

THE ARAB-ISRAELI CONFLICT AND INTERNATIONAL LAW

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Michael Lynk and Susan Akram

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A. INTRODUCTION

1. The Arab-Israeli conflict has become the most prominent arena of regional and international tension over the past century. Within the realm of modern international law, the conflict has contributed greatly to the development of rule-making. The laws of war,

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the scope of international humanitarian and human rights law, the rights of refugees, the centrality of self-determination, the laws on terrorism and the content of modern treaty-making – all have been significantly shaped by the norms established through the copious resolutions, diplomatic statements and legal commentary on the many features of the conflict. Yet, at the same time, the efficacy of international law has suffered because the principal actors have marginalized it as a diplomatic tool by the parties and the international community to shape a lasting peace in the region.

2. Since World War II, the international community has maintained a sustained focus on Israel, Palestine and the region for at least four distinct but interrelated reasons. First, three of the world's major religions – Christianity, Islam and Judaism – have strong historical and spiritual roots in the region and specifically in Jerusalem. Empires and nation-states with allegiances to each of these religions have ruled the territory that is Israel/Palestine since the beginning of the 20th century. While the Arab-Israeli conflict has little to do with theological differences, the religious overlay of what is essentially a political and territorial conflict has added to its intensity.

3. Second, the creation of the State of Israel in 1948 captured the imagination of many Western countries as an appropriate restitution for the horrors of the Jewish Holocaust in Europe. At the same time, many in the Third World saw the rise of Zionism and the dispossession by the Palestinians as an anachronistic example of settler colonialism, arriving on the historical stage just as the great European colonial empires were exiting. Since then, the Arab-Israeli conflict has become a flashpoint for the tensions between North and South, Judeo-Christianity and Islam, industrialized and poor states, secularism and belief, ethnicity and universalism, and colonialism and self-determination.

4. A third reason is that the conflict became an important political arena for the world's superpowers. During the Cold War, the United States and the Soviet Union competed for regional political alliances, marketplaces for their military industries, and secure supplies of oil and gas. Since 1990, the demise of the Soviet Union and the eclipse of Arab nationalism have only intensified the engagement of the United States in the region. During this time, America has fought wars in Kuwait, Iraq and Afghanistan, maintained

its political estrangement with Iran, deepened its strategic relationship with Israel and took the lead diplomatic role in the various unsuccessful peace processes between Israel and the Palestinians, while continuing its quest for guaranteed energy sources.

5. Fourth, the Arab-Israeli conflict has become the most international of modern international conflicts. The United Nations enabled the creation of the State of Israel, has cared for millions of Palestinian refugees over six decades, established peacekeeping missions, and closely monitored the ongoing conflict through volumes of resolutions and reports. The international community has been intimately engaged in the region through numerous diplomatic initiatives, massive arm sales and significant quantities of aid, trade, grants and investment. The conflict has received more public, political, scholarly and media attention than any other conflict in the modern world, all the while remaining unresolved and malignant, a discouraging set-back for the effectiveness of international law and diplomacy.

B MODERN HISTORY OF THE ARAB/ISRAELI CONFLICT

1 Palestine up to the League of Nations Mandate (1922)

6. The Zionist movement arose in pre-World War I Europe, primarily as a response to widespread anti-Semitism and the recurrent cycles of discrimination and violence against Jews. While other European Jewish movements organized around liberal emancipation or socialism in response to anti-Jewish bigotry, the Zionist movement proposed that only with the creation of a Jewish state in Palestine could Jews flourish as a people and live free of the pogroms and the exclusionary laws and practices that plagued their communities. Early Zionist writings on Palestine articulated the benefits of a new society and an old-new language in an old-new land. [A. Hertzberg (ed.) *The Zionist Idea* (New York: Antheneum, 1959)].

7. Political Zionism based its claim to Palestine as the Jewish homeland on the various Jewish kingdoms that had existed in parts of Palestine for several hundred years after

1200 BC. The land was subsequently conquered and ruled by a number of empires after 722 BC, including the Assyrians (circa 722 BC), the Babylonians (circa 670 BC), the Persians (circa 530 BC), the Greeks (circa 331 BC) and the Romans (61 BC). The name *Israel* finds its origins in the Israelite kingdom of the Old Testament, while the term *Palaestina* dates from the Roman conquest. A series of unsuccessful Jewish revolts against Roman rule in 70 and 132 AD led to the expulsion of the Jews from Jerusalem, although significant numbers of Jews would live in Palestine until the Christian Crusades around 1100 AD. After the Jewish revolts, most of the world's Jews were found in Europe, North Africa and the Middle East, while small communities of Jews lived after the end of the Crusades in Jerusalem and in various towns in Palestine, including Safed, Hebron and Tiberias.

8. The Romans ruled Palestine until the fourth century AD, when they were succeeded by the Byzantine Empire. In the seventh century, Muslim Arab armies from the Arabian Peninsula conquered much of the region, including Palestine. Jerusalem was taken in 638 AD by the Caliph Omar. At the time of the Arab conquest, much of the population in Palestine had become Christian under Byzantine rule. The Christian and Jewish populations in Palestine were protected by the Arabs, and many subsequently adopted the religion, culture and language of the Arab rulers. Muslim rule of Palestine was broken by the Christian Crusades in 1099, but Muslims under Saladin re-conquered Jerusalem in 1187. The area was then ruled by a succession of Muslim empires, including the Mamelukes of Egypt and, after 1517, the Ottoman Turks.
9. The first Zionist Congress was held in Basel, Switzerland in 1897, under the primary leadership of Theodor Herzl, a Viennese journalist and the author of *Der Judenstaat* (The Jewish State). The programme adopted by the Congress stated that: "The aim of Zionism is to create for the Jewish people a home in Palestine secured by public law." The Basel programme called for Jewish settlement in Palestine and the procurement of diplomatic support. ['The Basle Programme' in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 4.]. In its first 20 years, the Zionist movement steadily built a political, diplomatic and financial foundation, though

in this period it did not achieve majority support among European Jews. (Sachar, Chapter 2).

10. On the eve of the First World War, Palestine had been part of the Turkish Ottoman Empire for almost four centuries, and had been experiencing the first stirrings of Arab nationalism. The small intellectual class – led by teachers, artists, army officers and writers – were issuing appeals for more Arab culture and greater autonomy for the Arab provinces. The Palestinian Arabs were predominately Muslims, with a significant and prosperous Christian minority. They were largely an agrarian people, cultivating the Galilee, the coastal plain and the inland hill country, with the rest living in such cities and towns as Jerusalem, Gaza, Jaffa and Haifa. In the Galilee and the southern desert were nomadic Bedouin Arabs. Many of Palestine's 85,000 Jews were living in Jerusalem, where they formed a majority. [E. Rogan, *The Arabs: A History* (New York: Basic Books, 2009) 149-174]. Abu-Lughod 141

11. The First World War broke out in August 1914, with Great Britain and the Ottoman Empire on opposite sides. To encourage Arab support against the Turks, Britain promised to support the independence of the Ottoman Arab provinces in the Levant if the Arabs would join with the Allies against Germany and Turkey. In a series of letters exchanged between Sir Henry McMahon, the British High Commissioner in Cairo and Hussein Ibn Ali, Sherif of Mecca in 1915 and 1916, Great Britain stated that it was prepared to support “the independence of the Arabs in all of the regions within the limits demanded by the Sherif”, excluding only the areas along the northern Syrian coast between Damascus and the Mediterranean, as these “cannot be said to be purely Arab,” and the provinces of Baghdad and Basra in Mesopotamia. [‘The Hussein-McMahon Letters’, in JN Moore, (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 9]. The Sherif, hoping to extend his rule beyond the Hejaz region of the eastern Arabian Peninsula, subsequently fought with the British army based on these undertakings.

12. However, on 16 May 1916, Great Britain and France concluded a secret agreement –

the Sykes-Picot Agreement, named after the two negotiators, Sir Mark Sykes of Britain and Charles Georges-Picot of France – whereby the two countries divided up the Arab provinces of the Ottoman Empire into respective British and French zones of influence which would take effect after the defeat of the Ottomans. The Agreement would give Britain control over much of Mesopotamia, northern Arabia, Trans-Jordan and Gaza, while France would receive Cilicia, the Syrian coast, Mosul, Aleppo and Damascus. Palestine would come under a vaguely defined “international administration.” [‘The Sykes-Picot Agreement’, in JN Moore, (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 25-28]. The Sykes-Picot Agreement was made public by the Bolsheviks shortly after the Russian Revolution to embarrass the Allies.

13. Great Britain made a third promise respecting Palestine to the Zionist movement. On 2 November 1917, the British Cabinet endorsed a letter written by Lord Balfour, the British Foreign Secretary, to Lord Rothschild, a leading Zionist figure. The Balfour Declaration stated: ‘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.’ [‘The Balfour Declaration’ in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 32]. The Declaration was a significant achievement for the Zionist movement and for its leader Dr. Chaim Weizmann, enabling the movement to receive the political support of the most important European power just as Great Britain was capturing Palestine from the Ottomans.

14. When the Balfour Declaration was issued, around 90 percent of Palestine’s population of approximately 670,000 inhabitants were Palestinian Arab Muslims and Christians (600,000), while Jews comprised around 9 percent (56,000). [A. Shlaim, *The Iron Wall: Israel and the Arab World* (New York: W.W. Norton & Co., 2001) 7]. The end of the Ottoman Empire and the promise of independence by the Allies had created

high expectations among the Arabs. They also shared a growing concern about Zionism and its interest in Palestine. The King-Crane Commission was appointed by President Woodrow Wilson of the United States in May 1919 to assess the future political options of the former Ottoman Arab territories. It reported in August of that year that: ‘If [the Wilsonian principle of self-determination] is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine – nearly nine tenths of the whole – are emphatically against the entire Zionist program.’ [‘Excerpt from the Report of the American Section of the International Commission on Mandates in Turkey (The King Crane Commission)’ in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 57].

15. At Versailles in June 1919, the Allies adopted the Covenant of the League of Nations. Article 22 created the Mandate system, whereby the colonies of the defeated Powers – Germany, the Austrian-Hungarian Empire and the Ottoman Empire – were to be re-constituted as Mandates of the League of Nations, and awarded to specific European countries. Paragraph 4 of Article 22 stated that the former Ottoman territories had reached a stage of development where “their existence as independent countries can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.” [‘Article 22 of the Covenant of the League of Nations’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 72]. To the disappointment of the Arabs, the Versailles process did not grant them independence.

16. In July 1922, the Council of the League of Nations formalized the entrustment of the Palestine Mandate to Great Britain. The Council decision had five important features. First, it created a separate Mandate over Trans-Jordan, where Great Britain installed Abdullah, son of the Sherif of Mecca, as King. The Jordan River and the Dead Sea became the primary natural and political boundary between Palestine and Trans-Jordan. Second, Britain was also given Mandate authority over Iraq (where it placed Faisal, another son of the Sherif, as King), while France was awarded Syria and Lebanon. Third,

the Mandate for Palestine incorporated the language of the Balfour Declaration, promising a national home for the Jewish people in Palestine provided that the civil and religious rights of the non-Jewish communities in Palestine were not prejudiced. It also recognized the rights of ‘an appropriate Jewish agency’ to operate as a public body to assist the Mandatory in the establishment of a Jewish national home, and encouraged Jewish immigration and the ‘close settlement by Jews of the lands’. Fourth, the Mandate for Palestine did not specifically use the word ‘Arab’; the Palestinians Arabs were referred to only as ‘non-Jews’. And fifth, Great Britain undertook to promote the economic and political development of the country and to protect its religious and holy places. [‘The Mandate of Palestine Confirmed by the Council of the League of Nations’ in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 75-84; H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 129.]

2 The Peel Commission and Proposals of Partition (1937)

17. With the British Mandate authority in Palestine favourable to its settlement goals, the Zionist movement began to organize the migration of European Jews as part of its project to build a homeland in Palestine. Through the 1920s and 1930s (particularly following Adolf Hitler’s rise to power in Germany in 1933), rising rates of immigration saw the Jewish population in Palestine surge from 56,000 in 1917 to 175,000 in 1931 to 460,000 by 1939. In the inter-war period, the overall economy of Mandate Palestine grew with Jewish immigration and capital, along with Mandate investment in infrastructure. However, two distinct societies and economies were emerging, with separate Jewish and Palestinian educational systems, industries, cultures, cities and neighbourhoods. The *Yishuv* – the Jewish community in Palestine – established its own institutions to promote autonomous development, such as the Jewish Agency, the Jewish National Fund, the *Histadrut* (the Jewish trade union) and the Mapai party. Among the Palestinians, the Arab Executive and the Supreme Muslim Council, led by the Grand Mufti of Jerusalem, Haj Amin al-Husseini, became their primary representative organs, although they were

weakened by leadership struggles between the two leading Arab families in Jerusalem, the Husseinis and the Nashashibis.

18. With the growing Jewish immigration, widespread fears among the Palestinians respecting the rising threat to their majority status in their homeland resulted in violence between the communities in 1920, 1921 and 1929 and a prolonged Palestinian revolt in 1936-39. In the wake of the 1929 violence, the British government appointed the Shaw Commission to inquire into the causes of the violence. The Commission reported in March 1930, assigning responsibility for the immediate violence to Grand Mufti of Jerusalem Haj al-Husseini, and members of the Arab Executive. However, it also stated that the underlying cause was the “Arab feeling of animosity and hostility towards the Jews consequent upon their disappointment of their political and national aspirations and fear for their economic future.” The British government subsequently released the Passfield White Paper in October 1930, which proposed to limit Jewish immigration to Palestine by tying it to Arab economic development. Within a few months, Dr. Chaim Weizmann, the leading figure of European Zionism, had successfully persuaded British Prime Minister Ramsay MacDonald to withdraw the policy. [H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 175-8]. Attempts by the British Mandate authorities to establish legislative institutions in Palestine floundered, with the Palestinians not wanting to legitimize the Mandate and the Zionists demanding a council that was based on equal representation of Jews and Palestinians, despite their minority numbers.

19. With the doors to many Western countries closed, European Jewish immigration to Palestine intensified in the mid-1930s. The economy prospered, foreign investment expanded, the cities – particularly Tel Aviv and Haifa – grew significantly, but national tensions, never far from the surface, also rose. Jewish land purchases had begun to dislocate significant numbers of Palestinian peasants and farm labourers. In 1936, the newly-formed Arab Higher Committee, the leading political body among the Palestinians, launched a general strike, demanding an end to Jewish immigration, a halt of land sales to Jews, and national independence. In the wake of the general strike,

Britain established the Peel Commission to investigate the causes of the unrest. The Report, issued in 1937, acknowledged the contradictory national aspirations of the Palestinians and the Zionist movement: “The underlying causes of the disturbances, or (as we regard it) the rebellion, of 1936 are, first, the desire of the Arabs for national independence; secondly, their antagonism to the establishment of the Jewish National Home in Palestine, quickened by the fear of Jewish domination... We have found that, although the Arabs have benefited by the development of the country owing to Jewish immigration, this has had no conciliatory effect.” [‘Excerpts from the Report of the Palestine Royal Commission (The Peel Commission), in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 151].

20. The Peel Report recommended that Britain terminate the Mandate in Palestine as constituted, partition the country into Jewish and Arab states, with a British Mandate territory remaining in Jerusalem, Bethlehem, Nazareth, the Sea of Galilee, and a narrow corridor between Jerusalem and the Mediterranean. As well, it recommended that a quarter of the Palestinian population and a small percentage of the Jewish population should be transferred between the two proposed states. The importance of the Peel Report was its endorsement of the concept of partition for Palestine, the first time that an official British document had done so. The Zionist movement was divided over Peel’s two-state recommendation. Some opposed the idea as a dilution of its ambition of a Jewish state in all of Palestine, while others, such as David Ben-Gurion, saw the proposal as a pragmatic and necessary prelude to a larger Jewish state in the future. The Palestinians overwhelmingly rejected the Peel recommendation in favour of a unitary state with majority rule, and the general strike became a revolt which continued until the British army crushed it in 1939. The failure of the 1936-39 revolt left the Palestinians dispirited and disorganized, with much of their political leadership arrested or exiled.

21. Following the release of the Peel Report, the British government created the Woodhead Commission to provide advice on how to implement partition. Its report, issued in 1938, accepted the idea of partition, but with a geographically smaller Jewish state than that proposed by the Peel Commission. The following year, the British

government released a White Paper which abandoned partition as a feasible future for Palestine, and instead called for: ‘a State in which the two peoples in Palestine, Arabs and Jews, share authority in government in such a way that the essential interests of each are shared.’ The White Paper also called for a quota ceiling of 75,000 Jewish refugees into Palestine over the next five years, with no further Jewish immigration after that without Arab acquiescence. [‘Palestine Statement of Policy (The MacDonald White Paper), in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 211-221]. The leadership of the Zionist movement and the *Yishuv* opposed the White Paper, particularly its limitations on Jewish immigration and its abandonment of a Jewish state. The Palestinian leadership criticized the White Paper’s proposal to allow more Jewish immigration as a threat to its national aspirations, and for not recommending independence for Arab Palestine.

22. The start of the Second World War brought an uneasy truce to Palestine. The Grand Mufti had fled first to Iraq and later to Berlin, spending most of the war in Germany; other Palestinian leaders, while opposed to the British Mandate, sought to reach an accommodation with the British during the war. In May 1942, an extraordinary meeting of American Zionists in New York, with Ben-Gurion and Weizmann in attendance, adopted the Biltmore Program, which urged that “Palestine be established as a Jewish Commonwealth integrated in the structure of the new democratic world.” [‘Declaration Adopted by the Extraordinary Zionist Conference, Biltmore Hotel, New York, May 11, 1942’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 231-232]. To defend Palestine against the German army in North Africa, the British Mandate created Jewish brigades which fought against the Axis forces in the Levant and Italy; these units acquired the logistical and operational skills that would later contribute to the *Yishuv*’s military prowess during the 1947-9 war. By 1944, underground militant Jewish groups – notable, the *Irgun* and *Lehi* – began a campaign of sabotage against the British mandatory forces which would intensify over the next four years.

3 The United Nations, Partition and Conflict (1945-49)

23. With the war's end in 1945, tensions in Palestine rose markedly. Renewed European Jewish immigration to Palestine, much of it unauthorized, sparked conflict between Zionism and the British Mandate. Although in a weakened state, the Palestinians sought an end to the British Mandate and the establishment of a unitary state based on representative democracy. The Nazi Holocaust had killed six million European Jews and, with the full revelation of the horror, the political and diplomatic momentum in the West shifted decisively in favour of a Jewish state in Palestine. As the levels of violence escalated among the Palestinians, the Jewish *Yishuv* and the British Mandate army, the British government announced its desire in early April 1947 to end its Mandate and turn the problem over to the United Nations.

24. In May 1947, the United Nations General Assembly created the Special Committee on Palestine (UNSCOP), [UNGA Res 106 (S-1) (15 May 1947)], and its eleven member commission toured Palestine in the summer of 1947. The UNSCOP report was issued on 3 September 1947, with a majority report recommending partition of the territory into Jewish and Palestinian Arab states, and a minority report advocating a federal state with distinct Palestinian and Jewish self-governing institutions. The partition division, according to the figures in the majority Report, would provide for a Jewish state with 498,000 Jews and 497,000 Palestinians. In the proposed Palestinian state, there would be 725,000 Palestinians and 10,000 Jews. [‘Excerpts from the Report of the United Nations Special Committee on Palestine’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 260-311]. Upon receiving the UNSCOP Report, the United Nations General Assembly constituted an Ad Hoc Committee on the Palestine Question to frame the debate in plenary session of the UN membership. The Committee drew up two proposals, one for partition with economic union between the two areas, and one for a single state of Palestine with separate Jewish and Arab institutions.

25. On 29 November 1947, the General Assembly adopted the two-state partition recommendation by the required two-thirds majority vote: 33 in favour, 13 opposed and

10 abstentions. [‘General Assembly Resolution 181 (II) Concerning the Future Government of Palestine’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 314-339.] The UNGA partition plan proposed to divide Palestine into Jewish and Palestinian states, with an economic union between them. The two states were to each enact a constitution that would provide specified guarantees, including minority religious and political rights. Persons could choose which state they wished to be citizens. Jerusalem would become a *corpus separatum* under international trusteeship. The Jewish state would receive approximately 55 percent of Mandate Palestine, while the Palestinian state would acquire about 44 percent. By the end of 1947, Jews constituted approximately one third (610,000) of the population of Palestine, owned 7 per cent of the land, and were concentrated largely on the coastal plain, parts of the Galilee and in and around Jerusalem. The Palestinians numbered approximately 1,230,000, and lived in large numbers throughout Palestine, although they remained a predominately rural and agrarian population. The international city of Jerusalem and its environs would have 100,000 Jews and 105,000 Arabs. Independence would be granted no later than 1 August 1948. [‘Excerpts from the Report of the United Nations Special Committee on Palestine’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 260-311].

26. The Jewish Agency, the leading political institution of the *Yishuv*, accepted Resolution 181 (although there were prominent Zionist dissenters, including Menachem Begin, later Prime Minister of Israel). It was rejected by the Grand Mufti Haj al-Husseini (who remained in exile) and the Arab Higher Committee. The *Yishuv* was well-armed and well-organized, and the Palestinians, still plagued by fractious leaders, weak national institutions and military disarray from the defeat of the 1936-39 Revolt, were neither. Nor were the neighbouring Arab countries united in their political and military response to the conflict in Palestine. Fighting broke out between the Jewish and Palestinian communities in December 1947, and escalated sharply in early 1948. The weak Palestinian leadership began to crumble, and large numbers of Palestinians were either expelled by the Jewish militias or fled because of the fighting or fear of civilian massacres. By May 1948,

approximately 350,000 Palestinians had involuntarily left their homes.

27. Upon the declaration of Israeli independence on 15 May 1948, Arab armies from five countries entered the fighting. For the next six months, most of the fighting between the nascent Israeli army and the Arab armies took place within the areas allocated to the Palestinian state. With superior arms, training and discipline, the Israeli military decisively defeated the Arab armies. The strongest Arab army, the Jordanian Arab Legion, fought in the shadow of a tacit agreement between Israel and King Abdullah of Jordan, who coveted the western part of Palestine. As the war drew to a close in late 1948, Israel had enlarged its area of control through military action from the 55 percent of Palestine allocated by UNGA 181 to 78 percent. After mid-May 1948, another 380,000 Palestinians were expelled or fled, leaving only 150,000 Palestinians within the enlarged area now claimed by Israel. The 730,000 Palestinian refugees left homeless (and subsequently stateless) by the war were sheltered in make-shift tent camps in Lebanon, Syria, Jordan, the West Bank of the Jordan River and the Gaza strip. Both communities lost approximately 1% of their populations as casualties of the war. [H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 279-353; B. Morris, *1948* (New Haven: Yale University Press, 2008)].

28. Israel became a state on 14 May 1948, and was immediately recognized by the United States and the Soviet Union. In its Declaration of Independence, the country's founders proclaimed Israel as the birthplace of the Jewish people, paid homage to the millions of European Jews who perished in the Holocaust, and based the legal legitimacy of Israel on the Balfour Declaration, the 1922 League of Nations Mandate and UNGA Resolution 181. The Declaration stated that Israel was a Jewish state, and guaranteed the 'complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex' as well as 'full and equal citizenship' to the Arab inhabitants. ['Declaration of the Establishment of the State of Israel, May 14, 1948', in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 349-351]. Israel was subsequently admitted as a member of the United Nations on 11 May 1949, having declared that it accepted the obligations of the United Nations Charter [UNGA

Res 273 (III) (11 May 1949)].

29. On 11 December 1948, the United Nations General Assembly adopted Resolution 194, which established a Conciliation Commission to supervise the final settlement of all outstanding questions between Israel and the Palestinians, called for the protection of the various Holy Places, and requested the Security Council to ensure the demilitarization of Jerusalem [UNGA Res 194 (III) (11 December 1948)]. Resolution 194 also stated that: ‘the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date’, with compensation to be paid to those not choosing to return home and to those who suffered loss or damage to their properties.

30. The United Nations sponsored armistice talks between Israel, Jordan, Egypt, Syria and Lebanon on the Greek island of Rhodes. The ensuing 1949 Armistice agreements did not result in established borders, but recognized only the lines of demarcation which the various armies held at the ceasefire. Israel maintained control over the 78 percent of Palestine that it possessed at the ceasefire. Egypt held Gaza, and Jordan controlled the West Bank. In 1950, Jordan made a claim of sovereignty over the West Bank, a claim that was recognized by only two other countries (Britain and Pakistan). Egypt, on the other hand, acted as the administrator of Gaza in ‘the name of the Palestinian people’ and never claimed sovereignty over the territory. Jerusalem became a divided city, with Israel assuming control over its western sector and Jordan over its eastern sector, including the Old City. The Palestinians were left without a state, with 60 percent of its population having become refugees and the remaining 40 percent who had stayed in their homes now ruled by three different governments: Israel, Jordan and Egypt. Israel encouraged large-scale Jewish immigration from the European Jewish refugee camps and from the significant Jewish communities in North Africa and the Middle East to entrench the demographic transformation: between 1949 and 1952, approximately 700,000 Jews arrived in Israel to join the 650,000 Israeli Jews already there. Many of the Arab Jews, particularly those leaving Iraq and Egypt, later had their homes and properties confiscated. In Israel, they were settled in the emptied Palestinian urban neighbourhoods,

while new Israeli *kibbutzim* and immigrant settlements were established on the depopulated Palestinian orchards and farms. The small Palestinian population that remained in Israel after 1948 lived as Israeli citizens, but under special Israeli military regulations – restricting movement, land use and a range of civil liberties – which remained in place until 1966.

31. In December 1949, the United Nations created the United Nations Relief and Works Agency for the Palestinian Refugees in the Near East (UNRWA) to provide basic services – primarily education, housing, social services and health care – to the growing Palestinian refugee population in the Arab countries sheltering them in special camps. [‘General Assembly Resolution 302 (IV) Concerning Assistance to Palestinian Refugees, December 9, 1949’ in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 569-573]. UNRWA was funded largely by donations from western countries, and was intended as a temporary measure until a final settlement to the conflict was achieved. By virtue of UNRWA’s specific mandate for the Palestinians, they were expressly excluded from coverage by the 1951 *Convention Relating to the Status of Refugees* [(1951) 189 UNTS 150]. Initially, the Palestinian refugees lived in tents, and gradually moved into more permanent, if very modest, housing while remaining in refugee camps. UNRWA initiated its operations in Lebanon, Syria, Jordan and the Gaza Strip in 1950, and has continued its work in these places since then and, since 1967, in the Israeli-occupied Palestinian territories in the West Bank and East Jerusalem. [B. Schiff, *Refugees Unto the Third Generation: UN Aid to Palestinians* (Syracuse, New York: Syracuse University Press, 1995)].

32. In January 1949, the new State of Israel held its first Knesset elections based on proportional representation with a two percent threshold needed to win seats, which resulted in a plethora of political parties and perennial coalition governments. The elections were based on a universal electorate, with a voting age of 18. David Ben-Gurion, leader of the Mapai party, became the first prime minister, and Chaim Weizmann was elected by the Knesset to become Israel’s first president, a largely ceremonial office. A draft constitution was debated, but ultimately rejected, and Israel remains today

without a formal constitution. Many of the pre-state institutions, including the Jewish Agency, the Jewish National Fund and the *Histadrut*, maintained their economic and political importance in the new state.

4. War over Suez (1956)

33. The period between 1949 and 1956 witnessed a number of clashes on the armistice borders between Israel and its Arab neighbours. Some of the skirmishes were between armies, particularly along the Sea of Galilee and the demilitarized zone between Israel and Syria. Other clashes arose from the crossing of the Israeli frontier by exiled Palestinians, some armed and seeking revenge, others unarmed and wanting to visit family or harvest crops on their former lands. The Israeli military regularly responded with commando raids into Gaza and the West Bank. One raid in October 1953 on the Jordanian West Bank village of Qibya resulted in the deaths of approximately 65 Palestinian civilians, drawing the opprobrium of the UN Security Council [UNSC Res 101 (24 November 1953) UN Doc S/RES/101]. Tensions between Israel and Egypt grew with the rise to power of Gamal Abdel Nasser and the tightening of the Egyptian blockade of Israeli shipping in the Straits of Tiran and the Gulf of Aqaba. As well, Egypt's decision to buy Soviet arms via Czechoslovakia in 1955, its support of the Algerian rebellion against French colonial rule, and the American decision to block a World Bank loan to fund the Aswan dam on the Nile chilled the relations between the West and the Nasser regime.

34. Egyptian President Nasser's nationalization of the Suez Canal in July 1956 precipitated the decision by Britain, France and Israel – secured through the secret Protocol of Sèvres in October 1956 – to launch a massive co-ordinated attack on Egypt. Britain hoped to install a more Western-friendly government and regain control of the Canal; France aimed at crippling Egypt's aid to the Algerian uprising; and Israel wanted to curb Arab nationalism, as personified by Nasser, and to punish Egypt for its tacit support of Palestinian guerrilla (*fedayeen*) raids from Gaza. Israel's initial attack on 29 October 1956 quickly captured the Sinai Peninsula and the Gaza Strip from Egypt. Several days later, British and French aerial attacks destroyed the Egyptian air force. On

5 November 1956, Britain and France invaded Egypt under the pretext of separating the warring armies, with Britain capturing Port Said and marching towards Suez City. Both the United States and the Soviet Union demanded an immediate ceasefire and the withdrawal of foreign troops from Egyptian soil. Britain and France withdrew within a week. The United Nations General Assembly, under its Uniting for Peace powers, adopted a resolution establishing the UN Emergency Force to act as peacekeepers in the Sinai Peninsula. [UNGA Res. 1001 (XII) (7 November 1956)]. Israel subsequently withdrew from the Sinai and Gaza in early 1957 upon the arrival of the UN peacekeeping troops. [H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 472-514].

5. The Creation of the Palestinian Liberation Organization (1964)

35. Scattered widely around the Arab world after the *Nakba* (catastrophe) of 1947-9, the Palestinians remained in a prolonged political paralysis, without effective leaders or an independent national voice. Between 1949 and 1964, small guerrilla raids into Israel from Gaza, Syria and the West Bank amounted to only insignificant military irritants for the Israeli Defence Forces. But with the emergence of pan-Arab nationalism in the 1950s, the Palestinians in the refugee camps, in Arab universities and in the oil fields of the Arabian Gulf began to organize intensively. The Palestinian National Charter was issued in 1964 at a meeting of the Arab League. It created a new organization, the Palestinian Liberation Organization (PLO), which proclaimed the right to self-determination, called for armed struggle to liberate Palestine and declared Zionism a colonial and expansionist movement. [‘The Palestinian National Charter of 1964’, in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. III, 699-704]. After the massive Arab military losses in the June 1967 war, the emergent Palestinian resistance organizations, led by *Fatah* and its leader Yasser Arafat, gained control of the PLO from the Arab League and initiated their independent quest for a Palestinian state.

6. The June War of 1967

36. Tensions between Israel and its Arab neighbours rose dramatically in 1966 and early 1967. The contributing factors included Palestinian guerrilla raids into Israel from Jordan and Syria, a massive retaliation by the Israeli military into the Jordanian West Bank in November 1966, and regular skirmishes on the Israeli-Syrian demilitarized zone which culminated in the shooting down of six Syrian fighter jets in April 1967.

37. In May of 1967, the United Nations peacekeeping force– the United Nations Emergency Force – was withdrawn from the Sinai Peninsula on Egypt’s demand. President Nasser followed up by moving several Egyptian army divisions into the Sinai in order to relieve the Israeli pressure on Syria. A bellicose atmosphere quickly escalated, and Egypt closed the Gulf of Aqaba and the Straits of Tiran to Israeli shipping. President Nasser threatened to destroy Israel, although Israeli military leaders doubted Egypt’s intentions and military strength (‘I do not think Nasser wanted war. The two divisions he sent to the Sinai in May would not have been sufficient to launch an offensive against Israel. He knew it and we knew it.’ Chief of Staff of the Israeli Army General Yitzhak Rabin, quoted in *Le Monde* 29 February 1968). On 5 June, Israel attacked the Egyptian, Syrian and Jordanian air forces, destroying all three. It then invaded and captured the Sinai and Gaza. Following clashes initiated by the Jordanian army in support of Egypt, the Israeli army took East Jerusalem and the West Bank. On 9 June, Israel attacked and occupied the Syrian Golan Heights. A cease-fire was finally accepted by all parties on 10 June. [A. Lall *The UN and the Middle East Crisis, 1967* (Columbia University Press New York 1968)]. With the military victory, over one million Arabs, primarily Palestinians, came under Israel’s rule. Approximately 300,000 Palestinians from the West Bank and East Jerusalem were expelled or fled from their homes and crossed into Jordan. Approximately 100,000 Syrians living on the Golan Heights fled the fighting and became refugees as well. Syria, Egypt and Jordan suffered 4,300 military dead, while Israel lost almost 1,000 soldiers in combat.

38. Following the June war, the United Nations became the diplomatic focus for the international community’s supervision of the conflict. Besides seeking to terminate the

hostilities and ensure respect for international humanitarian law, a number of United Nations members sought two larger political goals arising out of the war: the end to Israel's belligerent occupation of the newly conquered lands, and the creation of a principled political and legal framework for a lasting peace in the Middle East. After five months of negotiations and debates at the United Nations during the summer and autumn of 1967, the Security Council unanimously adopted Resolution 242 on 22 November 1967. [UNSC Res 242 (22 November 1967) UN Doc S/RES/242]. It called for '[w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict,' and 'termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area.' The Resolution has come to be accepted as the legal and political foundation for Arab-Israeli peace negotiations. [S. Bailey, *The Making of Resolution 242* (Dordrecht: Martinus Nijhoff Publishers, 1985)].

39. Shortly after the end of the June 1967 war, Israel began to stake claims for some of the newly-conquered territories. On 27 June 1967, the Israeli Cabinet and Knesset voted for the 'municipal fusion' of Jerusalem by annexing East Jerusalem and some of the surrounding West Bank. The United Nations General Assembly immediately declared that the measures were invalid. [UNGA Res 2253 (XXII) (4 July 1967); UNGA Res 2254 (XXII) (14 July 1967)]. The Israeli Cabinet began approving projects during the summer of 1967 to populate East Jerusalem, the West Bank and the Golan Heights with Jewish civilian settlements, initially under the guise of military facilities. [H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 667-713; G. Gorenberg, *The Accidental Empire* (New York: Times Books, 2006)].

7. The October 1973 War

40. Intensive diplomacy by the international community between 1967 and 1973 accomplished little to resolve the Arab-Israeli conflict, to reach a peace agreement or even to create any substantive trust among the belligerent parties. Egypt and Israel fought a War of Attrition along the Suez Canal. Cold War rivalries heightened, as the Soviet

Union expanded its relationships with Egypt and Syria, and the alliance between the United States and Israel deepened. A growing rift between the PLO forces in Jordan and King Hussein, followed by a series of airplane hijackings in September 1970, resulted in a short civil war and the expulsion of the PLO from the Hashemite Kingdom and its relocation to Lebanon. Gamal Nasser mediated an end to the Jordan-PLO war, and then died of a heart attack; he was succeeded as Egyptian president by Anwar Sadat. In 1972, Egypt expelled 15,000 Soviet military advisors, which contributed to building Israeli confidence that the Arab states lacked the ability to wage another large war. In August 1973, Israel released the Galili Document, announcing the country's intention to expand its settlement policies on the lands captured in 1967. Peace plans proposed by the United States (the Rogers' Initiative, named after Secretary of State William Rogers) and the international community through the United Nations (the Jarring Mission, after the Swedish envoy Gunnar Jarring) gained little traction. Presidents Sadat of Egypt and Assad of Syria concluded that only another war would puncture Israel's self-confidence and crack the stalemate.

41. Egypt and Syria attacked the Israeli army positions in the Sinai Peninsula and the Golan Heights on 6 October 1973 in a conflict variously called the October War, the Ramadan War and the Yom Kippur War. The Arab objective appears to have been limited to regaining some of their lost territory and pushing the West to re-engage in serious peace mediation. The surprise attack gave the Arab armies an initial military advantage, but Israel, with creative military tactics, the emergency delivery of American weapons and the Arab unwillingness to sustain their offensive, was able to launch a significant counterattack. On 22 October, the UNSC passed Resolution 338, which called for a ceasefire and the immediate implementation of UNSC Resolution 242. [UNSC Res 338 (22 October 1973) UN Doc S/RES/338]. UNSC Resolution 340, adopted three days later, established the Second United Nations Emergency Force (UNEF II) to stand between the warring parties. [UNSC Res 340 (25 October 1973) UN Doc S/RES/340]. Approximately 2,800 Israeli soldiers were killed, while the Syrians and Egyptians suffered 8,500 military dead.

42. The immediate result of the October war was a military draw. Egypt regained some of its territory in the Sinai and Syria took back parts of the Golan Heights, while Israel crossed to the west of the Suez Canal and occupied territory close to Cairo. Jordan and Lebanon did not participate in the war, and the Palestinian territories remained under Israeli occupation. In the aftermath of the war, the Arab petroleum countries initiated an oil boycott of select Western countries, shaking the West's economy and burying its complacency about containing the spillover from the Arab-Israeli conflict. In Israel, Prime Minister Golda Meir became a political casualty of the war, forced to resign in April 1974 because of the Israeli government's perceived unpreparedness for the Egyptian-Syrian attack. [H. Sachar, *A History of Israel* (3rd ed.) (New York: Alfred A. Knopf, 2007), 740-787].

43. The United Nations convened an international conference on the Middle East late in 1973, seeking ways to implement Resolution 242 and to establish a just and lasting peace. In 1974, Egypt and Syria signed separate disengagement agreements with Israel, giving the two Arab countries modest territorial recoveries in the Sinai and the Golan. In October 1974, the Arab League declared the PLO as the sole legitimate representative of the Palestinian people. The following month, Yasser Arafat, chairman of the PLO, addressed the United Nations General Assembly. To counter this new-found legitimacy of the Palestinians, Israel intensified its covert negotiations with King Hussein of Jordan, seeking to create an Israeli-Jordanian condominium for the West Bank, but these talks floundered. Meanwhile, a second Egyptian-Israeli disengagement agreement in September 1975, negotiated under American auspices, produced further land transfers in the Sinai back to Egypt. ['Sinai Agreement between Egypt and Israel', September 1, 1975', in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1991), vol. IV, 5-12]. In Israel, the Likud party led by Menachem Begin won the May 1977 elections over the Labor Alignment, which had governed Israel continuously since 1948. In power, Begin and the Likud ruled with a distinct right-wing ideology, and intensified the growth of the Jewish settlements in the occupied territories.

8. Camp David and the Peace Treaty between Egypt and Israel (1978-79)

44. In a surprise initiative, Egyptian President Anwar Sadat flew to Jerusalem and addressed the Israeli Knesset in November 1977. Ten months of difficult bargaining followed, culminating in 12 days of summit negotiations at Camp David, in Maryland, between President Sadat and Israeli Prime Minister Begin, mediated by American President Jimmy Carter. The result was the Camp David Accords of 17 September 1978. [‘A Framework for Peace in the Middle East Agreed at Camp David’ (Egypt-Israel) (agreed 17 September 1978) (1978) 17 ILM 1466]. Subsequently, on 26 March 1979 Egypt became the first Arab country to sign a peace agreement with Israel. [Treaty of Peace Between the Arab Republic of Egypt and the State of Israel (signed 26 March 1979, entered into force 25 April 1979) 1136 UNTS 116]. The 1979 Peace Treaty affirmed Resolutions 242 and 338 as the basis for peace in the region, with the following key points of agreement: 1) the termination of the state of war between Israel and Egypt; 2) a complete Israeli withdrawal of all military forces and civilians from the Egyptian Sinai; 3) full recognition of each other’s rights, including the termination of economic boycotts; 4) free passage of Israeli shipping through the Suez Canal, the Strait of Tiran and the Gulf of Aqaba; 5) maintenance of the UN forces in a buffer zone; and 6) establishment of a financial claims commission. Diplomatic relations between Israel and Egypt followed, and Israel withdrew completely from the Sinai in 1982. Upon the signing of the Peace Treaty, Egypt was expelled from the Arab League. Anwar Sadat and Menachem Begin jointly won the Nobel Peace Prize in 1978 for their diplomacy. President Sadat was subsequently assassinated by Islamic fundamentalists in October 1981, in part for signing a peace treaty with Israel.

45. As part of the Peace Treaty, a joint letter from President Sadat and Prime Minister Begin to President Carter dated 26 March 1979 committed the parties to initiate negotiations on autonomy for the West Bank and Gaza. The letter aimed at ‘the establishment of the self-governing authority in the West Bank and Gaza in order to provide full autonomy to the inhabitants’ within a five year transitional period, together with the end of Israeli military government. [‘Joint Letter Concerning the Egyptian-Israeli Peace Treaty to President Carter from President Sadat and Prime Minister Begin’,

in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. IV, 381-382]. Prime Minister Begin took a strict interpretation of this commitment, maintaining that it did not impair Israel's right to claim sovereignty over the occupied Palestinian territories after the completion of the five year transitional period. The subsequent negotiations between Egypt and Israel over the future of the occupied territories, without Palestinian involvement, failed to reach any agreement regarding the future of the Palestinian territories or even the end of the occupation. The Palestine National Congress, meeting in Damascus in January 1979, adopted a programme denouncing the Camp David process "as a grave threat to the cause of Palestine and of Arab national liberation." ['Political and Organizational Programme Approved by the Palestine National Council at its Fourteenth Session', in JN Moore (ed.) *The Arab-Israeli Conflict* (Princeton: American Society of International Law, 1974), vol. IV, 339-343].

9. The War in Lebanon (1975-90)

46. In April 1975, the multiple schisms in Lebanon – confessional, class, ideological and economic – erupted into an all-encompassing civil war. The primary causes of the civil war included the tensions between the Maronite militias and the Muslim and Druze communities; the maldistribution of wealth; the arrival of the PLO and the discontent of the Palestinian refugees in Lebanon against the Lebanese government; a weak central government; and the regular interference in Lebanon's affairs by its neighbours. For the first year of the war, the left-wing, Muslim and PLO military alliance held the upper hand against the various right-wing Maronite militias. Syria then intervened on the side of the Maronites in 1976 with American and Israeli consent. The Syrian military presence was enough to shift the balance of power, but not to end the conflict. Israel supported the Maronite-led militias, and Iran, Iraq and Syria all supplied various confessional and political militias with arms and finances. The initial years of the civil war marked the political rise of the Lebanese Shiites, who were the country's largest and the most impoverished community; its leading militias – Amal, Hezbollah and Islamic Jihad –

received support from Iran and Syria. [W. Khalidi, *Conflict and Violence in Lebanon* (Cambridge, MA.: Harvard University Press, 1983)].

47. In March 1978, a terrorist attack on an Israeli bus north of Tel Aviv carried out by Palestinian guerrillas from Lebanon resulted in approximately 35 Israeli civilian deaths. Israel immediately launched 'Operation Litani', a major military attack into southern Lebanon to destroy guerrilla bases. The UNSC passed Resolution 425, calling for an Israeli military withdrawal 'forthwith' from Lebanon, and establishing the United Nations Interim Force in Lebanon (UNIFIL) [UNSC Res 425 (19 March 1978) UN Doc S/RES/425]. Although UNIFIL operated in southern Lebanon with 3,000 international troops, it was unable to halt Palestinian incursions into Israel or Israel military raids into Lebanon.

48. In December 1981, the Israeli Knesset legislatively annexed the Golan Heights. This had many repercussions. Politically, it strained Israel's relations with the new Reagan administration in the United States, which suspended a pending arms sale agreement. The annexation also caused an uproar in the Arab world, which further isolated Egypt. Diplomatically, the United Nations Security Council unanimously adopted Resolution 497, proclaiming that 'the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect'. [UNSC Res 497 (17 December 1981) UN Doc S/RES/497].

49. On 3 June 1982, a renegade Palestinian faction hostile to the PLO shot and seriously wounded the Israeli ambassador to Britain. Within several days, Israel launched 'Operation Peace for Galilee,' a massive and well-planned invasion of Lebanon with two principal goals: the destruction of the PLO presence in Lebanon and support for the ascension of Bashir Gemayel, a Maronite warlord, to the presidency of Lebanon. The Israeli military quickly occupied all of southern Lebanon, and by 13 June had imposed a siege on Beirut. The Israeli air force destroyed all Syrian missile bases in the Bekaa Valley and shot down 96 Syrian war planes, effectively removing Syria from the conflict. The UN Security Council passed Resolution 508 on the day of the invasion, demanding

an immediate ceasefire. [UNSC Res 508 (5 June 1982) UN Doc S/RES/508]. The following day, UNSC Resolution 509 was adopted, requiring the withdrawal of all Israeli forces from Lebanon. [UNSC Res 509 (6 June 1982) UN Doc S/RES/509]. The language of these two resolutions incorporated the UN consensus for ending the conflict: withdrawal of Israeli forces from Lebanon, respect for the territorial integrity and sovereignty of Lebanon within its internationally recognized borders, and respect for the rights of the civilian population. Notwithstanding, Israel continued its military occupation of southern Lebanon and initiated a bombardment of West Beirut for the next several months, where a large Lebanese and Palestinian civilian population was effectively trapped. From June to August 1982, the Security Council continued to adopt resolutions demanding a ceasefire, without effect. [UNSC Res 518 (12 August 1982) UN Doc S/RES/518; UNSC Res 517 (4 August 1982) UN Doc S/RES/517; UNSC Res 516 (1 August 1982) UN Doc S/RES/516; UNSC Res 515 (29 July 1982) UN Doc S/RES/515; UNSC Res 513 (4 July 1982) UN Doc S/RES/513; UNSC Res 512 (19 June 1982) UN Doc S/RES/512; UNSC Res 511 (18 June 1982) UN Doc S/RES/511]. An estimated 18,000 Lebanese and Palestinians in Lebanon, primarily civilians, were killed during the Israeli invasion.

50. With United States diplomatic intervention, a ceasefire was put in place on 12 August 1982. The PLO implemented the Habib Agreement (named after the American envoy Philip Habib), which called for the evacuation of PLO fighters from Lebanon to Tunisia and other Arab states, and a multinational force to supervise their departure. By 9 September, the PLO evacuation was concluded, and the multinational supervisory force left Beirut shortly afterwards. Less than a week later, Lebanese president-elect Bashir Gemayel was assassinated, likely by Syrian agents. Israeli forces moved into West Beirut and took control of the city. As later concluded by the 1983 Kahan Commission report (created by Israel to investigate the Sabra and Shatila massacre), the Israeli Defence Forces under Defence Minister Ariel Sharon were responsible for allowing Lebanese Maronite Phalangist militias into the Sabra and Shatila refugee camp in Beirut where a large Palestinian civilian refugee population remained after PLO fighters had withdrawn. For 40 hours between 16 and 18 September 1982, with the Israeli forces encircling and

monitoring the camp, the Phalangist militias massacred between 800 and 3,500 civilians. [‘Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (Kahan Report), February 8, 1983’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Aidsley, NY: Transnational Publishers, 2005) vol 1, 702]. The Security Council adopted Resolution 521, condemning the ‘criminal massacre of Palestinian civilians in Beirut’ without assigning responsibility [UNSC Res 521 (19 September 1982) UN Doc S/RES/521]. Following the release of the Kahan Report, Sharon was forced to resign as Defence Minister, and Prime Minister Begin was politically weakened.

51. By June of 1985, Israel had pulled most of its troops out of central Lebanon, but continued to occupy a self-proclaimed ‘security zone’ in South Lebanon, with the support of the Israeli-funded South Lebanese Army (SLA). The Lebanese civil war eventually came to an end in 1990, with a political agreement mediated by the Saudis which resulted in alterations, but no overhaul, of the Lebanese political structure. Over the fifteen years of the war, an estimated 150,000 Lebanese and Palestinians, primarily civilians, had been killed. Lebanon then began a slow political and economic reconstruction, impeded by the presence of the Syrian army in the centre and north of the country, and the Israeli army in the south. Hezbollah, a Shiite Lebanese political party and militia, undertook increasingly effective guerrilla operations against the Israeli army and the SLA in southern Lebanon through the 1990s. Israel eventually ended its military occupation in 2000. The Syrian military involuntarily withdrew in 2005, following strong international pressure after the assassination of former Lebanese Prime Minister Rafiq Hariri. On 7 April 2005, the UN Security Council adopted Resolution 1595, which created an international independent investigation commission to investigate the Hariri murder on behalf of Lebanon and the international community [UNSC Res 1595 (7 April 2005) UN Doc S/RES/1595].

10. Arab Peace Plan (1982)

52. On 9 September 1982, the Twelfth Arab Summit Conference released the Fez Arab Peace Plan. The Plan adopted a series of principles for an end to the Arab-Israeli conflict and for a lasting peace in the Middle East. The principles included: (1) Israel’s

withdrawal from all the Arab territories captured in the June 1967 war; (2) the dismantling of all Israeli settlements; (3) a guarantee of freedom of worship in the Holy Places; (4) an independent Palestinian state in the West Bank and Gaza, with Jerusalem as its capital; (5) the right of the Palestinians to all of their national rights under the leadership of the Palestine Liberation Organization; (6) regional peace; and (7) the guarantee of these principles by the Security Council. [‘Excerpts from the Final Declaration of the Twelfth Arab Summit Conference, Fez (Fez Arab Peace Plan)’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Aidsley, NY: Transnational Publishers, Inc, 2005) vol 2, 863-4].

11 Intifada I (1988-93)

53. The first Palestinian *intifada*, or uprising, precipitated by an Israeli army vehicle killing four Palestinian workers in a truck crash in Gaza on 8 December 1987, quickly spiralled into widespread demonstrations throughout the occupied territories. The spontaneous uprising led to six years of massive civil resistance, protests, economic boycotts, tax withholding and strikes aimed at ending the Israeli occupation and bringing about independence for the Palestinians. The uprising intensified in July 1988 when the Israeli government authorized of the building of a tunnel adjacent to the Dome of the Rock in Jerusalem, the *Haram al-Sharif*, Islam’s third holiest site. The first *intifada* was led by a new and well-organized generation of Palestinians who grew up under Israeli occupation; they were sympathetic to the PLO, but not led directly by its exiled leadership in Tunisia.

54. The Israeli political and military leadership was caught off-guard by the *intifada*. Their response to the *intifada* was ‘Operation Iron Fist:’ using live ammunition against demonstrators; imposing collective punishment on towns and villages through curfews and home demolitions; and the imprisonment of participants and the deportations of the *intifada*’s leaders. An estimated 1,100 Palestinians and 160 Israelis were killed during the first *intifada*. As well, approximately 80,000 Palestinians were imprisoned. Both the UN Security Council and General Assembly adopted resolutions concerning the *intifada*,

which variously confirmed the applicability of the Fourth Geneva Convention to the occupied territories and East Jerusalem, deplored Israeli practices in responding to the uprising, and re-asserted the inadmissibility of the acquisition of territory by force: [UNSC Res 681 (20 December 1990) UN Doc S/RES/681; UNGA Res 46/82 (19 December 1991) UN Doc A/RES/46/82; UNSC Res 672 (12 October 1990) UN Doc S/RES/672; UNSC Res 607 (5 January 1988) UN Doc S/RES/607; UNSC Res 605 (22 December 1987) UN Doc S/RES/605]. One significant offshoot of the first *intifada* was the founding of *Hamas* (“the Islamic Resistance Movement”) in Gaza as a Palestinian Islamist political and military organization; it was formed in response to the perceived failure of secular Palestinian political movements to end the Israeli occupation and achieve an independent state.

55. On 31 July 1988, King Hussein announced that Jordan was withdrawing all administrative and legal claims to the West Bank. [‘His Majesty King Hussein of Jordan’s Address to the Nation Concerning Disengagement from the West Bank’, in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Aidsley, NY: Transnational Publishers, Inc, 2005) vol 2, 586-590]. In November of that year, the PLO conference in Algiers accepted the legitimacy of Israel, endorsed all relevant UN resolutions on the Middle East, renounced terrorism, and called for a two-state solution to the conflict. [Palestine Liberation Organization ‘Declaration of Palestinian Independence Issued by the Palestine Liberation Organization, November 15, 1988 (Algiers Declaration)’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol 2, 590-593]. The Iraqi invasion of Kuwait in August 1990, and the subsequent military ejection of Iraqi forces by the US-led international coalition in February 1991 led indirectly to renewed diplomacy to address the Israeli-Palestinian conflict. At the time of the Iraq invasion, the PLO leadership had sided with Iraqi dictator Saddam Hussein, resulting in the PLO’s diplomatic isolation after Iraq was expelled from Kuwait. In October 1991, the US and the USSR issued a joint invitation to Israel and many Arab countries to a peace conference in Madrid. Neither the Palestinians nor the PLO were specifically invited to Madrid, although Palestinian representatives from within the occupied territories were included as part of the Jordanian delegation with the

PLO's blessing. A notable outcome of the Madrid meeting was the establishment of five multilateral working groups on the Israeli-Palestinian conflict, addressing the outstanding issues of arms control and regional security, the environment, water, regional economic development and the refugees.

56. In 1990, Israeli Prime Minister Yitzhak Shamir and his Likud-led government embarked upon a significant expansion of Israeli settlements in the occupied territories, both to satisfy the territorial aspirations of his right-wing political partners in government and to house the significant influx of Jewish immigrants from the collapsing Soviet Union. The settlement policy provoked a showdown with President George H.W. Bush of the United States, who blocked a \$10 billion (US) loan to Israel in February 1992. The Jewish civilian settlement project in the occupied territories had been supported by every Israeli government since 1967, and had grown from approximately 10,000 settlers in 1972 to 107,000 settlers in 1983 to 228,000 settlers by 1990. The American loan was subsequently unfrozen after the election victory of Yitzhak Rabin and his Labor alignment party in June 1992 and his commitment to freeze 'political settlements' in the occupied territories. While the Madrid process produced little progress during the Shamir government, the pace quickened after the election of Rabin. Parallel secret negotiations between semi-official Palestinian and Israeli representatives in Oslo under the auspices of the Norwegians were initiated, beginning in December 1992. These negotiations culminated in a tentative agreement in August 1993.

12 Oslo Accords (1993)

57. The secret Oslo negotiations brought about the Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 ('DOP'), signed on the White House lawn by Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasser Arafat in the presence of American President Bill Clinton. ['Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinian Liberation Organization', in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol 2, 890-897]. The DOP

enabled the establishment of the Palestinian Interim Self-Government Authority in parts of the occupied territories, and Israel recognized the PLO as the legitimate representative of the Palestinians. In turn, the PLO recognized the State of Israel and renounced violence. Israel agreed to withdraw its military forces from parts of the West Bank and Gaza. As well, the DOP and its accompanying documents addressed the issues of Palestinian elections, economic co-operation, and interim security arrangements. The Oslo Accords also set out a transitional five year process for negotiating a final peace accord between Israel and the Palestinians, within the framework of United Nations Security Council Resolutions 242 and 338, but they did not otherwise require that international law and the considerable body of UN resolutions on the conflict would be the terms of reference for the eventual peace agreement. The Accords left the most difficult ‘final status’ issues – including Jerusalem, the settlements, water, borders, security and the Palestinian refugees – to be negotiated at the end of the process. Neither the DOP nor any of the subsequent documents called explicitly for a Palestinian state to be established at the end of the process. Prime Minister Rabin, Foreign Minister Peres and Chairman Arafat won the 1994 Nobel Peace Prize for their role in creating the DOP.

58. The 1993 DOP was followed by a series of subsequent agreements on various transitional issues between Israel and the PLO, reached under the diplomatic supervision of the United States. These agreements included: the Protocol on Economic Relations between the Government of Israel and the PLO of April 1994; the Agreement on the Gaza Strip and the Jericho Area between Israel and the PLO of May 1994; the Agreement on Preparatory Transfer of Powers and Responsibility between Israel and the PLO of August 1994; the Interim Agreement on the West Bank and Gaza Strip between Israel and the PLO of September 1995; the Agreement on Temporary International Presence in the City of Hebron between Israel and the PLO of May 1996 (‘TIPH’), and the Protocol Concerning Redeployment in Hebron between Israel and the PLO of January 1997. [All are found in: MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol. 2].

59. The principal territorial feature of the Oslo process was the creation of three zones of control in the occupied Palestinian territories for the interim period: Area 'A', consisting of the heavily-populated Palestinian cities and towns, would be under the full political and security control of the Palestinian Authority; Area 'B', consisting of smaller Palestinian communities and rural areas, would be governed by Palestinian civil control and Israel security control; and Area 'C', consisting of the Israeli settlements and territory adjacent to the pre-1967 Israeli border would be entirely controlled by Israeli security. The result was a series of non-contiguous islands of Palestinian-ruled land – Area 'A' – enclosed by larger areas under Israeli security rule, with the Palestinians required to pass through a multitude of Israeli checkpoints to move from one island of PA control to another. As well, Israel's military law, with its 2,000 military orders enacted since 1967, remained the principal legal framework for governing the Palestinian territories. Under the interim agreements, East Jerusalem would continue to be under full Israeli control. The West Bank and Gaza were to be viewed as a single territorial unit for the purposes of a future Palestinian self-governing entity.

60. In November 1995, a Jewish right-wing militant assassinated Prime Minister Yitzhak Rabin, removing Israel's most credible supporter of the Oslo process from the country's political scene. He was succeeded by Shimon Peres, who narrowly lost the subsequent national elections to Benyamin Netanyahu of the Likud Party in May 1996. In January 1996, Palestinians held presidential and legislative elections, which were won by Yasser Arafat and his Fatah organization. In April 1996, a short intensive conflict broke out between Hezbollah and Israel – 'Operation Grapes of Wrath' – which killed several hundred Lebanese civilians, including 100 civilians hit by Israeli shelling who had sought shelter at a UN compound in Qana, southern Lebanon. The UN Security Council adopted Resolution 1052, calling for an immediate cessation of hostilities and respect for the territorial integrity of Lebanon [UNSC Res 1052 (18 April 1996) UN Doc S/RES/1052].

61. In 1997, the Netanyahu government decided not to hand over further territory to the Palestinian Authority that was required by the Oslo agreements. As a consequence, negotiations on the 'final status' issues that were to begin in 1996 made no meaningful

progress. Meetings between Israel and the Palestinian Authority late in the life of the Netanyahu government, pushed by the Clinton administration, resulted in the Wye River Memorandum in October 1998 [Wye River Memorandum (Interim Agreement) (Israel-Palestine Liberation Organization) (signed 23 October 1998) (1998) 37 ILM 1251], which set out a timeline for phased Israeli redeployments and additional security arrangements, including the establishment of a Palestinian police force. The timeline established that 'final status' negotiations were to start as soon as the Memorandum entered into force. The Wye Memorandum was suspended two months later by Prime Minister Netanyahu, and his government fell shortly afterwards following a vote of no-confidence in the Knesset. In the national elections of May 1999, Ehud Barak and the Labor Party were voted into office on a platform of resuscitating the Oslo process.

13 Peace Treaty between Jordan and Israel (1994)

62. On 26 October 1994, Israel and Jordan entered into a Treaty of Peace at Wadi Araba, signed by Prime Ministers Yitzhak Rabin and Abdul Salem Majali, and witnessed by American President Bill Clinton [Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan (adopted 26 October 1994, entered into force 10 November 1994) 2042 UNTS 393]. The treaty established a framework for political, economic, cultural cooperation and the basis for permanent peace between the two states based on UNSC Resolutions 242 and 338. King Hussein of Jordan had conducted numerous secret meetings with a succession of Israeli governments since the 1960s to stabilize the border between the counties and, after 1967, to advance Jordan's claim for the return of the West Bank. The Treaty pledged that the two countries would 'develop good neighbourly relations of co-operation between them to ensure lasting security, will refrain from the threat or use of force against each other and will settle all disputes between them by peaceful means'. [A. Shlaim, *Lion of Jordan: The Life of King Hussein in War and Peace* (New York: Penguin, 2008)].

14 Subsequent Peace Talks: Camp David II

63. Following the election of the Barak government in Israel in May 1999, the faltering Oslo process acquired a new sense of optimism. Prime Minister Barak and President Arafat met in Egypt in September, and agreed to the Sharm el-Sheikh Memorandum [“Sharm el-Sheikh Memorandum, September 4, 1999” in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol 2, 1149-52]. It provided for three small Israeli military withdrawals from the West Bank, the release of some Palestinian prisoners, and the start of intensive negotiations towards a final status peace agreement.

64. While the Israelis and Palestinians prepared for final status talks, Israel and Syria engaged in intensive negotiations in late 1999 and early 2000 for the return of the Golan Heights to Syria. Conducted primarily through American interlocutors, a draft peace agreement was achieved, but the negotiations eventually floundered in March 2000. A key unresolved issue was whether the final border between the two countries would be based on the 1923 Mandate line with all of Lake Tiberias (also known as the Sea of Galilee) within Israel, or the 1949 armistice line with Syria possessing the eastern edge of the Lake.

65. After the failure of the Syrian track, President Clinton hosted Prime Minister Barak and President Arafat at a summit in July 2000 at the American presidential retreat at Camp David. The three leaders met for two weeks of intensive negotiations in an attempt to reach a final and durable peace agreement. The Camp David II summit failed to achieve a final agreement, with the parties at some distance from each other, primarily due to differences over final borders, the ultimate status of Jerusalem, and the fate of the Palestinian refugees. The parties reached an understanding on some basic principles, including the centrality of resolutions 242 and 338 as the framework for peace, which were incorporated into a Trilateral Statement on the ME Peace Summit (‘Camp David II’). [--‘Trilateral Statement on the Middle East Peace Summit’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1159].

66. In December 2000, the parties were brought back to the White House to make one final effort to reach an agreement based on the 'Clinton Parameters'. ['Clinton Parameters to Palestinian and Israeli Negotiators (December 23, 2000)' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1160]. These parameters called for a return of much of the West Bank and Gaza to the Palestinians, Israeli retention of its principal settlement blocs, Israeli territorial compensation to the Palestinians for some of these retained lands, the demilitarization of the new Palestinian state, a division of Jerusalem according to demography, a form of joint sovereignty over the Old City, and the acceptance of some Palestinian refugees to settle in the nascent Palestinian state. Both sides accepted the parameters, although with separate reservations. The Clinton Parameters became the framework for subsequent talks at Taba, Egypt in late January 2001, where further progress towards narrowing the differences was made, but, once again, the issues of borders, Jerusalem and refugees bedevilled the achievement of a final settlement and no agreement was reached. ['European Union Non-paper on the Taba Conference (2001)', in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1169-70]. By then, President Clinton was out of office and Prime Minister Barak would be defeated by Ariel Sharon of the Likud party in Israeli national elections in early February 2001. [W. Quandt, *Peace Process: American Diplomacy and the Arab-Israeli Conflict since 1967* (Washington: Brookings Institute Press, 2005) (3rd ed.)].

15 Intifada II (2000)

67. The second Palestinian *intifada*, or *Al-Aqsa Intifada*, occurred in the aftermath of a visit by Likud opposition leader Ariel Sharon in late September 2000 to the *Haram al-Sharif*, the holy Muslim sanctuary in Jerusalem's Old City, several weeks after the end of the Camp David II summit. Many Palestinians viewed the Sharon visit as a deliberate provocation. Palestinian demonstrations erupted over the following three months in Jerusalem across the occupied territories and within Israel. Nearly 500 people were killed and over 10,000 injured during this period, the vast majority of them unarmed Palestinians. The subsequent fact-finding commission into the causes of the *Al-Asqa*

Intifada, led by former US Senator George Mitchell, recommended in April 2001 that the violence end, that the parties implement ways to rebuild confidence, and that they resume negotiations. It observed that: ‘[i]f the parties are to succeed in completing their journey to their common destination, agreed commitments must be implemented, international law respected, and human rights protected’ [‘The Report of the Sharm el-Sheikh Fact Finding Committee, (Mitchell Report), April 30, 2001 in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1172, 1175].

68. However, the violence continued to escalate. A series of suicide bombings in March 2002 conducted by Hamas militants killed approximately 40 Israeli civilians, which led the Israeli military to launch ‘Operation Defensive Shield’. Israel re-occupied all of the West Bank in order to arrest suspected terrorists, find weapons and destroy suspected weapons-manufacturing facilities. The headquarters of the Palestinian Authority in Ramallah was largely destroyed in the fighting, and President Arafat was confined to the headquarters for the next two years. Approximately 500 Palestinians were killed in the fighting. The UN Security Council expressed its concern in a series of resolutions condemning terrorism, calling on all parties to observe international humanitarian law, expressing concern about the grave humanitarian crisis faced by the Palestinian people, and demanding the speedy withdrawal of Israeli forces from Ramallah and all other re-occupied Palestinian cities [UNSC Res 1435 (24 September 2002) UN Doc S/RES/1435; UNSC Res 1405 (19 April 2002) S/RES/1405; UNSC Res 1403 (4 April 2002) UN Doc. S/RES/1403; UNSC Res 1402 (30 March 2002) UN Doc S/RES/1402].

69. Just prior to the massive violence in late March and April 2002, the UN Security Council adopted Resolution 1397 on 12 March 2002. For the first time, the Security Council expressly endorsed a two-state solution for the conflict. It expressed ‘a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized boundaries.’ [UNSC Res 1397 (12 March 2002) UN Doc S/RES/1397].

70. Two weeks later, at the Arab League summit in Beirut, Crown Prince Abdullah of Saudi Arabia proposed a comprehensive peace plan for the settlement of the Israeli-Palestinian and Israeli-Arab conflict, based on Resolution 242 and the 1982 Fez Arab Peace Plan. The Arab Peace Initiative Plan, which the Arab League adopted on 28 March 2002, had five principle elements: (1) full Israeli withdrawal from all the territories occupied since the June 1967 war; (2) the establishment of a independent and sovereign Palestinian state in the West Bank and Gaza, with East Jerusalem as its capital; (3) a 'just solution' of the Palestinian refugee problem based upon UNGA Resolution 194 of 1948; (4) the end of the Arab-Israeli conflict, and the establishment of a general peace agreement between the Arab countries and Israel; and (5) normal relations between the Arab world and Israel. ['Arab Peace Initiative Established at the Arab League Summit, March 28, 2002' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol 2, 1205].

71. In April 2002, the United Nations, the Russian Federation, the United States and the European Union met in Madrid to form the 'Quartet', which would focus the activities of these states and institutions on securing the conditions for a lasting peace in the Middle East. At the initial meeting in Madrid, the Quartet expressed concern about the humanitarian crisis caused by the April 2002 conflict between Israel and the Palestinians, reiterated that resolutions 242 and 338 were the foundation for peace, welcomed the Arab peace plan issued two weeks previously, condemned terrorism, and called for an end to all Israeli settlement activity and the Israeli occupation.['Letter from the Secretary – General Containing a Joint Statement by the Quartet, April 10, 2002' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers Inc Aidsley New York 2005) vol 2, 1206].

72. As the second *Intifada* intensified, international diplomatic efforts continued. American President George Bush proposed a 'roadmap' for peace on 24 June 2002, calling for a 'vision of two states, a secure State of Israel and a viable, peaceful, democratic Palestine.' ['Speech by United States President George W. Bush on Mid-East Peace (24 June 2002)' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict*

(Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1208]. The concept of the Roadmap was subsequently endorsed by the Quartet in September 2002 [‘Communiqué Issued by the Quartet’ (17 September 2002)] and by the UN Security Council in Resolution 1515 [(19 November 2003), both in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1212, 1243]. The Roadmap was envisioned to be a ‘performance-based and goal-driven’ plan to enable the establishment of a Palestinian state living in peace beside Israel within a specific time line. This plan would ‘resolve the Israel-Palestinian conflict, and end the occupation that began in 1967, based on the foundations of the [1991] Madrid Conference, the principle of land for peace, UNSC Resolutions 242, 338 and 1397, agreements reached by the parties’ and the 2002 Arab Peace Plan. The Roadmap was to have a three phase implementation process. Phase I – ending terror and violence, normalizing Palestinian life and building Palestinian institutions – was to be completed as early as May 2003. Phase II – the possible creation of an independent Palestinian state with provisional borders and ‘attributes of sovereignty’ – was to have been completed between June and December 2003. And Phase III – the signing of a permanent status agreement and an end to the conflict – was to have been completed no later than 2005. [‘Elements of a Performance-Based Road Map to a Permanent Two-state Solution to the Israeli-Palestinian Conflict (15 October 2002)’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1214]. By the end of 2003, however, terrorism had not been thwarted, no settlement freeze had been implemented and Israel had not withdrawn from areas of the West Bank that it had occupied after the start of the second *Intifada*. The Roadmap fell into diplomatic limbo.

73. In April 2004, the United States formally revised its position on the status of Israeli settlements. From the late 1960s until the end of the Carter presidency, the United States had taken the position, in concert with the rest of the international community, that the settlements were illegal under international law. This position shifted under President Ronald Reagan, who downgraded the official American stance towards the settlements to one that regarded them as being merely ‘an obstacle to peace.’ This formal position

changed once again in April 2004, when President George W. Bush and Israeli Prime Minister Ariel Sharon exchanged letters on the issue of the Israeli-Palestinian conflict. In these letters, President Bush formally acknowledged what had been the unspoken American policy in previous years by accepting the permanency of the Israeli settlements in East Jerusalem and the major settlement blocs in the West Bank. President Bush stated in his letter that: ‘In light of new realities on the ground, including already existing major Israeli population centers...any final status agreement will only be achieved on the basis on mutually agreed changes that reflect these realities.’ [GW Bush ‘Exchange of Letter Between United States President George W. Bush and Israeli Prime Minister Ariel Sharon (14 April 2004)’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1245, 1247]. The Jewish settler population in the occupied territories, which stood at 258,000 in 1992, had grown to 440,000 by 2004. [‘Comprehensive Settlement Population, 1972 – 2008’ at Foundation for Middle East Peace, http://www.fmep.org/settlement_info/settlement-info-and-tables/stats-data/comprehensive-settlement-population-1972-2006]. By 2012, the settler population had reached 540,000.

74. The special relationship between the United States and Israel has played a significant role in the evolution of the Arab-Israeli conflict. Diplomatically and politically, the United States has provided strong support for Israel at international forums, such as the United Nations, and through its domestic legislatures, via resolutions of support and votes of aid in Congress. According to the United States Congressional Research Service, “U.S. military aid has helped transform Israel’s armed forces into one of the most technologically sophisticated militaries in the world,” enabling Israel to “maintain [its] qualitative military edge.” After 1949, American aid levels to Israel were initially modest and consisted largely of economic loans. However, after the 1967 war, the nature and quantity of American assistance, particularly involving military hardware, increased dramatically. Since 1974, Israel has been the largest recipient of American foreign assistance. Tensions have occasionally risen between the two countries involving aid, including the military use by Israel of American-made cluster bombs in Lebanon in 1982 and 2006, and Israel’s ongoing civilian settlements in the occupied territories. [‘U.S.

Foreign Aid to Israel,' Congressional Research Service (4 December 2009), located at: <http://www.fas.org/sgp/crs/mideast/RL33222.pdf>].

75. In 2002, Israel began the construction of a wall through the West Bank near the 1949 armistice line which would prevent armed Palestinian attacks on its civilian population but would also place a number of Jewish settlements and a significant portion of the occupied territories on the Israeli side of the wall. In December 2003, the United Nations General Assembly voted in favour of seeking an advisory opinion from the International Court of Justice on the legal consequences of the wall. [UNGA Res ES-10/14 (8 December 2003) UN Doc A/RES/ES-10/14]. On 9 July 2004, the International Court of Justice ruled that the wall was a violation of international law and directed it to be dismantled, with compensation to affected Palestinians. ['International Court of Justice Decision: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (9 July 2004)' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc. Aidsley New York 2005) vol 2, 493-539]. On 20 July 2004, the United Nations General Assembly voted 150-6-10 to accept the ICJ ruling and to demand that 'Israel, the occupying power, comply with its legal obligations as mentioned in the advisory opinion'. The UNGA resolution also called upon all UN members 'to comply with their legal obligations as mentioned in the advisory opinion.' [UNGA Res ES-10/15 (20 July 2004) UN Doc A/RES/ES-10/15]. Earlier, on 30 June 2004, the Israeli Supreme Court ruled that sections of the wall had not met the proportionality principle of minimizing its harm to Palestinians, and ordered those specific sections to be moved ['Israeli Supreme Court Decision: *Beit Sourik Village Council et al. v. The Government of Israel et al* (30 June 2004)' in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 460-492].

16 Israeli Palestinians in Israel

76. In October 2000, at the beginning of the second Palestinian *intifada*, Israel police clashed with Palestinian demonstrators in the Galilee, in northern Israel. Thirteen

Palestinians, 12 of whom were Israeli citizens, were killed by the police. A subsequent judicial inquiry called by the Israeli government – the Or Commission – criticized the Israeli police for excessive force, and labelled the attitude of the Israeli government towards the Palestinian minority within Israel as “neglectful and discriminatory”. [‘The Official Summation of the Or Commission report’ (2 September 2003) in *Ha’aretz*, at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=335594&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y>]. Palestinian citizens of Israel have the right to vote, and several Palestinian political parties have regularly won seats in the Israeli Knesset. However, the Palestinian minority – which makes up approximately 20% of Israel’s population – suffers from inequalities in education rates, access to social and health services, employment opportunities, land ownership and use, and state funding to local municipalities. Among Israeli Palestinians, per capita income rates are significantly lower, and poverty and unemployment levels are consistently higher in comparison to Jewish Israelis. [‘2008 Human Rights Report: Israel and the Occupied Territories’ (25 February 2009), U.S. Department of State, at: <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119117.htm>].

17 Israeli withdrawal from Gaza (2005)

77. Israeli Prime Minister Ariel Sharon presented a disengagement plan to the Israeli cabinet in April 2004 that proposed a unilateral Israeli withdrawal from the Gaza Strip and four small West Bank settlements. [‘Israeli Prime Minister Ariel Sharon’s Disengagement Plan (18 April 2004’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1250]. In October 2004, the Israeli Knesset approved Sharon’s Disengagement Plan with some modifications. The Plan, as approved and executed, maintained Israeli military control at all access points to Gaza, including the sea coast and air space, and the border with Egypt. [‘Government Resolution Regarding the Disengagement Plan, June 6, 2004’ in MC Bassiouni (ed) *Documents on the Arab-Israeli Conflict* (Transnational Publishers, Inc Aidsley New York 2005) vol 2, 1255]. The Plan was implemented in August 2005, with Israel dismantling the 17 Jewish settlements in Gaza and evacuating all of the 8,000 settlers to Israel and the West Bank. The Israeli withdrawal from Gaza heightened

tensions within Ariel Sharon's Likud-led government, and he formed a new political party, Kadima, in December 2005, attracting a number of former Likud ministers and MKs. However, in January 2006, Sharon suffered a massive stroke, and fell into a permanent coma. Ehud Olmert became the leader of Kadima, won the March 2006 elections, and formed a new government.

18 Lebanon War II (2006)

78. Following Israel's withdrawal from Lebanon in May 2000, the border between Israel and Lebanon stayed relatively calm. Hezbollah, the Lebanese Shiite political party and militia controlled the south of the country, with weaponry acquired from Iran.

Hezbollah's immediate *animus* against Israel was the continued Israeli detention of Lebanese prisoners and Israel's control of the occupied Sheba'a farms, on the Israeli-Lebanese-Syrian borders. On 12 July 2006, Hezbollah militants attacked through a border gate, killing eight Israeli soldiers, wounding and capturing two others, and taking the captured soldiers into Lebanon. Israel cited this as a *casus belli*, and initiated air strikes the following day on civilian infrastructure in Lebanon, including the Beirut international airport and the main highway between Beirut and Damascus. The same day, Hezbollah launched rockets into northern Israel, hitting Haifa. The Israeli air strikes and Hezbollah missiles continued throughout the subsequent 34 days of the war.

79. On 23 July, Israeli land forces invaded southern Lebanon. They subsequently fought a number of battles with Hezbollah militia units over the following three weeks. The United Nations Security Council adopted Resolution 1701 on 11 August, which called for a 'full cessation of hostilities', the deployment of the Lebanese army and UNIFIL soldiers to southern Lebanon, the full exercise of control by the Lebanese government over weapons on its territory and the disarmament of all armed groups, and a 'permanent ceasefire' leading to a 'long-term solution' [UNSC Res 1701 (11 August 2006) UN Doc S/RES/1701]. By war's end, on 14 August, over 1,000 Lebanese, predominately civilians, had been killed, and approximately one million people were displaced. Lebanon suffered heavy damage to its infrastructure. Israel suffered approximately 119 military deaths and 39 civilian deaths, and more than 250,000 Israelis evacuated the north to escape the

Hezbollah rockets. UNIFIL troops were subsequently placed throughout southern Lebanon. In January 2008, the report of the Winograd Commission – appointed by the Israeli government to investigate its conduct of the war – criticized the “serious failings and flaws in the lack of strategic thinking and planning, in both the political and the military echelons.” [‘Winograd Commission Final Report’ (January 30, 2008), located at: http://www.cfr.org/publication/15385/winograd_commission_final_report.html].

19 Split between PA/PLO and Hamas (2007)

80. After the death of Yasser Arafat in November 2004, Mahmoud Abbas was elected President of the Palestinian Authority in January 2005. He had previously served as Prime Minister of the PA for eight months in 2002. In January of 2006, the Palestinian Authority held its second national elections. Hamas, the Islamist party, won 74 seats in the 132 seat Palestinian legislature, while the ruling party, Fatah, won 45 seats. The popular vote was much closer, with Hamas receiving 44.5% and Fatah 41.4%. The 2006 election was broadly accepted, nationally and internationally, as free and fair, although Israel and many Western governments viewed the election of a Hamas government as unacceptable because of its Islamist politics and prior engagement in terrorism.

81. The following month, the US and the EU ceased assistance to the PA as it was now led by Hamas, a US-designated ‘terrorist organization’. Israel, which also designated Hamas as a ‘terrorist organization’, began to withhold the tax and customs receipts that it collected monthly on the PA’s behalf. As well, the PA also lost access to international banking services and loans. As the already-strained Palestinian economy deteriorated because of the loss of much of its foreign assistance, violence broke out between Fatah and Hamas factions, and over 100 Palestinians were killed. On 8 February 2007, Hamas and Fatah signed the Mecca Accord, a national unity agreement mediated by Saudi Arabia which called for a coalition government, an end to the international boycott of the PA, and an end to the factional Palestinian violence. Under the Mecca Accord, Hamas and Fatah joined in a government coalition. However, the Accord disintegrated in mid-June 2007, with Hamas taking control of Gaza and Fatah acquiring control of the West

Bank. President Abbas appointed Salam Fayad as the new Prime Minister, and the PA once again received international recognition. Hamas, which claimed to be the authentic PA, was diplomatically isolated.

20 Annapolis Accord (2007)

82. On 27 November 2007, the United States, supported by the Quartet, hosted a one-day Middle East peace conference at the US Naval Academy in Annapolis, Maryland, attended by President George Bush, Prime Minister Ehud Olmert and President Mahmoud Abbas. At the end of the conference, the three leaders issued a Joint Understanding on Negotiations at the end of the Conference, which called for intensive ‘good faith bilateral’ negotiations to achieve a peace treaty before the end of 2008 that would lead to ‘two states, Israel and Palestine, living side by side in peace and security’. Israel and the Palestinian Authority also agreed that they would each fulfil their obligations under the 2003 Roadmap until they reached a peace treaty. Following Annapolis, the two parties conducted regular meetings through 2008, but the negotiations did not result in any substantive progress towards a final peace treaty. On 16 December 2008, the United Nations Security Council adopted Resolution 1850 [UNSC Res 1850 (16 December 2008) UN Doc S/RES/1850], which welcomed the 2007 Annapolis Joint Understanding, re-affirmed its support for the ‘two-state solution, building upon previous agreements and obligations’, and noted the importance of the 2002 Arab Peace Initiative. Israel held elections in February 2009, electing Benjamin Netanyahu, the leader of the Likud party, once again as Prime Minister. In June 2009, the new American president, Barack Obama, delivered a major speech in Cairo, addressing the sometimes fraught relationship between the United States and the Muslim world. In his speech, Obama cited the “unbreakable” bond between America and Israel, acknowledged the “intolerable” situation and suffering of the Palestinians, and said that it was time for the Israeli settlements to stop [‘Remarks by the President on A New Beginning’ (4 June 2009), located at: http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/].

21 The Conflict in Gaza (2008-09)

83. Following regular eruptions of violence between Israel and Hamas, an informal six month ceasefire was reached in late June 2008. The ceasefire largely held, although Israel maintained its blockade of Gaza, limiting the amount of food, fuel and other supplies that could enter the territory. Shortly after the ceasefire expired in late December 2008, a ferocious conflict ensued, with Israel bombing numerous Hamas targets and civilian institutions in Gaza and subsequently sending in several thousand IDF ground troops and tanks. Approximately 1,300 Palestinians, the majority estimated to be civilians, died in the conflict, along with 13 Israelis. The United Nations Security Council passed Resolution 1860 [UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860], which called for an immediate ceasefire and the full withdrawal of Israeli forces from Gaza. It also requested international efforts to alleviate the humanitarian and economic situation in Gaza, called for the prevention of illicit trafficking in arms into Gaza, and encouraged intra-Palestinian reconciliation. In September 2009, the United Nations Human Rights Council released the report of a fact-finding mission, chaired by retired South African judge Richard Goldstone, which found that both Israel and Hamas had likely committed war crimes during the Gaza conflict, with much of its focus on Israeli military actions. [‘United Nations Fact-Finding Mission on the Gaza Conflict’ (September 15, 2009), located at: <http://unispal.un.org/UNISPAL.NSF/db7f13669e3abfd885257501007e0e51/7762c5ef0b1dea24852576650053d1aa?OpenDocument>]. The findings of the Goldstone report were accepted by the United Nations General Assembly in November 2009 [UNGA Res 64/10 (5 November 2009) UN Doc A/64/L.11].

22. Palestine at the United Nations (2011-12)

84. In November 2012, the President of the Palestinian Authority, Mahmoud Abbas, requested that the status of Palestine at the United Nations General Assembly be upgraded to Non-Member Observer State. The General Assembly, in UNGA Res. 67/19 (29 November 2012) voted in favour of the request by a vote of 138-9-41. The Resolution also re-affirmed the right of the Palestinian people to self-determination on the

Palestinian lands occupied by Israel since 1967, re-iterated its call for a two-state solution, and urged the resumption of the stalled peace negotiations between Israel and the Palestinians. Among other things, the new status would allow Palestine to seek membership in various UN agencies, including the International Criminal Court. This upgrading at the General Assembly followed an unsuccessful application by the Palestinian Authority in the autumn of 2011 to the Security Council to be admitted as a state member of the United Nations. Through President Obama, the United States had announced that it would veto the application at the Security Council, on the basis of prematurity as no final agreement on statehood had been reached through negotiations between Israel and the Palestinian Authority. Following heavy lobbying by the United States and other countries, only eight members of the Security Council had committed support for the Palestinian Authority's application by early November, which was one member short of passing a favourable resolution. However, had the resolution been put to a vote at the Security Council, the US had announced that it intended to exercise its veto.

C. Principle Legal Issues

1. Belligerent Occupation and the 4th Geneva Convention

85. The primary outcome of the June 1967 war was to bring the Egyptian Sinai peninsula, the Egyptian-administered Gaza Strip, the Jordanian West Bank and East Jerusalem, and the Syrian Golan Heights under Israeli military control. Between 1975 and 1982, Israel returned the Sinai in territorial stages to Egypt. In 2005, Israel unilaterally withdrew its remaining settlements and troops from Gaza, although it has continued to exercise effective control over its land borders, airspace and sea coast. Israel also maintained military control over different parts of southern Lebanon between 1982 and 2000. The international community has consistently defined the Israeli control of these territories as a belligerent occupation and therefore subject to the applicable international law on the subject. In contrast, Israel has maintained that East Jerusalem is sovereign Israeli territory, the Golan Heights are part of Israel through the formal application of its law, jurisdiction and administration to the territory, its occupation of Gaza ended in 2005, and

the West Bank is ‘disputed’ or ‘administered’ territory not subject to the international law on belligerent occupation. Israel ratified Geneva Convention IV on 6 July 1951, Jordan became a party to the Convention on 29 May 1951, and the Palestine Liberation Organization made a unilateral declaration on 7 June 1982 to bind itself to the Convention.

86. Shortly after the end of the June 1967 war, the UN Security Council unanimously adopted Resolution 237, which recommended that the States involved in the war scrupulously respect ‘the humanitarian principles governing...the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949’ (UNSC Res 237 [14 June 1967]). Five months later in its cornerstone resolution on the Middle East conflict, a unanimous Security Council called for the ‘withdrawal of Israel armed forces from territories occupied in the recent conflict’ (UNSC Res 242 [22 November 1967]).

87. In a number of subsequent resolutions, both the Security Council and the General Assembly of the UN have specifically affirmed that the 1967 lands controlled by Israel are occupied territories under international law and the protections of Geneva Convention IV apply. In September 1969, the Security Council called upon Israel ‘scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation’ (UNSC Res 271 [15 September 1969]). In May 2004, the Security Council reiterated its position regarding: ‘the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949’ (UNSC Res 1544 [19 May 2004]). In all, the Security Council has stated that Geneva Convention IV applies to the Israeli occupation of the Palestinian and Arab territories in more than 25 resolutions. Similarly, the General Assembly has adopted over 100 resolutions since 1967 holding that Geneva Convention IV applies to the situation. In December 2009, the General Assembly ‘demand[ed] that Israel accept the *de iure* applicability of the Convention in the Occupied Palestinian Territory including East Jerusalem, and other Arab territories occupied by Israel since 1967, and that it comply

scrupulously with the provisions of the Convention' (UNGA Res 64/92 [19 January 2010]).

88. In July 2004, the International Court of Justice declared in its Advisory Opinion on the Israeli construction of the wall in the West Bank that Geneva Convention IV applies to Israel's occupation of the Palestinian and Arab territories captured in 1967. In para. 101, the ICJ ruled that it 'considers 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' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Advisory Opinion]* para. 101).

89. Belligerent occupation arises when the military forces of one party have taken possession of enemy territory during an armed conflict (see → *Occupation, Belligerent*). The obligations borne by a belligerent occupier are codified primarily in the Hague Regulations of 1907 and in Geneva Convention IV of 1949 and its Additional Protocols. Art. 43 of the 1907 Hague Regulations and Art. 64 of Geneva Convention IV are considered the cornerstone of the occupier's obligations in the territory it occupies. Benvenisti has posited that Hague Art. 43 has been increasingly disregarded, and its key proscription—that the occupier should not change the laws in force in the occupied territory—has become defunct. He asserts that the incorporation of this principle in Geneva Convention IV's Art. 64 has not changed this fact, and that Israel is no different than other recent occupiers in setting aside the principle. 'The occupant's powers have expanded through time to cover almost all the areas in which modern governments assert legitimacy to police ... contemporary attention is paid more to the interests of the indigenous community under occupation rather than to the wishes of the ousted government ... [M]ost contemporary occupants ignored their status and their duties under

the law of occupation’ (Benvenisti [1993] 6). Dinstein comes to essentially the same conclusion about the law of prolonged occupation, but concludes that it is based on a broad reading of the Hague Regulations and Geneva Convention IV: ‘[T]he scope of authority vested in the Occupying Powers must be commensurate with the objective need—accelerating the longer the occupation lasts—to enact new legislation, to introduce new development projects, and to consider new schemes of socio-economic reform’ (Dinstein [2009] 287).

90. The High Contracting Parties to Geneva Convention IV, meeting in Geneva in December 2001, called upon ‘the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory including East Jerusalem, and to refrain from perpetrating any violation of the Convention’ (‘Declaration of the Conference of High Contracting Parties to the Fourth Geneva Convention’ [5 December 2001]). At the same Conference, the → *International Committee of the Red Cross (ICRC)* said that it ‘has always affirmed the *de iure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel including East Jerusalem’ (‘Conference of High Contracting Parties to the Fourth Geneva Convention: Statement by the International Committee of the Red Cross’ [5 December 2001]).

91. The Government of Israel has taken the position that, while it will generally apply the humanitarian provisions of Geneva Convention IV within the 1967 Palestinian and Arab territories, the Convention is not applicable *de iure* because the West Bank, East Jerusalem and Gaza were not territories validly under Jordanian or Egyptian sovereignty at the time of the 1967 war. The Israeli Ministry of Foreign Affairs stated in 2003 that: ‘The West Bank and Gaza Strip are disputed territories whose status can only be determined through negotiations. Occupied territories are territories captured in war from an established and recognized sovereign. As the West Bank and Gaza Strip were not under legitimate and recognized sovereignty by any State prior to the Six Day War, they should not be considered occupied territories’ (Israel, Ministry of Foreign Affairs ‘Disputed Territories’ [February 2003]).

92. Israel's position was based upon two influential articles written shortly after the June 1967 war. Blum (later Israel's Ambassador to the UN) wrote in 1968 that, since Israel acquired the territories through a defensive war and no State could demonstrate a better title, its control of the Palestinian territories amounted to a valid title in international law (Blum [1968]). Shamgar (later President of the Israeli Supreme Court) stated in 1971 that the legal position of the territories captured by Israel in June 1967 was *sui generis* because Jordan had acquired the West Bank and East Jerusalem following an unlawful invasion in 1948. Similarly, Egypt had no better title to Gaza. Accordingly, the captured Palestinian territories were not validly a 'territory of a High Contracting Party,' as per Art. 2 Geneva Convention IV (Shamgar; see also Gerson; Schwebel).

93. Among legal scholars who are critical of Israel's position regarding the non-applicability of Geneva Convention IV to the Palestinian and Arab territories, Dinstein has written that the argument is 'patently sterile', as the Convention applies to all armed conflicts and all occupations. Dinstein notes that, notwithstanding this position, the Israeli government has indicated an *ad hoc* acceptance of the Convention vis-à-vis the West Bank when arguing before the Israeli Supreme Court (Dinstein 21, 30). Imseis has argued that the 'Missing Reversioner' theory is undermined by its reliance on the unsupported concept of 'defensive conquest', and by its inability to recognize the self-determination rights of the Palestinian people in international law. He also noted that the Israeli argument has found very little support among legal scholars or the international community (Imseis [2003]; see also Kretzmer; Falk and Weston).

94. The Supreme Court of Israel (sitting as the High Court) has declared that it is competent, within limitations, to review the actions of the Israeli military authorities in the occupied territories captured in 1967. The Court has accepted that the law of belligerent occupation, as codified by the Hague Regulations, applies *de facto* to the legal regime in Gaza (prior to Israel's withdrawal in 2005) and the West Bank, but not to East Jerusalem (*Ja'mait Ascan v IDF Commander in Judea and Samaria* [1982]) 37 (4) PD 785). However, the Court has also declared that Geneva Convention IV is treaty law and

has not become part of customary international law; as such, it is not applicable to the occupied territories, and is not enforceable by the Israeli judiciary (*Nasralla v IDF Commander of the West Bank* [1988] 43 (2) PD 265). Under Article 43 of the Hague Regulations “[the occupying power] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” The Supreme Court has interpreted Article 43 to place some limitations on the authority of the Israeli military authorities, but also to legitimize a broad range of security and political considerations when balanced against the welfare and civil life of the local Palestinian population. In *Ja’mait Ascan*, the Court accepted that the Israeli settlers on the West Bank are part of the local population for the purposes of Article 43, and proceeded to approve the creation of a major highway network in the occupied territories linking the settlements to Israel and Jerusalem. In *Abu-Aita v Commander of Judea and Samaria* (1983) (37 (2) PD 197), the Court ruled that integrating the economies of Israel and the occupied territories would benefit public order and civil life for the local population, and endorsed the legality of applying a value-added tax in the territories when it was introduced in Israel.

95. Israel has occupied the Palestinian territories and the Golan Heights since 1967. International humanitarian law prohibits the occupier from altering the *status quo* respecting the laws, economy and social structure of the occupied territory beyond what is strictly dictated by military necessary and security. A significant legal question is whether a prolonged occupation changes the legal dynamics of the governing rules of belligerent occupation. The Israeli Supreme Court has addressed the issue of whether a prolonged occupier can reform the laws and administrative structures of an occupied territory to adapt to economic, social and political changes and whether doing so entrenches the occupation in such a way as to defeat the purpose of the law on belligerent occupation. The Supreme Court ruled that the occupier’s powers widen as the occupation lengthens: *The Christian Society for the Sacred Places v Minister of Defence* (1971) (26 (1) PD 574); *Ja’mait Ascan* (1982). Commenting on the prolonged Israeli occupation, Dinstein maintains that a *military government* must be permitted some leeway in the application of its lawmaking powers if the occupation becomes protracted (Dinstein 120).

Roberts recommends that a prolonged occupation should become a distinct category within the law of belligerent occupation, but insists that, whether short or prolonged, an occupier's rights are significantly curtailed. Ben-Naftali, Gross and Michaeli submit that belligerent occupation is meant to be temporary, and Israel's deliberate violation of this principle renders its occupation unlawful per se. Benvenisti argues that the occupier in a prolonged occupation must not be permitted to unilaterally extend its powers as circumstances require, but should be required to engage the participation and input of the indigenous community in the affairs of the territory (Benvenisti 147).

2. Refugees

96. The historical and legal issues underlying the Palestinian refugee problem have been a major source of contention among Israel, the Palestinian Authority, and the Arab States. In 2011, 4.9 million *refugees* were registered with the UN Relief and Works Agency for Palestine Refugees ('UNRWA'), the specialized UN agency dedicated to the provision of *humanitarian assistance* to the Palestinian refugees. The majority are refugees from the 1948 war and their descendants, while the rest are refugees and their descendants from the 1967 war. UNRWA operates 58 Palestinian refugee camps in Jordan, Lebanon, Syria, Gaza and the West Bank, with a total camp population in 2011 of 1.4 million refugees.

97. The causes of the 1947–9 Palestinian refugee problem have been the subject of a protracted historical debate. Count Folke Bernadotte, the first UN Mediator for Palestine, stated in September of 1948: 'The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion' ('Progress Report of the UN Mediator on Palestine, 14, Delivered to the General Assembly' [16 September 1948]). Some modern historians, relying on archival material from Israeli State records, have maintained that the leadership of the Zionist movement, through its Plan Dalet in the spring of 1948, authorized the expulsion of the Palestinian Arab population from the designated Jewish and Arab territories (Pappe; Masalha; Shlaim [1995]).

98. The official Israeli position is that the Palestinian Arabs left on their own volition during the 1947–49 conflict or at the direction of the warring Arab armies (see Government Press Office, State of Israel, ‘The Refugee Issue: A Background Paper’ [October 1994]). Some modern historians who have adopted this position have suggested various theories to explain the exodus of the Palestinian refugees including a direct call by the Arab leadership to the population to leave, or that the Palestinian exodus was a natural consequence of the tragedy of war. Some historians have also described the refugee crisis of 1947–9 as a *de facto* exchange of Arab and Jewish populations (Karsh; Sachar; Sykes).

99. Israeli historian Benny Morris, among the first to review the declassified 1948 materials in the Israeli archives in the 1980s, has argued that many Palestinians fled their homes in 1947–9 either because of Israeli military attacks or fear of such attacks. He has also maintained that, while there was no centralized expulsion policy by the Israeli leadership, expulsions of Palestinians regularly occurred during the war. Morris’s central argument was that the Palestinian refugee problem was ‘born of war, not of design’ (Morris [1994] and [2004]).

100. A number of contentious legal issues on the Palestinian refugee issue have emerged over the years. The first has to do with the definition of Palestinian refugee. As the Palestinian refugee problem grew in size and political importance in the autumn of 1948, the UN General Assembly passed Resolution 194 on 11 December 1948, which, among other issues, addressed the Palestinian refugee crisis. Resolution 194 established the United Nations Conciliation Commission (UNCCP), with a mandate to provide international protection to the refugees, and defined the refugee population for whom it was responsible: all persons displaced from their homes in Palestine due to the 1947–49 conflict. This group-based *international protection* definition would encompass over 8 million of the worldwide Palestinian population of approximately 10 million persons today. In contrast, UNRWA’s is a needs-based humanitarian definition which applies to approximately 5 million of the total refugee population. Further complicating the definition question is the debate over the provisions that purport to exclude Palestinian

refugees from the coverage of the United Nations High Commissioner for Refugees (UNHCR) mandate under its Statute, and the 1951 Convention on the Status of Refugees under its Article 1D. These definitions and provisions affect what *durable solutions* are to be afforded the Palestinian refugees, and the meaning of Paragraph 11 of Resolution 194 (UNGA Res 194 [III] [11 December 1948]).

101. Resolution 194's formula for a durable solution for the refugees appeared in paragraph 11: '[T]he refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and ... compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good'. Resolution 194 has been re-affirmed virtually every year since its initial passage by the General Assembly (UNGA Res 65/98 [12 December 2010]) (Akram and Rempel).

102. The second has to do with whether Palestinians have a right of return to any part of the territory of historic Palestine. Central to this debate is the legal standing of UNGA Resolution 194, and whether it provides a right for the Palestinian refugees to return to their homes and properties in present-day Israel. Some leading legal academics have argued that Resolution 194, as a General Assembly resolution, is nonbinding. Further, they maintain that Resolution 194 neither creates a 'right' to return nor affirms a pre-existing legal right; that either permission to return or a 'right' to return is preconditioned on the refugees 'living at peace' with Israel; and that Israel alone has the right to determine when the preconditions have been fulfilled, when and how many refugees might return as part of an overall peace agreement. This position interprets the phrase 'his own country' found in Art. 12 (4) *International Convention on Civil and Political Rights (1966)* and Art. 13 (2) *Universal Declaration of Human Rights (1948)* to mean that the right to return extends only to a State's own nationals; this would not apply to Palestinian refugees, who are neither citizens nor nationals of Israel. Above all, permitting a substantial right of return is seen in Israel's eyes, as an 'existential threat' (Peters and Gal; Lapidoth; Radley)

103. Other legal scholars writing on the issue have maintained that Resolution 194 has a broad meaning and application, and is based on concrete legal rights for Palestinian refugees found in a number of distinct bodies of law. In their view, Resolution 194 and its regular re-affirmation requires Israel to admit the refugees back to their homes on the basis of *nationality*, *state succession*, and *non-discrimination* principles that prohibit denationalization of ‘habitual residents’ of the territory of a successor state and prohibit discriminatory application of nationality laws (Oppenheim; Brownlie). These principles are found in such treaties as the *International Convention on the Elimination of Racial Discrimination (1965)*. Other scholars argue that the right of Palestinians to return to place of origin is based on humanitarian law principles found in the Fourth Geneva Convention that guarantee the right to return at the end of conflict. These positions are based on the fact that the Palestinians were the ‘habitual residents’ of what was once Palestine and now is Israel. This right applies to both the 1948 and the 1967 refugees, and their descendants. Furthermore, some of these scholars assert that this right vests in the individual refugees, and cannot be waived or surrendered by a political institution (Quigley; Takkenberg; Lawand). Finally, scholars ground the right of Palestinian refugee return in modern principles of international refugee law (Goodwin-Gill; Akram and Rempel).

104. A third significant area of legal controversy on the Palestinian refugee issue is the issue of restitution and compensation of Palestinian refugee properties and other losses. This debate focuses on the individual and collective claims of the Palestinian refugees for the *restitution* of their lost homes and properties in present day Israel, as well as monetary damages for related losses. Israel’s position is that Palestinian refugee property was taken in exchange for the property Jews left behind in Arab states, and that only compensation will be awarded in a final settlement. Israel has stated its preference for a global collective fund which would be primarily used for refugee resettlement either in a Palestinian State or elsewhere in the world, and financed largely by the international community. Any contributions made by Israel would be *ex-gratis*, and not arise from any legal or financial liability (‘Private [Israeli] Response on Palestinian Refugees’, Taba

Talks [23 January 2001]) The Palestinians have argued that international law supports Israel's obligation to restitute Palestinian properties and pay for refugee properties expropriated or destroyed in 1948 and afterwards in present-day monetary valuations. As well, they assert that additional damages are owed for individual and collective suffering, for Israel's use of Palestinian properties since 1948, and for rehabilitation ('Palestinian Non-Paper on Palestinian Refugees', Taba Talks [23 January 2001]; see also Lynk; Benvenisti and Zamir).

105. During the negotiations process on the resolution of the Palestinian refugee issue, Israel has regularly advanced the issue of Jewish refugees from Arab lands who left, or were forced to leave, their homes and properties in 1948 and afterwards. This issue has been raised in the context of requesting compensation for the material and non-material losses of these refugees. The Palestinian position has consistently been that the issue of compensation for the Jewish refugees should not be linked to the Palestinian refugee issue; rather, this issue should be negotiated by Israel with the responsible Arab governments.

106. UN Security Council Resolution 242 of 22 November 1967 called for 'the necessity [of] achieving a just settlement of the refugee problem', without further guidance. The 1993 Declaration of Principles, the initial legal and diplomatic framework between Israel and the PLO, provided that the refugee question would be one of the 'final-status' issues to be addressed at the end of the envisioned five year process. While the DOP stated that its purpose was to recognize mutual legitimate and political rights, it did not define them with respect to any of the 'final-status' issues including the refugee issue ('Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinian Liberation Organization' in Bassiouni [ed] vol 2, 890–897).

107. The 2000 Camp David talks did not result in any agreements. While the Taba Summit in January 2001 also did not reach a peace agreement, it did produce two separate draft proposals from Israel and the PLO on the Palestinian refugees. The Palestinian proposal rests on an interpretation of UNGA 194 grounding a right of return

in human rights and humanitarian law. It focused on refugee choice of returning to home or land within 1948 Israeli borders, or from available resettlement options. The Palestinian proposal discussed Israel's moral and legal responsibility for forced displacement and dispossession of Palestinian refugees in 1948 and for preventing their return ('Palestinian Non-Paper on Palestinian Refugees' Taba Talks [23 January 2001]). The Israeli proposal includes the Israeli narrative of the Palestinian refugee issue, a framework for solution and mechanism for implementation, modalities for compensation and rehabilitation, a special clause for Jewish refugees, and an 'end of claims' clause. The five options set out in the Israeli proposal are a limited number of refugees 'returning' to Israel; a land swap; resettlement primarily in a Palestinian State; rehabilitation in Arab host countries; or resettlement in third States ('Private [Israeli] Response on Palestinian Refugees' Taba Talks [23 January 2001]).

108. Following the demise of the Oslo Process after Camp David and the Taba Summit, the next initiative on the Palestinian refugees came from the Quartet and its Performance-Based Road Map issued in April 2003. The Road Map, similar to the Oslo DOP, sought to resolve the refugee issue during the third and final phase of the renewed peace process. As part of this third stage, the parties were to: 'reach final and comprehensive permanent status agreement that ends the Israel-Palestinian conflict in 2005, through a settlement negotiated between the parties based on UNSC Res. 242, 338 and 1397, that ends the occupation that began in 1967, and includes an agreed, just, fair, and realistic solution to the refugee issue' ('Elements of a Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 15 October 2002' in Bassiouni [ed] vol 2, 1214).

3. Jerusalem

109. Jerusalem is unique among cities. As a centre of religious faith, it is holy to Christianity, Islam and Judaism. As a city of politics, it is highly contested, with both Israel and the Palestinians claiming it as their political capital. As an urban habitat, it is demographically divided, with Jews and Palestinians living in separate districts and neighbourhoods, and possessing different levels of access to services, opportunities and

rights. In international law, the special status of Jerusalem has been regularly addressed by the UN and the international community, particularly since 1947.

110. In the November 1947 partition plan adopted by the UN General Assembly in Resolution 181, Jerusalem was designated as a *corpus separatum*, politically separate from the proposed Jewish and Arab States and governed under a special international trusteeship to be overseen by the UN. This proposal for a separate administrative regime for Jerusalem had been earlier recommended by the partition proposals contained in the 1937 Peel Commission report and the 1947 UNSCOP report.

111. With the ensuing war, the proposal for the *internationalization* of Jerusalem was effectively stillborn. The Israel-Jordan General Armistice Agreement of April 1949 confirmed the *de facto* division between eastern and western Jerusalem as the armistice line, but did not confer *de jure* sovereignty over Jerusalem to either side ('General Armistice Agreement between Israel and Jordan, 3 April 1949' in Moore [ed] vol III, 397-406).

112. Following the defeat of Jordan in June 1967, Israel occupied East Jerusalem and the West Bank. On 27 June 1967, the Israeli Knesset extended its jurisdiction to any part of 'Eretz Israel' designated by the Government. Israel immediately applied its authority to incorporate East Jerusalem and parts of the West Bank into the Jerusalem municipality ('Israel's 1967 Enactments concerning the Application of Israeli Law, Jurisdiction and Administration to East Jerusalem, 27 June 1967' in Lapidoth and Hirsch [eds] 167-8). Soon afterwards, the Government of Israel initiated intensive settlement construction for Israeli Jews in East Jerusalem, and by 1972 approximately 8,600 Israeli Jews were living in settlements in eastern Jerusalem.

113. The UN Security Council subsequently adopted a number of resolutions concerning the status of Jerusalem. In Resolution 476 of 30 June 1980, the Security Council deplored 'the persistence of Israel in changing the physical character, demographic composition, institutional structure and the status of the Holy City of

Jerusalem;’ affirmed the application of Geneva Convention IV to the occupation of Jerusalem; and stated that ‘all measures which have altered the geographic, demographic and historical character and status of the Holy City of Jerusalem are null and void.’ (UNSC Res 476 [30 June 1980]). Similarly, UNSC Resolution 298, adopted in September 1971, deplored ‘the failure of Israel to respect the previous resolutions’ on Jerusalem, confirmed ‘that all legislative and administrative actions taken by Israel to change the status of Jerusalem ... are totally invalid and cannot change that status’, and called upon Israel ‘to rescind all previous measures and actions and to take no further steps in the occupied section of Jerusalem which may purport to change the status of the City’ (UNSC Res 298 [25 September 1971]).

114. In the 1993 Oslo Declaration, Jerusalem was identified by the parties as one of the final status issues, which would be negotiated as part of a permanent peace agreement (‘Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinian Liberation Organization’ in Bassiouni [ed] vol 2, 890–897, Art. V (3)). Following the failure of the Camp David summit in July 2000, President Bill Clinton issued the ‘Clinton Parameters’ in December 2000, which stated that the general principle pertaining to Jerusalem and the Old City would be that ‘Arab areas are Palestinian and Jewish areas are Israeli’. As for the Old City, the Clinton Parameters recommended ‘Palestinian shared sovereignty over the Haram and Israeli sovereignty over the Western Wall’ (‘Clinton Parameters to Palestinian and Israeli Negotiators, 23 December 2000’ in Bassiouni [ed] vol 2, 1160–2). The two sides subsequently accepted this general principle during further peace negotiations at Taba, Egypt in January 2001, although the Palestinian side rejected Israeli sovereignty over the Ma’ale Adumim and Givat Ze’ev settlements near Jerusalem (‘European Union Non-Paper on the Taba Conference, 2001’ in Bassiouni [ed] vol 2, 1169–70).

115. Among legal scholars, Dinstein has noted that, while the Supreme Court of Israel has accepted the Israeli annexation of East Jerusalem in a series of cases, ‘it is abundantly clear that the unilateral annexation of East Jerusalem by Israel is not valid under international law’ (Dinstein 18–19). Imseis has argued that both the Israeli settlements

and the 1980 annexation legislation are part of Israel's demographic re-engineering of Jerusalem in order to assert sovereignty, and, as such, are prohibited under international law (Imseis [2000]). Gerson wrote that any Israeli claim to sovereignty over East Jerusalem would be treated no differently in law than its claim to the West Bank, as 'both seem to stand or fall on the same merits' (Gerson 213–214). Blum maintained that Jordan did not possess valid sovereignty over East Jerusalem or the West Bank prior to the June 1967 war, and therefore Israel was entitled to extend its laws and administration to these lands on the same basis as the lands that were not assigned to Israel by Resolution 181, but over which it acquired sovereignty after the 1947–9 war (Blum [1974]).

4. Settlements

116. The legality of the Israeli civilian settlements constructed in the occupied Palestinian and Arab territories has been a controversial topic since their inception shortly after the June 1967 war. Most diplomatic, judicial and legal commentators have maintained that the settlements are illegal under international law, while a minority view has argued that they are lawful.

117. The analysis employed by commentators and scholars respecting the settlements' legality commonly starts with the foundational instruments of international humanitarian law. The Hague Regulations concerning the Laws and Customs of War on Land (annexed to the Convention respecting the Laws and Customs of War on Land), which emerged out of the *Hague Peace Conferences (1899 and 1907)*, implicitly prohibit the demographic transformation of an occupied territory by designating the occupying power as an interim administrator and usufructuary, with no greater power over the territories than to protect and beneficially manage them for the indigenous population until their eventual return to the new sovereign government: Arts 43, 46, 52, 55. After World War II, the international community adopted the Geneva Convention relative to the Protection of Civilian Persons in Time of War ('Geneva Convention IV') to extend protection to civilians in time of armed conflict. The Convention expressly prohibits the implantation of settlers by the occupying power in the territories that it occupies. Art. 49 (6) Geneva Convention IV states that: 'the Occupying Power shall not deport or transfer parts of its civilian

population into the territory it occupies'. Israel ratified the Geneva Convention IV on 6 July 1951.

118. In its July 2004 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice declared that: '... the Israeli settlements in the Occupied Palestinian Territory [including East Jerusalem] have been established in breach of international law'. In doing so, the Court held that Art. 49 (6) prohibits not only forcible transfers, 'but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory' (at para. 120).

119. The International Committee of the Red Cross released a study in 2005 which sought to identify the established rules of customary international humanitarian law. The ICRC concluded that the overwhelming weight of present evidence — Geneva Convention IV of 1949, the 1998 Statute of Rome, military manuals from a number of respected countries, UN resolutions, the domestic legal codification of the prohibition by a number of States, and commentaries by international organizations, among others — established that the prohibition against settler implantation had become a rule of customary international humanitarian law ('Rule 130' in Henckaerts and Doswald-Beck 462). At least one commentator has criticized the study (see Dinstein [2006]).

120. Additional Protocol I of the Four Geneva Conventions (1977), Art. 85 (4) (a) reiterates the prohibition against transfer of the population of the occupier into the territory it occupies, and elevates the prohibition from a 'breach' of Geneva Convention IV to a 'grave breach.' The Rome Statute of the *International Criminal Court (ICC)*, moreover, proscribes settler implantation as a 'war crime.' Art. 8 (2) (b) (viii) prohibits: 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies....' There remains a debate on whether the First Additional Protocol and the Rome Statute have become part of customary international law. Israel is not a party to either Additional Protocol I or the Rome Treaty, primarily because of the inclusion of the prohibition against civilian settlements in occupied

territories (see Statement by Judge Eli Nathan, Head of the Delegation of Israel to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th Plenary Meeting [17 July 1998] <<http://www.un.org/icc/speeches/717isr.htm>> [30 August 2011]).

121. In December 1971, the UN General Assembly passed the first of many resolutions over the years condemning the Israeli settlements, maintaining that: ‘all measures taken by Israel to settle the occupied territories including occupied Jerusalem, are completely null and void’ (UNGA Res 2851 [XXVI] [20 December 1971]). The UN Security Council adopted five resolutions in 1979 and 1980 criticizing the settlements as a violation of international law. On 1 March 1980, the Security Council adopted its lead resolution, UNSC Resolution 465, which states that: ‘... Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East’. Resolution 465 also called upon Israel to dismantle the existing settlements.

122. Various influential regional, humanitarian and human rights organizations have commented on the legal status of the Israeli settlements. The Council of the European Union in 2008 stated that ‘... settlement building anywhere in the occupied Palestinian Territories including East Jerusalem, is illegal under international law’ (‘Declaration by the Presidency on Behalf of the European Union on the Middle East’ [14 March 2008]). The Conference of the High Contracting Parties to the Fourth Geneva Convention issued a declaration in December 2001, which reaffirmed its position on ‘... the illegality of settlements in the [occupied Palestinian Territories including East Jerusalem], and of the extension thereof’. Amnesty International has commented on the issue, stating in 2003 that: ‘The establishment of settlements violates international humanitarian law and constitutes a serious violation of the prohibition on discrimination’ (‘Israel and the Occupied Territories: The Issue of Settlements Must Be Addressed According to International Law’ [8 September 2003]).

123. A number of scholars have judged the settlements to be contrary to international law. According to Kretzmer: ‘the widely accepted view is that [Art. 49 Geneva Convention IV] does apply to establishment, or even promotion, of civilian settlements ... Establishing civilian settlements in occupied territory in order to further the economic or political interests of the occupying power is incompatible with these principles [of customary international law]’ (Kretzmer 77). Imseis cited a range of human rights concerns caused by the settlements, finding that: ‘in addition to violating Article 49 of the Fourth Geneva Convention, Israel’s Jewish colonial settlements in the OPT potentially represent very serious transgressions of other international human rights and criminal law conventions ...’ (Imseis [2003] 106–7). Dinstein viewed the 2004 pronouncement of the ICJ that the Israeli settlements are illegal as ‘unassailable’, but was critical of the view which assumes the illegality of those settlements where ‘settlers have acted entirely on their own initiative’ rather than relying upon the support or encouragement of the State (Dinstein 240–241).

124. The Government of Israel has consistently maintained that its settlement project conforms to international law. The Israeli Foreign Ministry has stated that Geneva Convention IV does not apply to the Palestinian territories, since they were ‘not under the legitimate sovereignty of any state’ at the time of the June 1967 war, and therefore the prohibitions against settler implantation do not apply. Furthermore, the Foreign Ministry interprets Art. 49 Geneva Convention IV as ‘intended to protect the local population from displacement including endangering its separate existence as a race, as occurred with respect to the *forced population transfer* in Czechoslovakia, Poland and Hungary before and during the war. This is clearly not the case with regard to the West Bank and Gaza’. It also argues that Art. 49 (6) was intended to prohibit only the forcible transfer of the population of the occupying power, and does not apply to the voluntary migration of the occupier’s civilian population (‘Israeli Settlements and International Law’ [May 2001]).

125. Among those legal scholars disputing the designation of the Israeli settlements as illegal, Rostow argued that the 1922 Mandate of the League of Nations permitted “close

settlement by Jews” in all of Palestine’, and this right continued after the end of the Mandate because no trusteeship agreement was reached under Art. 80 UN Charter, ‘which leaves intact the Jewish right of settlement in the West Bank and the Gaza Strip’ (Rostow 9–10). In his 1978 analysis, Gerson wrote that: ‘in the perspective of contemporary international law, Israel’s land acquisition and settlement policy was not unlawful as it neither aimed for, nor neared, a stage involving displacement of the existing population as a prelude to future annexation’ (Gerson 173). Stone maintained that Geneva Convention IV did not apply to Israel’s acquisition of the Palestinian territories in 1967 but, if it did, Art. 49 (6) would not be engaged because the provision was intended to prohibit ‘the impairment of the economic situation or racial integrity of the native population of the occupied territory or inhuman treatment of its own population’, neither of which had been a practice of the Israeli government in the territories (Stone 177–181).

126. The Supreme Court of Israel (sitting as the High Court of Justice) has not taken a position on the legality of the settlements, holding that the issue is non-justiciable. In 1979, the High Court of Justice ruled in the *Elon Moreh* case that private Palestinian lands could not be requisitioned for settlements under customary international law if the dominant purpose was for political reasons rather than for military needs (*Dweikat v Israel* H CJ 390/79). However, in this and subsequent decisions, the High Court has specifically declined to rule on the general application of international law including Art. 49 (6) Geneva Convention IV, to the settlements. In 2005, the Court issued *Mara’abe v The Prime Minister of Israel*, dealing with the route of the Wall around the Jewish settlement of Alfei Menashe. In the decision, it stated: ‘It is not relevant ... to examine whether this settlement activity conforms to international law or defies it, as determined in the *Advisory Opinion* of the International Court of Justice at The Hague. For this reason, we shall express no position regarding that question’ (H CJ 7957/04 para. 19).

5. The Wall Opinion

127. Israel’s construction of a 670 kilometre wall and barrier through the West Bank and

East Jerusalem has generated international controversy. In July 2004, the International Court of Justice issued an Advisory Opinion on request by the General Assembly, stating that the Wall violated international human rights and humanitarian law, and that Israel was obliged to dismantle it, and pay reparations to the Palestinian victims.

128. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [[2004] I.C.J. 136 (July 9)], the ICJ found, in a 14-1 decision, that the construction of the Israeli Wall in occupied territory violated international law. The Wall Opinion dealt with seven significant legal issues. The ICJ concluded: (1) that it had jurisdiction to render the advisory opinion as requested by the General Assembly; (2) that there were no compelling political or diplomatic reasons for it to not render the opinion; (3) that the Wall as currently constructed within the occupied territories and East Jerusalem violates international law; (4) that Israel must immediately stop construction, dismantle the Wall, terminate its breaches of international law in maintaining the Wall regime, and nullify all related legislation, actions and policies; (5) that Israel must restore all Palestinian properties confiscated in construction of the wall and pay reparations for all damage caused by such construction; (6) that the community of States has an obligation to ensure compliance with the Fourth Geneva Convention of 1949, not to recognize Israel's actions in constructing the Wall and establishing the Wall regime, and to cease all aid to Israel that supports its acts; and, (7) finally, that the United Nations, particularly the General Assembly and the Security Council, must take further action to terminate the illegal situation resulting from the Wall's construction.

129. On the main issues of jurisdiction, the finding of illegality of the Wall, the requirements to terminate the breaches, restore Palestinian property and pay damages, the justices voted 14-1. On five of the issues, the sole dissenter was the American justice, Thomas Buergenthal. On the issues regarding the obligation of other states not to recognize Israeli actions regarding the Wall, to take steps to ensure Israeli compliance with the Opinion, and to cease all aid to Israel that supports the Wall regime, the justices voted 13 in favour, with Justice Kooijmans of the Netherlands joining Buergenthal in the 2 votes against.

130. This was the first time the ICJ rendered an opinion directly on the lengthy Palestine-Israel conflict, and the high level of agreement of the justices on many of the key questions that have persisted in this situation reflects the legal consensus that has been reached on these questions in the interim. Among the substantive conclusions the Court reached were that the Palestinian people were entitled to self-determination; that the areas between ‘the Green Line and the former eastern boundary of Palestine under the Mandate’ as well as East Jerusalem, were occupied by Israel as a matter of international law; that Israel was bound to the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 in its actions in the Occupied Territories; and that Israel was also bound to the human rights treaties it had ratified, which were fully applicable in the Occupied Territories.

131. Among the important conclusions drawn by the ICJ were those on the applicability of the Fourth Geneva Convention to the conflict. The Court rejected the ‘missing reversioner’ argument – an argument promoted by some Israeli jurists but which was not, according to the Court, supported by international legal authority. The ICJ stated: “[It] considers 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.” [*Advisory Opinion*, 2004 I.C.J. at 177]. Additionally, the Court found that Israel was bound to the provisions of the 1907 Hague Regulations, particularly Section III concerning military authority over hostile territory, as the Regulations had become customary international law governing situations of military occupation.

132. After concluding that Israel was required to apply the main body of international humanitarian rules, the International Court addressed the applicability of international

human rights conventions in the occupied territories. The three main international human rights instruments of concern to the Court were: the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1989 Convention on the Rights of the Child (CRC). Noting that Israel was party to all three instruments, the ICJ held that these conventions apply both in peacetime and during armed conflict, limited only by their derogation clauses. All three instruments, moreover, had already been construed by their interpretive bodies to clearly extend to areas outside a State's territory but under its effective jurisdiction or control. Having found that all of these treaties and conventions applied, the ICJ ruled that the construction of the Wall in the occupied territories contravened both international humanitarian and human rights law.

133. By unanimous vote, the Court found that Israel had breached key principles of international human rights law: “[T]he Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated regime, by contributing to the demographic changes referred to [above], contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council Resolutions.” [*Advisory Opinion*, 2004 I.C.J. at 191-192].

134. As to remedies, the ICJ concluded that Israel was obliged to cease construction, dismantle the Wall, terminate the breaches of international law the Court found were involved in the Wall regime, and to nullify all related legislation and policies. In declaring the ‘wall regime’ illegal, the Court addressed the process of granting permits to

Jews to pass through the Wall gates, but denying such permits to Palestinians, and linked these conclusions to its findings on violations of Palestinian human rights.

135. The Israeli Supreme Court also heard petitions challenging the legality of the Wall, and came to a different conclusion — that the Wall complied with legal requirements, but that portions of it must be relocated to reduce harm to Palestinian villagers. [*HCI 2056/04 Beit Sourik Vill. Council v. Israel* [2004] 43 ILM 1099]. The two decisions were made a week apart, purportedly relied on the same international legal principles, but drew differing conclusions.

136. Both the ICJ and the Israeli Supreme Court found that the Wall violated humanitarian law because of the extent to which it impacts the existence and livelihood of the Palestinian civilian population. Both found that the damage to Palestinian rights was disproportionate to Israel's security concerns, but required different outcomes as a result. The ICJ found the entire construction of the Wall to be unlawful, as well as its 'associated regime.' The Israeli Supreme Court found that "some deviation from the Green Line was acceptable, but that in many instances the Israel Defense Forces had routed the wall as to cause disproportionate harm to the Palestinian population." [Geoffrey R. Watson, "The 'Wall' Decisions in Legal and Political Context", 99 *AJIL* 6, 8 (2005)]. It invalidated orders for the construction of several parts, and required that the IDF reroute the wall to decrease the impact on Palestinian life.

137. Most of the academic debate over the Wall Opinion has focused on the question of whether self-defense or proportionality could justify construction of the Wall. The ICJ concluded that neither humanitarian law's 'military necessity' nor the UN Charter's Art. 51 exceptions applied, without much explanation or analysis. In contrast, the Israeli Supreme Court gave a detailed three-part analysis of the 'proportionality' test that allowed it to weigh the security concerns against the humanitarian, an approach commentators have considered superior. [See Geoffrey R. Watson, "The 'Wall' Decisions in Legal and Political Context," 99 *AJIL* 6-26 (2005); and David Kretzmer, "[The Advisory Opinion: The Light Treatment of International Humanitarian Law](#)," 99

AJIL 88-102 (2005)].

138. The separate opinions of at least three of the Justices reflect the scope of the debate over the self-defense and proportionality issues. Justice Higgins disagreed with the majority that “an attack originating in the West Bank could not be an armed attack by a ‘state,’” finding that Art. 51 had no such requirement. [Geoffrey R. Watson, “The ‘Wall’ Decisions in Legal and Political Context,” 99 AJIL at 18(2005) (referring to *Advisory Opinion*, 2004 I.C.J. at 215 (Separate Opinion of Judge Higgins))]. Justice Kooijmans claimed that “Security Council Resolutions 1368 and 1373 had broadened the notion of self-defense so as to include ‘international terrorism’ not necessarily attributable to a particular state,” and claimed that the Court had ignored this change in self-defense law. However, he could not agree that terror attacks from occupied territories could be characterized as ‘international.’ [*Id.* (referring to *Advisory Opinion*, 2004 I.C.J. at 230 (Separate Opinion of Judge Kooijmans))]. Justice Buerenthal, as well, found that Art. 51 is not limited to state-sponsored ‘armed attack,’ and that recent UN Security Council Resolutions supported that view. He concluded that attacks coming from the West Bank triggered Art. 51, and he faulted the Court for failing to analyze whether the Wall was a necessary and proportionate response to that threat. [*Advisory Opinion*, 2004 I.C.J. at 241-243 (Separate Opinion of Judge Buerenthal)]. For academic viewpoints challenging the Wall Opinion along similar lines, see Sean D. Murphy, “Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?,” 99 AJIL 62-76 (2005); Michla Pomerance, “The ICJ’s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial,” 99 AJIL 26-42 (2005); Arthur Watts, “Israeli Wall Advisory Opinion (Legal Consequences of a Wall in the Occupied Territory),” Max Planck Encyclopedia of International Law, available at http://www.mpepil.com.ezproxy.bu.edu/subscriber_article?id=/epil/entries/law-9780199231690-e150; and Ruth Wedgwood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense,” 99 AJIL 52-61 (2005). For academic viewpoints generally supportive of the Wall Opinion, see Susan M. Akram and Michael Lynk, “The Wall and the Law: A Tale of Two Judgements,” 24 Netherlands Quarterly of Human Rights 61 (2006); Pieter H.F. Bekker, “The World Court’s Ruling Regarding Israel’s West Bank Barrier and the

Primacy of International Law: An Insider's Perspective”, 38 Cornell Int'l L.J. 553 (2005); Paul J. I. M. De Waart, “International Court of Justice Firmly Walled in the Law of Power in the Israeli-Palestinian Peace Process”, 18 Leiden J. Int'l L. 467 (2005); Richard A. Falk, “Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall,” 99 AJIL 42-52 (2005); Ardi Imseis, “[Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion](#)”; 99 AJIL 102-118 (2005); and Iain Scobbie, “Words My Mother Never Taught Me: ‘In Defense of the International Court’”, 99 AJIL 76-88 (2005).

139. On 15 September 2005, the Israeli Supreme Court issued *Mara'abe vs The Prime Minister of Israel*, dealing with the route of the Wall around the settlement of Alfei Menashe. The Court unanimously rejected the arguments of the Palestinian petitioners that the construction of the Wall in occupied territory was illegal. The Supreme Court did not address the legality of the Israeli settlements under international law, and agreed with the Israeli Government's arguments about why the Wall could not be built on the 1949 Green Line. The Court found that the protection of Israeli settlers beyond the Green Line and Israeli citizens living close to the Green Line were adequate justification for construction of the Wall. However, as in *Beit Sourik*, the Supreme Court went on to find that the particular section of the Wall in the northern West Bank had a serious impact on the five Palestinian villages neighbouring Alfei Menashe, and therefore failed the Court's proportionality test.

140. In *Mara'abe*, the Supreme Court explicitly rejected the International Court of Justice's ruling in *Advisory Opinion*. The Supreme Court stated that the *Advisory Opinion* was not binding, primarily because the International Court did not have an adequate factual record to properly assess Israel's difficult security-military needs. The Supreme Court also faulted the ICJ for failing to proportionally assess the impact of different segments of the Wall. For additional academic viewpoints contrasting the two Israeli Supreme Court decisions with the Wall Opinion, see Aeyal M. Gross, “The Construction of a Wall Between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation”, 19 Leiden J. Int'l L. 1 (2006);

Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v. the International Court of Justice," 40 *Vand. J. Transnat'l L.* 1425; Charles F. Martel, "Give Peace a Chance: How Considering Peace Process Obligations Would Have Improved the Rulings of the International Court of Justice and the Israeli Supreme Court on the Israeli Security Barrier," 17 *Duke J. Comp. & Int'l L.* 305 (2007); Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's Wall Advisory Opinion," 5 *Chinese J. Int'l L.* 269 (2006).

6. Resolution 242

141. The United Nations Security Council unanimously adopted Resolution 242 on 22 November 1967, under Chapter VI of the Charter of the United Nations, its single most famous, most widely cited and most contentious pronouncement. In the aftermath of the June 1967 war between Israel and its Arab neighbours, the Resolution was designed by its drafters to provide a comprehensive framework for a 'just and lasting' peace in the region. Resolution 242 initiated the international diplomatic process that has since guided all major peace initiatives for the final settlement of the Israeli-Arab and Israeli-Palestinian conflict. Every major player in the Middle East peace process has accepted Resolution 242 as a cornerstone document of political and legal principles, and every peace agreement or significant diplomatic statement on the issue has included an explicit reference to it. Yet, the Resolution has also acquired a range of contradictory interpretations, in part because of its centrality to the intense legal debate over the conflict, and in part because of its seemingly ambiguous wording.

142. Resolution 242 sets out six major principles for "the establishment of a just and lasting peace in the Middle East." First, the withdrawal of Israeli armed forces from territories that it occupied in the conflict; Second, the termination of all claims or states of belligerency, respect for 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; Third, freedom of navigation through international waterways; Fourth, a just settlement of the refugee problem; Fifth, a

guarantee of the territorial inviolability and political independence of every state in the area; and Sixth, these principles would be informed by the framework of the Charter of the United Nations and the “inadmissibility of the acquisition of territory by war”. Resolution 242 was primarily drafted by the British Ambassador to the United Nations, Lord Caradon, based on earlier proposed resolutions advanced by other countries in the General Assembly and the Security Council. [Sidney Bailey, *The Making of Resolution 242*, 1985; A. Lall, *The UN and the Middle East Crisis, 1967, 1968*]

143. The central controversy surrounding the meaning of Resolution 242 is whether Israel is required to withdraw from all of the territory it conquered in 1967. The controversy arises from the choice of words in paragraph 1(i): “Withdrawal of Israel armed forces from territory occupied in the recent conflict”. Much of the debate has focused on the absence of words such as “all” or “the” before “territory” in the phrase, and whether the absence of these words was intended to permit Israel to retain some of the conquered territory. The ambiguity of the phrase, and the legal and political involved, has driven much of the debate since.

144. The long debate over the meaning of the phrase began during the Security Council’s deliberations on the adoption of Resolution 242 on 22 November 1967. All fifteen members of the UNSC spoke during the deliberations, and a majority of members pronounced their views on paragraph 1(i). Eight of the members – the Soviet Union, Bulgaria, Argentina, Brazil, Ethiopia, Mali, Nigeria and India – stated explicitly in their speeches that the Resolution called for the complete withdrawal of the Israeli military from the Arab territories. Two countries – the United Kingdom and France – were less emphatic in their speeches, but both made direct reference to the relationship between the withdrawal provision and the inadmissibility principle. Japan also mentioned the inadmissibility principle in its speech, but without drawing reference to the relationship. The remaining four members – Canada, China (Taiwan), Denmark and the United States – made no express reference in their speeches to the withdrawal provision. No member of the Security Council stated during the deliberations that the withdrawal provision meant that Israel could retain territory. The only express comments made during the

deliberations that pointed to the purported significance of the missing word(s) were from the Israeli Ambassador to the United Nations, Abba Eban, who spoke as a non-UNSC member. Foreshadowing the subsequent controversy, he argued that: “The most important words in most languages are short words, and every word, short or long, which is not in the text, is not there because it was deliberately concluded that it should not be there.” [UNSCOR, 1382nd Meeting (22 November 1967)].

145. The legal and diplomatic debate over the meaning of Resolution 242 encompasses three main issues. First, some legal scholars and diplomats have argued that the absence of “the” or “all” in the withdrawal paragraph was deliberate and intended to permit Israel to retain control and, eventually, sovereignty over some of the lands captured in June 1967. Lapidoth has written that the withdrawal provision’s indefinite language means that the provision is clear and unambiguous in favour of Israel’s acquisition of some of the conquered territories. [R. Lapidoth, “Security Council Resolution 242 at Twenty Five” (1992), 26 *Israel Law Review* 295]. Rostow and Goldberg maintained that the missing words were a deliberate choice of the Security Council, and could only mean that it endorsed territorial retention by Israel [Rostow, “The Perils of Positivism: A Response to Professor Quigley” (1992), 2 *Duke Journal of Comparative & International Law* 229; Goldberg, “United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East” (1973), 12 *Columbia Journal of Transnational Law* 187]. Taking the opposite view, McHugo has argued that the absence of the words “all” or “the” does not imply that “some” was intended. As an example, he points to paragraph 2(a) of the Resolution – “For guaranteeing freedom of navigation through international waterways in the area” – and notes that there are a number of waterways in the region, and the absence of “all” before the term “international waterways” cannot mean that the Security Council intended the guarantee to apply to only some of them [McHugo, “Resolution 242: A Legal Reappraisal of the Right-Wing interpretation of the Withdrawal Phrase with Reference to the Conflict Between Israel and the Palestinians” (2002), 51 *International and Comparative Law Quarterly* 851].

146. A second area of debate on the withdrawal provision focuses on whether the French version of Resolution 242 resolves its purported ambiguity. While the English version of the withdrawal provision lacks either “the” or “all”, the French version states: “Retrait des forces armées israéliennes des territoires occupés lors du récent conflit”, which translates as “from the occupied territories”. During his 22 November 1967 speech at the Security Council, the French ambassador to the United Nations pointed to the lack of ambiguity in the French version: “We must admit, however, that on the point which the French delegation has always stressed as being essential – the question of withdrawal of the occupation forces [*celui du retrait des forces d’occupation*] – the resolution which has been adopted, if we refer to the French text which is equally authentic with the English, leaves no room for any ambiguity [*ne laisse place à aucune amphibologie*], since it speaks of withdrawal “*des territoires occupés*”, which indisputably corresponds [*ce qui donne une interprétation indiscutable*] to the expression “occupied territories”. [UNSCOR, 1382nd Meeting, 22 November 1967]. Rosenne and Korn have argued that the negotiations and drafting for Resolution 242 were conducted in English only, and therefore it is the only authentic version from which to draw an interpretative meaning [S. Rosenne, “On Multi-Lingual Interpretation” (1971), 6 *Israel Law Review* 360; D. Korn, “The Making of United Nations Security Council Resolution 242” (Institute for the Study of Diplomacy, 1992)]. In contrast, Perry maintains that the French version clears up the confusion in the English text, and is, more importantly, consistent with the other clauses in the Resolution. He also argues that both English and French are the two official languages of the Security Council and must be read together to resolve ambiguities, regardless of which language was primarily used during the drafting. [G. Perry, “Security Council Resolution 242: The Withdrawal Clause” (1977), 31:4 *Middle East Journal* 413]. Article 33 of the *Vienna Convention on the Law of Treaties* states that: “When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail”, and “The terms of the treaty are presumed to have the same meaning in each authentic text”.

147. A third area of controversy has to do with the relationship between the inadmissibility clause and the withdrawal provision. Underlying this argument are the imperatives of international law, and its contested interpretation: if the inadmissibility principle is given a purposive interpretation, then the withdrawal provision can only mean a complete withdrawal of Israeli armed forces from the 1967 territories. A number of legal scholars and diplomats have maintained that the inadmissibility principle can either be disregarded as a dubious principle within international law or it has elastic exceptions that apply in the case of Israel's conquest in 1967. Schwebel, Stone, Goldberg and M. Roseene have all argued that the inadmissibility principle does not apply in any significant way to the Israel because the territories were acquired through a war of self-defence, not a war of conquest. [M. Rosenne, "Legal Interpretations of UNSC 242", in *UN Security Council Resolution 242: The Building Block of Peace-Making* (Washington: Washington Institute for Near East Policy, 1993); J. Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981); A. Goldberg, "United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East" (1973), 12 *Columbia Journal of Transnational Law* 187; and S. Schwebel, "What Weight to Conquest" (1970), 64 *American Journal of International Law* 344]. Eban maintained that the inadmissibility principle was a legal concept specifically shaped by its birth in Latin America, and had no applicability to other conflicts [UNSCOR, 1375th Meeting (13 November 1967)]. Others have argued that the inadmissibility principle embodies the post-war position of international law, and that Resolution 242 and its withdrawal provision must be read in line with the legal obligations on all modern nations. Lynk asserts that the inadmissibility principle represents a cornerstone of international law since the end of the Second World War, and is binding on United Nations members through their commitment to the Charter. If the Security Council had intended to create an exception to the inadmissibility principle in international law through Resolution 242, it would have had to make an express statement to that effect. [‘Conceived in Law: the Legal Foundations of Resolution 242’ (2007), 37:1 *Journal of Palestine Studies* 7]. Leading scholars on international law are agreed that, in the era since 1945, conquest does not transfer legal title, regardless of whether the territory was acquired through a war of aggression or a war of self-defense [von Glahn, *Law Among*

Nations, 1992, at p. 376; Cassese, *International Law*, 2001, at p. 102; Shaw, *International Law*, 2003, at p. 423; Korman, *The Right of Conquest*, 1996, at pp. 259-60].

148. A number of diplomats involved, directly or indirectly, in the negotiations or drafting of Resolution 242 made subsequent comments on the meaning of the withdrawal provision. Lord Caradon would state in 1981 that the pre-1967 border was unsatisfactory and thus Resolution 242 intended – by not putting ‘the’ in the withdrawal provision – to permit minor adjustments at Latrun and Tulkarm. He also reiterated his comments, first made at the Security Council in 1967, that the inclusion of the inadmissibility principle was vital to ensure “this balance, this equality, which was the essence of the unanimous Resolution.” Lord Caradon added that he opposed Israel’s “annexation of East Jerusalem” and “the creeping colonialism on the West Bank and in Gaza and in the Golan.” [“Security Council Resolution 242” in *U.N. Security Council Resolution 242: A Case Study in Diplomatic Ambiguity* (Institute for the Study of Diplomacy, 1981)]. Dean Rusk, the United States Secretary of State in 1967, said in his memoirs that he wanted to see the pre-1967 border on the West Bank “rationalized”, but that the United States had “never contemplated any significant grant of territory to Israel as a result of the June 1967 war.” [*As I Saw It*, W.W. Norton & Co., 1990, at p. 389]. Arthur Goldberg, who was American Ambassador to the United Nations in 1967, later argued that Resolution 242 “does not insist upon only ‘minor border rectifications’”, based on the absence of “the” and “all” in the withdrawal provision [“Negotiating History of Resolution 242”, *U.N. Security Council Resolution 242: A Case Study in Diplomatic Ambiguity* (Institute for the Study of Diplomacy, 1981)]. Eugene Rostow, who was the American Under Secretary of State in 1967, would later write that the inadmissibility principle was a “murky” and “obscure” notion, “devoid of content”, and one that “no one seems to know how [it] crept into the draft of the Resolution” [“The Perils of Positivism: A Response to Professor Quigley” (1992), 2 *Duke Journal of Comparative & International Law* 229, at pp. 243-4; “Legal Aspects of the Search for Peace in the Middle East” (1970), 64 *American Society of International Law Proceedings* 64, at p. 69]. In a contemporary comment, U Thant, the Secretary General of the United Nations in 1967, wrote of the importance of upholding the inadmissibility principle:

There is the immediate and urgently challenging issue of the withdrawal of the armed forces of Israel from the territory of neighbouring Arab states occupied during the recent war. There is near unanimity on this issue, in principle, because everyone agrees that there should be no territorial gains by military conquest. It would, in my view, lead to disastrous consequences if the United Nations were to abandon or compromise this fundamental principle.

[Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1966 – 15 June 1967, General Assembly, Official Records: Twenty-second Session, Supplement No. 1A (15 September 1967), at para. 47].

149. The Security Council subsequently re-affirmed the inadmissibility principle in six subsequent resolutions on East Jerusalem and the Golan Heights: S.C. Res. 478, U.N. Doc. S/RES/478 (20 August 1980); S.C. Res. 476, U.N. Doc. S/RES/476 (30 June 1980); S.C. Res. 298, U.N. Doc. S/RES 298 (25 September 1971); S.C. Res. 267, U.N. Doc. S/RES/267 (3 July 1969); and S.C. Res. 252, U.N. Doc. S/RES/252 (21 May 1968).

D CONCLUSION

150. History and law are deeply intertwined in the Israeli–Palestinian conflict. Both are highly contested and diversely interpreted by the parties, and both are intimately linked to the distinct national narratives woven by each side. Central to the Israeli narrative is the return to an ancient homeland (dedicated to Jews by God) after two millennia of exile, persecution and the Holocaust, the establishment of a modern State ruled by law, and the necessity of the unyielding sword in the face of intractable enemies in the Arab world opposed to its very existence. The Palestinians narrate their history quite differently: after centuries living as the majority indigenous population in Palestine, they were evicted from their homeland by a settler movement after a horrendous genocide against European Jews for which they bore no responsibility, and they have fought back through a prolonged anti-colonial campaign, against formidable regional and international odds, ever since. Throughout the conflict, the neighbouring Arab States have sympathized with the Palestinians, while anxious about the destabilizing consequences of the strife upon their own countries.

151. International law has been frequently relied upon by Israel and the Palestinians to support their respective narratives, their diplomatic and political claims, and their negotiating positions. All of the central issues to the current conflict — occupation, borders, Jerusalem, settlements, refugees, among others — have legal foundations grounded in international humanitarian and human rights conventions, UN resolutions, scholarly writings, diplomatic statements, international and domestic judicial rulings, and treaties and agreements by the regional players. On many of these issues, international law has spoken with clarity and principle. Indeed, at its best, international law is flexible, but it is not subservient to political whim. Kofi Annan, the former Secretary-General of the UN, spoke in March 2002 of the settled framework of legal and diplomatic principles that should inform a final peace agreement in the Middle East: ‘There is no conflict in the world today whose solution is so clear, so widely agreed upon, and so necessary to world peace as the Israeli–Palestinian conflict’ (UNSG ‘Leading their Peoples Back from Brink is “Duty” of Israeli, Palestinian Leaders, Secretary-General Tells Arab League Summit’ [27 March 2002] Press Release SG/SM/8177). Yet international law has insufficiently informed the numerous treaties, declarations and agreements negotiated during the long peace process that began in 1991, and the international community has only occasionally backed up its many resolutions at the UN with meaningful action. The distance between legal principles and *Realpolitik* in the Middle East has repeatedly dimmed the prospects for a genuine peace in that tormented region.

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