate\\_Elaraby.htm](http://www.icj-cig.org/icjwww/idocket/imwp/imp_advisory_opinion_separate_Elaraby.htm). This quote and all quotes from Written Statements, Oral Pleadings and the Advisory Opinion of the ICJ in the case are taken from *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List, No. 131. For a transcript of the Advisory Opinion, see *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2005) 38 (1-2) *Is.L.R.* 17 (hereinafter: "ICJ Opinion").

## **Evolution of Israel's Boundaries – Yehuda Z. Blum**

1. "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people."
2. *British and Foreign State Papers, 1919–39*, 1st Series, vol. XIII, 374, 386–7.
3. R. Meinertzhagen, *Middle East Diary 1917–1956* (Cresset Press, 1959), 22.
4. H.F. Frischwasser-Ra'anani, *The Frontiers of a Nation* (Batchworth Press, 1955), 144, 146.
5. Third session of the People's Council, *Records of the People's Council and the Provisional Council of State*, vol. I, 19 [Hebrew].
6. See for example Article II(2) of the Israel-Jordan General Armistice Agreement of April 3, 1949.
7. UN Doc. S/PV.1345 of May 31, 1967, 47.
8. See UN Security Council resolutions 233–236, adopted between June 6 and 11, 1967.
9. Interview with *Der Spiegel* magazine of November 5, 1967.
10. Walter Laqueur and Barry Rubin (editors), *The Israel-Arab Reader: A Documentary History of the Middle East Conflict*, 6th rev. ed. (Harmondsworth, 2001), 228.
11. *Ibid.*, 479.
12. *Ibid.*, 414.

## **Misleading Interpretation Resolution 242 – Ruth Lapidot**

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1. This article is partly based on a previous paper by the author ("Resolution 242 at Twenty-five") published in 26 *Israel Law Review (Is.L.R.)* 295 (1992). The following essay is published with the kind permission of the *Is.L.R.* The author has discussed the subject with a great number of experts, and the list is too long to be fully reproduced. Special thanks are due to Prof. Eugene V. Rostow, Ambassador Joseph Sisco, Prof. William V. O'Brien, Mr. Herbert Hansell, Dr. Shavit Matias, Brig. Gen. Ilan Shiff, Ambassador Dr. Robbie Sabel, Justice Elyakim Rubinstein, and Messrs. Daniel Taub, David Kornbluth, Benjamin Rubin, and Joseph Ben Aharon. Needless to say, the responsibility for the contents is the author's.
2. Adnan Abu Odeh, Nabil Elaraby, Meir Rosenne, Dennis Ross, Eugene Rostow, and Vernon Turner, *UN Security Council Resolution 242: The Building Block of Peacemaking* (Washington, DC: Washington Institute for Near East Policy, 1993).
3. E.g., John McHugo, "Resolution 242: A Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict between Israel and the Palestinians," 51 *International and Comparative Law Quarterly* (2002) 851-882, reprinted in Victor Kattan, ed., *The*

*Palestine Question in International Law* (London: British Institute of International and Comparative Law, 2008), 357-387.

4. See, e.g., Ruth Lapidoth, *supra* note 1, at 305-306, 311-316.

5. The French version reads: "*retrait des forces armees israeliennes des territoires occupes lors du recent conflit.*"

6. SCOR, 22nd year, Resolutions and Decisions, 8-9. For the legislative history of the resolution, see Arthur Lall, *The UN and the Middle East Crisis, 1967* (New York: Columbia University Press, 1968).

7. UN Press Release SG/SM/4718 of March 19, 1992, p. 11, and the clarification, DPI of March 20, 1992.

8. Lord Caradon, the Representative of Great Britain, SCOR, 22nd year, 1373rd meeting, November 9, 1967, p. 18, section 164; Ambassador A. Goldberg of the USA, *ibid.*, 1377th meeting, November 15, 1967, p. 6, section 54; the Representative of Denmark, Mr. Borch, at the 1373rd meeting, November 9-10, 1967, p. 24, section 235; the Representative of Canada, Mr. Ignatieff, at the 1373rd meeting, p. 22, section 212, and at the 1377th meeting, p. 9, section 86; the Representative of Nigeria, Mr. Adebé, at the 1373rd meeting, November 9/10, 1967, p. 12, section 107. It is true that in 1971 the International Court of Justice decided that a resolution taken in accordance with Chapter VI can also be a binding decision (Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding Security Council Resolution 276 (1970), *International Court of Justice, Reports* 1971, p. 16, sections 113 and 114). But this was not the prevalent view in 1967, when the discussions on Resolution 242 took place in the Council. See John W. Halderman, *The United Nations and the Rule of Law* (Dobbs Ferry, NY: Oceana, 1967), 65-89. See also Julius Stone, *No Peace-No War in the Middle East* (Sydney: Maitland, 1969), 23-24; Jean Dehaussy, "La crise du Moyen-Orient et l'O.N.U.," 95 *Journal de droit international* (1968) 853-888; Shabtai Rosenne, "Directions for a Middle East Settlement: Some Underlying Legal Problems," 33 *Law and Contemporary Problems* (1968) 44-67, at 57; Yehuda Z. Blum, *Secure Boundaries and Middle East Peace in the Light of International Law and Practice* (Jerusalem: Hebrew University, 1971), 63-64, n. 127; Yoram Dinstein, "The Legal Issues of 'Para-War' and Peace in the Middle East," 44 *St. John's Law Review* (1970) 477; Amos Shapira, "The Security Council Resolution of November 1967: Its Legal Nature and Implications," 4 *Is.L.R.* (1969) 229-241; Philippe Manin, "Les efforts de l'Organisation des Nations Unies et des Grandes Puissances en vue d'un Reglement de la crise au Moyen-Orient," 15 *Annuaire Francais de droit international* (1969) 154-182, at 158-159; Pierre-Marie Martin, *Le Conflit Israélo-arabe: recherches sur l'emploi de la force en droit international public positif* (Paris: Librairie generale de droit et de jurisprudence, 1973), 232-234.

9. Arthur J. Goldberg, "A Basic Mideast Document: Its Meaning Today," lecture presented at the Annual Meeting of the American Jewish Committee, May 15, 1969.

10. Sydney D. Bailey, *The Making of Resolution 242* (Dordrecht: Martinus Nijhoff, 1985), at 178-179.

11. Eugene V. Rostow, "The Illegality of the Arab Attack on Israel of October 6, 1973," 69 *American Journal of International Law (Am.J.Int'l.L.)* (1975) 272-289, at 275. Resolution 338 states:

#### The Security Council

1. Calls upon all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;
2. Calls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts;
3. Decides that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a

just and durable peace in the Middle East.

12. The author wishes to express her thanks to Ambassador J. Sisco for having drawn her attention to this fact.

13. General Assembly Resolution 2625 (XXV) of October 24, 1970.

14. General Assembly Resolution 3314 (XXIX) of December 14, 1974.

15. Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council," 64 *Am.J.Int'l.L.* (1970) 1-18, at 8.

16. See Stone, *supra* note 8, at 33; Rosenne, *supra* note 8, at 59; Martin, *supra* note 8, at 258-265; Higgins, *supra* note 8, at 7-8; Blum, *supra* note 8, at 80-91.

17. UN Doc. S/8227, of November 7, 1967.

18. See Julius Stone, *The Middle East under Cease-Fire* (Sydney: The Bridge, 1967), 6ff; Quincy Wright, "Legal Aspects of the Middle East Situation," 33 *Law and Contemporary Problems* (1968) 5-31, at 27; William V. O'Brien, "International Law and the Outbreak of War in the Middle East," 11 *Orbis* (1967) 692-723, at 722-723; Nathan Feinberg, *The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers* (Jerusalem: Magnes Press, 1970), 114-115; Stephen M. Schwebel, "What Weight to Conquest?," 64 *Am. J. Int'l L.* (1970) 344-347, at 346; Eugene V. Rostow, "Legal Aspects of the Search for Peace in the Middle East," *Proceedings of the American Society of International Law* (1970) 80; A. Cocatre-Zilgien, "L'Imbroglgio Moyen-oriental et le droit," 73 *Revue generale de droit international public* (1969) 52-61, at 59; John Norton Moore, "The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes," 19 *Kansas Law Review* (1971) 403-440, at 425; S. M. Berman, "Recrudescence of the *Bellum justum et pium* Controversy and Israel's Conquest and Integration of Jerusalem," *Revue de droit international* (1968) 359-374, at 367ff; B. Doell, "Die Rechtslage des Golfes von Akaba" 14 *Jahrbuch fur Internationales Recht* (1969) 225-259, at 258; Martin, *supra* note 8, at 153-173; Amos Shapira, "The Six-Day War and the Right of Self-Defence," 6 *Is.L.R.* (1971) 65-80; Allan Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank," 14 *Harvard International Law Journal* (1973) 1-49, at 14-22; Thomas M. Franck, "Who Killed Article 2(4)," 64 *Am. J. Int'l L.* (1970) 809-837, at 821; Y. Dinstein, *supra* note 8, at 466 et seq.; Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2005), 192; Barry Feinstein, "Self-Defence and Israel in International Law: A Reappraisal," 11 *Is.L.R.* (1976) 516-562; Edward Miller, "Self-Defence, International Law and the Six Day War," 20 *Is.L.R.* (1985) 49-73. Cf., however, John L. Hargrove, "Abating the Middle East Crisis through the United Nations (and Vice Versa)," 19 *Kansas Law Review* (1971) 365-372, at 367; M. Charif Bassiouni, "The 'Middle East': The Misunderstood Conflict," 19 *Kansas Law Review* (1970) 373-402, at 395; John Quigley, quoted in Eugene V. Rostow, "The Perils of Positivism: A Response to Professor Quigley," 2 *Duke J. Comp. & Int'l L.* (1992) 229-246, at 229.

19. See, e.g., John N. Moore, "The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes," 19 *Kansas Law Review* (1970) 425; Schwebel, *supra* note 18, at 344; Rostow, *supra* note 18, at 276. It should be mentioned, however, that according to various authors, Israel's rights in part of the occupied territories exceed those of a military occupant because of the defectiveness of the title of the authorities who had been in control of those territories prior to the Israel occupation; the principle has been maintained mainly with respect to the West Bank (Judea and Samaria) and the Gaza Strip: see Schwebel, at 345-346; Stone, *supra* note 18, at 39-40; Elihu Lauterpacht, *Jerusalem and the Holy Places* (London: Anglo-Israel Association, 1968), 46ff; Cocatre-Zilgien, *supra* note 18, at 60; Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria," 3 *Is.L.R.* (1968) 270-301; Martin, *supra* note 18, at 265-279.

20. Irrespective of the rules that apply to international treaties, it is well known that preambles to Security Council resolutions carry much less weight than the operative part.

21. See, e.g., replies by Jordan (March 23, 1969) and by Lebanon (April 21, 1969) to questions submitted by Ambassador Gunnar Jarring, in the Report by UN Secretary-General U. Thant, UN

Doc. S/10070, of January 4, 1971. See also Talcott W. Seelye, "Meaning of '67 Israel Resolution Disputed," *New York Times*, April 1, 1988 (the writer was a U.S. ambassador to Tunisia and Syria).

22. Statement by Ambassador Abba Eban, UN GAOR, 23rd session, 1686th Plenary Meeting, October 8, 1968, pp. 9-13, at 9 (section 92), 11 (section 110).

23. See Lall, *supra* note 6, at 252-254.

24. SCOR, 22nd year, 1382nd meeting, November 22, 1967, p. 7, section 61. See also Cyrus R. Vance and Joseph J. Sisco, "Resolution 242, Crystal Clear," *New York Times*, March 20, 1988.

25. Rostow, "Perils of Positivism," *supra* note 18, at 241-242.

26. It seems there was no other way to translate that provision into French: "When the French text appeared, the British and American Governments raised the matter at once with the United Nations Secretariat, and with the French Government, to be told that the French language offered no other solution for the problem....[N]one of the people involved could think of a more accurate French translation." See Rostow, "Illegality of the Arab Attack," *supra* note 11, at 285. See also Shabtai Rosenne, "On Multi-lingual Interpretation," 6 *Is.L.R.* (1971) 360-365 at 363.

27. SCOR, 1382nd meeting, November 22, 1967, p. 12, section 111.

28. Vienna Convention on the Law of Treaties, 1969, Article 33.

29. Charles Rousseau, *Droit International Public*, vol. 1 (Paris: Pedone, 1970), at 289.

30. On the Arab point of view, see, e.g., John B. Quigley, "Displaced Palestinians and a Right of Return," 34 *Harvard International Law Journal* (1998) 171-229, reprinted in Victor Kattan, ed., *The Palestine Question in International Law* (London: British Institute of International and Comparative Law, 2008), 41-100. On the Israeli point of view, see, e.g., Yaffa Zilbershats and Nimra Goren-Amittai, *Return of Palestinian Refugees into Area of the State of Israel* (Ruth Gavison, ed.) (Jerusalem, 2010) (Hebrew).

31. GAOR, 3rd session, part I, 1948, Resolutions, pp. 21-24.

32. See, e.g., Ruth Lapidot, "Are There Viable Solutions to the Palestinian Refugee Problem?," 39 *Justice* (Jerusalem) (2004) 17-18.

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