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The Status of Judea & Samaria (The West Bank)  
and Gaza and the Settlements in International Law

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# **THE STATUS OF JUDEA & SAMARIA (THE WEST BANK) AND GAZA AND THE SETTLEMENTS IN INTERNATIONAL LAW**

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## 1. INTRODUCTION

The status of Judea and Samaria (henceforth referred to also by the Hebrew acronym *Yesha*, which also includes Gaza), the so-called West Bank, in international law is highly controversial. The State of Israel's official position is that since the Six-Day War they are "disputed territories" and not "occupied territories." Although Israel did not actually annex the Yesha territories to Israel or apply its sovereignty to them, it does nevertheless have a priority claim to sovereignty until such time as the dispute is peacefully resolved. In the interim period, which has lasted since 1967, and until a peace agreement is signed, there is nothing illegal in the establishment of Jewish settlements on that land. The State of Israel's position was confirmed in the Levy Committee Report, authored by a committee established by the Israeli government, on which Supreme Court Justice (Ret.) Edmund Levy (Chairman), District Court Justice (Ret.) Tchia Shapira, and former Legal Advisor to the Foreign Ministry, Attorney Alan Baker served.<sup>1</sup>

On the other hand, there is an opposing position, whereby the Palestinian Arabs are entitled to an independent state in all Yesha territories, while Jewish settlement in Yesha is forbidden under international law. Since Israel took over the Yesha territories, it has held them as occupied territories under belligerent occupation. The line delineated in the Armistice Agreements between Israel and Jordan, on the one hand, and between Israel and Egypt, on the other (the "Green Line"), is, to all intents and purposes, an international border. This position was confirmed in the Advisory Opinion issued by the International Court of Justice, as requested by the UN General Assembly, regarding the legal consequences of building a separation barrier ("the wall") in the "occupied Palestinian territories."<sup>2</sup> The Advisory Opinion stated that the West Bank territories are "occupied Palestinian territories" where Palestinians have the right to self-determination. Israel is obliged to apply all the provisions of the Hague Regulations, which are Annexes to the Hague Convention (IV) of 1907,<sup>3</sup> respecting the Laws and Customs of War on Land, and the provisions of the Fourth Geneva Convention of 1949, respecting the Protection of Civilian Persons.<sup>4</sup> According to the majority opinion of the judges, the building of the wall, as the separation barrier was called by the General Assembly, constitutes an obstacle to the Palestinians' right to self-determination on these territories.

This study analyzes these subjects under international law. The status of Yesha in international law is linked in fact and in law to the question of Israel's sovereignty in all of the land to the west of the River Jordan (henceforth "Eretz Israel"). The study discusses the establishment of the State of Israel, the state of the Jewish people, in Eretz Israel (Part 2); the question of sovereignty over Eretz Israel from the time of the British Mandate to the present day, taking account of the resolutions adopted by the League of Nations in the wake of World War I ("WWI"), as well as the international treaties concluded between Israel and neighboring countries, the resolutions adopted by UN institutions, the General Assembly and

the Security Council, in light of the agreements between Israel and the PLO, and the Palestinian Authority's status in the UN (Part 3); the status of the Yesha territories in international law – the Israeli position, Security Council Resolutions, and the Advisory Opinion of the International Court of Justice in the matter of the separation barrier (“the wall”) (Part 4); the settlements and the right of Israelis to settle in Yesha under international law – the laws of armed conflict and the question of their application, the interim agreements with the PLO, and comparative perspectives regarding the rules and practices developed in international law with respect to the rights of settlers in occupied territories since World War II (Part 5); the question of self-determination for the Palestinian people (Part 6); the State of Israel's right to self-defense (Part 7); the limits set by the *ordre public international* to the establishment of a Palestinian state alongside Israel (Part 8); and conclusions (Part 9).

## **2. THE ESTABLISHMENT OF THE STATE OF ISRAEL, THE JEWISH STATE**

“If I forget thee, O Jerusalem, may my right hand forget its cunning,” declared Charles Malik, the Lebanese delegate to the United Nations, immediately after the UN General Assembly adopted its Partition Plan. Abba Eban, the Israeli delegate, retorted, “If you continue saying this for 2,000 years, we shall start believing it.”<sup>5</sup> The Jewish people can, according to the Bible, trace their roots in Jerusalem back to the days of the patriarch Abraham. Jerusalem has been in the hearts and minds of Jews throughout the history of the Jewish nation, and they physically turn to face towards Jerusalem in prayer. All generations of the Jewish people have maintained their ties to their Promised Land (according to the promise made by God to their Patriarchs, Abraham, Isaac and Jacob), from which they had been expelled by force twice.

During two millennia of diaspora, Jews managed to retain a clear, direct link to their heritage thanks to a unique language (Hebrew), religion (Judaism), and culture (practices common to Jews all over the world). Jewish settlement in Eretz Israel has not ceased for even a single generation after sovereignty had been lost.<sup>6</sup> The return of Jews to Israel has intensified and turned into waves of immigration since 1882 (the early days of the first *aliyah* [wave of immigration] from Europe and from Yemen).

The Jewish people are the only people who throughout all of history considered the Land of Israel as their homeland. After the Jews lost their sovereignty in 70 CE, the country was ruled in turn by the Romans, Byzantines, Arabs, Crusaders, Mamelukes and Ottomans. The desolation and destruction of the land is recorded in numerous sources. Under the first period of Islamic rule (634-1099 CE), a large portion of the agricultural settlements was gradually abandoned. The land lay parched and areas of arable land were few.<sup>7</sup> Ineffective irrigation and drainage methods turned the fertile land of the Sharon and Emek Hefer regions into swampland and a prime source of malaria. Mark Twain, on a visit to the Holy Land in 1867, described the Jezreel Valley as having “not a solitary village throughout its whole extent –

not for thirty miles in either direction. There are two or three clusters of Bedouin tents, but not a single permanent habitation. One may ride ten miles hereabouts and not see ten human beings.”<sup>8</sup> Twain ends by quoting the Biblical curse from Leviticus 26:32-33 that had come true: *I myself will lay waste the land, so that your enemies who live there will be appalled. I will scatter you among the nations and I will draw out a sword and pursue you. Your land will be desolate and your cities waste.*

The fate of Jerusalem was no better than that of the rest of the country. Even when the Muslims ruled, they did not make it their capital city.<sup>9</sup> While under Jordanian rule, from 1948 to 1967, no foreign Arab leader came to pray at the Al Aqsa Mosque on the Temple Mount.

Prior to the establishment of the State of Israel there was no “Palestinian” Arab state to the west of the Jordan River. The name “Palestine” does not have Arab roots, but rather is a distorted form of the name which the Romans gave to the land after crushing the Bar Kochva revolt. In an attempt to delete from history and memory any identification between the province of Iudæa and the Jewish people, the name of the province was erased and it was given the new name Syria Palæstina, which eventually became Palestine. This name was derived from the Philistines, the residents of the coastal plain in the Biblical era,<sup>10</sup> who had vanished from the face of the earth, no longer having any ties with the land, nor any chance of returning there.

The change in the state of the land came with the large-scale waves of Jewish immigration. After a visit to Palestine in March 1921, Churchill was deeply impressed with the progress made by the Jewish settlements established there by Zionist immigrants. At a Parliamentary debate following that visit, Churchill related to the Parliament Members his impressions of how the Zionist immigrants had turned “the most inhospitable soil, surrounded on every side by barrenness and the most miserable form of cultivation . . . into a fertile and thriving country estate, where the scanty soil gave place to good crops and good cultivation, and then to vineyards and finally to the most beautiful, luxurious orange groves, all created in 20 or 30 years by the exertions of the Jewish community who live there.”<sup>11</sup> Moreover, “all round the Jewish colony, the Arab houses were tiled instead of being built of mud, so that the culture from this centre has spread out into the surrounding district.”<sup>12</sup>

It was in appreciation of the special connection between the Jewish people and their homeland that the international community came to recognize Israel as a state in which the Jewish people had the right to regain their sovereignty.<sup>13</sup> Without doubt, this right was enhanced by the further acknowledgement that Jews in the diaspora were in constant danger from persecution and pogroms, destruction and annihilation, culminating in the Holocaust. The right of every Jew to immigrate (“return”) to Eretz Israel is the cornerstone of the Jewish State, whose *raison d’être* is to provide a safe haven for Jews from all over the world who wish to pursue a Jewish lifestyle as they choose, openly and undisturbed, in a state whose official day of rest is the Sabbath, where Jewish festivals are official holidays, the language is

Hebrew, where Jews living in their own country are safe from anti-Semitic attacks, or at least not helpless to defend themselves against any such attack.

### **3. ERETZ ISRAEL IN INTERNATIONAL LAW – HISTORICAL OVERVIEW**

#### **3.1 The British Mandate**

At the San Remo Conference in 1920, the Supreme Council of Principal Allied Powers determined that Palestine would be entrusted to Britain as a mandate and that “the Mandatory will be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people.”<sup>14</sup>

The Conference heralded the end of British military rule in Eretz Israel. In July 1920 Sir Herbert Samuel, a Jew who had made a significant contribution to the Balfour Declaration, was appointed as British High Commissioner of Palestine. In its confirmation of the Mandate Document on 24 July 1922, in accordance with Article 22 of the Covenant of the League of Nations, the League determined the conditions of the Mandate over Palestine and charged the Mandatory government with the responsibility of establishing a national home for the Jewish people in Palestine. Since Palestine was under Ottoman rule at the time, Turkish agreement was required. That agreement was eventually given in the Treaty of Lausanne, signed on 23 July 1923. Under Article 16 of the Treaty, Turkey renounced all rights over territories outside its frontiers laid down in that Treaty. According to the Treaty, the future of those territories had already been decided or should be decided by the pertinent parties. Since the decision on the future of Palestine was made in 1922, with the adoption of the final text of the Mandate Document by the League of Nations, the future of that territory had already been determined.

The Preamble to the Mandate Document states explicitly that it is based on international recognition: “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.”

- Article 2 of the Mandate made Britain responsible for “placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home [in Palestine]”;

- Article 6 required the Mandatory to “facilitate Jewish immigration . . . and encourage . . . close settlement by Jews on the land, including State lands and waste lands not required for public purposes”;
- Article 11 required the Administration of Palestine to “introduce a land system . . . having regard . . . to the desirability of promoting the close settlement and intensive cultivation of the land”;
- Article 7 made Britain “responsible for enacting a nationality law . . . framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine”;
- Shortly prior to the ratification of the Mandate, Article 25 was added, empowering the British Mandatory, with the consent of the Council of the League of Nations, to “postpone or withhold application of . . . provisions of this mandate” to the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined.

The Palestine Mandate does not mention Arab national rights in Palestine. Regarding the non-Jewish population in general, it provides that “nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities” (second paragraph of the Preamble and Article 2 of the Mandate Document). The Mandate makes no reference to the political rights of the non-Jewish population. The reason for this is clear, since the object and purpose of the Mandate was to reconstitute the political ties of the Jewish people to their homeland.

Out of the three classes of mandates established according to Article 22 of the Covenant of the League of Nations, the Palestine Mandate was considered an “A” Class Mandate, albeit with unique (*sui generis*) characteristics, since it was designed to establish a state for the Jewish people, most of whom were not resident in Palestine at that time, rather than independent statehood of the local population, as was the case with other mandates.<sup>15</sup> It is noted that at the San Francisco Conference in 1945, at which the United Nations Charter was drafted and adopted, the rights under the mandates were maintained in Article 80, which addressed the need to maintain the rights “of any states or any peoples or the term of existing international instruments to which Members of the United Nations may respectively be parties.”<sup>16</sup> The Arab delegations at the San Francisco Conference made several unsuccessful attempts to prevent the use of the word “peoples” in Article 80. Egypt (and similarly Syria) proposed that the text would read “the rights of the people of any territory or the terms of any Mandate.” This proposal sought to make clear that “only the rights of the inhabitants of the territory were protected.” The Iraqi wording – “the rights of the people of that territory” – was clearly intended to ensure that the rights of any people not present in the territory would not be recognized, i.e., to make an exception in the



case of the Palestine Mandate, by virtue of which the historical ties of the Jewish people to Eretz Israel were recognized, as were their rights to sovereignty over the land. However, those proposals were rejected, and the Arab delegates did not manage to prevent the protection of the rights granted in the Palestine Mandate in its entirety, including its provisions pertaining to the rights of the Jewish people in Eretz Israel.

In effect, Arab pressure and riots in Palestine (supported by British officials favoring the establishment of a homogenous Arab empire, affiliated with Britain, in the whole of the Middle East<sup>17</sup>) resulted in Churchill's White Paper of 1922 which, while reiterating the right of the Jewish people to a national home in Palestine, permanently detached the area of the Jewish homeland east of the Jordan River (constituting ca. 76 percent of the original Mandate territory), with respect to which he made a separate agreement with Emir Abdullah of Transjordan, giving him control of that area, first as an Emirate subject to the British Mandatory and, since 22 March 1946, as the independent Kingdom of Jordan.

During the entire period of the Palestine Mandate, the British, who were entrusted with ensuring its fulfillment, in practice acted to frustrate its very purpose, wishing thereby to appease the Arab and Muslim world. They did so by restricting Jewish immigration to Palestine, on the one hand, while, on the other hand, permitting the entry of Arabs from neighboring countries who sought to settle in Palestine following its development by the Zionist movement and the ensuing work opportunities; by restricting the sale of land to anyone who was not an Arab resident of Palestine; and by the poor administration of state lands, allowing the Arab population to seize them freely.<sup>18</sup> The Palestine Citizenship Order-in-Council, 1925, contained no provision facilitating the acquisition of Palestinian citizenship by Jewish immigrants, as provided in the Palestine Mandate.<sup>19</sup>

### **3.2 The United Nations Partition Resolution**

The United Nations Partition Resolution of 29 November 1947 (General Assembly Resolution 181(II)), recommended the partition of Palestine into a Jewish state and an Arab state linked in an economic union, with a special international regime for the City of Jerusalem as a *corpus separatum*. The Resolution was not implemented because it was rejected by all the Arab nations, that decided to oppose it by force. According to the Partition Resolution, each one of the two states – the Jewish and the Arab – would have to sign a declaration concerning the status of Holy Places, religious buildings and sites, religious and minority rights, citizenship, international agreements and financial obligations, and an undertaking regarding the economic union.<sup>20</sup> Under public international law, UN General Assembly resolutions are in any event mere recommendations and consequently devoid of any legal effect as such. Their legal

effect is contingent upon their acceptance by the parties. On 15 May 1948, the date of declaration of the establishment of the State of Israel, the provisional Israeli government sent a telegram to the UN Secretary General stating its willingness to sign the declaration and the aforementioned obligations.<sup>21</sup> The Arab nations rejected the proposal outright.<sup>22</sup>

On 29 November 1948, when Israel applied for UN membership, it did not reiterate its willingness to sign the declaration and the obligations,<sup>23</sup> nor did it do so in its second application for membership on 24 February 1949.<sup>24</sup> The first application stated only that “a formal declaration that the Government of Israel accepts all the obligations stipulated in the United Nations Charter is enclosed,” a declaration reiterated in Israel’s second application for membership. No reference to any other document, apart from the United Nations Charter, was made. In the course of the deliberations of the Ad Hoc Political Committee regarding Israel’s admission as a member of the United Nations, only one Committee member, the Cuban delegate, addressed a question to the Israeli delegate, Mr. Abba Eban, concerning the declaration. Mr. Eban replied that Israel had not been asked to sign the declaration. The presentations of Israeli President Chaim Weizmann and Mr. Eban to the Ad Hoc Committee clarified that, after the Arab nations had expressed their firm opposition to the Resolution, stating that it had no validity, was not binding on them, that they had every right to resist its implementation and even physically invaded Israel in order to forcibly impede the Resolution, it could no longer be relied upon, and that it would be appropriate to determine Israel’s borders by agreement between Israel and the neighboring countries.<sup>25</sup>

On admitting Israel as a member of the United Nations, the General Assembly noted only that Israel was a “peace-loving State and is able and willing to accept the obligations contained in the [UN] Charter.”<sup>26</sup> There was no further reference to the declaration. It is noted that when, in 1967, in the wake of the Six-Day War, the UN General Assembly and the UN Security Council concerned themselves with the consequences of the war and with Jerusalem, no reference was made in the resolutions to the General Assembly’s Partition Plan, an Arab state and a Jewish state with economic union, or to Jerusalem as a *corpus separatum* under international rule. Reference was only made to the immediately pre-existing situation, when Jordan controlled the territories of Judea and Samaria, which it named the “West Bank,” Egypt controlled the Gaza Strip, Israel controlled the remaining area of the land to the west of the River Jordan, and Jerusalem was divided between Jordan and Israel.<sup>27</sup>

After the State of Israel was established, it informed the United Nations that on the basis of accepted rules of public international law, it considered itself to be a new legal entity rather than a successor of British Mandate rule.<sup>28</sup>

### 3.3 The Green Line and the Armistice Agreements

In any event it was not the UN Partition Resolution that established the State of Israel. Had Israel not defeated the Arab armies (including those of non-neighboring states – Iraq and Saudi Arabia) that invaded the state which had only just come into being upon termination of the British Mandate, the State of Israel would not have been established. True, the Arab nations did not declare war against it, since by definition such a declaration would have implied recognition of Israel's existence, but each of the aggressor nations unequivocally declared a state of war. The War of Independence began with declarations and acts of aggression on the part of the Arab nations which were illegal (from the standpoint of international law), since in international law war may not be used to settle international conflicts. Such conflicts must be settled by peaceful means (subject to the "self-defense" exception). The War of Independence, which was waged by the Arab nations invading Israel in order to prevent the actual implementation of the UN Partition Resolution, ended with the illegal occupation (from the point of view of international law) of the Gaza Strip by Egypt, and Judea and Samaria and East Jerusalem by Jordan.

The Armistice Agreements, which were signed in 1949 between Israel and its neighboring countries, expressly stipulated that "the Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question" (Art. V(2) of the agreement with Egypt), and that "no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations" (Article II(2) of the agreement with Jordan, and an identical provision in the agreement with Lebanon).<sup>29</sup> Indeed, the element of "defined territory" as a condition for statehood has remained unclear in the case of Israel.<sup>30</sup>

The Armistice Agreements stipulated that they were intended to facilitate the transition to "permanent peace" between the parties and the "liquidation of armed conflict." With the ink barely dry on the Armistice Agreements, Israel was subjected to numerous terrorist acts of sabotage, murder, robbery, looting and plunder that were launched from the territories of Egypt and Jordan, and deliberately and encouraged by those states in violation of the Armistice Agreements. Israel was repeatedly condemned by the Security Council for its limited retaliatory actions (which were, in fact, acts in self-defense, designed to prevent future acts of terrorism), while the Arab states evaded responsibility for the incursions originating from their countries, protected from any condemnation by a Soviet veto at the Security Council. In international law a state is responsible for acts of terror launched from its territory against another state, and the state invaded is even entitled to enter into a defensive war against that state whose land

is being used as a base. In addition, in violation of international law, Egypt occupied the island of Tiran at the mouth of the Gulf of Aqaba and imposed a naval blockade of the Straits of Tiran,<sup>31</sup> thus preventing Israeli shipping from reaching Eilat, the Israeli port at the head of the gulf (Egypt had already closed the Suez Canal to ships travelling to Israel or coming from it, another blatant violation of international law). These activities caused Israel to join France and Britain in the Sinai Operation (October 25 – November 5, 1956), in the course of which Israel captured the Sinai Peninsula, from which it withdrew later on, as the United Nations deployed its Emergency Force (UNEF) in the Sinai Peninsula.

### **3.4 Security Council Resolutions 242 and 338**

In 1967 Egypt embarked on a series of steps that indicated its intention of going to war against Israel. In May 1967 Egyptian President Gamal Abdel-Nasser mobilized and sent troops to the Sinai Peninsula and closed off the Straits of Tiran to the passage of ships flying the Israeli flag and ships flying other flags carrying strategic cargoes, in violation of international law. This was in addition to the previous gross breach of closing the Suez Canal for many years, a canal which was meant to be open to the free passage of ships of all nationalities.<sup>32</sup> Only a few days after the Egyptian troops had been deployed in Sinai, then UN Secretary General U Thant, acting upon the request of President Nasser, withdrew UNEF from the Sinai Peninsula without first consulting the UN organs, in particular the General Assembly, exactly when the force was needed to prevent the escalation and deterioration of a war situation.<sup>33</sup> On 30 May 1967 Egypt entered into a mutual defense alliance with Jordan, which was later extended to include Iraq. A defense alliance with Syria had already been in place since November 1966. Jordanian King Hussein, too, signed an agreement with Egypt, placing his forces under overall Egyptian command. President Nasser accompanied these acts with declarations that left no room for doubt as to his plans to wipe out Israel. Israel's diplomatic endeavors to halt the aggression and remove the threats to its existence failed.

In international law, no nation is obliged to sit by passively and await an actual enemy attack on its territory. It is the nation acting belligerently towards its neighbors and declaring its intention to annihilate them which in international law is considered the aggressive party and the one in breach of the law.<sup>34</sup> On 5 June 1967, after several weeks of full mobilization of the Israel Army reserves that paralyzed the Israeli economy, Israel was ultimately forced to take defensive measures, as it was entitled to do under the United Nations Charter, with a preemptive strike against the Egyptian Air Force, destroying its fleet of aircraft on the ground. Jordan and Syria, with no provocation whatsoever from Israel, joined Egypt in attacking Israel on that same day. Troops supporting the Arab attack arrived from Iraq, Algeria and Kuwait. The Six-Day War

ended with Israel's victory. The Sinai Peninsula, the Golan Heights, the Gaza Strip, Judea and Samaria [the West Bank], and the Old City of Jerusalem came under Israeli control.

UN Resolution 242, passed in the wake of the Six-Day War (on 22 November 1967),<sup>35</sup> was aimed at establishing the guidelines for a "peaceful and accepted settlement" to be agreed by "the States concerned." Accordingly, the Resolution provided:

the fulfillment of [United Nations] Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of . . . withdrawal of Israeli armed forces [not necessarily "all armed forces"] from territories [not necessarily "the territories" or "all the territories"] occupied in the recent conflict. . . [the] 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.

The text and interpretation of the Resolution have been analyzed at length,<sup>36</sup> with the following conclusions: (a) The United Nations has a number of official languages, but only two working languages – English and French. The working language used by the overwhelming majority of member states, and all of those which were party to the conflict (Israel and the Arab states) at the time that Resolution 242 was drafted, was English. Hence, pursuant to the case law of the International Court of Justice, it follows that the Resolution should be construed on the basis of the English text. There is no doubt that the reference in the English text is to the withdrawal of armed forces (not *all* forces) from territories (not *the* territories or *all the* territories), as could perhaps have been concluded from the translations of the English text into some of the other languages. In particular, the Spanish text states "*all the Israeli armed forces*" ["todas las fuerzas armadas Israelis"], but the translation into Spanish came after the official version in the working language and no conclusions can be drawn from it; (b) The adoption of the final text by the Security Council was preceded by negotiations and arguments (all carried out in English) over its formulation, following which the British proposal was adopted, evidencing that the words were not chosen inadvertently but after weighing every word carefully; (c) At the meeting of the United Nations 1895<sup>th</sup> plenary meeting of the General Assembly on 3 November 1970, the representative of France remarked that "in order to avoid reviving an old quarrel, this part of Resolution 242 (1967) must be quoted in exactly the same terms as those that were adopted, the English text in the original English, the French text in the original French version," etc. It has been noted that this is probably the most authoritative confirmation one could have that the French text was intended to convey exactly the same meaning as the English and not *vice versa*.<sup>37</sup>

The preamble to Resolution 242 states that the Security Council emphasizes the inadmissibility of the acquisition of territory by war, and it has rightly been pointed out that this sentence in itself does not say much, that, in fact, it says no more than the established international law rule, that only a formal agreement, and more particularly after a war, usually a treaty of peace, is competent to transfer territory from one country to another.<sup>38</sup> In particular, if the acquisition of territory by war is inadmissible, then Egypt also had no right to sovereignty over the Gaza Strip and Jordan had no right to sovereignty over Judea and Samaria and Jerusalem, after invading and occupying those territories in the war of 1948.

Security Council Resolution 338, which was adopted during the Yom Kippur War (on 23 October 1973),<sup>39</sup> in which Egypt and Syria attacked Israel without provocation from Israel, calls for the implementation of Resolution 242 of 1967, and stipulates that “immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.” Although not expressly stated in the resolutions, there is no doubt that they were adopted pursuant to Chapter VI of the United Nations Charter, which empowers the Security Council to make non-binding recommendations regarding the peaceful settlement of disputes (as distinct from the Security Council's powers to adopt binding resolutions and enforcement action under Chapter VII to deal with threats to international peace and security, such as those adopted against Iraq in connection with the Gulf War).

### **3.5 Severing the Ties between Jordan and the West Bank**

In 1988 King Hussein declared that Jordan had severed its legal and administrative ties to the West Bank.

### **3.6 The Peace Agreements with Egypt and Jordan**

Under the Peace Agreement signed between Israel and Egypt in 1979 (further to the Camp David Accords), sovereignty of the Sinai Peninsula reverted to Egypt, and an international border between Egypt and Israel was established.<sup>40</sup> An international border between Israel and Jordan was established in the Peace Agreement signed by both countries in 1994.<sup>41</sup> Israel has no international border with Syria and Lebanon. Such a border can be established only by agreement between Israel and each of those countries.

### **3.7 The Agreements with the Palestine Liberation Organization (PLO)**

On 13 September 1993 the PLO signed a Declaration of Principles,<sup>42</sup> stating that Resolutions 242 and 338 would provide the basis for negotiations with Israel. It should be noted that throughout the negotiations leading up to the Declaration of Principles, the Israeli government believed that the Declaration would be signed with a Palestinian group from Judea and Samaria, which formed part of the Jordanian-Palestinian delegation at the talks, and not with the PLO (or, as it was known at the time, PLO-Tunis, since its representatives were resident not in Judea and Samaria but in Tunis). It was only on the morning of the actual day of signing that Yasser Arafat announced that if the PLO was not the other party to the Declaration it would not be signed at all. This threat persuaded the Israeli prime minister at the time, Yitzhak Rabin, to concede in this matter so that the Declaration could be signed on that day after all.<sup>43</sup>

Following that Declaration, on 4 May 1994, the Agreement on the Gaza Strip and the Jericho Area (“Gaza-Jericho Agreement”) was signed, transferring control of Jericho and the Arab towns in the Gaza Strip to the Palestinian Authority (PA). Overall security in the territory (as distinct from internal security in the areas handed over to the PA) remained under Israeli control, as did control of Israeli settlements in the Gaza Strip, the roads leading to them from Israeli territory, and the Philadelphi Corridor – a narrow strip of land between the Gaza Strip and Egypt.

The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed on 28 September 1995 for a period of five years from the date of signature of the Gaza-Jericho Agreement, provided that the West Bank and the Gaza Strip would be transferred to the Palestinian Authority (PA) gradually, including state lands (Art. 16 of Annex III to the Interim Agreement).<sup>44</sup> After signing the Interim Agreement, Israel handed over broad powers – in both civil and security matters – to the PA in extensive areas in the West Bank, in which the Arab population was concentrated. As aforementioned, in every area transferred to the PA, powers over state lands were likewise transferred for an interim period of five years. However, the Interim Agreement did not apply at all to issues reserved for the negotiations on the permanent status agreement, including Jerusalem and the Yesha settlements (Art. XXXI(5) of the Interim Agreement). Furthermore, both parties agreed that the outcome of negotiations on the permanent status would not be prejudiced by the Interim Agreement, and neither party would be deemed to have renounced or waived any of its existing rights, claims or positions by virtue of having entered into the Agreement (Art. XXXI(6) of the Interim Agreement). The interim period elapsed long ago, but a permanent status agreement has not yet been concluded.

### **3.8 Israel's Unilateral Withdrawal from the Gaza Strip (the Disengagement Program)**

On 6 June 2004, the Israeli government adopted a decision on Israel's unilateral disengagement plan from the Gaza Strip. The decision was passed by the *Knesset* in the Disengagement Plan Implementation Law, 5765-2005, and in August-September of 2005 Israel withdrew unilaterally from the Gaza Strip. In January 2006, the Islamic Hamas movement won the elections to the Palestinian Legislative Council. Several rounds of confrontations between PLO activists and Hamas in the Gaza Strip ended with Hamas gaining control over the Strip in June 2007, after taking over military installations that had previously been under PLO control, followed by the execution of officers of the PLO security forces. In response, PA leader Abu Mazen dismissed the Palestinian Unity Government. Since then, control of Arab towns in the West Bank has been in the hands of Fatah (the largest PLO faction), while Hamas controls the Gaza Strip. A number of reconciliation agreements have been declared between Fatah and Hamas, but none so far has reached the point of being able to establish a united Palestinian leadership.

Israel's withdrawal from the Gaza Strip did not contribute to peace between the parties either. The disengagement has been followed by the firing of thousands of rockets from the Gaza Strip at Israel, forcing Israel to take military action in the Gaza Strip twice – first in Operation Cast Lead in 2008, followed by Operation Pillar of Defense (in the Hebrew original, “Pillar of Cloud,” after Exodus 13:21) in 2012.

### **3.9 The Palestinian Authority's Status in the United Nations**

On 23 September 2011, PA leader Abu Mazen applied to the Secretary General of the United Nations for Palestine to be recognized by the UN as a member state, whose territory would include “all Palestinian territories occupied by Israel in 1967.”

The very fact of applying to the UN Secretary General was a breach of international law, since it contravened the Interim Agreement signed with Israel in 1995. Article XXXI(7) of that Agreement provided that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”

In international law, there is a distinction between an entity's status as a state and membership of the United Nations. Thus, for instance, Switzerland, a sovereign state, was for many years not a member of the UN. On the other hand, there are entities which were members before they attained full independence, such as India, which was a founding member of the United Nations in 1945, two years before gaining full



independence from British rule. It is noteworthy that the UN itself is not a state and recognition may be granted only by other states and governments. The conditions for the existence of a state are determined objectively in international law, while membership of the United Nations is addressed in the United Nations Charter.

In international law, the objective conditions for the existence of a state are those determined in the Montevideo Convention on the Rights and Duties of States, 1933: (1) a permanent population; (2) a defined territory; (3) an effective government; and (4) the capacity to enter into international relations with other states.

As for the Palestinian Authority, those conditions have not yet been fulfilled. The territory of the Arab state must be determined in an agreement with Israel; the territories in question are currently under dual government – that of the PLO in the West Bank and of Hamas in the Gaza Strip, and the status of many residents is that of eternal refugees who do not consider themselves permanent residents of those territories. They claim the right of return for themselves to Israeli territory within the Green Line. To date the PA has refused to recognize Israel's right to exist as the state of the Jewish nation.

The conditions for membership of the United Nations are stipulated in Articles 3-6 of the United Nations Charter. Pursuant to Article 4(1): "Membership in the United Nations is open to all other peace-loving states<sup>45</sup> which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

A precondition for admission to the United Nations is a Security Council recommendation in support of membership. Under Article 27(3) of the UN Charter, Security Council resolutions on all substantive matters require the affirmative votes of nine member states, including the agreement of all permanent members of the Security Council (since the permanent members of the Security Council have the power to veto a Council decision). Once a Security Council recommendation is adopted, the question of membership passes to the General Assembly. Since admission to the United Nations is an "important question" under Article 18(2) of the UN Charter, the decision on admitting a new member state must be made "by a two-thirds majority of members present and voting." Each of the 193 member states has one vote and no state has the power of veto.

The United Nations has also certain types of observer status for entities which are not members of the organization. All observers, of whatever type, may participate in General Assembly debates but may not vote. Among them are "non-member observer States," such as the Vatican/the Holy See, or Switzerland (from 1946 to 2002); entities which are not states and which have permanent observer status in the organization, such

as that held by the Palestinian Authority from 1974 to 2012; regional organizations authorized by their member states to have observer status, such as the European Union; inter-governmental regional organizations, such as the Arab League, the Organization of the Black Sea Economic Cooperation (BSEC), the Council of Europe, etc.; and other entities which maintain permanent offices at the United Nations, such as the International Committee of the Red Cross (ICRC).

On 11 November 2011, the Security Council approved a report by a special committee of the Council, stating that it was unable to make a unanimous recommendation to the Security Council concerning the Palestinian Authority's application for admission as a UN member.<sup>46</sup> The United States announced that it would veto any decision to support the application. Two other permanent members, France and Great Britain, said that they would abstain in the event of a vote. Alongside the states that supported the application, there was also a group of states that considered that the PA did not meet the conditions required by the UN Charter, i.e., that it was not "peace-loving," that it would not accept the obligations of member states under the UN Charter, and that it would not be capable of, or willing to, fulfill those obligations.

In order for a Security Council vote to be held, one out of its 15 member states must request that a vote be taken. However, after the report had been approved by the Council, the PA decided not to push for a Security Council vote, but to go directly to the General Assembly which, although not empowered to grant membership in the organization, can upgrade the PA's status to that of a non-member observer state.

On 29 November 2012, exactly on the 65<sup>th</sup> Anniversary of the General Assembly's Partition Resolution of 29 November 1947, the General Assembly, by a large majority (138 members in favor, 9 against and 41 abstentions), adopted a resolution to "accord to Palestine non-member observer State status in the United Nations."<sup>47</sup> It is noteworthy that even the nations which supported the upgrade included some, such as New Zealand, that pointed out that whether Palestine is a state is a separate question, and that it can only be a state *de facto* with Israel's agreement.

The United Nations Palestine website carries texts of the Palestine National Charters of 1964 and 1968.<sup>48</sup> Article 9 of the Palestine National Charter of 1968 determines that "armed struggle is the only way to liberate Palestine." It further states that "this is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it." Other articles of the Charter determine that "the partition of Palestine. . . and the establishment of the state of Israel are entirely illegal" (Art. 19), and that "the Balfour Declaration, the Palestine Mandate, and everything that

has been based on them, are deemed null and void” (Art. 20). Only “the Jews who had normally resided in Palestine until the beginning of the Zionist invasion are considered Palestinians” (Art. 6). “The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or stayed there. Anyone born, after that date, of a Palestinian father – whether in Palestine or outside it – is also a Palestinian” (Art. 5).

According to another document on the United Nations Palestine website,<sup>49</sup> on 26 April 1996 the Palestine National Council convened to discuss an amendment to the Charter and adopted the following decisions: (a) to abrogate the provisions of the Palestine National Charter that contradict the letters exchanged between Chairman Yasser Arafat and Prime Minister Yitzhak Rabin of 9 and 10 September 1993; (b) to mandate the legal committee of the PLO to present a new text of the Palestine National Charter. The decision was adopted by the required two-thirds majority.

The same document states that on 22 January 1998, Chairman Yasser Arafat sent a letter to President Bill Clinton of the United States to the effect that as a result of the 1996 decisions, “Articles 6-10, 15, 19-23, and 30 [of the Charter] have been nullified, and the parts in Articles 1-5, 11-14, 16-18, 25-27 and 29 that are inconsistent with PLO commitments to recognize and live in peace side by side with Israel have also been nullified.” At the end of the letter Arafat assured President Clinton that “all the provisions of the Covenant that were inconsistent with the commitments of September 9/10, 1993 to Prime Minister Rabin, have been nullified.”<sup>50</sup>

That document states further that on 7 December 1998, the PLO Executive Committee reaffirmed the contents of the letter. On 10 December 1998, the Central Council of the PLO met in Gaza and also decided to reaffirm the letter. Finally, on 14 December 1998, at the invitation of Chairman Yasser Arafat, the speaker of the Palestinian National Council (PNC), and the speaker of the Palestinian Council, members of the PNC, as well as members of the Central Council, the Council, Palestinian heads of ministries “and other personalities convened a meeting in Gaza [at which the participants] reaffirmed, by a show of hands, their support for the peace process and the above-mentioned decisions . . . regarding the Charter.”<sup>51</sup>

The problem is that to this day no new charter has been drawn up. Nor has a legal committee been set up to rewrite one. In fact, on the contrary, statements by Arab leaders indicate that the PLO Charter remains in force.<sup>52</sup> On 2 February 2001 Salim Za'noun, Speaker of the PNC, published a manifesto in Cairo declaring that the PLO Charter is still in effect, because the PNC had not yet convened to ratify the amendments that had previously been proposed and, in particular, because no legal committee had been set up to formulate such required amendment.<sup>53</sup> At the 6<sup>th</sup> General

Conference of the PLO in 2009,<sup>54</sup> Abu Mazen declared that the PLO Charter of 1968 constituted part of the identity of the Palestine Liberation Organization and formed the basis of the organization's political program; his words raise serious concerns that the Charter was never abrogated and that Arafat's assertions and declarations were false.

#### **4. THE STATUS OF THE WEST BANK IN INTERNATIONAL LAW**

##### **4.1 The Israeli Position**

The West Bank and Gaza were all part of British Mandate territory until 1948. In the War of Independence Egypt invaded and occupied (in violation of international law) the Gaza Strip, and Jordan – the West Bank. Egypt has not claimed title to the Gaza Strip. Jordan, on the other hand, purported to annex the West Bank in 1950, but the annexation was not recognized in international law. Only Great Britain (subject to a reservation regarding East Jerusalem) and Pakistan recognized the annexation attempt, which was also opposed vehemently by all Arab states.<sup>55</sup> In May 1950, Egypt, joined by Syria, Saudi Arabia and Lebanon, demanded the expulsion of Jordan from the Arab League on these grounds.<sup>56</sup> Eventually, a compromise was reached and on 12 June 1950 the Arab League declared that Jordan was holding the territory as a “trustee.”<sup>57</sup>

In 1967, following the Six-Day War, the territories, which had originally been designated as part of the Jewish national home according to the Mandate document, reverted to Israeli control. Prominent international jurists opined that Israel was in lawful control of those territories, that no other state could show better title than Israel thereto, and that these territories were not “occupied” in international law.<sup>58</sup> Indeed, Israel was entitled to declare that it has applied its sovereignty thereto.

In effect, because of political and other considerations, Israel applied its sovereignty only to East Jerusalem and the Old City. This was done by the application of Israeli law, jurisdiction and administration by the government to these areas by virtue of Amendment No. 11 to the Law and Administration Ordinance, 5708-1948, which was adopted by the Knesset on 27 June 1967.<sup>59</sup> In this matter, Israel acted in the same way it did after the War of Independence, applying its jurisdiction, by virtue of the Area of Jurisdiction and Powers Ordinance, 5708-1948,<sup>60</sup> to all Eretz Israel territories that were held by the Israel Defense Forces (IDF), whether within or beyond the boundary lines designated for the State of Israel by the United Nations Partition Resolution of 29 November 1947, among them large parts of the south and the Negev, as well as the Jerusalem Corridor, Acre, Nazareth, Jaffa, Lod, Ramle, Ashdod, Ashkelon, Beer Sheva and West Jerusalem. Israel's guiding perception since its establishment, expressed in this Ordinance, was that Israel does not “annex” territories that were part of the

Mandate for Palestine prior to 1948, since it does not consider itself an occupying state therein.

On the same date, 27 June 1967, Israel also enacted the Protection of Holy Places Law, 5727-1967, which assured protection of these sites from desecration and any other violation, and freedom of access for “members of the different religions to the places sacred to them or their feelings.”<sup>61</sup> On 30 July 1980 the Knesset enacted Basic Law: Jerusalem Capital of Israel, which stipulates that “Jerusalem, complete and united, is the capital of Israel.”<sup>62</sup>

Regarding the remaining areas of Yesha, the official position designates them as “disputed territories” to which Israel has a priority claim of right. Since they were not taken from any other sovereign state, the Hague Regulations 1899/1907 and the Fourth Geneva Convention do not apply to them.<sup>63</sup> However, Israel chose voluntarily to observe and abide by the humanitarian provisions of the Geneva Convention.<sup>64</sup> On 13 July 1987, Israel announced its position in a letter to the International Committee of the Red Cross (ICRC), as follows:

Israel maintains that in view of the *sui generis* status of Judea, Samaria and the Gaza Strip, the *de jure* applicability of the Fourth Convention to these areas is doubtful. Israel prefers to leave aside the legal questions of the status of these areas and has decided, since 1967, to act *de facto* in accordance with the humanitarian provisions of the Convention.<sup>65</sup>

Israel further decided to subject the acts of its military government to the judicial review of the Supreme Court, sitting as the High Court of Justice. Accordingly, the state has never contested the *locus standi* in its responses to petitions filed by alien enemies who were inhabitants of the territories not under Israeli sovereignty.<sup>66</sup> The Court has also accepted petitions from NGOs, petitioning the Court on behalf of the residents. The Supreme Court has treated all acts of State officials in Judea, Samaria and the Gaza Strip, whether legislative or administrative, as subject to Section 15 of the Basic Law: The Judiciary. This law subjects all state and local officials to the judicial review of the Supreme Court sitting as the High Court of Justice, including jurisdiction to issue orders in the nature of *habeas corpus*.<sup>67</sup> In this respect, all military commanders, including the Chief of Staff, have been regarded as state officials. The judicial review is conducted by the Court under both Israeli constitutional and administrative law, as well as the norms of international law, with respect to which the Court's skillful familiarity with international law – customary international law, conventions, commentaries and literature – has been noted. The Court has kept verifying, in lengthy *obiter dicta*, that the acts of state officials were in compliance with the Fourth Geneva Convention, ensuring that if a convention were applicable, the act would be in conformity therewith.<sup>68</sup> Consequently, even though the Fourth Geneva Convention, according to its language, does not apply in Yesha, it has nonetheless been

applied in practice by the Israeli Supreme Court at an unprecedented level, compared to any instance, past and present, of belligerent occupation.<sup>69</sup>

Israel's position regarding the non-applicability of the Hague Regulations is legally founded. The Hague Regulations, which were first enacted in 1899 as an Annex to the Hague Convention (II), and later updated and amended in 1907 as an Annex to the Hague Convention (IV) respecting the Laws and Customs of War on Land, were designed to safeguard the interests of the states that were contracting parties to the Hague Convention. Since Jordan's annexation of Jerusalem and the West Bank in 1950 did not gain international recognition and Jordan's occupation was achieved by illegal use of force, not in self-defense, i.e., in contravention of international law, Jordan was not a legitimate sovereign power in that territory. The Regulations concerning occupied territories (Regulations 42-56) apply, according to the text of the Convention, to territories seized from a legitimate sovereign. Therefore, Israel's position that the provisions of the Regulations do not apply to the West Bank is well-founded.<sup>70</sup>

The status of the West Bank and Gaza raises a further surprising paradox, if one insists that they are "occupied territories." The peace treaties that Israel signed with Egypt in 1979 and with Jordan in 1994 did not determine sovereignty over the West Bank and Gaza. However, in international law "occupied territories" are those under "belligerent occupation." Where the parties – in the present case Israel, Jordan and Egypt – are no longer belligerent, the question arises of how those territories can continue to be considered subject to "belligerent occupation" following the peace agreements with Jordan and Egypt.<sup>71</sup>

Regarding the applicability of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, there are differences of opinion. Part I, Article 2 of the Convention reads:

In addition to the provisions which shall be implemented in peace-time, 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 second paragraph may be interpreted in two ways: further to the first paragraph addressing the applicability of the Convention in cases of war, paragraph 2 determines the applicability of the Convention to "cases of partial or total occupation of the territory of a High Contracting Party," regardless of whether the country whose territory was occupied met the occupation with armed resistance.<sup>72</sup> Alternatively, the second paragraph conditions the restriction of the application of the Convention to all cases of partial or total occupation of the territory of a High Contracting Party, *only* if

the said occupation meets with no armed resistance, as was the case, e.g., in the occupation of Denmark by Germany in World War II. In all other cases of occupation, it does not matter whether or not the occupied territory belonged to a High Contracting Party. The 1958 Commentary of the International Red Cross denotes that this paragraph does not make its scope of application clearly, but supports the second interpretation.<sup>73</sup>

The second interpretation is subject to criticism. It has been pertinently pointed out that limiting the second paragraph solely to cases where there is no resistance leads to a nonsensical interpretation: why should the applicability of the Convention be limited to occupation by a contracting party only in this case, as distinct from other instances of occupation where there is, *prima facie*, no need to fulfill this requirement?<sup>74</sup>

In fact, as is further clarified below, the first interpretation is compatible with the text of the Convention, the context and the object and purpose of the Convention. For this reason, it is the one which is compatible with the rules of the Vienna Convention on the Law of Treaties, 1969 (the provisions of which are considered customary international law). Article 31, entitled “General Rule of Interpretation,” provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Article 2 of the Fourth Geneva Convention addresses its scope of application: Paragraph 1 covers the protection of civilian persons “*in cases of declared war . . . between . . . the High Contracting Parties*, even if the state of war is not recognized by one of them.” Paragraph 2 covers the protection of civilians in “cases of . . . occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” Paragraph 3 states that, even if “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.” The text of Paragraph 2 thus distinguishes between two principal circumstances: protection in time of war and protection in time of occupation of the territory of a High Contracting Party by another High Contracting Party.

This interpretation is also more compatible with the context than the alternative interpretation. Part II of the Convention addresses primarily the general protection of populations against certain consequences of war, and its provisions cover protection in time of war. Part III covers the status and treatment of protected persons, and its subsections include provisions that cover protection in time of war, provisions “common to the territories of the parties to the conflict and to occupied territories,” and provisions applicable only during occupation. The context therefore implies a distinction between provisions applicable in time of war and those applicable to occupation, rather than a distinction between provisions that are applicable in time of war and occupation, and those which apply only to occupation that has met with no armed resistance.

Regarding the object and purpose, the Convention draws a distinction between two situations of occupation: one where land was seized from a lawful sovereign, and another where it was seized from a state which had itself illegally invaded that territory. Let us assume for a moment that Turkey would attempt to occupy all of Cyprus today, but fail to do so, and instead Cyprus would liberate Northern Cyprus from Turkish rule. Is it conceivable that Cyprus would be obliged to apply to land, which belonged to it initially, the provisions of the Geneva Convention applying to occupied territories, to retain the legal order instituted there by Turkey and not settle Greek Cypriots in the territory?<sup>75</sup> The provisions of the Geneva Convention concerning the occupying party's obligations were not meant to cover this situation, according to the object and purpose of the Convention. They were meant to apply only to the occupation of territory belonging to a lawful sovereign power.

On the face of it, since Israel does apply in practice the provisions of the Geneva Convention to West Bank residents, the distinction in interpretation makes no difference, but this is not quite true. Since the Convention excludes from its protection nationals of the occupying power,<sup>76</sup> its provisions do not fit, because of its one-sidedness, the case of territories to which the occupier has a well-founded claim of right. When Dinstein first opined that the territories were occupied under international law,<sup>77</sup> he considered that "within the framework of the right of possession Israel can make great achievements: build and plant, pave and settle. In short, there is room for practical Zionism, a Zionism that realizes dreams, even at a time when the lights of political Zionism are dimmed." However, this is not quite accurate. The provisions of the Geneva Convention do not provide protection to Jewish settlers seeking to realize the rights of Israel in the Yesha territories,<sup>78</sup> but only to the Palestinian Arab residents of those territories. As above-mentioned, the provisions of the Convention do not fit at all the situation in which the occupying power has a rightful claim to sovereignty over the territory. Israel's position, that it does not recognize the applicability of the Convention, but merely applies its humanitarian provisions in practice to the Arab residents of Yesha, is the appropriate response to the need to protect the human rights of the Arab population in the pertinent situation, in which the land was not seized from a foreign lawful sovereign.

A study analyzing cases of occupation of territories since World War II indicates that the occupying states refused to apply the international law rules applicable to belligerent occupation, justifying their non-application on various grounds: an assertion of ownership over the occupied territory; the occupation of the territory followed an invitation of the indigenous government; the intervention was needed to repress gross and systematic violations of human rights or to facilitate self-determination; the occupant did not have in mind the permanent and exclusive control of the occupied territory.<sup>79</sup>



The occupation of Iraq in 2003-2005 is distinctive in that the Security Council adopted Resolution 1483 (2003),<sup>80</sup> providing the American-led coalition with powers that the Coalition Provisional Authority (CPA) considered to be sufficient to transform the Iraqi political, military and legal system, by measures that go far beyond those which are deemed acceptable under the international law of occupation. The occupying powers considered that, had they been bound by the norms of the law of occupation, the objectives of the occupation would have been thwarted from the outset, and they would not have been able to transform Iraq into a democracy which respects basic human rights, since under occupation laws the occupying power is obliged to maintain the legal status as at the time of occupation.<sup>81</sup> The question whether the Security Council is competent to authorize an occupying power to take measures not permitted under the international law of occupation is outside the scope of this study. Another pertinent question, outside the scope of this study, concerns the viability and desirability of such measures being imposed on the indigenous population without its proper cooperation in the transformation process.

Regarding the status of the territory, it is notable that in any event the Fourth Geneva Convention does not address territories but persons entitled to protection. It does not determine anything at all regarding sovereign rights in the territory, nor does it stipulate a deadline for ending the occupation.<sup>82</sup> Likewise, the Hague Regulations do not set a deadline for ending the occupation. The opinion that the occupying power must enter into serious negotiations to end the occupation, an obligation which has additional implications for the measures which may or may not be undertaken, above and beyond what is stated in the Convention,<sup>83</sup> is unsupported.

#### **4.2 The Security Council's Position on Jerusalem**

The Security Council responded to Israel's actions in Resolution 252 (1968), which states that "all legislative and administrative measures and actions taken by Israel . . . which tend to change the legal status of Jerusalem are invalid and cannot change that status,"<sup>84</sup> and in Resolution 478 (1980), which "censures in the strongest terms the enactment by Israel of [the] Basic Law on Jerusalem," declared Israel's actions and the Basic Law "null and void" and "reaffirmed [the Security Council's] determination . . . to secure the full implementation of its resolutions in this matter by Israel."<sup>85</sup> The non-recognition of Jerusalem as the capital of Israel in international law is reflected, *inter alia*, in the fact that foreign countries do not have their embassies in Jerusalem. From the point of view of international law, Israel's sovereignty over East Jerusalem is not recognized. This fact, however, has no effect regarding the final status of Jerusalem, which can only be determined in a peace treaty between the parties to the conflict.

### 4.3 The ICJ Advisory Opinion on the Separation Barrier

On 8 December 2003, the General Assembly adopted a resolution to apply to the International Court of Justice in The Hague for the urgent provision of an Advisory Opinion on 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 East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?” The resolution bears the title: “Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory.”<sup>86</sup> Israel submitted arguments only regarding the jurisdiction of the Court. In Israel’s opinion (and in the opinion of Australia, Canada, the EU Member States, and the USA), the Court should have exercised its discretion and declined to give an Advisory Opinion in this matter. Israel submitted that it is inconceivable “that a court of law, seized of a request for an opinion on Israel’s actions in constructing the fence – a non-violent measure designed to prevent precisely the kind of attack that we are at this very moment witnessing – could think it proper to enter into the question in isolation from consideration of the carnage that is being visited on Israeli civilians by its principal interlocutor before the Court in these proceedings.” Israel noted in its submissions that in the forty months immediately preceding its submissions, Palestinian terror attacks had left 916 people dead and over 5,000 injured, many critically. The fact that the resolution of the 10<sup>th</sup> Emergency Special Session of the General Assembly requesting the advisory opinion is absolutely silent on the matter is a travesty, reflecting the gravest prejudice and imbalance within the General Assembly.

The EU, via Ireland, holding the presidency at that time, argued that it was inappropriate for the Court to give an opinion in this matter, since the opinion would not help the parties resolve their highly-political dispute by negotiations. France, in a separate document, also underscored that this request for an advisory opinion could set a dangerous precedent, inciting states to seek a vote by the General Assembly to refer to the Court disputes over which the Court would not have contentious jurisdiction. France noted that, since the Court’s power to give an advisory opinion is discretionary, it left it to the Court to determine in its wisdom whether it should exercise its powers in the present case. The Russian Federation emphasized that negotiations are the only way to achieve a peaceful and just settlement of the conflict; hence, regardless of whether or not the Court will exercise its discretion to give the opinion, it should take care not to write an opinion that would hamper, or create additional obstacles for, the negotiation process. Norway considered it inappropriate for the Court to give an opinion in this case, since applying the Court’s jurisdiction would not help resolve the dispute. The Czech Republic considered that it was inappropriate for the Court to give an advisory

opinion, since the question raised was political rather than legal. Japan, too, expressed its view that applying the jurisdiction of the Court would not contribute to resolving the dispute, which could only be settled by means of negotiations between the parties.

It is noted that the Court has jurisdiction to give an advisory opinion at the request of international organizations. The purpose of the opinion, however, is not to resolve a dispute between parties, but to advise the applicant body regarding the legal situation. Jurisdiction is at the Court's discretion and it is not obliged to apply it. In a previous case, the Court itself had stated that giving an opinion, against the background of a dispute, without the consent of the state in question, may be incompatible with the judicial character of the Court.<sup>87</sup> However, *in casu*, notwithstanding the objections of all the above-mentioned states, the Court decided by a majority vote to issue the Advisory Opinion.

Moreover, one of the International Court judges who sat on the bench in this matter, Judge Dr. Nabil Elaraby of Egypt, said in an interview to an Egyptian newspaper in August 2001, two months before he joined the Court, that even if Israel was granted the possibility of presenting its arguments to the Court, they would be found devoid of merit and lacking credibility. Israel's application to have Judge Elaraby disqualified was dismissed by a majority of 13 judges to 1.<sup>88</sup> Only Judge Buergenthal, in a dissenting opinion, found it improper for a judge to express views bearing on the credibility and validity of arguments likely to be presented by the interested parties to the case, in a manner likely to affect its outcome. The ICJ decision to exercise jurisdiction and give an advisory point has been criticized sharply in Judge Buergenthal's declaration, published with the Advisory Opinion, and in the separate opinions of a number of judges. In Buergenthal's view, "the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits." In her separate opinion, Judge Higgins raised doubts as to the propriety of the exercise of jurisdiction in this case (paras. 2ff.). Judge Higgins considered that the question before the Court reflected "one element within a multifaceted dispute" (para. 14). She noted that "the larger intractable problem (of which the wall may be seen as an element) cannot be regarded as one in which one party alone has already been classified by a court as the legal wrongdoer; where it is for it alone to act to restore a situation of legality; and where from the perspective of legal obligation there is nothing remaining for the other 'party' to do" (para. 3) [the quotation marks appear in the original, since the other party to the conflict is not a state, and therefore not considered a "party" proper]. Furthermore, as noted by Judge Higgins (paras. 12ff.), in contrast to previous cases, the object of the General Assembly, in requesting the Court's opinion, was not to secure advice on the Assembly's decolonization duties, but later, on the basis of the opinion, to exercise powers over the dispute. In refraining from addressing this matter at all, the Court has revised, rather than applied, the existing case law.

Even though in its Advisory Opinion in the *Western Sahara* case,<sup>89</sup> the ICJ held that to give an advisory opinion would be “incompatible with the Court’s judicial character,” *inter alia*, when “the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent” (*ibid.*, para. 33), the court has, however, been reluctant to find that such circumstances were present in later cases.<sup>90</sup>

The reason given by the Court for overriding the principle of consent to judicial settlement and for exercising its discretion to assume jurisdiction in the case of the “Wall,” that “the opinion is requested on a question which is of particularly acute concern to the United Nations” (ICJ Advisory Opinion on the Wall, para. 50), has been referred to as a “striking innovation, extending the powers of the majority in the General Assembly and curtailing the freedom of choice belonging to States in the field of settlement of disputes.”<sup>91</sup>

In the *Max Planck Encyclopedia of Public International Law*, it has been pertinently recommended that “the difficulties arising in cases where the request for an opinion was related to a pending dispute could be avoided if the Court were required to decline to give an opinion unless the parties to the dispute agreed in advance to accept it as binding.”<sup>92</sup>

On the merits, the ICJ’s starting point has been that the West Bank territories are Occupied Palestinian Territory. Admittedly, this term was used in the text of the General Assembly’s request for an Advisory Opinion. However, the General Assembly is a political body,<sup>93</sup> and the ICJ should not have considered itself exempt from assessing whether the term was accurate.

A study examining the UN attitude to the Yesha territories found that the General Assembly had refrained from calling them Occupied Jordanian Territory or Occupied Egyptian Territory, because all other states (with two exceptions) did not recognize the Jordanian occupation and Egypt has never claimed sovereignty over the Gaza Strip.<sup>94</sup> The problem of terminology was resolved by the General Assembly referring to the Yesha territories from 1967 to 1973 as Occupied Arab Territory, or just Occupied Territory. In 1973 the General Assembly referred to the “right of the Arab States and peoples whose territories are under foreign occupation” (emphasis added – TE).<sup>95</sup> By 1977 the reference had become “Palestinian and other Arab territories occupied since 1967,”<sup>96</sup> and in 1979 the Security Council employed the same terminology.<sup>97</sup>

Instead of examining the issue in depth, the Court made do with a general determination that the Fourth Geneva Convention applies to any occupied territory where there is an armed conflict between two or more contracting states. Israel and Jordan were contracting states to the Convention at the time when the armed conflict broke out in 1967. The Court therefore concluded that the “Fourth Geneva Convention

is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the *precise* prior status of those territories” (emphasis added – *TE*).<sup>98</sup> The Hague Regulations also apply as customary international law in occupied territories.<sup>99</sup>

The Court’s conclusions are based on what the Court calls a “brief analysis” of the historical background to the status of the Occupied Palestinian Territory (paras. 70-77 of the Advisory Opinion), an analysis which is so imprecise that Judge Higgins, in her separate opinion, referred to the presentation of the facts by the Court as a “history” (in inverted commas) which, in her opinion, is “neither balanced nor satisfactory.”

According to the Court (para. 70), “[a]t the end of the First World War, a class ‘A’ Mandate for Palestine was entrusted to Great Britain . . . in the interest of the inhabitants of the territory.” The Court refers in this respect to its Advisory Opinion in the matter of the International Status of South West Africa. But this analysis is inaccurate. It will be recalled that Palestine was entrusted to Great Britain as a Mandate in the interest of the Jewish people, which at the time did not constitute a majority of the local population in the territory,<sup>100</sup> a fact which distinguished this Mandate from all other mandates granted at that time.

The next milestone in the historical description of the Court is the General Assembly’s Partition Plan of 29 November 1947 (para. 71 of the Advisory Opinion). The Court states that Israel proclaimed its independence on the strength of the General Assembly Resolution. This point, too, as demonstrated above, is not at all accurate. The Court refers to the Armistice Agreements between Israel and the neighboring states, which determined the armistice demarcation line (the “Green Line”). But the Court fails to mention what was stated unequivocally in the Agreements themselves about this line, namely, that it would not be considered a political or territorial boundary.<sup>101</sup> As far as the Court is concerned, the Green Line had to all intents and purposes become an international border, even if the Court does not state this explicitly, but just by way of drawing a distinction between Israel’s actions to the west of the Green Line, which are apparently legitimate, and those beyond the Green Line which, in the Court’s opinion, are in breach of international law.<sup>102</sup>

The Court makes no reference whatsoever to the invasion and occupation of the Yesha territories by Jordan in the War of Independence, which was illegal under international law, nor is a single mention made of Jordan’s attempted illegal annexation, which was also not recognized in international law. In a separate opinion, Judge Kooijmans states

that, in his opinion, the Court should have addressed this matter, since it would have reinforced the Palestinian position. In his opinion (paras. 8-9), as soon as Jordan claimed sovereignty over the West Bank, that was sufficient to fulfill the precondition prescribed in the Fourth Geneva Convention, that in 1967 Israel seized the territory from a High Contracting Party, regardless of whether or not Jordan's claim was well-founded in international law. Apparently, Judge Kooijmanns' opinion has not been adopted (and rightly so) by the other judges, who preferred to overlook the Jordanian invasion altogether.

From the Armistice Agreements (para. 72), the Court leaps straight to the Six-Day War (para. 73), without mentioning how that war broke out. From there it moves on to Security Council Resolution 242 (para. 74), here, too, ignoring the fact that the Resolution did not require Israel to withdraw from all the territories it had occupied during the war, and that this Resolution was not drafted absentmindedly, but very carefully, following lengthy discussions and negotiations. Paragraph 75 of the Advisory Opinion addresses Security Council resolutions that condemned the measures taken by Israel with a view to changing the status of the City of Jerusalem immediately after the war and later on – with the adoption of Basic Law: Jerusalem. Paragraph 76 refers to the peace treaty with Jordan, fixing the boundary with Israel, “without prejudice to the status of any territories that came under Israeli military government control in 1967.” Paragraph 77 refers briefly to the fact that a number of agreements were signed with the PLO. Regarding these agreements, it states only that they required Israel to “transfer to Palestinian authorities certain powers and responsibilities.” Such transfers did take place but, as a result of subsequent events (which the Court does not specify at all), “they remained partial and limited.”

The “historical” background, presented by the Court in its Advisory Opinion, is disconnected from history. But the Court could not have reached its conclusions in any other way. It was only on the basis of this “history,” while overlooking the real history, that it was possible to depict Israel as an occupying power, lacking any legitimate claim of right of its own in the West Bank, and to depict the “Green Line” as being actually identical to an international boundary (a determination that contravenes the peace treaty between Israel and Jordan and the agreements between Israel and the PLO, since it effectively predetermines the outcome of the negotiations, while the agreements expressly stipulate that they in no way predetermine the outcome of the negotiations on the permanent status of the West Bank). The West Bank has thus become, in the eyes of the Court, “Occupied Palestinian Territory” since the time of the British Mandate, the place where the Palestinian people would attain self-determination. In this respect, it is noteworthy that the original PLO Charter of 1964 provided that the PLO “does not exercise any territorial sovereignty over the West Bank in the Hashemite Kingdom of

Jordan, on the Gaza Strip or in the Himmah Area” (Art. 24). This provision was deleted from the PLO Charter when its 1968 version was adopted.

Finally, the Court holds that Israel does not even have the right to self-defense against that non-state entity, even though – as pointed out in the Declaration of Judge Buergenthal and in the separate opinion of Judge Higgins – the United Nations Charter, “in affirming the inherent right of self-defense, does not make its exercise dependent upon an armed attack by another State” (Buergenthal’s declaration, para. 6) and that, moreover, the Security Council itself adopted a resolution immediately following the terrorist attack of Al-Qaeda in the USA on 11 September 2001, recognizing the right of states to defend themselves against terrorist attacks and to combat terrorism.

#### **4.4 Interim Summary**

General Assembly resolutions are non-binding recommendations. Nor are the Security Council resolutions in the matter of the Israel-Arab conflict binding on the parties. In any event, Security Council Resolutions 242 and 338 do not mandate the establishment of a separate Arab state in Jerusalem, the West Bank and the Gaza Strip. Nor did the Interim Agreements signed by Israel and the PLO decide the question of sovereignty over those territories. Israel’s unilateral withdrawal from the Gaza Strip in August-September 2005, further to the Government of Israel’s Disengagement Program, did not resolve the question of sovereignty, and neither did the General Assembly’s upgrade of Palestine’s status in the United Nations to that of a Non-Member Observer State. The International Court of Justice’s Advisory Opinion changes nothing in this matter. The opinion was written on a basis that was, with respect, both factually and legally unsound. In any event, like any advisory opinion of the Court, it is not binding. In the legal situation obtaining in this matter, only a permanent status agreement can determine the questions of sovereignty over the West Bank and the Gaza Strip.

### **5. THE SETTLEMENTS IN INTERNATIONAL LAW**

#### **5.1 The West Bank Settlements**

As explained above, Israel is not a foreign occupying power in the West Bank.<sup>103</sup> Consequently, there is no obstacle to the establishment of civilian Jewish settlements on state lands,<sup>104</sup> whether at the initiative of the state or the Jewish settlers themselves. As far as private property is concerned, Israel is entitled to expropriate private property (in consideration for payment) for various public purposes, according to accepted criteria in law-abiding democratic nations.

## 5.2 The Rules of International Law Regarding Occupied Territories

Even if Israel were an alien occupying power in Yesha, Jewish settlement there would still be permissible under international law. Pursuant to the sixth paragraph of Article 49 of the Fourth Geneva Convention (to which Israel is a High Contracting Party), an occupying power “shall not deport or transfer parts of its own civilian population into the territory it occupies.”<sup>105</sup> According to the Commentary of the International Committee of the Red Cross (ICRC), this paragraph was 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.”<sup>106</sup> It is noted that a breach of this prohibition was not considered to be a grave breach of the Convention. Additional Protocol I, added to the Geneva Convention in 1977, provides (Art. 85(4)) that a breach of the prohibition would be considered a grave breach.<sup>107</sup> Israel is not a High Contracting Party to the Protocol.

However, the voluntary settlement of citizens of the occupying power in the occupied territory (not on private land) is permissible, otherwise there would be no meaning to the term “transfer,” which the provision forbids.<sup>108</sup> The purchase of land by citizens of the occupying power in occupied territories is likewise not forbidden.<sup>109</sup> Nor is there any obstacle to the occupying power taking active steps to settle its citizens in civilian settlements in the occupied territory, if the settlement is justified for security reasons, and is established in a strategic location.<sup>110</sup> It is not necessary for the army to need the land to provide for its needs. The anticipation that, if it is left in the owner’s possession, acts of sabotage will originate therefrom, suffices.

Regarding state-owned land, Hague Regulation 55 provides that the occupying state is only an administrator and usufructuary of “public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country.” The occupying state must safeguard the capital of these properties (subject to regular wear and tear). Ownership of the property is not transferred to it, but it may enjoy the benefits thereof. *Inter alia*, the occupying state may also let, lease or cultivate the land.<sup>111</sup>

The situation is different for private property. According to Hague Regulation 46, the occupying state must respect private property and may not confiscate such property, i.e., expropriate it without compensation for an illegal purpose.<sup>112</sup> But the occupying state may take temporary possession of privately owned land, against consideration, in order to establish civilian settlements that serve its security needs.<sup>113</sup>



As aforementioned, with respect to Yesha, Israel was not obliged, under international law, to apply either the Hague Regulations or the Fourth Geneva Convention. However, in the cases deliberated in Israeli courts the state declared that, although not legally obliged to apply these rules in Yesha, it will nevertheless apply the humanitarian provisions included therein. The Court accepted the state's position without deciding this issue on its merits. This is the background against which one must read the decisions of the Israel Supreme Court in the cases deliberated before it.

The Court ruled that private lands may be seized (against consideration) for the purpose of civilian settlements only where the need for such a settlement is necessary for security reasons, whereas the expropriation of private land for settlement purposes not motivated by security needs is prohibited (e.g., the "Elon Moreh" case).<sup>114</sup> In another case, the Court authorized the seizure of land despite the petitioner's claim that "both the areas of Tubas and of Ramallah are calm and quiet and there is nothing to fear." The Court's response (per Justice Witkon) stated that,<sup>115</sup>

There is no better cure for a malady than its prevention at onset, and it is better to discover and thwart a terror act before it has been committed. . . . One does not have to be a military and security expert to realize that terrorist elements operate more easily in an area inhabited only by a population that is indifferent or is sympathetic towards the enemy than in an area where there are also persons likely to look out for them and to report any suspicious movement to the authorities. Among the latter, terrorists will find no hideout, assistance or supplies.

In other cases the Supreme Court declined to address the legality of Jewish settlements beyond the Green Line, since their status would be determined definitively in the peace treaty, when such is signed, and "until then it is the duty of the respondent [*in casu*, the Commander of the Israel Defense Forces (IDF) in the Gaza Strip] to protect the civilian population (Arab and Jewish) in the area under its military control."<sup>116</sup>

Article 49, paragraph 6, of the Fourth Geneva Convention stipulates that "the Occupying Power shall not deport or transfer parts of its own civilian population." Israel has never forcibly uprooted its civilians, or transferred large numbers of them, to Yesha territories. Israel has only allowed people to settle of their own free will on land which is not privately owned. In some cases Israel allowed its citizens who, either themselves or their parents, owned land in the Yesha territory or in East Jerusalem before 1948, and had been expelled or dispossessed by Jordan, to return to their land after 1967. The Geneva Convention does not apply at all to such settlement. Israel did not attempt to confiscate the land or uproot the local population out of political or racial motivation, nor has it sought to alter the demographic nature of the area.<sup>117</sup>

### **5.3 The Agreements with the PLO**

The Interim Agreement between Israel and the PLO, signed on 28 September 1995, does not cover the matters that will be negotiated with respect to permanent status, including Jerusalem and the Yesha settlements (Art. XXXI(5) of the Interim Agreement). Moreover, the Interim Agreement states that “neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions” (Art. XXXI(6)). It is true that Article XXXI(7) determines that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.” However, had this provision been capable of preventing the establishment of new settlements, then it would have rendered paragraph (6) devoid of meaning and therefore redundant. The Palestinian Authority has not applied such an interpretation to its own acts, since such an interpretation would have prevented the Arab population, too, from undertaking any building on the territories handed over to the Palestinian Authority under the Interim Agreement. It has been further pointed out that, during the course of the negotiations on the Interim Agreement in 1995, the Palestinian delegation requested that a “side letter” be attached, 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. However, ultimately, the Palestinian leadership withdrew its request for such a side letter.<sup>118</sup> Hence, nothing in the Interim Agreement affects the settlements. It is permissible to expand the existing ones and also to establish new settlements.

Indeed, the Edmund Levy Committee Report<sup>119</sup> determines that the legality of the presence of the settlements derives from the historic, indigenous and legal rights of the Jewish people to settle in those areas, validated in international documents recognized and accepted by the international community.

### **5.4 Comparative Perspectives**

Since World War II a number of wars have taken place, resulting in settlement in territories occupied during the war. A study examining such incidences revealed not a single case where the settlers were required to evacuate their homes after those territories reverted to the State whose territory had been occupied, not even where the occupying State encouraged the emigration of its residents so as to influence the demography of the occupied territory, in contravention of the provisions of the Fourth Geneva Convention.<sup>120</sup> Within the present limited framework, I shall briefly address two examples – (a) the status of ethnic Russians who were resettled by the Soviet Union in the Baltic States after World War II, when the Baltic States regained independence; and (b) how international law addressed claims for restitution brought by

Greek Cypriot refugees who had been expelled from, and dispossessed of, their homes and property in Northern Cyprus after the territory had been occupied by Turkey in 1974, followed by the establishment of the Turkish Republic of Northern Cyprus, which has never been recognized in international law.

*a. The status of ethnic Russians in the Baltic States.*

In 1944, towards the end of World War II, the Soviet Union occupied the Baltic States of Lithuania, Latvia and Estonia. Stalin and his successors forcibly moved some half a million ethnic residents of the Baltic States to Siberia, while resettling hundreds of thousands of Russian citizens in those States, in a manner which greatly altered their demography, in particular in Estonia, where the number of ethnic Estonians dropped to ca. 60 percent by 1989, when Estonia was liberated from the Soviet Union, and Latvia, where ethnic Latvians represented only slightly over half of the population at the time of Latvia's liberation from the Soviet Union. In this case there appears to have been a fundamental breach of Article 49 of the Fourth Geneva Convention, but the Soviet Union claimed that the annexation of the Baltic States took place with their agreement, hence the Geneva Convention did not apply.

When the Soviet Union was dismantled, independent Lithuania granted citizenship also to its Russian residents, whose overall numbers did not affect the composition of the population. By contrast, Latvia and Estonia adopted a very different attitude. The ethnic Russians, who before the war had had no connection with those countries, were not granted either citizenship or civil rights. When Latvia and Estonia joined the European Union, not only did the EU not demand that the ethnic Russians must leave and return to Russia, but it demanded that Latvia and Estonia should amend their citizenship laws to make it easier for the ethnic Russians to become citizens of those countries and ensure full protection of their human rights and fundamental freedoms.

*b. The claims of Greek Cypriots regarding the homes in Northern Cyprus which they were forced to leave following the Turkish occupation.*

After hundreds of years of Ottoman rule, followed by British colonial rule, Cyprus attained independence in 1960, following an international agreement between Great Britain, Greece and Turkey. The majority of the population was Greek Cypriot, with a significant Turkish Cypriot minority (approximately one-fifth). The Constitution of independent Cyprus provided for participation of the two national communities in the central government, the legislature, the judiciary, the public

service and the army. The parliament, the administration, and the public service were to be composed of 70 percent Greek Cypriots and 30 percent Turkish Cypriots. This arrangement was short-lived and accompanied by harsh ethnic clashes, spurred also by the mother countries, Greece and Turkey.

In 1974, after a failed attempt by nationalist Greek Cypriots, supported by the Greek military government, to incorporate Cyprus into Greece (*enosis*), Turkey invaded Cyprus, occupied more than a third of the island and established the Turkish Republic of Northern Cyprus (TRNC). At the time of the occupation, some 200,000 Greek Cypriots, who had hitherto lived in the area occupied by the Turks, were forced to leave. At the same time, some 80,000 Turkish Cypriots fled their homes in the Greek part of the island. Turkey continues to occupy that area to this day. About half of the residents of the region are Turkish immigrants settled there by the Turkish government. The TRNC has only been recognized by Turkey. The Turkish settlement in Northern Cyprus was undertaken in breach of the Geneva Convention.

Greek Cypriots have submitted a large number of applications to the European Court of Human Rights in Strasbourg, demanding the return of their homes. All states which are Contracting Parties to the European Convention on Human Rights and Fundamental Freedoms, 1950, must respect the right of every citizen to “the peaceful enjoyment of his possessions” (Art. I of Protocol No. 1 to the Convention) and “respect for . . . his home” (Art. 8 of the Convention). Greece and Turkey are Contracting States. The European Court of Human Rights has held Turkey responsible for the acts and omissions of the authorities within the TRNC in numerous cases, because of its full and effective control in that territory. Accordingly, the Court held that it was competent to decide the Greek Cypriot applications.

In an application that was heard on the merits in 1996, the *Loizidou* case,<sup>121</sup> the Court ruled that the Greek Cypriots, who were forced to leave their homes in 1974, were the legal owners of the property that remained in the territory occupied by Turkey. Furthermore, since the occupation Turkey has been responsible for the continuing violation of their rights under the European Convention. The TRNC’s allegations that it had expropriated the property were dismissed; since the Turkish Republic of Northern Cyprus has not been recognized in international law, such expropriation was likewise not recognized. Therefore, the applicant’s right to enjoy her possessions had been violated.

By contrast, the Court ruled that there was no violation of the applicant’s right to respect for her home, pursuant to Article 8 of the Convention. In 1972, the claimant married and moved to Nicosia, in a neighborhood which became, two years later,

part of the Greek side of the island. Even if she intended to return to her family home on the Turkish side, such intention is not protected under the Convention. “Home” is the place where a person actually lives, not the place where he grew up, or the place that had been the family home for generations (para. 66 of the Court’s decision). Regarding the relief to which Mrs. Loizidou was entitled, the Court ruled that the parties should negotiate an agreed settlement within the six months subsequent to the ruling, and notify the Court of any agreement that they may reach.

In 2005, following a decision of the European Court of Human Rights, Turkey established the Immovable Property Commission in Northern Cyprus (IPC); the Commission’s purpose is to “establish an effective domestic solution” for claims of Greek Cypriots who had been forced to leave their property in Northern Cyprus. In 2010, in the case of *Demopoulos*,<sup>122</sup> the European Court of Human Rights heard applications of Greek Cypriots who claimed that the remedies provided by the IPC – that is, compensation – are wholly inadequate, since they effectively prevent them from reclaiming possession of their property and homes. According to the applicants, financial relief should be awarded only in rare instances where it is materially impossible to reconstitute their homes (e.g., if the house had been destroyed). In any other event, the appropriate remedy is the *de facto* restitution of their homes. The Turkish government submitted that the restitution of private property is not possible if the property has been transferred to other private persons, or is located in military areas, or is being used for a public purpose – roads, schools, hospitals, or serves some other public interest.

The European Court of Human Rights considered, as a starting point, the fact that “some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static. Turkish Cypriots who inhabited the north have migrated elsewhere; Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance” (para. 84). The Court dismissed (paras. 92ff.) the applicants’ arguments that the failure to reconstitute their property *in specie* retroactively legitimizes illegal Turkish acts.

The Court further added (para. 116) that to order Turkey to effect restitution in every case, save those in which it is physically impossible (e.g., if the actual property no longer exists), would risk being arbitrary and injudicious. Some thirty-five years after the applicants, or their predecessors in title, had left their property, Turkey must also take into account all the legal and practical factors that prevent restitution, primarily the rights acquired in the intervening period by third parties. The European Court of Human Rights cannot be expected to interpret and apply the

rules of the Convention in a manner that would impose an unconditional obligation on a government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention but, at the same time, creating disproportionate new wrongs.

The Court reiterated its determination that it is the duty of the States to respect the right of every citizen to his home, meaning only a real home with which the person has “a concrete tie in existence at this moment in time,” not just “‘family roots,’ which is a vague and emotive concept.” Thus, for instance, regarding the claim of one applicant to restitution of her home, the Court ruled (para. 137) that “the Applicant was very young at the time she ceased to live in the then family home in 1974 . . . .For almost her entire life, the applicant has been living with her family elsewhere. The fact that she might inherit a share in the title of that property in the future is a hypothetical and speculative element, not a concrete tie in existence at this moment in time. The Court accordingly does not find that the facts of the case are such as to disclose any present interference [by Turkey] with the applicant's right to respect for her home.”

To summarize, the European Court ruled that all the applicants must first exhaust their domestic remedies before the Immovable Property Commission of Northern Cyprus, the Court having been satisfied that the IPC's composition meets the requirements of independence and impartiality, and that it carries out its functions according to legislation, which seeks to provide a mechanism of redress and which has been interpreted so as to comply with international law, including the Convention, providing an accessible and effective framework of redress. The Court noted that the applicants are not compelled to appear before the IPC. They may choose to await a political solution when the international dispute over Cyprus is settled peacefully.

## **6. THE ISSUE OF THE PALESTINIAN PEOPLE'S SELF-DETERMINATION**

### **6.1 Defining the Palestinian People**

According to the International Court of Justice in The Hague, only the Palestinian people have the right to self-determination in all areas of Judea and Samaria beyond the Green Line. The Palestinians themselves claim a right to self-determination in the whole territory of the British Mandate for Palestine. Since Palestinians are a majority of the population in the land to the east of the Jordan River, ruled by a Bedouin minority, it is reasonable to expect that this territory should be included in the claim. This

conclusion may also be implied from the text of the Palestinian National Charter of 1968, Articles 1 and 2, whereby “Palestine, in its entirety, with the boundaries it had during the British Mandate,” is “an indivisible territorial unit,” “the homeland of the Arab Palestinian people,” as it will be recalled that “the territories lying between the Jordan and the eastern boundary of Palestine” were part of the Mandate territory, with respect to which the Mandatory had the right to suspend, or withhold, the application of certain provisions of the Mandate, in view of existing local conditions (Art. 25, Mandate document). Once the West Bank comes under Palestinian rule, the existing local conditions would seem to require the inclusion of these territories in that Palestinian state.

In the context of the Land of Israel which lies to the west of the Jordan river, the question arises whether the claim to self-determination refers: (1) only to Arabs currently living in the West Bank and Gaza (Yesha) territories; or (2) to the West Bank and Gaza (Yesha) Arabs, as well as any person defined as a refugee since 1948, according to the rules laid down in this matter by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), established by the UN after the War of Independence specifically to “carry out direct relief and works programs for Palestine refugees”; or (3) should Arabs with Israeli citizenship within the Green Line also be included in the definition? There is a further question of whether the claim to self-determination is made only with respect to Judea and Samaria and Gaza, or extends to all of Eretz Israel to the west of the Jordan River.

Since the implications of this question are of great significance to Israel’s right to defend itself, and even to its very existence, a close examination of this issue is highly important. To that end, the meaning of each of the different options must be clarified and understood. The second and third options in particular require an analysis of the refugee question since 1948; a proper understanding of the PLO position, according to the organization’s documents currently published on the United Nations Palestine website; and an evaluation of the implications of the Arab Spring for the Middle East and the current status in Iraq, Syria, Lebanon, Egypt, Libya and Tunisia, as well as in Judea and Samaria and the Gaza Strip themselves.

## **6.2 Self-Determination for Arabs in the West Bank and Gaza Only**

Discussions of the existence of a right to self-determination for people in a certain region usually refer to a people living in that region. To date, the only exception has been the Jewish people. Because of the Jewish people’s historical ties with Eretz Israel, dating back thousands of years, ties which were never severed even after the Jewish people were forcibly exiled and lost their sovereignty over the land, the League of Nations determined in the Mandate Document that the land would be administered by

the British Mandatory for the purpose of reconstituting the national homeland for the Jewish people, even though the majority of the Jewish people did not live in the country at the time the Mandate was given. All other mandates established by the League of Nations were given for the benefit of peoples living on their own land under colonial rule. Similarly, when the International Court of Justice refers to the Palestinians' right to self-determination, it seems to refer, at least on the face of it, to the Palestinian Arabs living in Judea, Samaria and Gaza today.

However, an examination of the various documents dealing with the Palestinians and their claim to self-determination reveals that the Palestinians themselves do not consider that the recognition of a right to self-determination of the residents of Judea, Samaria and Gaza will conclude their national claims. On the contrary, they appear to view their position as parallel to the Jewish people. Article 1 of the PLO Charter of 1968 determines that "the Palestinian people are an integral part of the Arab nation."

The parallel is inappropriate. Whereas the Jewish people has only one country in the world where it can realize its right to self-determination, the Palestinians form the majority of the population of Jordan, whose territory constitutes ca. 76 percent of the overall territory originally allocated to the British Mandate for Palestine and only later, after the Mandate had been approved by the League of Nations, was ultimately carved out of the Jewish national homeland by the British Mandatory to establish an Arab state. The Arab nation as a whole has over 20 states. Indeed, Article 1 of the Palestinian National Charter provides further that "Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland and the Palestinian people are an integral part of the Arab nation." There is no parallel here to the Jewish people, which suffered in exile for thousands of years because it had not a single land of its own.

### **6.3 Self-Determination for Arabs in the West Bank and Gaza and for All Palestinian Refugees since the War of Independence**

The possibility that the scope of the claim to self-determination extends also to the claim of all Arab refugees since the War of Independence to self-determination in the territory of Palestine that lies to the west of the Jordan River requires an examination of the origins of the refugee problem.

Following the War of Independence, Israel absorbed some 600,000 Jews from Arab nations and a similar number of Arabs<sup>123</sup> left areas of Israel within the Green Line. Throughout history wars have produced refugees and population exchanges, and this case was no different than others. What makes the Israeli-Arab conflict novel is the outright refusal of the Arab nations to absorb and integrate the Arab refugees, despite



their vast territories and rich oil resources. Even in Jordan, where Palestinians are the majority population, they suffer from discrimination by comparison with the ruling Bedouin minority.<sup>124</sup> For its part, Israel absorbed Jewish refugees without receiving any compensation for the property which they had to leave behind in the Arab states, and with no assistance from international organizations. Had the Arab nations used only the property that the Jewish refugees had left behind and that the Arab states had seized,<sup>125</sup> they would have been able to resolve, without any difficulty, the problem of the Arab refugees whom, according to their own declarations, they considered to be their brethren.

UN Security Council Resolution 242 declared the necessity “for achieving a just settlement of the refugee problem.” Yet it made no mention of the Palestinian refugees. This was no chance omission. The Resolution was drafted in recognition of the fact that there were refugees on both sides. Indeed, when discussing a just settlement to bring about the end to the dispute, it is impossible to ignore the fact that the War of Independence produced both Jewish and Arab refugees.

In recent years a claim is frequently heard that the Palestinians are a separate people, thus there was no exchange of population following the War of Independence. However, there is no “Palestinian” language and no specific “Palestinian” culture. The Palestinians are Arabs, indistinguishable from Jordanians, Syrians, Lebanese, Iraqis and others.

A declaration by Jamal al-Husseini, representative of the Arab Higher Committee to the United Nations Ad Hoc Committee on the Palestinian Question, which debated the question of Palestine in 1947, makes this point clearly (even though it ignores the lack of unity and rivalries between the Arab factions, detailed in Section 6.5 *infra*):

One other consideration of fundamental importance to the Arab world was that of racial homogeneity. The Arabs lived in a vast territory stretching from the Mediterranean to the Indian Ocean, spoke one language, had the same history, tradition and aspirations. Their unity was a solid foundation for peace in one of the most central and sensitive areas of the world. It was illogical, therefore, that the United Nations should associate itself with the introduction of an alien body into that established homogeneity, a course which could only produce new Balkans.<sup>126</sup>

Likewise, the testimony given in 1937 by the Secretary General of the Arab Higher Committee in Mandatory Palestine, Auni Abdul Hadi, to the British Royal Commission (the Peel Commission):<sup>127</sup>

There is no such country as Palestine! ‘Palestine’ is a term the Zionists invented! There is no Palestine in the Bible. Our country was for centuries part of Syria.

Prior to 1967 the Palestinians who lived in Judea, Samaria and the Gaza Strip did not demand a separate right to self-determination.

However, regardless of whether or not the Palestinians have a right to self-determination, in any event there is no other example in history of a refugee problem being perpetuated for so many years, since in the regular course of affairs every country absorbed those refugees who shared ethnic roots with its population.

Other differences relate to the definition of the Palestinian refugees and their treatment by the UN.<sup>128</sup> The UN Refugee Agency takes care of refugees from all over the world. Only with respect to the Palestinian refugees a special UN agency was created, namely the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which deals solely with Palestinian refugees and has at its disposal much greater resources than those available to the UN Refugee Agency. UNRWA employs many people, for the most part themselves designated as refugees, who earn their livelihood at the Agency, in contrast to the situation obtaining at the UN Refugee Agency which, in order to prevent the perpetuation of refugee status, does not employ local refugees in resolving the problem.

Furthermore, whereas refugees are generally defined as people who lived permanently in a certain location and were forced to leave as a result of war or persecution or natural disaster, Palestinian refugees are defined as people who lived in Palestine for at least two years prior to the conflict of 1948, i.e., between June 1946 and May 1948, and lost their home and livelihood as a result of the Israeli-Arab conflict. A study investigating the date of arrival of Arab residents to Eretz Israel<sup>129</sup> indicates that their numbers increased substantially following the waves of Jewish immigration, which created employment opportunities that had not previously existed in the country.<sup>130</sup> Reports by the Director of UNRWA in 1951 and 1960<sup>131</sup> denote that UNRWA exercised great flexibility in defining people as refugees, so as to include people who, although they may have lost property in Israel, did have a home, because they only worked in Israel before the war, but their home was in an area that was not within the Green Line. Also included in their number were Bedouins who customarily led a nomadic lifestyle between different areas and had no permanent abode in Israel within the Green Line. Moreover, numbers of refugees were artificially swelled further due to a failure to report deaths and the false registration of people as refugees in order to boost support.

One outcome of these differences is that, whereas people who became refugees as a result of other conflicts around the world were obliged to be rehabilitated, the problem of the Palestinian refugees was perpetuated and in effect their numbers have continued to grow over the years. Unlike refugees who are taken care of by the UN Refugee Agency, whose descendants are not considered refugees, and if they acquire citizenship of some other country are themselves not considered refugees, all generations of

descendants of Palestinian refugees are also designated as refugees, including those who have acquired citizenship of another country, as is the case with Palestinian refugees in Jordan, who continue to be designated as refugees by UNRWA.<sup>132</sup> According to UNRWA data, registered Palestinian refugees currently number around 5 million.<sup>133</sup> It is noted that in 2009 Jordan revoked the citizenship of thousands of Palestinian refugees who had received Jordanian citizenship, allegedly as a complement to Jordan's withdrawal from the West Bank in 1988.<sup>134</sup>

#### **6.4 Israeli Arabs within the Green Line**

May Israeli Arabs, who are citizens of Israel living within the Green Line (comprising approximately 20 percent of Israel's population), also claim a right to self-determination? And if so, where? The PLO has a clear stance on this matter. As aforementioned,<sup>135</sup> the United Nations Palestine website contains the texts of the Palestinian National Charters of 1964 and 1968. According to the Charter, "the Palestinian Arab people assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it." Palestinians are "those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father – whether inside Palestine or outside it – is also a Palestinian." The partition of Palestine and the establishment of the State of Israel are considered to be entirely illegal. "The Balfour Declaration, the Mandate for Palestine and everything that has been based upon them are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong." Only the Jews who "had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." Contrary to the obligations which the PLO had undertaken under the Interim Agreement, the PLO has not drafted a new charter to comply with its obligations. Nor did the Palestine National Council establish the legislative committee which was supposed to draft the articles of the new charter.

Furthermore, to date no Palestinian leader has recognized the right of the Jewish people to self-determination in Eretz Israel. The "Geneva Initiative – a Model for an Israeli-Palestinian Permanent Status Agreement" [as the paper is entitled in Hebrew – TE] (November 2003), sent by mail to all Israeli residents, and presented in its opening page, authored by the well-known Israeli writer, David Grossman, as containing "material and unprecedented achievements in the relationship of the two peoples," refers to the Palestinian people, on the one hand, and the Israeli people, on the other.

The Jewish people are referred to only once, in the Preamble, which also declares the recognition of their right to a state. However, nowhere in the document is there any mention of the Jewish right to self-determination in Israel, and there is also no reference to Israel being recognized as the state of the Jewish people. Under the Geneva Model Agreement (Art. 2(4)), “the Parties recognize Palestine and Israel as the homelands of their respective peoples. The Parties are committed not to interfere in each other’s internal affairs,” that is, the Palestinian people, on the one hand, and the “Israeli” people, on the other.

Under Article 4(5), “the State of Israel shall be responsible for resettling the Israelis residing in Palestinian sovereign territory outside this territory,” i.e., there are to be no Jews at all on territory under Palestinian control. There is no parallel provision regarding the territory under Israeli control. Only Palestinian refugees shall be entitled to compensation for both their property and their refugeehood under the Model Agreement (Art. 7(3), 7(9) and 7(10)).

The Model Agreement stipulates (Art. 7(10)) that a “Refugeehood Fund” is to be established under the supervision of an international commission, to be set up for that purpose and to which Israel is to be a contributing party (the international community is likewise called upon to contribute – naturally, in a non-binding manner). Funds will be disbursed for “communal development and commemoration of the refugee experience.” Funds are to be received and administered by the beneficiary refugee communities, which will themselves determine the use of the money (Art. 7(10)).

The Geneva Initiative makes no reference to the Jewish refugees, nor to those who were expelled from their homes in the Old City, Hebron, Gush Etzion and other areas, in the War of Independence, whose property was later declared by Jordan to be “property of the Zionist enemy.” Israel will be entitled to deduct from its contribution to the international fund only “the value of the Israeli fixed assets that shall remain intact in former settlements and [be] transferred to the state of Palestine . . . taking into account assessment of damage caused by the settlements” (Art. 7(9)(e)).

Regarding the rights of Arab refugees, the Geneva Initiative determines that they are free to choose whether to remain in their present host countries, in which case Israel must compensate those countries (Art. 7(11)(f)); move to the State of Palestine; or choose permanent residency in Israel, which will absorb refugees according to a number that will consider, as a basis, “the average of the total numbers submitted by the different third countries to the International Commission” (Art. 7(4)(e)(III)). Although this provision is vague and does not stipulate an exact number, and ostensibly Israel may exercise discretion regarding the number, nonetheless, the basis for its calculation is stated in the Model Agreement.

Furthermore, the right of the refugees to choose to reside within the Green Line, taken together with the fact that Israel is not referred to as the state of the Jewish people, but of the Israeli people (including its ca. 20 percent Arab minority), creates a real cause for concern that irredentism will follow. Since, in the declared view of the PLO, Israeli Arabs are also Palestinians, there is reasonable concern that, even if the Palestinian refugees mostly return to the territories of Judea and Samaria, Israeli Arabs will join the Arabs living in Judea and Samaria, as well as the Palestinian Arabs to the east of the Jordan River, to claim for all of them the right to self-determination in the whole territory of Mandatory Palestine, where they would be a majority population, following the influx of the Arab refugees.

## **6.5 Implications of the Arab Spring and the Existing Status of Arab States**

The Arab Spring provides clear evidence that the differences between the various factions in the Arab world are not national but religious, ethnic or tribal, with Sunnis and Shiites throughout the Middle East fighting one another with an intensity that belies the fact that 1300 years had elapsed since they were separated (with each faction fighting also the other minorities, such as Christians or Kurds). The fighting is in no way related to the national boundaries determined by the mandatory governments created after the dismantling of the Ottoman Empire following World War I.<sup>136</sup> On the contrary, in Iraq, Syria and Lebanon those boundaries are blurring with each passing day. As it transpires that there is no Iraqi, Syrian or Lebanese people, it is extraordinary to continue insisting that the Palestinian people is the only one that continues to exist as a people entitled to self-determination.

This bewilderment is further underlined if account is taken of the split between, on the one hand, the Palestinians in Gaza, who voted in free elections for rule by the Islamic Hamas, rather than by the PLO and the PA, and the Palestinians in the West Bank, who are under PA rule, on the other. Since Abu Mazen came into power in 2005, there have been no free elections in the West Bank, for fear of discovering that here, too, the majority might prefer religious to nationalist rule.<sup>137</sup> In this state of affairs, it is not at all clear whose self-determination is being claimed.

## **7. ISRAEL'S RIGHT TO SELF DEFENSE**

### **7.1 The Right and Obligation of a State to Defend its Citizens**

Under international law, a state has the right to defend itself. This right is recognized in Article 51 of the Charter of the United Nations, although it derives primarily from customary international law, to which all states are subject regardless of their

obligations under the Charter. The existence of this right is clear, because international law comprises the obligations that states have undertaken to observe and the rights that they may assert on the basis of these obligations, and they could not have agreed otherwise. The first duty of every state is to protect its citizens from external enemies, since it is to that end that citizens forego their right to protect themselves (the second duty is to protect citizens from one another, as far as possible, or the duty of establishing an exact administration of justice; and the third, to provide them with public services and maintain public institutions which citizens would be unable to provide and maintain themselves).<sup>138</sup> The right to self-defense is not only against physical acts of terror, but also against existential threats. Accordingly, this section is devoted to an examination of the threats to Israel's existence from the establishment of a Palestinian state in the West Bank and the conclusions to be drawn regarding Israel's right to self-defense against those threats.

## **7.2 The Lessons of the Interim Agreements with the PLO**

The architects of the Oslo Agreements expected them to establish a sound economic base in the territories that were transferred to Palestinian Authority rule, with a view to enhancing a just, lasting and comprehensive peace in both Israel and these territories. Such a development has not taken place. Instead, the PA has given Israel a preview of the risks posed by a terrorist entity established alongside Israel. The withdrawal from the Gaza Strip offered yet another preview of what might happen once Israel withdraws completely and control passes entirely into the hands of the Palestinian leadership: not peace and tranquility, but the destruction of civilian infrastructures left there by Israel and the destruction of the Erez industrial zone, which had been established to promote peaceful co-existence through industrial cooperation. Rather than the much hoped for peaceful relationship, Israeli residents have, since the unilateral withdrawal from the Gaza Strip, encountered the mass acquisition of arms by the Palestinian leadership and the various terror organizations, their delivery to the territories evacuated by Israel, and the launching of thousands of missiles at Israeli civilian population centers. Any effort on Israel's part to put an end to these occurrences elicited condemnation on all sides, from friendly and hostile nations alike, and from all international organizations. At the same time, Israel is required to provide for the Gaza Strip residents' humanitarian needs, including water and electricity, while the debts accumulating for their provision to both the Gaza Strip and the West Bank Palestinians become one more burden on the Israeli taxpayer.<sup>139</sup>

The killings of innocent Israeli citizens through harsh and gruesome, well-planned attacks by Arabs who could then escape to safe havens in the PA-controlled territories has become part and parcel of the "peace process" since its inception. Television

networks around the world have broadcast numerous images of Israeli buses being blown up together with their on-board passengers. The Palestinian “police” (in effect, Chairman Arafat’s regular army), established under the Oslo agreements, turned the guns provided by the Israeli government to defend themselves not against the “enemies of peace” from within, but rather against the Israel Defense Forces (IDF) and Jewish civilians.

In the Israel-PLO Interim Agreement, the parties committed themselves to foster mutual understanding, refrain from incitement and prevent incitement by any organizations, groups or individuals within their jurisdiction. The PLO and the Palestinian Authority have constantly violated this commitment.<sup>140</sup> Israel does not even exist on school textbook maps, whether new or old. Instead, one encounters “Palestine.” Schoolbooks and syllabi present the whole of the Jewish people, past and present, as the root of all evil. The classic anti-Semitic libel, accusing all Jews of the death of Jesus Christ, is used to fuel hatred. Children are asked to explain, in a false and twisted way, why Jews were persecuted in Europe and why they are hated everywhere. The Palestinian Broadcasting Corporation has never ceased to broadcast and publicize virulent incitement.<sup>141</sup> PA leaders take pride in sending out terrorists to perform acts of terror in Israel. In keeping with that, they name central city squares and streets after the terrorists and glorify their deeds.

Cynical use of children is also made in active warfare. Instead of being protected, they are placed in the front line and encouraged to throw rocks and explosive devices to create a living shield, while adults fire their rifles at Israelis from behind. Radio and television broadcasts praise the Jihad (holy war). Children are taught that it is a virtue to become a *shahid* (martyr), by the indiscriminate killing of men, women and children. The Protocols of the 1949 Geneva Convention set the age below which children may not be recruited into the armed forces at fifteen years. Article 38 of the United Nations Convention on the Rights of the Child stipulates that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.” A staged film of the killing of 12-year-old Muhammed al-Durrah by IDF soldiers in the Gaza Strip depicted IDF soldiers, through no fault of their own, as ruthless child murderers.<sup>142</sup>

The Interim Agreement also expressly guaranteed freedom of access and freedom of worship for Jews at the “Shalom ’al Israel” ancient synagogue in Jericho and at Joseph’s Tomb in Nablus. The synagogue in Jericho was burnt down a short time after the Agreement entered into force. Joseph’s Tomb has also been severely damaged, freedom of access to it has on many occasions involved risk to life and limb, and it can only be maintained due to protection by IDF soldiers.

The peace process and economic agreements concluded between Israel and the PLO (including the establishment of a customs union between Israel and the PA-controlled territories) should have yielded “dividends of peace” to the Arab population in the PA-controlled territories.<sup>143</sup> Instead, the PA mismanaged and embezzled a substantial part of the Palestinian budget, as well as the billions of dollars flowing from donor states (including the U.S., the EU member states, and Japan).<sup>144</sup> In April 2014, the European Parliament adopted the report by the European Court of Auditors in 2013, revealing major dysfunctions in the management of EU financial support to the Palestinian Authority, and calling for a serious overhaul of the funding mechanism.<sup>145</sup>

The objectives of the customs union were frustrated by its own provisions.<sup>146</sup> Rather than encourage the establishment of a functioning and thriving economy, the PA set up its own agencies, or monopolies, to import goods from Israel as well as from third countries. Reportedly, more than 100 exclusive importing agencies have been created. Those are controlled by persons with close contacts to the PA chairman, some of them serving simultaneously as officials of the PA. The import monopolies served to transfer income from the poorer classes to a new economic class, that used its profits to pay the bureaucracy that serves its ends and to enrich itself.

The legal system that was established has been yet another instrument serving the Authority rather than the public. In the absence of a proper rule of law, investors have not been forthcoming, industries have not been established, and employment and trading activity have deteriorated significantly by comparison with the period before the territories were transferred to PA administration.

Israeli citizens have also suffered serious financial losses, both from intentional damage to Jewish property and from a wave of thefts by Arab residents of the PA-controlled territories, who enjoyed the protection of the PA after their acts. The Israeli economy suffers the direct and indirect results of the war on terror, including damage from the rockets launched from the Gaza Strip. These have resulted in a significant increase in ongoing security costs, an atmosphere of insecurity that deters investors and tourists, and indirect damage to branches of the economy and businesses.

Despite all this, Israel is constantly blamed for the poverty and frustration of the Palestinians. Moreover, human rights organizations turn a blind eye to serious violations of human rights by the PA, which shows no respect for the basic rights of the population (e.g., the suppression of criticism; public executions and the callous murder, with no due process of law, of Arabs suspected of collaborating with Israel; the torture of prisoners; denial of, and disrespect for, freedom of expression, the freedom of the media and academic freedom; expropriation of private property without judicial order; a failure to establish and maintain a proper rule of law; the arbitrary non-enforcement of court decisions and judgments; etc.).<sup>147</sup> Other serious violations include the use of



ambulances to transport explosive devices and terrorists, the use of innocent civilians as human shields in fighting, and in particular the incitement of children, educating them to hate and, above all, the use of children in warfare. By contrast, many human rights organizations go out of their way to find, and even invent, “crimes” committed by Jews.

### **7.3 Possible Implications Deriving from the Establishment of the International Criminal Court**

The International Criminal Court (ICC), established under the Rome Statute (Statute of the Criminal Court, in force as of 1 July 2002) to prosecute individuals for genocide, crimes against humanity, war crimes and crimes of aggression (which have yet to be defined), may present a further serious risk to Israeli citizens, leaders and soldiers.

According to Article 5(1) of the Statute, it addresses “the most serious crimes of concern to the international community as a whole.” Nevertheless, a provision was added to the list of the most serious crimes which, until the Statute entered into force, had never been included in the category of serious crimes,<sup>148</sup> namely Article 8(2)(b)(viii): “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies. . . .” This article was added at the initiative of the Egyptian delegation so that the Jewish settlements in Yesha and the Gaza Strip would be considered war crimes, and anyone living in those settlements, or fighting for their protection, would be considered a war criminal. Even if the settlements were not established by the State of Israel, even if the initiative to establish them came from the settlers in their private capacity, even if their establishment entailed no breach of the Fourth Geneva Convention (regardless of the general question of the Convention’s applicability to the Yesha territories), or of any accepted rule of international law – there is still a concern that, pursuant to this article, it will be possible to arrest Israeli citizens and have them tried for war crimes by the ICC.

Had Israel approved the Statute of the International Criminal Court, Jews would no longer be able to live in the Old City of Jerusalem or in Hebron, the City of the Patriarchs, where Jews have lived since ancient times up until the elimination of the Jewish community following the Arab attack and massacre of 1929, or in other parts of Judea, Samaria, the Gaza Strip and the Golan Heights. It is indeed difficult to imagine that these are the worst crimes to humanity which the ICC Statute intended to address, but they were nevertheless included in its text and the legislative history of the Statute indicates that they were intentionally included to oppose Jewish presence in the Land of Israel.<sup>149</sup>

Moreover, whereas only nations having a market economy may accede to the Treaty of the World Trade Organization (WTO, formerly GATT, General Agreement on Tariffs

and Trade), the ICC Statute also admits countries that show no respect whatsoever for human rights. Among the 139 signatories to the Statute are Iran, Algeria, Afghanistan, Zimbabwe, Syria and many other countries where justice and the rule of law are far from being guiding principles (only a minority of those countries ultimately ratified the Statute). To date, Jordan and Tunisia are the only Arab states to have ratified the Statute, but there is nothing to prevent Syria and Iran, *inter alia*, from following suit immediately after Israel ratifies it, if indeed it should choose to do so. There is no point in their joining as long as Israel continues not to. It is hard to believe that their signature would be motivated by the pursuit of justice and a profound belief in human rights. Israel cannot hope for justice from a court where such member states may appoint judges and prosecutors.

Israel signed the ICC Statute, but subsequently announced that it would not ratify it. As long as Israel does not ratify this Statute, it is capable of protecting its citizens from prosecution by this Court, whose jurisdiction is limited to acts committed on the territory of contracting parties and to citizens of member states. However, if a sovereign Arab state is established to the west of the Jordan River, it will be entitled to ratify the Statute, thus risking the prosecution of any Israeli leader, soldier or citizen for charges of “crimes” committed by them on that state’s territory.<sup>150</sup> The United Nations Conferences against Racism, held at Durban, South Africa (in the summer of 2001 and 2011), and the many condemnations of Israel by the UN General Assembly, the Security Council, UNESCO, the UN Human Rights Council (established in 2006 as successor to the UN Commission on Human Rights),<sup>151</sup> and the Goldstone Report (The United Nations Fact Finding Mission on the Gaza Conflict),<sup>152</sup> may provide insight into that which may be expected from the United Nations International Criminal Court.

Notably, Article 12(3) of the Rome Statute allows a state not party to the ICC Statute to accept the Court’s jurisdiction with respect to crimes committed by its nationals or on its territory. In January 2009, during Israel’s Operation Cast Lead in Gaza, the Palestinian Authority submitted a declaration to the ICC Registrar “[recognizing] the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002” (the date on which the Rome Statute entered into force).

If Palestine had been a state, the ICC would have been competent to exercise jurisdiction, even if those crimes were committed by civilians of non-member states of the Statute, such as Israel. But after the declaration was submitted to the Registrar, the Office of the Prosecutor of the ICC announced, on 12 April 2012, that it would not examine the claims or crimes committed in Palestine, *inter alia* because “the current status granted to Palestine by the United Nations General Assembly is that of ‘observer,’ not as a ‘non-member State’.”<sup>153</sup> The statement also notes that the Office of the Prosecutor is aware that “Palestine submitted an application for admission to the

United Nations as a Member State.” The Court might exercise its jurisdiction in the future, once the matter of Palestine’s status as a state is decided by the relevant UN institutions, or if the Security Council, acting under Chapter VII of the United Nations Charter, refers to the Prosecutor a situation in which the Court may exercise its jurisdiction pursuant to Article 13(b) of the Rome Statute.

Whether this subject should be decided by UN institutions, or according to the accepted rules of international law regarding the recognition of states, is another question altogether.<sup>154</sup> In support of the former position, it will be noted that, even where the text of a treaty limits participation to states (as does the ICC Statute), the treaty depositary may exercise a measure of discretion to accept non-state entities as parties, by virtue of an understanding adopted by the General Assembly on 14 December 1973.<sup>155</sup> Arguably, however, the analogy drawn from the practice of the Secretary General to the ICC Prosecutor may be called into question, since the latter, depending upon the legal system, may be viewed not as a political organ but as a judicial one.

In support of the latter position, arguably the issue of Palestine’s statehood should be framed purely in terms of general international law, and the General Assembly vote should be assessed through the lens of the public international law rules concerning recognition of states, rather than regarding the General Assembly vote as decisive. In any case, such a politically-charged issue would require a thorough legal analysis before a decision is made one way or another. Even though every state has a right to self-defense in international law, Israel has been condemned repeatedly for acts undertaken in self-defense. Political and other considerations have made the international community, the international media and human rights activists apply double standards in Israel’s case.<sup>156</sup> As pointed out pertinently by Alan Dershowitz, “By treating Israel and its enemies comparably and ‘even-handedly,’ the world fails to recognize the important distinction between a flawed democracy and imperfect dictatorships.”<sup>157</sup>

The fear alone of claims submitted to the ICC may have a chilling effect on Israeli citizens and their leaders, preventing IDF commanders and soldiers from defending Israel as they should. As aforementioned, Palestine does not fulfill the conditions for being recognized as a state. Israel, for its part, must do everything within its power to prevent the Palestinian Authority from being accepted as a contracting party to the Rome Statute.

## 8. THE LIMITATIONS OF INTERNATIONAL PUBLIC POLICY ON THE ESTABLISHMENT OF A PALESTINIAN STATE ALONGSIDE ISRAEL

In international law, as in any legal system, it is recognized that the application of legal rules is not automatic. Insofar as the result of their application contradicts public policy, those provisions should not be applied blindly; rather, the removal of the obstacle arising from such contradiction should be awaited. Hence, for example, if a certain state is entitled to claim the return of an archeological artifact that had been removed illegally from its territory, nonetheless, as long as there is a real risk that, after its return, the artifact will not be properly protected in that state and may be harmed or even destroyed there, then international law recognizes an international public policy (*ordre public international*), whereby the return of the artifact may be postponed until adequate protection of the object is guaranteed by that state.<sup>158</sup> Such an *ordre public international* should apply *a fortiori* when the issues concern the protection of human lives and a nation's right to self-defense.

In light of everything stated above, there are conditions that must be fulfilled prior to concluding a sustainable peace treaty. As long as the following conditions are not fulfilled, the coming into effect of any agreement should be suspended on grounds of *ordre public international*:

- a) The identity of the Palestinian people, on behalf of whom the agreement is made, must be clarified; also whether they are represented by Hamas in Gaza, by Abu Mazen and the Palestinian Authority, or by others. Since Hamas was elected to rule in Gaza in free elections, whereas in the West Bank no elections have been held since 2005, this question cannot be left open. Following the events of the Arab Spring in Egypt and Syria, it would seem that the declared position of the Western world, in particular the United States and the European Union, provides support for regimes which enjoy majority support in the local population, rather than dictatorships. Consequently, it is necessary to ascertain the majority preference, and whether their democratic leadership seeks peace and wants to conclude a peace treaty with Israel.
- b) The Palestine National Council must establish the legislative committee that will draft a new Palestinian National Charter, to be adopted by the Palestinian National Council, that will openly renounce the armed struggle and recognize Israel as the state of the Jewish people.
- c) As long as the Palestinians insist that all generations of descendants of Palestinian parentage, regardless of their present place of residence in the world, and regardless of their citizenship at present, are Palestinians entitled to the right of return to the Land of Israel, west of the Jordan river, any agreement with them will present a risk to the right of self-determination which was recognized in the Mandate Document for the Jewish people in the Land of Israel. It makes no difference whether the right of return of five million Palestinians will be restricted to the territory between the Green Line and the

Jordan River, or extend to all of the Land of Israel to the west of the Jordan river. If the Palestinians insist that such a right of return is recognized, then Israel must demand that the land to the east of the Jordan River, which makes up 76 percent of the area originally designated as Mandatory Palestine, the majority of whose population are Palestinians, must also be included in the peace treaty. Otherwise, the demographic pressure created by the Arabs in Judea, Samaria and Gaza (including those who had exercised their right of return), who may then be joined by Israeli Arabs – since they, too, are Palestinians according to the PLO Charter definition – could tip the balance to Israel’s detriment. As aforementioned, the negotiations that preceded the signing of the PLO Declaration of Principles in 1993 were held with the Jordanian-Palestinian delegation and not with the PLO, with the understanding that, in order to settle the dispute, not only the Palestinian population resident in the West Bank and the Gaza Strip must be addressed, but the overall Palestinian population, including those resident in Jordan. From the outset, that population was not meant to include anyone not present at all in the Land of Israel or in Jordan, such as PLO personnel who were based in Tunis at the time.

- d) In the PA-controlled territories, democratic institutions must be established; Arab governance must become transparent and accountable; the reformed Arab legal system must protect human rights and fundamental freedoms, and subject its authorities to open criticism. Private law being the charter of a free society, and private sector initiative the key to economic prosperity, they require legal rules that govern property rights, their transfer and the settlement of disputes by an independent judiciary. The rules must be transparent, stable and enforceable in a fair and efficient manner. An agreement with a dictator, who does not enjoy popular support and does not need to stand for election and is, consequently, not accountable to his people, will not bring about a true, long-lasting peace. The opportunity to share in economic prosperity and growth must be guaranteed not only to a thin governing class and their cronies, but to all residents on an equal, non-discriminatory basis.
- e) The Palestinian Authority must put an end to incitement against Israel and to anti-Jewish hate propaganda, and instead engage in educating its population – primarily the children – to peace with Israel and the Jewish people, and above all else, be prepared for genuine peace and mutual respect in speech and deed.

## 9. CONCLUSIONS

- 1. Israel’s position that Judea and Samaria (the West Bank) are not “occupied territories” under international law, since they were not taken from any foreign sovereign power, is well-founded. Even though Israel has not actually annexed those territories and has not applied its sovereignty to them, it has a priority claim of right to sovereignty over them,

which prevails over any Palestinian or Arab adverse claim. According to a French proverb, *Adieu le passé, c'est aussi adieu la posterité* [to bid farewell to the past is also to bid farewell to posterity]. The Jewish people have not forgotten their past.

2. The claim that the Palestinians have a right to an independent state in all areas of Judea, Samaria and Gaza (Yesha), while Jewish settlement in Yesha is prohibited, has no basis in international law. According to international law, Israel does not have to agree to the establishment of a sovereign Arab state to the west of the Jordan River, nor cancel, or even freeze, their settlement by Jews.
3. The historical connection of the Jewish people with Eretz Israel/Palestine was recognized by the international community in the British Mandate for Palestine, which granted political rights only to the Jewish people. Those rights were approved and reconfirmed in Article 80 of the United Nations Charter.
4. United Nations resolutions are non-binding recommendations and hence devoid of legal validity. Their validity is conditional on their acceptance by the parties. Regarding the General Assembly's Partition Plan, after Israel had declared its willingness to sign the declaration accept the obligations embedded in the resolution, whereas the Arab nations rejected it outright, the United Nations did nothing to enforce it. Consequently, it remained devoid of validity, and Israel was accepted to the UN without being required to accept the boundaries proposed in that resolution.
5. The Security Council resolutions made with respect to the Arab-Israeli conflict are not binding on the parties, since they were made within the framework of the Council's powers, under Chapter VI of the United Nations Charter to make recommendations to the parties with a view to a pacific settlement of the dispute. Security Council Resolutions 242 and 338 do not mandate the establishment of a separate Palestinian state in Jerusalem, Judea and Samaria, and the Gaza Strip.
6. The Interim Agreements signed between Israel and the PLO did not settle the question of sovereignty over those territories.
7. Israel's unilateral withdrawal from the Gaza Strip in August-September 2005, further to the Israeli government's Disengagement Program, did not resolve the matter of sovereignty.
8. Upgrading the status of Palestine at the United Nations to that of a Non-Member Observer State does not affect the question of sovereignty over the territories of Yesha (Judea, Samaria and the Gaza Strip).
9. The Advisory Opinion of the International Court of Justice also changed nothing in this matter. The Advisory Opinion was drafted on shaky foundations from both the factual

and legal points of view. In any event, like any advisory opinion of the Court, it is not binding.

10. In the existing legal situation, only a permanent status agreement can settle the issue of sovereignty in Yesha. In order to draft a permanent status agreement, it is necessary to know who the Palestinians that are party to that agreement are – firstly, whether their popular support is given to a representation by Hamas, by the PLO, or by some other representation, and secondly, whether the agreement will cover only residents of Yesha, or will include, as specified in the Palestinian National Charter, all generations of descendants of Palestinian parentage, wherever they may be located today, regardless of whether they have acquired citizenship of other countries, and regardless of the question of which side of the Green Line they live on. These questions must be answered in order to assess the feasibility of signing an agreement at all, and to determine whether the territory of the Palestinian state must include also the land to the east of the Jordan River, which constituted the majority (ca. 76 percent) of the land allocated originally to the British Mandate for Palestine.
11. Israel has the right and duty to defend itself, its civilians and its residents. The dangers threatening Israel from the establishment of a Palestinian state on land to the west of the Jordan River should deter anyone, desiring and seeking a true peace, from supporting such a “solution” to the Arab-Israeli dispute, before the conditions to peaceful co-existence are met. The Oslo Accords were meant to bring about “a just, lasting and comprehensive peace.” Yet since they came into effect, Israel has witnessed not peace but violence of the worst kind since the establishment of the State of Israel. The establishment of the Palestinian Authority should serve as a guide to the grave risks posed by such an Arab state, which may eventually lead to the destruction of the Jewish state. Any agreement must take into account Israel’s need to live in peace within secure boundaries, free from threats or acts of force, as provided in Security Council Resolution 242.
12. The preconditions for a true peace require the Palestinians to lay down their arms and renounce terror and violence; to draft a new charter to replace the Palestinian National Charter of 1968; to recognize Israel as the state of the Jewish people and put an end to incitement against it and to anti-Jewish hate propaganda. Arab democratic institutions must be established; Arab governance must become transparent and accountable; the reformed Arab legal system must respect and protect human rights and fundamental freedoms, and subject its authorities to open criticism. Private law being the charter of a free society, and private sector initiative the key to economic prosperity, they require legal rules that govern property rights, their transfer and the settlement of disputes by an independent judiciary. The rules must be transparent, stable and enforceable in a fair and efficient manner. Above all, the Palestinians must be ready for true peace and mutual respect in speech and deed. As long as these conditions are not fulfilled, the

coming into effect of any agreement should be suspended on grounds of *ordre public international*.

13. Until a peace treaty, concluded by the parties, comes into effect, Israel is entitled, under international law, to continue the settlement of the territories of Judea and Samaria, fulfilling the principles laid down by the League of Nations in the original Mandate Document.

### **About The Author**

Talia Einhorn, Professor of Law (Ordinaria) at Ariel University Department of Economics and Business Management and Visiting Senior Research Fellow at Tel Aviv University Faculty of Management, earned the degrees of B.Sc. (math-physics) (*cum laude*), Hebrew University of Jerusalem; LL.B., LL.M. (*magna cum laude*), Tel-Aviv University; and Dr. iur. (*magna cum laude*), University of Hamburg. She is author of *The Role of the Free Trade Agreement between Israel and the EEC: The Legal Framework for Trading with Israel between Theory and Practice* (Nomos 1994), *Private International Law in Israel* (Kluwer Law International 2009, 2<sup>nd</sup> ed. 2012) and numerous articles in international, European and Israeli law journals and scientific publications. She was founder and Editor-in-Chief of *European Business Organization Law Review* (EBOR) (2000-2002). She testified before the US Congress Joint Economic Committee on the economic relations between Israel and the Palestinian Authority (21 October 1997 hearing). Einhorn was appointed Professor of Law at Concordia International University Estonia (1998-2001), and Senior Research Fellow at T.M.C. Asser Institute for Private and Public International Law, International Commercial Arbitration and European Law, The Hague (1999-2002). She has taught and lectured widely at Israeli, European and American universities and institutes of higher education.

Professor Einhorn is a titular member of the International Academy of Comparative Law; and a member of the Scientific Board of the Interdisciplinary Association of Comparative and Private International Law (IACPIL); the German Society of International Law; the American Society of International Law; ASCOLA (Academic Society for Competition Law); the International Advisory Committee consulting the Republic of China Private International Law Reform Committee (2005); the Board of the Israeli Association for the Study of European Integration (1997-2000); the German Association for the Study of European Integration; ILA (International Law Association) International Trade Law Committee; ILA Cultural Heritage Law Committee; ILA International Arbitration Committee; the Israeli Bar Association.



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\* Full Professor (*Ordinaria*), Ariel University, Ariel, Israel. I thank Dr. Yaacov Chisdai, Attorney-at-Law, for his insights and critical comments.

<sup>1</sup> Report on the status of building in Yesha (Edmund Levy Report), 21 June 2012:

<<http://www.pmo.gov.il/DOcuments/doch090712.pdf>> (in Hebrew). An English brief summary of the Committee's findings and recommendations is provided at <[http://en.wikipedia.org/wiki/Levy\\_Report](http://en.wikipedia.org/wiki/Levy_Report)>.

<sup>2</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Advisory Opinion of 9 July 2004): <<http://www.icj-cij.org/docket/files/131/1671.pdf>>.

<sup>3</sup> Convention (IV) respecting the Laws and Customs of War and Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 – <<http://www.icrc.org/applic/ihl.nsf/Treaty.xsp?documentId=4D47F92DF3966A7EC12563CD002D6788&action=openDocument>>.

<sup>4</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949: <<http://www.icrc.org/ihl/INTRO/380>>.

<sup>5</sup> The facts were verified by the author with Mr. Abba Eban.

<sup>6</sup> See: Dan Bahat, Benjamin Zeev Keidar and Zeev Vilnai, *The Continuity of Jewish Settlement in Eretz Israel from the Bar Kochva Uprising to the Beginning of New Immigration* (Ministry of Defense Publications, 1974); *The History of Eretz Israel* (Yaacov Shavit, Editor-in-Chief) (Keter/ Yad Ben-Zvi, 1981) (in Hebrew), Vols. 5ff., each volume detailing the history of the Jewish *yishuv* (settlement) in Eretz Israel during every period since the destruction of the Second Temple, including the economic conditions, everyday life, and spiritual and cultural life of each.

<sup>7</sup> *The History of Eretz Israel* (Yaacov Shavit, Editor-in-Chief), Vol. 6: *Moslem and Crusader Rule (634-1291)* (Joshua Prawer, ed.) (Keter/ Yad Ben-Zvi, 1981) (in Hebrew), pp. 151ff., with references to additional sources.

<sup>8</sup> Mark Twain: *The Innocents Abroad* (American Publishing Company, 1869, reprint Signet Classics, 2007), p. 371.

<sup>9</sup> For the status of Jerusalem in Islam, see Dore Gold, *The Fight for Jerusalem – Radical Islam, the West and the Future of the Holy City* (Yedioth Ahronoth, 2008) (in Hebrew), p. 94f.

<sup>10</sup> *The History of Eretz Israel* (Yaacov Shavit, Editor-in-Chief), Vol. 6: *Moslem and Crusader Rule (634-1291)* (Joshua Prawer, ed.) (Keter/ Yad Ben-Zvi, 1981) (in Hebrew), p. 50. For the historical development of the term “Palestine” as a synonym for the Holy Land or the Land of Israel, see Uriel Dan and Yaakov Shimoni, “Palestinian-Arab Society and the Trans-Jordan Emirate,” *The History of the Land of Israel*, Vol. 9: *The British Mandate and the National Homeland (1917-1947)* (Yehoshua Porath and Yaacov Shavit [eds.]), (Yad Ben-Zvi/Keter, 1982) (in Hebrew), pp. 263ff.

<sup>11</sup> Churchill's speech to the British Parliament is available on HC Deb 14 June, 1921, Vol. 143, cc.265-334, at cc.286-287: see

<[http://hansard.millbanksystems.com/commons/1921/jun/14/middle-eastern-services#S5CV0143P0\\_19210614\\_HOC\\_420](http://hansard.millbanksystems.com/commons/1921/jun/14/middle-eastern-services#S5CV0143P0_19210614_HOC_420)>. Cf., also, the report of Churchill's biographer – Martin Gilbert,

*Churchill and the Jews: A Lifelong Friendship* (Simon and Schuster, 2007), p. 65f.

<sup>12</sup> Ibid.

<sup>13</sup> See Benzion Netanyahu, *The Founding Fathers of Zionism*, 3<sup>rd</sup> edition (Yedioth Ahronoth, 2003) (in Hebrew), the chapter on Theodor Herzl and his endeavors to obtain official recognition by the Ottoman Empire, Germany, France and Great Britain of the Jewish people's right to establish a sovereign state in the Land of Israel, pp. 83-126. Thanks to Herzl's groundwork, the acceptance of Zionism by the League of Nations had been well prepared even before the League was established – *ibid.*, pp. 113-114.

<sup>14</sup> *i.e.* The Balfour Declaration – the declaration delivered by British Foreign Secretary Lord Arthur Balfour to Lord Lionel Walter Rothschild on 2 November 1917, whereby “His Majesty's government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

<sup>15</sup> J. Stoyanovsky, (London: Longmans, Green and Co., 1928), pp. 40-47, with further references.

<sup>16</sup> Cf. *Documents of the United Nations Conference on International Organization, San Francisco 1945 Documents* (UN Information Organizations, 1945), Vol. 10, pp. 477, 487, 515-516; See also Nathan Feinberg, *The Arab-Israel Conflict in International Law* (Magnes, 1970), pp. 40ff.

<sup>17</sup> See, e.g., the account of the riots written in April 1920 by Robert Meinertzhagen, *Middle East Diary 1917-1956* (London: Cresset Press, 1959) 79ff.

<sup>18</sup> Yaacov Shavit and Gideon Biger, “The British Mandate for Palestine: Government, Administration and Legislation,” *The History of the Land of Israel*, Vol. 9: *The British Mandate and the National Home (1917-1947)* (Yehoshua Porath and Yaacov Shavit [eds.]) (Yad Ben-Zvi/Keter, 1982) (in Hebrew), pp. 86, 103-106.

<sup>19</sup> *Ibid.*, pp. 93-94.

<sup>20</sup> See the text of the Resolution: <http://www.yale.edu/lawweb/avalon/un/res181>.

<sup>21</sup> At the same time, Israel also made several applications to the UN Security Council to send armed forces to protect Jerusalem and other Holy Places from Arab armies, which were attacking the Jewish population and sites sacred to both Jews and Christians. The UN Report on Jerusalem acknowledged Israel’s complaints but the UN did nothing to enforce the Partition Resolution. See Gold, *supra* n. 9, pp. 136-139, with further references.

<sup>22</sup> The declarations made by the Arab delegates immediately after the adoption of the Partition Resolution are brought in *Israel's Foreign Relations: Selected Documents* (Meron Medzini [ed.]) (Jerusalem: Ministry of Foreign Affairs, 1981–2002), vol. 1 (1947), available at

<<http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/The%20Arab%20reaction.aspx>>.

<sup>23</sup> <<http://unispal.un.org/UNISPAL.NSF/0/0B7D3DADCCA7AFFE052566C6005A7415>>.

<sup>24</sup> <<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3CF6E4FF96FF99%7D/IP%20S%20I267.pdf>>.

See also Nathan Feinberg, *On an Arab Jurist's Approach to Zionism and the State of Israel* (Jerusalem: Magnes, 1971), pp. 41f.

<sup>25</sup>

<<http://unispal.un.org/UNISPAL.NSF/85255e950050831085255e95004fa9c3/1db94e43c280a26052565fa004d8174?OpenDocument>>. Israel’s application for admission to membership in the United Nations Report of the Ad Hoc Committee (A/855) were discussed extensively at the 207<sup>th</sup> meeting of the Plenary of the General Assembly on 11 May 1949, UN Official Records of the 3<sup>rd</sup> Session of the General Assembly, Part II, Plenary Meetings of the General Assembly, Summary Records of Meetings 5 April–18 May 1949, Lake Success, New York, available at

<<http://unispal.un.org/UNISPAL.NSF/0/0B3AB8D2A7C0273D8525694B00726D1B>>.

<sup>26</sup> <<http://unispal.un.org/UNISPAL.NSF/0/83E8C29DB812A4E9852560E50067A5AC>>;

<<http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/Admission%20of%20Israel%20to%20the%20United%20Nations-%20General.aspx>>.

<sup>27</sup> Cf. Elihu Lauterpacht, *Jerusalem and the Holy Places* (Anglo-Israel Association, 1968), 23.

<sup>28</sup> Law of Treaties – Replies from Governments to Questionnaires of the International Law Commission, UN Doc A/CN.7.19, Yearbook of the ILC (1950), Vol. II, pp. 206-218, at pp. 214-215. For a study in detail of the succession of states in the Israeli context, see Talia Einhorn, “Israel,” in *Sources of State Practice in International Law* (Ralph Gaebler and Alison Shea [eds.]), 2<sup>nd</sup> ed. (Brill, 2014) 283, 286ff.

<sup>29</sup> See Article V(2) of the Egyptian-Israeli Armistice Agreement:

<<http://unispal.un.org/UNISPAL.NSF/0/9EC4A332E2E2FF9A128525643D007702E6>>, and Article II(2) of the Jordanian Armistice Agreement:

<<http://www.mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/Israel-Jordan%20Armistic%20Agreement.aspx>>.

See also identical provisions in Article II(2) of the Lebanese-Israeli Armistice Agreement and Article V(2) of the Israeli-Syrian Armistice Agreement.

<sup>30</sup> Peter Malanczuk, “Israel: Status, Territory and Occupied Territories,” in *Encyclopedia of Public International Law*, Vol. 12, 149 (1990).

<sup>31</sup> Cf. Leo Gross, “The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba,” *American Journal of International Law* 53 (1959) 564.

<sup>32</sup> Egypt’s claim that Israel was in a state of war with Egypt, giving it the right to such conduct against Israel, was rejected by the Security Council. After signing the cease-fire agreement with Israel in 1949, Egypt had no more grounds for such a claim. For a detailed account, see Rosalyn Higgins, “The Place of International Law in the Settlement of Disputes by the Security Council,” *American Journal of International Law* 64 (1970) 1.

<sup>33</sup> For a critical analysis of Secretary General U Thant’s decision and acts in this matter, see Rosalyn Higgins, “The June War: The United Nations and Legal Background,” *Journal of Contemporary History* 3 (1968) 253, reprinted in J.N. Moore (ed.), *The Arab-Israeli Conflict* (Princeton University Press, 1977) 535, 544ff.

<sup>34</sup> Yoram Dinstein, *War, Aggression and Self-Defence*, 5<sup>th</sup> ed. (Cambridge University Press, 2011), paras. 531ff., 545ff., with further references, and paras. 548-549, regarding the case of the Six-Day War.

<<http://unispal.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/7d35e1f729df491c85256ee700686136?OpenDocument>>.

<sup>36</sup> For the text and a detailed interpretation of Resolution 242, see Shabtai Rosenne, “On Multi-Lingual Interpretation,” *Israel Law Review* 6 (1971) 360. The article is also available on the Israeli Ministry of Foreign Affairs website:

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/on%20multi-lingual%20interpretation%20-un%20security%20counc.aspx>>.

<sup>37</sup> Ibid., with further references in footnote 7.

<sup>38</sup> Shabtai Rosenne, “Directions for a Middle-East Settlement,” *Law and Contemporary Problems* 33 (1968) 44, at p. 59.

<<http://unispal.un.org/unispal.nsf/0/7FB7C26FCBE80A31852560C50065F878>>.

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-egypt%20peace%20treaty.aspx>>.

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20peace%20treaty.aspx>>.

<<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx>>.

<sup>43</sup> Yigal Carmon, “The Story behind the Handshake,” *Commentary* 98 (1994) 25, p. 28; the first page of the Declaration of Principles, on which the “Palestinian delegation” (the Jordanian-Palestinian delegation to the Middle East Peace Conference) was deleted and replaced with “the PLO” (in handwriting), was photographed and brought in Abu Mazen’s book, recording the “archeology” of the Declaration of Principles (since the official Declaration which was printed thereafter does not include the deletion that occurred immediately prior to the signing). Cf. Abu Mazen, *Through Secret Channels: The Road to Oslo: Senior PLO Leader Abu Mazen’s Revealing Story of the Negotiations with Israel* (Garnet, 1997).

<sup>44</sup> <<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>>.

<sup>45</sup> In effect, the word “states” in this Article was interpreted in a broad sense as also including entities which had not yet attained full independence. See John Cerone, “The UN and the Status of Palestine – Disentangling the Legal Issues,” *ASIL [American Society of International Law] Insights*, Vol. 15, Issue 26 (Sept. 13, 2011).

<sup>46</sup> Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, UN Security Council, S/2011/705 of 11 November 2011, available at <<http://unispal.un.org/UNISPAL.NSF/0/097ACC6FFFF29D5785257949005D2A63>>.

<sup>47</sup> <[www.un.org/News/Press/docs/2012/ga11317.doc.htm](http://www.un.org/News/Press/docs/2012/ga11317.doc.htm)>.

<sup>48</sup> <<http://www.un.int/wcm/content/site/palestine/pid/12008>>.

<sup>49</sup> <<http://www.un.int/wcm/content/site/palestine/pid/12361>>.

<sup>50</sup> <<http://www.jewishvirtuallibrary.org/jsource/Peace/ArafatCharterAssurance.html>>.

<sup>51</sup> The ceremony of the show of hands can be viewed in a clip on the following link, which also includes a speech by Salim Za’noun, Speaker of the Palestinian National Council (PNC), prior to the show of hands, stating that the Charter had not actually been amended, since the legal committee had not convened; and a speech by Yasser Arafat himself which does not really support the version of the Charter having been amended:

<[http://www.palwatch.org.il/SITE/MODULES/videos/pal/videos.aspx?fld\\_id=140&doc\\_id=87](http://www.palwatch.org.il/SITE/MODULES/videos/pal/videos.aspx?fld_id=140&doc_id=87)>.

Note: The actual clip includes an English translation from Arabic, but the webpage itself is in Hebrew.

<sup>52</sup> Ibid.; see also Gold, *supra* n. 9, p. 192, with additional references.

<sup>53</sup> “The Years of Hope” (*Haaretz*, 4 September 2002) (in Hebrew), with additional examples of statements by leaders to the effect that the Charter remained unchanged <<http://www.haaretz.co.il/misc/1/1.822374>>.

<sup>54</sup> A report on the PLO 6<sup>th</sup> General Conference in 2009 is accessible at

<<http://unispal.un.org/UNISPAL.NSF/0/853668C3E95F8E068525785500565876>>.

<sup>55</sup> Y.Z. Blum, “The Missing Reversioner: Reflections on the Status of Judea and Samaria,” *Israel Law Review* 3 (1968), 279, 288.

<sup>56</sup> The sessions of the Arab League are documented at

<<https://www.jewishvirtuallibrary.org/jsource/Peace/legsess.html>>.

<sup>57</sup> Ibid.

<sup>58</sup> Blum, *ibid.*, pointed out that these territories were not “occupied” in the sense of the Geneva Convention, since those rules are destined to assure the reversion of the former legitimate sovereign which, in this case, did not exist; see also Stephen Schwebel, “What Weight to Conquest?” *American Journal of International Law* 64 (1970) 344, reprinted in Stephen Schwebel, *Justice in International Law: Selected Writings* (Cambridge: Cambridge University Press, 1994), 521; Elihu Lauterpacht, *Jerusalem and the Holy Places* (Anglo-Israel Association, 1968), 51-53; Julius

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Stone, "The Middle East under Cease-Fire," in *The Arab-Israeli Conflict, Vol. II: Readings* (J.N. Moore [ed.]), 47, 68-71; id., *No Peace – No War in the Middle East* (Sydney: Maitland Publications for the International Law Association – Australian Branch, 1969), pp. 38-41.

<sup>59</sup> Law and Administration Ordinance (Amendment no. 11), *sefer ha-chukkim* (official collection of Israeli statutes) 499 (27 June 1967), accessible in English at

<http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/13%20law%20and%20administration%20ordinance%20-amendment%20no.aspx>. The Amendment added to the Ordinance Article 11B ("Application of Law"), providing that "the law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the government by order." In this matter, see Yehuda Zvi Blum, "Zion Redeemed in International Law," *Hapraklit* 27 (1971), 315, pp. 316ff. (in Hebrew).

<sup>60</sup> The Ordinance is available in English translation at

<http://www.israelawresourcecenter.org/israelaws/fulltext/areaajurisdictionpowersord.htm>.

<sup>61</sup> *Sefer Ha-Chukkim* 499 (27 June 1967). An English translation is available at

<http://www.knesset.gov.il/laws/special/eng/HolyPlaces.htm>.

<sup>62</sup> An English translation is available at [https://www.knesset.gov.il/laws/special/eng/basic10\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm).

<sup>63</sup> See the provisions of part 1 of the Fourth Geneva Convention, 1949, relative to the Protection of Civilian Persons in Time of War <http://www.icrc.org/ihl.nsf/INTRO/380>, and Article 2 of the Fourth Hague Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907: <http://www.icrc.org/ihl/INTRO/195?OpenDocument>.

<sup>64</sup> Meir Shamgar, "The Observance of International Law in the Administered Territories," *Israel Yearbook of Human Rights* 1 (1971) 262; id., "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," in *Military Government in the Territories Administered by Israel 1967-1980 – The Legal Aspects* (Meir Shamgar [ed.]) (Jerusalem: Hebrew University of Jerusalem, Sacher Institute for Legislative Research and Comparative Law, 1982), Vol. 1, 13, pp. 31ff.

<sup>65</sup> Cf. Nissim Bar-Yaakov, "The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip," *Israeli Law Review* 24 (1990) 485, 489ff. with further details.

<sup>66</sup> A list of over 100 such petitions, representing the state position, is presented by Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), xvii-xxi.

<sup>67</sup> See Talia Einhorn, "Israel," in *International Law and Domestic Legal Systems* (Dinah Shelton [ed.]) (Oxford University Press, 2011), 288, 303, footnote 73, with further references. The article is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1926988](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926988).

<sup>68</sup> Dinstein, *supra* n. 66, pp. 25ff., 30.

<sup>69</sup> Dinstein, *ibid.*; Eyal Benvenisti, *The International Law of Occupation*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2012), 217ff. See also Talia Einhorn, "Israel," *ibid.*, at pp. 303-304.

<sup>70</sup> Cf., e.g., Benvenisti, *ibid.*, p. 207.

<sup>71</sup> The surprising element of this paradoxical state of affairs was addressed by Yoram Dinstein, "The International Legal Status of the West Bank and Gaza Strip," *Israel Yearbook on Human Rights* 28 (1998) 37, 41-42; see also the analysis of this issue by the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of the Wall, which still considers the territories to be under belligerent occupation, even after the conclusion of the peace treaties with Egypt and Jordan, by Fania Domb, "The Separation Fence in the International Court of Justice and the High Court of Justice: Commonalities, Differences and Specifics," in *International Law and Armed Conflict, Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Michael N. Schmitt and Jelena Pejic [eds.]) (Martinus Nijhoff, 2007), 509, 511ff.

<sup>72</sup> Cf. Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," *supra* n. 64, pp. 39f.

<sup>73</sup> Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet [General Editor]) (Geneva: International Committee of the Red Cross 1958, reprint 1994), pp. 21f,

<http://www.icrc.org/ihl.nsf/b466ed681ddfcd241256739003e6368/5aa133b15493d0c12563cd0042a15a?OpenDocument>. Cf. also Dinstein, *supra* n. 66, para. 48ff.; Benvenisti, *supra* n. 69, p. 207.

<sup>74</sup> Meir Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage," *supra* n. 64, p. 40.

<sup>75</sup> In the matter of this dispute, see further discussion in Section 5.4 *infra*.

<sup>76</sup> Article 4 of the Fourth Geneva Convention. See Dinstein, *supra* n. 66, para. 141(a).

<sup>77</sup> Yoram Dinstein, "Zion shall be Redeemed in International Law," *Hapraklit* 27 (5731-1971), 5, p. 11. See also his additional article: Yoram Dinstein, "Zion has not been Redeemed or 'Not Demonstrations but Acts'," *Hapraklit* 27

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(5731-1971) 519, p. 522 – “The primary lesson to be drawn from the history of the Zionist endeavor in Israel is that what the Jews need . . . is ‘not demonstrations but acts.’ . . . My proposal, which I repeat, is to stop talking about perfect rights and focus on creating a reality of peace. It is the State of Israel that should oppose the perception that it purported to annex Jerusalem, while at the same time doing everything possible so that when the time comes – which may take several generations – if no peace treaty is attained with Jordan, it will be possible to talk about prescriptive acquisition.”

<sup>78</sup> In its Advisory Opinion, the International Court of Justice held that a state does not have a right of self-defense in case of armed attacks against its civilians that originate from occupied territories which are not a state, in which that state exercises control (para. 139). Judge Thomas Buergenthal, who objected to application of the Court’s jurisdiction to render the Advisory Opinion, also rejected outright the restrictions determined by the Court to the right of self-defense, without any foundation in the United Nations Charter or in international law. In this matter, Judge Buergenthal referred to Resolution 1368, adopted by the Security Council immediately after the Al-Qaeda attack on the United States on 11 September 2001, regarding the right of the United States to defend itself against terrorist attacks launched by a non-state actor. Judge Buergenthal added that the fact that Israel exercised control over the Yesha territories was irrelevant to Israel’s right to self-defense against attacks originating there. Judge Rosalyn Higgins, in a separate opinion (para. 34), found that the Court’s position in this matter reflected “formalism of an unevenhanded sort” and that an occupying power, too, has the right to defend its civilian citizens.

<sup>79</sup> Benvenisti, *supra* n. 69, Chapter 7, pp. 167-202, lists a series of occupations following World War II in which occupying states refused to apply the laws of belligerent occupation under the Hague Regulations and the Geneva Convention.

<sup>80</sup> <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>>.

<sup>81</sup> Benvenisti, *supra* n. 69, Chapter 9; *see also* Dinstein, *supra* n. 66, paras. 23ff.

<sup>82</sup> Benvenisti, *ibid.*, p. 245.

<sup>83</sup> *See* Benvenisti, *ibid.*, pp. 245-246.

<sup>84</sup> <<http://unispal.un.org/UNISPAL.NSF/0/dde590c6ff232007852560df0065fdb?OpenDocument>>.

<sup>85</sup> <<http://unispal.un.org/UNISPAL.NSF/0/DDE590C6FF232007852560DF0065FDDB>>.

<sup>86</sup> UN General Assembly Resolution A/RES/ES-10/14 (A/ES-10/L.16), available at <<http://palestineun.org/wp-content/uploads/2013/08/es-10-14.pdf>>.

<sup>87</sup> “In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, para. 2, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.” – *Western Sahara*, Advisory Opinion [1975] ICJ Rep. 12, para. 33.

<sup>88</sup> “Egyptian judge to participate in International Court of Justice case on Israeli wall” (3 February 2004), <<http://www.un.org/apps/news/story.asp?NewsID=9649&Cr=icj&Cr1=>>.

<sup>89</sup> *Western Sahara*, Advisory Opinion, [1975] ICJ Rep. 12 (16 October 1975).

<sup>90</sup> Hugh Thirlway, “Advisory Opinions,” *Max Panck Encyclopedia of Public International Law*, 3<sup>rd</sup> ed. (Oxford University Press, 2006), with further references, para. 15.

<sup>91</sup> *Ibid.*, para. 16.

<sup>92</sup> *Ibid.*, para. 41.

<sup>93</sup> The pronounced anti-Israel bias in General Assembly Resolutions and the reasons therefor were analyzed by Alan Dershowitz, “Israel: the Jew among Nations,” in *Israel among the Nations – International and Comparative Law Perspectives on Israel’s 50<sup>th</sup> Anniversary* (Alfred Kellermann, Kurt Siehr and Talia Einhorn [eds.]) (The Hague: Kluwer Law International, 1998), 129.

<sup>94</sup> Robbie Sabel, “The International Court of Justice Decision on the Separation Barrier and the Green Line,” *Israel Law Review* 38 (2005) 316, 318f.

<sup>95</sup> UN General Assembly Resolution A/RES/3175 (XXCIII) of 17 December 1973 <<http://unispal.un.org/UNISPAL.NSF/0/8F9EF0C2108AB49C852568C6006704CC>>.

<sup>96</sup> UN General Assembly Resolution A/RES/32/5 of 28 October 1977

<[http://www.jewishvirtuallibrary.org/jsource/UN/unga32\\_5.html](http://www.jewishvirtuallibrary.org/jsource/UN/unga32_5.html)>.

<sup>97</sup> UN Security Council Resolution S/RES/446 (1979) of 22 March 1979

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<http://unispal.un.org/UNISPAL.NSF/0/BA123CDED3EA84A5852560E50077C2DC>.

<sup>98</sup> Paragraph 101 of the Advisory Opinion.

<sup>99</sup> Judge Higgins, in her separate opinion (para. 23), writes that “it might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court’s disposal,” as to *which* of the Hague Regulations Israel had violated.

<sup>100</sup> See the discussion in Section 3.1 *supra*.

<sup>101</sup> See Section 3.3 *supra*. In this context it is noteworthy to recall the words of Jordan’s Permanent Representative at a discussion held at the Security Council on 31 May 1967, immediately before the Six-Day War – UN Doc. S/PV.1345 of 31 May 1967: “To my knowledge the question of Palestine is still before the Security Council. The problem is not solved. There is an Armistice Agreement. The Agreement did not fix boundaries; it fixed a demarcation line. The Agreement did not pass judgement on rights – political, military or otherwise. Thus I know of no territory; I know of no boundary; I know of a situation frozen by an Armistice Agreement.”

<sup>102</sup> For a detailed discussion of this issue, see Sabel, *supra* n. 94, pp. 325-329.

<sup>103</sup> Following the unilateral withdrawal from the Gaza Strip, settlements actually remain today only in Judea and Samaria.

<sup>104</sup> For the meaning of the term “state land,” see the Order Concerning Government Property (Judea and Samaria region) (No. 59), 5727-1967; see also Plia Albeck, “What are State Lands? On the State Lands in Judea, Samaria and the Gaza Strip,” *Halishka* (5759-1999) 46, pp. 9-11 (in Hebrew).

<sup>105</sup> The transfer of civilians of the occupying power to occupied territories for other purposes became a war crime only in Additional Protocol I to the Geneva Convention, 1977, and under pressure from Egypt became a “most serious crime” in the Rome Statute of the ICC, prohibiting a state from settling its civilians in occupied territories, whether directly or indirectly – cf. Section 7.3 *infra*.

<sup>106</sup> ICRC Commentary: <http://www.icrc.org/ihl/COM/380-600056>.

<sup>107</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: <http://www.icrc.org/ihl/INTRO/470>.

<sup>108</sup> Dinstein, *supra* n. 66, pp. 238-247.

<sup>109</sup> *Ibid.*, p. 241, citing also in this matter the decision of the Military Tribunal in the Nuremberg Trials in the matter of IG Farben: *IG Farben Trial* (Krauch et al.) (US Military Tribunal, Nuremberg, 1948), 10 LRTWC [*Law Reports of Trials of War Criminals*] 1, 44: “We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner is, in fact, freely given.”

<sup>110</sup> *Ibid.*, p. 243. See also HCJ 606, 610/78, *Suleiman Taufiq Ayub et al. v. The Minister of Defense* (“Beit-El” case), 33(2) PD 113, pp. 124-127.

<sup>111</sup> HCJ 285/81 *El Nazer v. The Commander in the Judea and Samaria areas*, 36(1) PD 701.

<sup>112</sup> *Beit-El* case, *supra* n. 110, at p. 123.

<sup>113</sup> *Ibid.*, pp. 129-130.

<sup>114</sup> HCJ 390/79 *Duweikat v. The State of Israel*, 34(1) PD 1.

<sup>115</sup> *Beit-El* case, *supra* n. 110, pp. 118-119.

<sup>116</sup> HCJ 4219/02 *Yusef Mohammed Gossin v. Commander of IDF Forces in the Gaza Strip*, 56(4) PD 608, 611 (per Justice Aharon Barak, President).

<sup>117</sup> See Alan Baker, “Israel’s Rights Regarding Territories and the Settlements in the Eyes of the International Community,” in *Israel’s Rights as a Nation-State in International Diplomacy* (Alan Baker [ed.]) (Jerusalem: Jerusalem Center for Public Affairs, 2011), 65, 72.

<sup>118</sup> *Ibid.*, at p. 68.

<sup>119</sup> See n. 1 *supra*.

<sup>120</sup> Working paper by Eugene Kontorovich of Northwestern University, presented in June 2013 at Bar-Ilan University. The findings were reported by Ariel Kahana, “Settlers Around the Globe,” *Makor Rishon* newspaper (14 June 2013), *Yoman*, pp. 24-25 (in Hebrew).

<sup>121</sup> *Loizidou v. Turkey* (merits), Case 40/1993/435/514 (European Court of Human Rights, 1996)

<http://www.hri.org/news/special/loizidou/onmerits.html>.

<sup>122</sup> *Demopoulos and others v. Turkey*, Cases 46113/99, 3543/02, 21819/04, 19993/04, 10200/04, 13466/03 (European Court of Human Rights, 2010) [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97649#{"itemid":\["001-976449"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97649#{).

<sup>123</sup> In this context different numbers have been provided, varying from 200,000 to 600,000 Arab refugees. See discussion by Samuel Katz, *Battleground – Fact and Fantasy in Palestine* (Bantam, 1973, revised ed. 2002), pp. 14-37, with additional references.

<sup>124</sup> Mudar Zahran, “Jordan is Palestinian,” *Middle East Quarterly* 19 (2012) 3. Available at <<http://www.meforum.org/3121/jordan-is-palestinian>>.

<sup>125</sup> See Itamar Levin, *Locked Doors: The Seizure of Jewish Property in Arab Countries* (Praeger, 2001).

<sup>126</sup> GAOR, 2<sup>nd</sup> Session, 1947, Ad Hoc Committee on the Palestine Question, pp. 5-11, in: Ruth Lapidot and Moshe Hirsch (eds.), *The Jerusalem Question and its Resolution: Selected Documents* (Dordrecht: Martinus Nijhoff, 1994), p. 13.

<sup>127</sup> <<http://www.jewishvirtuallibrary.org/jsource/myths3/MFroots.html>>.

<sup>128</sup> For the anomaly in the attitude of the United Nations and its various organizations towards the Palestinian refugees, in comparison with the attitude towards the Jewish refugees, see Stanley A. Urman, “The United Nations and Middle East Refugees: The Differential Treatment of Arabs and Jews,” in *Israel’s Rights as a Nation-State in International Diplomacy* (Alan Baker [ed.]) (Jerusalem: Jerusalem Center for Public Affairs, 2011), p. 45.

<sup>129</sup> For a critical study of UNRWA and its activities, see James G. Lindsay, “‘Fixing UNRWA’: Repairing the UN’s Troubled System of Aid to Palestinian Refugees,” The Washington Institute for Near East Policy, Policy Focus #91 (Jan. 2009), available at <<http://prn.mcgill.ca/research/papers/PolicyFocus91.pdf>>. Lindsay was legal advisor and general counsel for UNRWA in the years 2002-2007. See also Rephael Ben-Ari, “Blurring the Lines between Humanitarianism and Politics,” in *Palestinian Manipulation of the International Community* (Alan Baker [ed.]), (Jerusalem Center for Public Affairs, 2014), p. 137.

<sup>130</sup> See Joan Peters, *From Time Immemorial – The Origins of the Arab-Jewish Conflict Over Palestine* (Harper & Row, 1984).

<sup>131</sup> Cf. *Interim Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, UN General Assembly Official Records, UN Doc Supp. 19 (A/1451/Rev. 1), New York, 1951, paras. 15ff.; *Annual Report of the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 1 July 1959 – 30 June 1960, General Assembly official records, UN Doc Supp. 14 (A/4478), at p. 13.

<sup>132</sup> <<http://www.unrwa.org/etemplate.php?id=86>>

<sup>133</sup> Ibid.; see also <<http://www.unrwa.org/userfiles/2011120434013.pdf>>, which refers to 4.9 million refugees (p. 4).

<sup>134</sup> Khaled Abu Toameh, “Amman begins stripping state’s Palestinians of citizenship,” *Jerusalem Post* (20 July 2009), <<http://www.imra.org.il/story.php3?id=44643>>.

<sup>135</sup> See the discussion in Section 3, *supra*.

<sup>136</sup> Cf. Azar Gat and Alexander Yakobson, *Nations – The Long History and Deep Roots of Political Ethnicity and Nationalism* (Cambridge: Cambridge University Press, 2013), pp. 225f., 293.

<sup>137</sup> Amir Oren, “In rare, scathing article, prominent Fatah member calls Abbas ‘tyrant’ and ‘dictator,’” *Haaretz* English edition, 13 July 2013. The article cites a prominent Fatah (PLO) representative, Dr. Sufian Abu-Zaida, who states that “the *Ra’is* (Abu Mazen) now heads everything connected to the Palestinian people and the Palestinian cause. He is chairman of the Palestine Liberation Organization and resident of the State of Palestine and president of the Palestinian Authority, and he is also head of the Fatah movement and the general commander of the [security] forces, and due to the disruption of the activity of the Legislative Council, his [presidential] orders become law. . . . And in the shadow of the total paralysis that has spread throughout the PLO institutions, he is the sole decider there, and in the shadow of the weakness of the leadership with which the Fatah movement is afflicted, especially its central committee, which hardly functions any longer as a framework for collective leadership, he is the only one in business”: <<http://www.haaretz.com/weekend/week-s-end/premium-1.535449>>. See also the article by Amira Hass, “Authority with No Separation of Powers,” *Haaretz*, 12 July 2013 (p. 13) (in Hebrew).

<sup>138</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book V, Ch. 1, Part 1 (1776), pp. 564ff. (the first duty), pp. 579ff. (the second duty), pp. 590ff. (the third and last duty): <<http://www2.hn.psu.edu/faculty/jmanis/adam-smith/ealth/nations.pdf>>.

<sup>139</sup> See, e.g., Sharon Udasin, “Knesset panel: Gov’t must help Israel Electric Company collect Palestinian Authority debt.” The debt has by February 2014 amounted to NIS 1.369 billion.

<<http://www.jpost.com/Enviro-Tech/Knesset-panel-Govt-must-help-Israel-Electric-Company-collect-Palestinian-Authority-debt-343568>>; Regarding water, see the Water Authority report, “The Issue of Water between Israel and the Palestinians” (March, 2009), accessible at

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<<http://www.water.gov.il/Hebrew/about-reshut-hamaim/The-Authority/FilesWatermanagement/IsraelRashut.pdf>>.

For a recent study see Haim Gvirtzman, “The Truth Behind the Palestinian Water Libels,” BESA – Begin-Sadat Center, Perspectives Paper No. 238 (24 February 2014), available at <<http://besacenter.org/perspectives-papers/truth-behind-palestinian-water-libels>>.

<sup>140</sup> See Alan Baker, “Palestinian Incitement as a Violation of International Legal Norms,” in: *The Changing Forms of Incitement to Terror and Violence* (Alan Baker [ed.]), (Jerusalem Center for Public Affairs, 2012), p. 147.

<sup>141</sup> See studies by Itamar Marcus, Head of Palestinian Media Watch, PMW: <<http://www.palwatch.org.il/>>, illustrating ongoing incitement by the Palestinian Authority, its leaders and its institutions.

<sup>142</sup> For the Muhammad al-Durrah affair, see Wikipedia article including numerous additional references: <[http://en.wikipedia.org/wiki/Muhammad\\_al-Durrah\\_incident](http://en.wikipedia.org/wiki/Muhammad_al-Durrah_incident)>. Cf., in particular, the ballistic and technical expert examination by Jean-Claude Schlinger, available at <<http://www.m-r.fr/balistique.pdf>>, and at <[http://www.dailymotion.com/video/xpfpo6\\_affaire-al-dura-itw-de-jean-claude-schlinger-expert-en-balistique\\_news](http://www.dailymotion.com/video/xpfpo6_affaire-al-dura-itw-de-jean-claude-schlinger-expert-en-balistique_news)>.

<sup>143</sup> Talia Einhorn, “The Need for a Rule-Oriented Israeli-Palestinian Customs Union: The Role of International Trade Law and Domestic Law,” *Netherlands International Law Review* 44 (1997) 315; see also the author’s testimony before the Joint Economic Committee (JEC) of the U.S. Congress, 21 October 1997: Talia Einhorn: “The Customs Union between Israel and the Palestinian Authority: A Critical Analysis,” in Arieh Stav (ed.), *Israel at the Crossroads: The Economic Aspects of the Peace Process* (Ariel Center for Peace Research, 1997), p. 65; oral testimony brought in *Justice* (June, 1998) 40-43.

<sup>144</sup> Ronen Bergman, *Authority Given (Yedioth Ahronoth, 2002)*. See also Dimitris Bouris, “Palestine Donors: Time to end paper solutions to real problems” (19 March 2013), available at <<http://euobserver.com/foreign/119483>>, and the staff reports prepared prior to the meetings of the Ad Hoc Liaison Committee, established in 1993 as a 15-member committee that serves as the principal policy-level coordination mechanism for development assistance to the Palestinian people. The Committee is chaired by Norway and co-sponsored by the EU and the U.S. In addition, the United Nations participates together with the World Bank and the International Monetary Fund. The Committee seeks to promote dialogue between donors, the PA and the Government of Israel – the 19 March 2013 meeting: Recent Experience and Prospects of the Economy of the West Bank and Gaza – Staff Report Prepared for the Meeting of the Ad Hoc Liaison Committee (Brussels, March 19, 2013), available at <<http://www.eccpalestine.org/wp-content/uploads/2013/04/IMF-AHLC-March-2013.pdf>>, and the Staff Report Prepared for the Meeting of the Ad Hoc Liaison Committee (East Jerusalem and Ramallah, 11 September 2013), available at <<http://www.imf.org/external/country/WBG/RR/2013/091113.pdf>>.

<sup>145</sup> See the article written by the Chairman of the European Parliament’s Committee on Budgetary Control, Michael Theurer, “Europe’s Unaccountable Palestinian Aid,” *The Wall Street Journal* (9 April 2014), referring to the report made by the European Court of Auditors, “European Union Direct Support to the Palestinian Authority” (Special Report no. 14/2013). The report is available full-text at:

<[http://www.eca.europa.eu/Lists/ECADocuments/SR13\\_14/SR13\\_14\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR13_14/SR13_14_EN.pdf)>. On 3 April 2014 it was adopted by the European Parliament in the European Parliament Resolution (paras. 272-287), available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2014-0288%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>>.

<sup>146</sup> Cf. Einhorn, *supra* n. 143; regarding recent developments, see Talia Einhorn, “Developments in Regional Trade Law – A View from Israel,” *European Journal of Law Reform* 15 (2013) 71, p. 78.

<sup>147</sup> Cf. The report of human rights violations (April 2013) prepared by the Independent Commission for Human Rights Violations (ICHR): <<http://www.ichr.ps/en/2/5/1046/April-2013-Report-of-Human-Rights-Violations-APRIL-2013-Report-of-Human-Rights-Violations.htm>>.

<sup>148</sup> See Dinstein, *supra* n. 66, p. 238.

<sup>149</sup> See Israel’s declaration at the time of signing the Statute, expressing its deep disappointment and regret at the insertion of this provision into the Statute:

<<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf>>.

<sup>150</sup> See Talia Einhorn, “Israel and the International Criminal Court,” *Nativ* (2000/4-5) 36 (in Hebrew).

<sup>151</sup> See Hillel Neuer, “The Demonization of Israel at the United Nations in Europe,” in: *Palestinian Manipulation of the International Community* (Alan Baker [ed.]), (Jerusalem: Jerusalem Center for Public Affairs, 2014), p. 47.

<sup>152</sup> See Dore Gold, “Degrading International Institutions: The United Nations Goldstone Report,” in: *Palestinian Manipulation of the International Community* (Alan Baker [ed.]), (Jerusalem: Jerusalem Center for Public Affairs, 2014), p. 91.



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<sup>153</sup> <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>>.

<sup>154</sup> For a clear explanation of the two positions, see John Cerone, “Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State,” *ASIL [American Society of International Law] Insights*, Vol. 16, issue 37 (7 December 2012).

<sup>155</sup> See *ibid.*, n. 24, refers to the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties.

<sup>156</sup> Dershowitz, “Israel: the Jew among Nations,” *supra* n. 93; *id.*, *The Case for Israel* (Hoboken, NJ: Wiley, 2003).

<sup>157</sup> Dershowitz, “Israel: the Jew among Nations,” *ibid.*, p. 132.

<sup>158</sup> Cf. Kurt Siehr, “International Art Trade and the Law,” *Hague Academy of International Law Recueil des cours* 243 (1993-VI) 11, at pp. 262f., 268.