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UN Antagonism Towards the State of Israel Resolution 2334 of the UN Security Council: A Misinterpretation of International Law

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UN ANTAGONISM TOWARDS THE STATE OF ISRAEL

RESOLUTION 2334 OF THE UN SECURITY COUNCIL: A Misinterpretation of International Law

Jacob Dolinger*

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INTRODUCTION

On December 23, 2016, the United Nations (UN) Security Council adopted Resolution 2334 by a vote of 14-0 with the United

States abstaining.¹ The Resolution addresses the settlements by Israeli citizens in the “Palestinian territory,” including East Jerusalem.² It bases its position on the so called “4 June 1967 lines,” condemning all acts of terror and supporting a “two-state solution” and the achievement of peace.³ The Resolution classifies the State of Israel as an “occupying power” that is obligated by the 1949 Fourth Geneva Convention to protect Civilian Persons in Time of War.⁴ The Resolution invokes an Advisory Opinion rendered in 2004 by the International Court of Justice.⁵

I sustain the following: (1) the positions adopted by the Security Council have no basis in international law and they contradict the opinions of the major authorities in this field of law; (2) the International Court of Justice’s 2004 *Wall* Advisory Opinion on the settlements, which the Resolution invokes, is devoid of any legal value; (3) there is no such thing as “4 June 1967 lines,” which the Resolution refers to; and (4) the Security Council’s position blatantly ignores historical background, geographical realities, and the legal precedents related to the Israel-Arab continuous conflict.

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¹ U.N. SCOR, 71th Sess., 7853d mtg. at 4, U.N. Doc. S/PV.7853 (Dec. 23, 2016); *see also* Press Release, Security Council, Israel’s Settlements Have No Legal Validity, Constitute Flagrant Violation of International Law, Security Council Reaffirms, U.N. Press Release SC/12657 (Dec. 23, 2016), <https://www.un.org/press/en/2016/sc12657.doc.htm>.

² S.C. Res. 2334, ¶ 4 (Dec. 23, 2016).

³ *Id.* ¶ 13–16.

⁴ *Id.* ¶ 3.

⁵ *Id.*

Moreover, I claim that the Security Council does not abide by the principles established in the Charter of the United Nations, requiring the Security Council to follow international law and that the Security Council has not complied with Resolution 2334.

After reviewing the favorable comments of Professor Theodor Meron, an eminent figure in the field of international law both as professor and as judge of various international criminal courts, on the Resolution,⁶ I strongly disagree with the points developed by the illustrious internationalist. While Meron insists on the need of Israel to abide by the Fourth Geneva Convention on humanitarian rights,⁷ I shall demonstrate that Israel did, and does, effectively comply with the principles of this Convention. Any Palestinian suffering is the exclusive result of the Palestinian leadership's creations of organizations that perpetuate human rights violations. Meron's refusal to apply historical and biblical sources to matters of public international law is strongly refuted by demonstrating that the great founders of this field of law in the last few centuries have effectively invoked history and the Bible in connection with various principles of the law of nations.

Resolution 2334, like numerous manifestations of the Security Council and of other international organizations, insists on the obligation of establishing peace between Israel and the Palestinian Arabs.⁸ I will show that the official constitutional documents of the Palestinian organizations clearly and emphatically advocate for the destruction of the State of Israel and that this desideratum is present in every manifestation of the Palestinian leadership, especially when addressing their people in their language. This contradicts the Israeli Proclamation of Independence of 1948, which proclaimed the determination to reach a peaceful accord at the time when the neighboring Arab states started their first war against Israel.⁹

The policies followed by the Palestinians consist of a total rejection of the State of Israel; therefore, all trials to reach a peace accord,

⁶ Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AM. J. INT'L L. 357, 357 (2017).

⁷ *Id.* at 374–75.

⁸ S.C. Res. 2334, *supra* note 2, ¶ 3–6.

⁹ Proclamation of Independence, 5708 (2) (May 14, 1948) (Isr.), https://www.knesset.gov.il/docs/eng/megilat_eng.htm.

including the efforts of U.S. President Bill Clinton, have failed. The Palestinians are not really ready for any concession even when presented with peace plans, containing an agreement to many of their demands.

Security Council Resolution 242 of 1967, approved immediately after the Six Day War, clarified that the devolution of territories was to be conditioned on the attainment of a full-fledged peace.¹⁰ This is in contrast to Resolution 2334, which demands that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, without conditioning it on the attainment of peace.¹¹ As I will stress further, the settlement activities are a necessary defense against the terrorist war that the Palestinians have been waging against the Israeli population.

THE RESOLUTION

Resolution 2334 of the UN Security Council of December 23, 2016, adopted the following statements and stipulations:

1. The establishment of settlements by Israel in the Palestinian territory, “including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law”; this situation constitutes “a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace.”¹²

2. Demands “that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem.”¹³

3. “Underlines that it will not recognize any changes to the ‘4 June 1967 lines’ including with regard to Jerusalem, other than those agreed by the parties through negotiations.”¹⁴

4. “Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution.”¹⁵

¹⁰ S.C. Res. 242, ¶ 4 (Nov. 22, 1967).

¹¹ S.C. Res. 2334, *supra* note 2, ¶ 4.

¹² *Id.*

¹³ *Id.* ¶ 12.

¹⁴ *Id.* ¶ 13.

¹⁵ *Id.* ¶ 14.

5. “Calls upon all States . . . to distinguish . . . between the territory of the State of Israel and the territories occupied since 1967.”¹⁶

6. “Calls for immediate steps to prevent all acts of violence against civilians,” and for clear condemnation of “all acts of terrorism.”¹⁷

7. Calls on both parties “to act on the basis of international law . . . [and] refrain from provocative actions, incitement and inflammatory rhetoric,” and to rebuild “trust and confidence . . . [in] a genuine commitment to the two-State solution.”¹⁸

8-9. Calls and Urges all parties to endeavor efforts viewing the achievement of peace.¹⁹

In its Preamble, Resolution 2334 sets the following points:

1. Inadmissibility of acquiring territory by force.²⁰

2. Classifies the State of Israel as an “occupying power,” which is obligated by the 1949 Fourth Geneva Convention to protect Civilian Persons in Time of War, and refers to the International Court of Justice 2004 Advisory Opinion.²¹

3. Condemns “all measures aimed at altering the” demography of the Palestinian Territory, including the “construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law.”²²

4. Expresses concern that these activities imperil “the viability of the two-State solution based on the 1967 lines.”²³

5. Recalls the obligation “for a freeze by Israel of all settlement activity.”²⁴

6. Recalls the obligation of “the Palestinian Authority Security Forces to . . . [confront] all those engaged in terror.”²⁵

¹⁶ *Id.* ¶ 15.

¹⁷ *Id.* ¶ 16.

¹⁸ *Id.* ¶ 17.

¹⁹ *Id.* ¶¶ 18–19.

²⁰ *Id.* ¶ 2.

²¹ *Id.* ¶ 3.

²² *Id.* ¶ 4.

²³ *Id.* ¶ 5.

²⁴ *Id.* ¶ 6.

²⁵ *Id.* ¶ 7.

7. Condemns all acts of violence against civilians, acts of terror, provocation, incitement, and destruction.²⁶

8. Reiterates “its vision of a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders.”²⁷

4TH OF JUNE 1967 LINES

The Resolution is based on historic and factual mistakes and various legal misconceptions.

The Resolution refers to “the 4 June 1967 lines.”²⁸ There are no such lines. On that day, the armed conflict started between Israel and the offensive military actions of Egypt, Jordan, and Syria.²⁹ This is known as the “Six-Day-War.”³⁰ The only lines that existed were the armistice lines signed between Israel and the attacking Arab states after the 1947-1948 war, which is known as the Israel’s War of Independence.³¹

These armistice lines derived from the cessation of the war waged by Egypt, Jordan, Iraq, Syria, and Lebanon as they invaded Israel.³² This invasion occurred immediately after the proclamation of the State based on the UN General Assembly Resolution 181, which partitioned the disputed land between the Jews and the Arabs.³³ The Jews accepted the partition and proclaimed the State of Israel,³⁴ whereas the Arabs rejected the Resolution, refused the peaceful solution designed by the United Nations, and invaded the

²⁶ *Id.* ¶ 8.

²⁷ *Id.* ¶ 9.

²⁸ *Id.* ¶ 13.

²⁹ Jeremy Brown, *1967 War: Six Days That Changed the Middle East*, BBC (June 5, 2017), <https://www.bbc.com/news/world-middle-east-39960461>.

³⁰ *Id.*

³¹ See Egyptian-Israeli General Armistice Agreement, Egypt-Isr., Feb. 24, 1949, 42 U.N.T.S. 251 [hereinafter *Egyptian-Israeli Armistice*]; Jordan-Israeli General Armistice Agreement, Jordan-Isr., Apr. 3, 1949, 42 U.N.T.S. 304; Lebanese-Israeli General Armistice Agreement, Leb.-Isr., March 23, 1949, 42 U.N.T.S. 287; Israeli-Syrian General Armistice Agreement, Syria-Isr., July 20, 1949, 42 U.N.T.S. 327.

³² Brown, *supra* note 29.

³³ G.A. Res. 181(II) A-B, Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question (Nov. 29, 1947).

³⁴ Brown, *supra* note 29.

newly created state.³⁵ The armistice agreement with Egypt stipulated that “the Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.”³⁶ Similar statements were made in the armistice agreements signed with the other invading Arab States.³⁷ There were no obligatory boundaries as everything was left for a future settlement.³⁸

Instead of settling, the Arabs maintained their animosity towards the state of Israel. They did not take any initiative in favor of the creation of a Palestinian state, and after eighteen years, they started a new war that became known as the “Six-Day War.”³⁹ The Six-Day War liberated Israel from any obligation regarding the armistice agreements.⁴⁰ Consequently, Israel was free to wage a defensive war and to remain in the territories in accordance with the results of the war.

Between the 1949 armistice agreements and the Six-Day War, the Arab states encouraged a succession of belligerent organizations to attack the population of Israel with continuous acts of terrorism.⁴¹ Israel’s retaliatory operations, which were deemed to avoid further attacks, were always met with condemnations by the UN and the UN’s unfortunate change of attitude from a peacemaker to an ac-

³⁵ *Id.*

³⁶ *Egyptian-Israeli Armistice*, *supra* note 31, art. 5.

³⁷ Brown, *supra* note 35.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ LASSA OPPENHEIM, OPPENHEIM’S INTERNATIONAL LAW 399 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (“Thus during the Arab-Israeli fighting since 1948 anti-Israeli groups operating from bases in neighboring Arab states have often from there organized and launched hostile expeditions into Israel.”).

complice of Palestinian terrorism—a continuous campaign of demonization of the State of Israel.⁴² In the Security Council, the Soviet veto always protected the Arab countries from any condemnation.⁴³

Before the Six-Day War, Egypt (1) closed the Straits of Tiran at the entrance of the Gulf of Aqaba, imposing a naval blockade, which prevented Israeli ships from reaching the port of Eilat, and (2) closed the Suez Canal to ships going to or coming from Israel.⁴⁴ Both arguably constituted *casus belli*.⁴⁵

FOURTH GENEVA CONVENTION OF 1949

The Security Council's Resolution 2334 states that Israel has an obligation to abide by the rules of the Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War, of August 12, 1949."⁴⁶

There are various problems with the attribution of competence of the Fourth Geneva Convention to the territories referred to by the Resolution. Article 2 of the Fourth Geneva Convention, as well as Article 2 of the other three Geneva Conventions signed on August

⁴² See JACOB DOLINGER, *THE CASE FOR CLOSING THE UNITED NATIONS: INTERNATIONAL HUMAN RIGHTS: A STUDY IN HYPOCRISY* 387–453 (2016) (presenting a long list of UN attitudes and resolutions tainted with the gravest prejudice and greatest injustice, viewing the demonization and de-legitimization of the State of Israel).

⁴³ *Id.*

⁴⁴ This was not the first time that Egypt closed the Suez Canal. S.C. Res. 95, ¶ 4 (Sep. 1, 1951); see also History.com Editors, *Six-Day War Ends*, HISTORY (Feb. 29, 2010), <https://www.history.com/this-day-in-history/six-day-war-ends>.

⁴⁵ *Definition of Casus Belli*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/casus%20belli> (explaining that *casus belli* is "an event or action that justifies a war or conflict"); see also S.C. Res. 95, *supra* note 44, ¶ 4 (noting that "Egypt was interfering with the passage through the Suez Canal of goods destined for Israel" and that "the restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at no time connected with the conflict in Palestine valuable supplies required for their economic reconstruction and that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab states and Israel").

⁴⁶ S.C. Res. 2334, *supra* note 2, ¶ 3.

2, 1949, refers to all conflicts that “may arise between two or more of the High Contracting Parties”⁴⁷ Besides Israel, there is no other “contracting party” as the presence of Israel in the West Bank is in a territory which has never acquired statehood.⁴⁸ Therefore, the territories referred to in the Resolution could not be a party to the Geneva Convention. The Convention expressly states in Article Four that “nationals of a State, which is not bound by the Convention are not protected by it.”⁴⁹ The persons, which live in a territory that is not a state, consequently, are not a party to the Convention.⁵⁰ The Palestinians made successive declarations that it considered itself bound by the Geneva Conventions in 1982, 1989, and 1990.⁵¹ But the Swiss Federal Department of Foreign Affairs, which acts in name of the Swiss government as the depositary for the Conventions, responded that it was not in a position to decide whether the communications could be considered as an instrument of accession.⁵² This was due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine.⁵³ Following the UN General Assembly’s resolution, granting non-member observer state status to Palestine in 2012, Palestine acceded to the Conventions of Geneva.⁵⁴ Can an adherence to the Conventions

⁴⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention*].

⁴⁸ S.C. Res. 2334, *supra* note 2, ¶ 4 (explaining that Resolution 2334 recognizes that it refers to “altering the demographic composition, character and status of the Palestinian Territory”; whereas, the Geneva Conventions deal with states, not territories).

⁴⁹ *Geneva Convention*, *supra* note 47, art. 4.

⁵⁰ Eugene Rostow, *Correspondence*, AM. J. INT’L L. 717, 719 (1990) (“The West Bank is not the territory of a signatory power, but an unallocated part of the British Mandate. It is hard, therefore, to see how even the most narrow and literal-minded reading of the Convention could make it apply to the process of Jewish settlement in territories of the British Mandate west of the Jordan River.”).

⁵¹ *Information Notice*, SWISS FEDERAL DEPARTMENT OF FOREIGN AFFAIRS (Dec. 11, 1990), https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/901211-GENEVE_e.pdf.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ G.A. Res. 67/229, Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources (Dec. 21, 2012).

45 years after the beginning of the settlements have retroactive effects?

Theodor Meron, who harshly criticizes the building of settlements in the territories, says that in his opinion, “these measures deny contiguity and visibility to any future independent Palestinian entity, not to mention a state.”⁵⁵ By which, he correctly recognizes that the territories do not constitute a state, not even an entity, in exact accordance with one of the main points of Israel’s position in defense of its policies. Meron’s basic argument about the applicability of the Geneva Convention to the Israel-Palestinian situation is that “High Contracting Parties” referred to in the second paragraph of the second article of the Geneva Convention is not relevant to the situation of the West Bank because the applicable rule is that of the first paragraph of the second article.⁵⁶ This paragraph also refers to “High Contracting Parties” so it could just as well serve to found Israel’s legal position. The fact that “occupation” only appears in paragraph two and not in paragraph one is irrelevant as the various dispositions of the Convention amount to one basic policy, and they all apply exclusively to states that are among the “High Contracting Parties.” Actually, because Meron throughout his article deals with the occupation factor, paragraph 2 should be the applicable rule.

Moreover, according to Article Six of the Convention, its application ceases on the general close of military operations and in the case of occupied territory,⁵⁷ the application ceases one year after the general close of military operations.⁵⁸ In this case, military operations ended fifty years ago.⁵⁹ Beyond the first year, the Convention maintains a few rules in force exclusively for the protection of the

⁵⁵ Meron, *supra* note 6, at 360.

⁵⁶ *Id.* at 363; see *Geneva Convention, supra* note 47. Article 2 of the Geneva Convention states that (1) “[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,” and (2) “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” *Geneva Convention, supra* note 47.

⁵⁷ *Geneva Convention, supra* note 47, art. 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

rights of individuals of humanitarian character provided that the occupier exercises the functions of government in the territory.⁶⁰ This is not the case in the West Bank, where the Palestinian Authority is the governing power. Moreover, the Resolution fails to indicate which issues of individual humanitarian protection have been disrespected by Israel. The Resolution also ignores the grave violations of basic human rights practiced by the Palestinian governing bodies against their own people, which include the following: (1) the suppression of criticism, (2) the public executions with no due process of law of Arabs suspected of collaborating with Israel, (3) the lack of freedom of expression, (4) the expropriation of private property without judicial order, and (5) the many other violations of basic human rights. A simple illustration of the projected Palestinian state is the fact that Mahmoud Abbas, elected for a four-year term in early 2005, continues in power eight years beyond his mandate, ruling with dictatorial powers.⁶¹

ISRAEL'S HUMANITARIAN POLICY

Israel has indeed abided by the humanitarian provisions of the Geneva Convention, announcing its position in a letter to the International Committee of the Red Cross as follows:

Israel maintains that in view of the *sui generis* status of Judea, Samaria and the Gaza Strip, the *de jure* applicability of the Fourth Convention to these areas is doubtful. Israel prefers to leave aside the legal question of the status of these areas and has decided, since 1967, to act *de facto* in accordance with the humanitarian provisions of the Convention.⁶²

An important illustration of the treatment the Palestinians receive from Israel is the attitude of the Israeli Supreme Court towards

⁶⁰ *Id.*

⁶¹ Khaled Abu Toameh, *Palestinians: Naming Abbas as PM violates basic law*, JERUSALEM POST (Feb. 8, 2012), at A1.

⁶² *Cf.* Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485, 489 (1990).

Palestinians. First, the Supreme Court could very easily avoid judging any claim of the Palestinians because they are not located within Israel's territory, and thus, there is no jurisdiction. But the contrary has occurred. Any request, complaint, or other approach of the Palestinians to the Israeli Supreme Court is duly examined and decided upon.⁶³ While Palestinians are limited to lower courts in land cases, in other cases, the Palestinians have been successful in attaining their requests from the Supreme Court.⁶⁴

In *Beit Sourik Village Council v. The Government of Israel*, the Supreme Court decided whether a fence that the government was erecting as protection against terrorist attacks would disturb the lives of the inhabitants of the Beit Sourik village.⁶⁵ The Supreme Court requested and received various analyses from experts that ranged from military matters and humanitarian principles to the principle of proportionality⁶⁶ and decided that the fence, which in itself the Supreme Court considered perfectly legal, demonstrating the error of the contrary opinion of the International Court of Justice, should change its route in order to ease the life of the inhabitants of that particular village.⁶⁷ This change, according to the expert assessments received, would still protect the safety of the Israeli population.⁶⁸ Considering all the evidence presented, the Supreme Court decided which segments of the fence illegally violated the rights of the Arab population and which segments were legal in accordance with international law.⁶⁹

⁶³ Tovah Lazaroff, *Committee OK's Bill Limiting Palestinian Access to High Court of Justice*, JERUSALEM POST (July 12, 2018), <https://www.jpost.com/Israel-News/Committee-OKs-bill-limiting-Palestinian-access-to-High-Court-of-Justice-562283>.

⁶⁴ *Id.*

⁶⁵ HCJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) P.D. 807, 807 (2004) (Isr.), http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf [hereinafter *Beit Sourik Village*] (Reprinted with permission of the Israeli Supreme Court and available at www.court.go.il); see also HCJ 2056/04 Beit Sourik Village v. Government of Israel 58(5) P.D. 807, 38 ISR. L. REV. 83 (2005) (English translation of decision).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Aharon Barak, the president of the court, referred in his opinion in *Beit Sourik* to another case—*Ajuri v. IDF Commander*—where he had described the security situation prevalent in Israel:

Israel's fight is complex. Together with other means, the Palestinian use guided human bombs. These suicide bombers reach every place where Israelis can be found (within the boundaries of the State of Israel and in the Jewish communities in Judea and Samaria and the Gaza Strip). They sow destruction and spill blood in the cities and towns. The forces fighting against Israel are terrorists, they are not members of a regular army; they do not wear uniforms; they hide among the Palestinian population in the territories, including inside holy sites; they are supported by part of the civilian population and by their families and relatives.⁷⁰

In this decision, the Supreme Court described the systematic and careful procedures followed by the Israeli authorities for the erection of the fence,⁷¹ which characterize the respect and consideration of the Israeli authorities to the Arab population of the West Bank. This is the description:

Parts of the separation fence are being erected on land which is not privately owned. Other parts are being erected on private land. In such circumstances – and in light of the security necessities – an order of seizure is issued by the Commander of the IDF forces in the area of Judea and Samaria. Pursuant to standard procedure, every land owner whose land is seized will receive compensation for the use of his land. After the order of seizure is signed, it is brought to the attention of the public, and proper liaison body of the Palestinian Authority is contacted. An announcement is relayed to the residents, and each interested party is invited to participate in a survey of the area

⁷⁰ HCJ 7015/02 *Ajuri v. IDF Commander* 56(6) PD 352, 358 (2002) (Isr.).

⁷¹ *Beit Sourik Village*, *supra* note 65.

affected by the order of seizure, A few days after the order is issued, a survey is taken of the area, with the participation of the landowners, in order to point out the land which is about to be seized.

After the survey, a one week leave is granted to the landowners, so that they may submit an appeal to the military commander. The substance of the appeal is examined. Where it is possible, an attempt is made to reach understanding with the landowner. If the appeal is denied, leave of one additional week is given to the land owner, so that he may petition the High Court of Justice.⁷²

As the various cases that were judged by the Supreme Court of Israel demonstrate, the arguments of the Arab owners are taken in due consideration, experts' opinions are accepted and examined, and the Supreme Court considers whether the direction of a fence should be modified. In some cases, this is exactly what happens and the court orders the military authorities to modify the direction of the fence.

It would be very difficult, if possible at all, to indicate a similar respectful attitude to the people of an occupied land by an occupying authority or by any court in the civilized world at any time.

The concluding paragraph of this decision is an important contribution to the major modern legal problem – Democracy versus Terrorism. It reads as follows:

Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. We are aware of the killing and destruction wrought by the terror against the state and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. We are aware that in the short term, this judgment will not make the state's struggle against those rising

⁷² *Id.*

up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provision of the law is an aspect of national security.⁷³

Israel's presence brought positive results to the economy of the territories and to the health conditions of the Palestinian population.⁷⁴ For example, from 1967 to 2000, life expectancy increased from 48 to 72, and infant mortality plummeted from 60 per thousand live births to 15.⁷⁵ This occurred as Israel built more than one hundred clinics, offered comprehensive health insurance, and modernized and expanded sewage and electrical infrastructures.⁷⁶ In the political arena, under Israeli rule, the Palestinians of Judea, Samaria, and Gaza exercised political freedoms. This included "freedom of the press, freedom of association, enfranchisement of women and the ability to seek the protection of the Israeli court system."⁷⁷

And then came the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, "when 98 percent of the Palestinians living in these areas came under the jurisdiction of the Palestinian Authority . . . which ended the freedoms the Palestinians

⁷³ *Id.* at 132; *see also* Dolinger, *supra* note 42, at 382–386. This is the essence of Justice Barak's legal philosophy regarding the need to conciliate democracy and human rights with the defense of the state and its citizens; a philosophy that has its adherents but also its adversaries. Among those who have strongly disagreed with Justice Barak stands Richard Posner, judge on the US Court of Appeals for the Seventh Circuit and professor at the University of Chicago Law School.

⁷⁴ CAROLINE B. GLICK, THE ISRAELI SOLUTION: A ONE-STEP PLAN FOR PEACE IN THE MIDDLE EAST 113–14 (2014).

⁷⁵ *Id.*

⁷⁶ *Id.* On the other hand, the same author wrote in her Jerusalem Post column about how the PLO transformed their lives into chaos by implementing the law of the jungle, enforced by mob-style militias, which trampled property rights and gutted civil rights.

⁷⁷ *Id.*

had enjoyed under Israeli rule and torpedoed their economy.”⁷⁸ These facts, as they evolved in the 1990s, demonstrate the harsh injustice that Israel suffers when the Security Council ironically orders the Jewish State to extend humanitarian protection to the Palestinians.

THE INTERNATIONAL COURT OF JUSTICE (ICJ) ADVISORY OPINION

The Resolution invokes the Advisory Opinion rendered on July 9, 2004, by the International Court of Justice (ICJ).⁷⁹ This is the advisory opinion regarding the fence (which the ICJ called the wall) that Israel erected to defend its citizens from the daily terrorist attacks by Arabs living in the territories.⁸⁰

In the first place, an ICJ Advisory Opinion is not a binding legal source.⁸¹ It is a mere opinion furnished by the court to the General Assembly of the UN.⁸² As its denomination indicates, it is an advisory opinion and not a judgment. Thus, an advisory opinion is a decision of political—and not legal—nature. As a matter of fact, it is known that some of the judges of the ICJ rule in accordance with the interests and or policies of the states of their citizenship.⁸³ This occurs as they are sent to serve at the ICJ by their nation’s governments.⁸⁴ Amichai Cohen observes that “the identity of the judges in

⁷⁸ *Id.* at 116, 119. Caroline Glick’s advocacy of a “One State Plan for Peace in the Middle East” is based on the rationale that “[a]pplying Israeli law to the areas would end the authoritarian repression that the Palestinians suffer under the rule of the Palestinian Authority. As permanent residents of Israel, with the option of applying for Israeli citizenship, the Palestinians would find themselves living in a liberal democracy where their individual rights are protected.” *Id.* at 119. The author informs that during the Palestinian uprising against Israel from 1988 to 1991, Palestinians killed about a thousand of their own people whom they accused of collaborating with Israel. *Id.* at 116, 119.

⁷⁹ S.C. Res. 2334, *supra* note 2, ¶ 3.

⁸⁰ Rep. of the I.C.J., at 4, U.N. Doc A/59/4 (Aug. 1, 2003 – July 31, 2004).

⁸¹ See *Advisory Proceedings*, I.C.J., <https://www.icj-cij.org/en/how-the-court-works> (last visited Oct. 12, 2018); see also *The Court*, I.C.J., <http://www.icj-cij.org/en/court> (last visited Oct. 12, 2018).

⁸² *Id.*

⁸³ Eric Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice, Biased?*, 34 THE J. OF LEGAL STUD. 599, 599, 624 (2005).

⁸⁴ *Id.*

international courts, their politics, values and independence from political control should become major issues in the debate over international law.”⁸⁵

It is important to analyze the 2004 Advisory Opinion of the ICJ to perceive the depth of the Security Council’s one-sidedness in Resolution 2334.⁸⁶ It is also important to compare the Resolution to similar Resolutions of the General Assembly and the Council of Human Rights, which are entirely prejudiced regarding the position and the policies of Israel.⁸⁷ This analysis will demonstrate how the UN organs have no problem making decisions and resolutions on the Israel-Arab conflict in spite of all evidence and against elementary common sense.

The 2004 Advisory Opinion of the ICJ is in total conflict with the facts that brought about the occupation. It is tainted by flagrant incorrect descriptions of the successive events that form the ongoing Middle East conflict. Moreover, the 2004 Advisory Opinion includes a short historical review, which refers to the War of Independence of 1948 in the following terms: “Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.”⁸⁸ Here, the ICJ tries to hide the universally known fact that the Arab states, unwilling to accept the proclamation of the State of Israel, attacked and invaded the territory designated by the UN Partition Plan to become the Jewish State.

How can the Court, an integral part of the UN, ignore the statement of Trygve Lie, the first secretary general of the same organization? Lie stated, “The invasion of Palestine by the Arab States was the first armed aggression which the world has seen since the world

⁸⁵ Amichai Cohen, *Rules and Applications of International Humanitarian Law*, 41 *ISR. L. REV.* 41, 67 (2008).

⁸⁶ S.C. Res. 2334, *supra* note 2, ¶ 3.

⁸⁷ *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> [hereinafter *Construction Advisory Opinion*].

⁸⁸ *Id.* ¶ 71, at 165; *see also* GA, Res. 181(II) A-B, Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question (Nov. 29, 1947), [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/181\(II\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/181(II)).

war.”⁸⁹ Paul Johnson, an internationally respected historian, describes the aggression as follows: “A provisional government was formed immediately. Egyptian air raids began that night. The next day, simultaneously, the last British left and the Arab armies invaded.”⁹⁰

The Egyptian newspaper, *Akhbar al-Yom*, quoted the Secretary General of the Arab League Azzam Pasha at a Cairo press conference. He said, “[T]his will be a war of extermination and a momentous massacre . . . like the Mongolian massacres and the Crusades.”⁹¹

At the UN Security Council’s meeting on May 15, 1948, Mr. Tarasenko, the representative of Ukraine, referred to the armed struggle happening in Palestine. He referred to it as “a result of the unlawful invasion by a number of States of the territory of Palestine, which does not form part of the territory of any of the States whose armed forces have invaded it,”⁹² and in the same vein, the United States delegate, Senator Austin, referring specifically to Jordan’s attitude and its answers to questions posed by the Security Council, classified the Arab state’s behavior as waging a war and acting against peace.⁹³

The ICJ’s inaccurate statement that “armed conflict then broke out” does not bode well for the prestige of any court, let alone the ICJ.⁹⁴ But when prejudice reigns, there is no limit to the level of misrepresentations that can occur. The lack of legal value of the ICJ’s 2004 Advisory Opinion lies in its conclusions, which are based on uncertainty and are self-contradicting.

In paragraph 137 in the 2004 Advisory Opinion, the ICJ states the following: “To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the

⁸⁹ DORE GOLD, *THE FIGHT FOR JERUSALEM: RADICAL ISLAM, THE WEST, AND THE FUTURE OF THE HOLY CITY* 135 (2007).

⁹⁰ PAUL JOHNSON, *A HISTORY OF THE JEWS* 527 (1988).

⁹¹ David Barnett & Efraim Karsh, *Azzam’s Genocidal Threat*, 18(4) *MIDDLE EAST Q.* 85, 87 (2011) (translating Mustafa Amin, *A War of Extermination*, *AKHBAR AL-YOM*, Oct. 11, 1947).

⁹² Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279, 279 (1968); *Id.* at 285–86.

⁹³ *Id.* at 9.

⁹⁴ *Construction Advisory Opinion*, *supra* note 87, ¶ 71, at 165.

wall was necessary to attain its security objectives.”⁹⁵ Paragraph 140 repeats the legal jewel: “In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interest of Israel against the peril which it invoked as justification for that construction.”⁹⁶ However, the strangest aspect of the ICJ’s conclusion is the continuation on paragraph 137: “The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order.”⁹⁷

Thus, the ICJ makes two statements that contradict each other in the same paragraph. The ICJ is not convinced that (1) the route chosen for the wall was the only way to protect the Israeli population, and (2) infringements caused to the Palestinian population by the route chosen cannot be justified by military exigencies, national security, or public order.

At the same time, the Court is not convinced, and yet it decides with conviction! Which court takes a decision based on doubt, on lack of conviction? Why did the Court not order technical, geographical, strategical, and military advice? Why did it not look into Israel’s arguments contained in a document that the Secretary General of the UN attached to the consultation for an Advisory Opinion as this paper is hardly referred to in the decision?⁹⁸

Israel argued that in the forty months immediately preceding the erection of the fence, Palestinian terror attacks had left 916 people dead and over 5,000 injured, many of them critically.⁹⁹ There is no word about that in the General Assembly’s request for an advisory opinion. Despite the unforgivable omission by the General Assembly, the ICJ could have easily looked into the Israeli submission and

⁹⁵ *Id.* ¶ 137, at 193.

⁹⁶ *Id.* ¶ 140, at 194.

⁹⁷ *Id.* ¶ 137, at 193.

⁹⁸ Letter from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel, <https://www.icj-cij.org/files/case-related/131/1579.pdf>; *Construction Advisory Opinion*, *supra* note 87.

⁹⁹ *Id.* ¶¶ 1.7, 3.56.

double-checked the facts related, but it did not really care to search for the truth.

Judge Rosalyn Higgins was very critical of the Court. In her separate opinion, she states:

Addressing the reality that “the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict,” the Court states that it “is indeed aware that the question of the wall is part of a greater whole and it would take this circumstance carefully into account in any opinion it might give.” In fact, it never does so. There is nothing in the remainder of the Opinion that can be said to cover this point. Further, I find the “history” as recounted by the Court in paragraphs 71-76 neither balanced nor satisfactory.¹⁰⁰

The Court says that “[i]n the 1967 armed conflict, Israel forces occupied all the territories which had constituted Palestine under the British Mandate (including those known as the West Bank, lying to the east of the Green Line).”¹⁰¹ Again, the Court reveals unforgivable historical errors because the territories that constituted Palestine under British Mandate included the following: (1) the territory which became the State of Israel, (2) the territories known as the West Bank, which was supposed to become the Arab State according to Resolution 181 of the General Assembly,¹⁰² and (3) the territory known before as Transjordan, which is known today as the independent state of Jordan. In sum, Israel did not occupy the state of Jordan and could not occupy its own territory; this shows the absurdity of the statement that Israel occupied “all the territories which had constituted Palestine under the British Mandate.”¹⁰³

In sum, when the Security Council bases Resolution 2334 on the ICJ’s 2004 Advisory Opinion, one should bear in mind that both organs of the UN—the Court and the Council—coincide in their un-

¹⁰⁰ *Construction Advisory Opinion*, *supra* note 87, ¶¶ 15–16, at 211 (separate opinion by Higgins, J.).

¹⁰¹ *Construction Advisory Opinion*, *supra* note 87, ¶ 73, at 166.

¹⁰² G.A. Res. 181 (II) A, Future Government of Palestine (Nov. 29, 1947).

¹⁰³ *Construction Advisory Opinion*, *supra* note 87, ¶ 73, at 166.

fair, unjust, illegal, and deliberately prejudicial one-sidedness regarding the conflict in the Holy Land. In Brian McGarry's introductory note to the Resolution, he suggests that the Security Council's upgraded language from "calls upon" to "demands" is a consequence of the ICJ's intervening opinion in *Wall*,¹⁰⁴ "in which the Court found that Israeli settlement activities had contravened international law."¹⁰⁵ The Resolution is as incorrect as the ICJ's 2004 Advisory Opinion and both are illegal as I hereby proceed to expose.

THE SECURITY COUNCIL AND INTERNATIONAL LAW

When the Security Council emits a Resolution that deals with the legal validity of an act or a behavior, establishes legal obligations, and demands certain actions or abstentions from a UN member state, as contained in Resolution 2334, the Council should base it on legal sources. An ICJ advisory opinion does not represent a legal source.

Article 38 of the International Court of Justice Statute provides that the ICJ's function is "to decide in accordance with international law" by applying "international conventions . . . international custom . . . the general principles of law recognized by civilized nations," and the "judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law."¹⁰⁶ The letter of the law, the text of a convention, and the nature of a custom can only be understood and applied in accordance with the most qualified jurists' interpretation and the Courts' application of them. These two sources are known as Doctrine and Jurisprudence.

Article 68 provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which

¹⁰⁴ Brian McGarry, *Introductory Note to United Nations Security Council Resolution 2334*, 56(3) I.L.M. 645, 646 (2017), <https://www.cambridge.org/core/journals/international-legal-materials/article/united-nations-security-council-resolution-2334/EBF1E6E5C132BDE13F6AB63173B281BE>.

¹⁰⁵ *Id.*

¹⁰⁶ Statute of the International Court of Justice art. 38, ¶ 1(a)–(d), June 26, 1945, 59 STAT. 1055.

it recognizes them to be applicable.”¹⁰⁷ Should we say that the ICJ decided the sources of international law stated in Article 38 were not applicable to the Advisory Opinion request regarding the “wall”? Or, in other words, the Opinion would not be given in accordance with the sources of International Law. If so, the Opinion would not carry any legal effect. Therefore, the Opinion certainly does not carry any legal effect, and the reference to it by the Security Council is absolutely useless as the Council insists on the legal aspects of the issues under consideration and deals with the international obligations of the State of Israel.

But it is not only the Rules of the ICJ that order the observance of international law. The whole structure of the United Nations established in its Charter, approved in San Francisco, California on June 26 1945, is based on this major principle.¹⁰⁸

The Preamble states the determination of the organization “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”¹⁰⁹ Additionally, the Charter provides that “international disputes or situations which might lead to a breach of peace” shall be settled “in conformity with the principles of justice and international law.”¹¹⁰ In Article 13, the Charter charges the General Assembly to “initiate studies and make recommendations for the purpose of (1) promoting international cooperation in the political field and (2) encouraging the progressive development of international law and its codification.”¹¹¹ The Charter also prescribes that the Security Council will discharge its duties “in accordance with the Purposes and Principles of the United Nations,”¹¹² which, as we saw, are based on “the principles of justice and international law.”¹¹³

So when the Security Council states in Resolution 2334 that Israel’s occupation of territories and establishment of settlements in

¹⁰⁷ *Id.* art. 68.

¹⁰⁸ U.N. Charter, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

¹⁰⁹ *Id.* at pmb1.

¹¹⁰ *Id.* art. 1, ¶ 1.

¹¹¹ *Id.* art. 13, ¶ 1(a).

¹¹² *Id.* art. 24, ¶ 2.

¹¹³ *U.N. Charter Principles*, U.N., <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/un-charter-principles/> (last visited Oct. 13, 2018).

the Palestinian territory constitute a “flagrant violation under international law,”¹¹⁴ referring to Israel’s “legal obligations,”¹¹⁵ we should assume that these peremptory statements have a basis in international law and that the sources of international law for the Security Council (as for the General Assembly) cannot be other than the ones for the ICJ as established in its charter. This is what must be analyzed. Does the position of the Security Council in Resolution 2334, like many previous resolutions of outright condemnation of Israel’s presence in the West Bank, have any basis on the authentic sources of international law?

In 1967, the Israeli army entered the Jordan River’s west bank, a territory occupied by Jordan and now known as West Bank.¹¹⁶ As Stuart Malawer wrote, “the Security Council and the General Assembly refused to censure Israel for its 1967 attack against the Arabs. The failure to censure Israel evidences an acceptance by the international community of the Israeli case”¹¹⁷ This evidences a development of the United Nations’ practice, which allows a state to exercise under Article 51 anticipatory self-defense.”¹¹⁸

Louis Henkin stated this theory very laconically: “If a nation is satisfied that another is about to obliterate it, it will not wait. But it has to make that decision on its own awesome responsibility.”¹¹⁹ This theory appears very clearly in D.W. Greig as he writes that the “pre-emptive attack launched by Israel principally against the United Arab Republic in June 1967, is an excellent illustration of the circumstances in which a right of anticipatory self-defense might still be claimed.”¹²⁰

The next step is to verify the legality of Israel’s permanence in the territories occupied during the defensive war. A short editorial comment published by the American Journal of International Law

¹¹⁴ S.C. Res. 2334, *supra* note 2, ¶ 1.

¹¹⁵ *Id.* ¶ 2.

¹¹⁶ West Bank refers to the territory west of the Jordan River.

¹¹⁷ STUART S. MALAWER, *STUDIES IN INTERNATIONAL LAW* 199–200 (1977).

¹¹⁸ *Id.*

¹¹⁹ Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, in the Fifty-Seventh Annual Meeting of the American Society of International Law (1963).

¹²⁰ D.W. GREIG, *INTERNATIONAL LAW* 681 (1970).

(AJIL), which became a classic, fundamental piece for understanding the legal status of the territories, describes two errors.¹²¹ Stephen Schwebel, former judge and president of the International Court of Justice, distinguished between aggressive conquest and defensive conquest (I) and between taking territory which the prior holder held lawfully and that which it had unlawfully (II).¹²²

Schwebel explains that "Israel has a better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt."¹²³ Thus, it follows that the modification of the 1949 armistice lines among those states within former Palestinian territory are lawful if not necessarily desirable. Schwebel further stresses that "Egypt's seizure of the Gaza strip, and Jordan's seizure and subsequent annexation of the West Bank and the old city of Jerusalem, were unlawful."¹²⁴ The seizures could not give these states "lawful, indefinite control, whether as occupying Power or sovereign: *ex injuria jus non oritur*."¹²⁵ On the same line and adding an interesting point of law, Elihu Lauterpacht summarized the situation:

Territorial change cannot properly take place as a result of the *unlawful* use of force. But to omit the word 'unlawful' is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor's charter. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.¹²⁶

Comparing the post-1967 standing of Israel with that of pre-1967 Jordan, Yehuda Blum added:

¹²¹ Stephen M. Schwebel, Editorial Comment, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970).

¹²² *Id.*

¹²³ *Id.* at 346.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 929, 976 (1974).

The legal standing of Israel in the territories in question is thus that of a State which is lawfully in control of territory in respect of which no other state can show a better title. Or, if it is preferred to state the matter in terms of belligerent occupation, then the legal standing of Israel in the territories in question is at the very least that of a belligerent occupant of territory in respect of which Jordan is *not* entitled to the reversionary rights of a legitimate sovereign.¹²⁷

Julius Stone characterizes Israel as a “lawful belligerent occupant.”¹²⁸ He further states that “the status of these residual territories is not merely, as is too often assumed, that of territories under belligerent occupation; it is rather that of continuing dedication to the objectives of the mandate.”¹²⁹

When Jordan, Egypt, and Iraq attacked Israel on June 5, 1967, they violated the 1949 armistice agreements.¹³⁰ Israel’s “occupation of foreign territory” does not make legal sense because once the armistice boundaries were nullified, the West Bank reverted to its status as Palestine. After the Arabs rejected the partition plan approved by the UN General Assembly in November 1947, the whole territory returned to its status of “land promised to the Jews” by the Balfour

¹²⁷ Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 293–94 (1968) (“It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding that sovereign’s reversionary rights have no application.”).

¹²⁸ JULIUS STONE, *ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS* 119 (1981).

¹²⁹ *Id.* at 122.

¹³⁰ *Armistice Agreements (1949)*, in *ARAB-ISRAELI CONFLICT AND CONCILIATION: A DOCUMENTARY HISTORY* 35, 81 (Bernard Reich ed., 1995); *see also* Egyptian-Israeli General Armistice Agreement, Egypt-Isr., Feb. 24, 1949, http://avalon.law.yale.edu/20th_century/arm01.asp; *see* Jordan-Israeli General Armistice Agreement, Jordan-Isr., April 3, 1949, http://avalon.law.yale.edu/20th_century/arm03.asp; *see* Lebanese-Israeli General Armistice Agreement, Leb.-Isr., March 23, 1949, http://avalon.law.yale.edu/20th_century/arm02.asp; *see* Israeli-Syrian General Armistice Agreement, Syria-Isr., July 20, 1949, http://avalon.law.yale.edu/20th_century/arm04.asp.

Declaration,¹³¹ which was later approved by the League of Nations through the mandate given to Great Britain at the San Remo Peace Conference in its Resolution of April 25, 1920.

Following the establishment of the British Mandate, the League of Nations determined in 1922, in accordance with article 22 of its Covenant, the conditions of the Mandate over Palestine and “charged the Mandatory government with the responsibility of establishing a national home for the Jewish people in Palestine.”¹³²

The preamble to the British Mandate Document states it was based on the international recognition of “the historical connection of the Jewish people with Palestine.”¹³³ Article Two rests the responsibility of “placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home” on Britain.¹³⁴ Article Six requires the Mandatory Power to ‘facilitate Jewish immigration,’ and Article Seven made Britain responsible for “enacting a nationality law . . . framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine.”¹³⁵ There is no mention of Arab national rights in the Palestine Mandate, and there is no reference to political rights of the non-Jewish

¹³¹ BALFOUR DECLARATION (1917), http://avalon.law.yale.edu/20th_century/balfour.asp. Declaration delivered by the British foreign secretary Lord Arthur Balfour to Lord Lionel Walter Rothschild on November 2, 1917, whereby “[h]is Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors 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.” *Id.*

¹³² Talia Einhorn, *The Status of Judea & Samaria (The West Bank) and Gaza and the Settlements in International Law*, 7 JERUSALEM CTR. FOR PUB. AFF. §1, § 3.1 (2014).

¹³³ *Palestine Mandate (July 24, 1922)*, in ARAB-ISRAELI CONFLICT AND CONCILIATION: A DOCUMENTARY HISTORY 35–36 (Bernard Reich ed., 1995) (“The principal Allied powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might 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.”).

¹³⁴ *Id.* at 36–37.

¹³⁵ *Id.*

population because the object and purpose of the British Mandate was exclusively to “reconstitute the political ties of the Jewish people to their homeland.”¹³⁶ The British Mandate only provides that “nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities.”¹³⁷

The League of Nations’ creation of the British Mandate was the world entity’s recognition of the right of the Jewish people to establish its home in the Land of Israel, its historic homeland, and to establish its state therein. Thus, the right of the Jews to their homeland was recognized in international law.

This recognition was inherited by the United Nations as per article 80 of its Charter which established the following:

Except as may be agreed upon in individual trusteeship agreements . . . nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.¹³⁸

The establishment of a national home for the Jewish people was tied to the whole of geographical Palestine encompassed by the territory from the Jordan River to the Mediterranean Sea, covering what is presently the official territory of Israel, as well as the territories claimed by the Palestinian Arabs. Geographic Palestine became so after Great Britain detached the territory beyond the Jordan river, known as “Transjordan” to create the Jordanian state, which, originally, was part of historical Palestine and the British Mandate.¹³⁹

The continuous terrorism, which Palestinian Arabs waged against Palestinian Jews practically throughout the whole Mandate period led the UN to depart from the British Mandate’s objective

¹³⁶ Einhorn, *supra* note 132.

¹³⁷ Palestine Mandate, *supra* note 133, at 35.

¹³⁸ U.N. Charter, *supra* note 108, art. 80, ¶ 1.

¹³⁹ *Transjordan, the Hashemite Kingdom, and the Palestine War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Jordan/Transjordan-the-Hashemite-Kingdom-and-the-Palestine-war> (noting that Jordan was administered by British rule after 1921).

and approve a partition plan. The plan divided what remained from the Palestinian territory into two parts. One for the Jews to create their state and one for the Palestinian Arabs to create theirs.¹⁴⁰ Despite the abandonment of the original British plan approved by the League of Nations, which stated that the entire territory would end up as the Jewish State, the Jews of Palestine agreed with the partition for the sake of peace,¹⁴¹ whereas the Palestinian Arabs as well as the Arab States did not accept it.¹⁴² The United Nations did nothing to enforce the Partition Plan and Israel was accepted to the UN without being required to accept the boundaries proposed by that resolution.¹⁴³

As the Jewish State was about to be born, the Arabs attacked and invaded its territory and, as we shall further quote, the Palestinian Arabs declared the illegality of the Partition Plan.¹⁴⁴ The war waged by the Arab States ended with the agreements which established the armistice lines, whereas the territory that had been destined by the UN for the Palestinian Arabs ended up occupied illegally by Jordan.¹⁴⁵ This illegal occupation lasted from 1948 to 1967 when the Arab countries opened another war against Israel – the Six Day War – which ended with Israel – in a defensive war - expelling the Jordanians from the territory they had illegally occupied. This is what Stephen Schwebel is referring to when he compares the presence of Israel with the former occupation by the Jordanians – a legal occupation versus an illegal occupation. In 1988, Jordan declared that it no longer considered itself as having any status over that area, so the legality of Israel's presence in the territories reached to full consolidation.¹⁴⁶

¹⁴⁰ Einhorn, *supra* note 132, § 3.2.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 3.3. Declaring war against the State of Israel would have implied the Arab nations' recognition of Israel's existence; however, it was unequivocally declared a state of war. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ HCJ 61/80 Haetzni v. State of Israel, 34(3) P.D. 595, 597 (1980); HCJ 69/81 Bassil Abu Aita v. The Regional Commander of Judea and Samaria 37(2) P.D. 197 (1983).

THEODOR MERON'S VIEWS

Theodor Meron affirms that “Jordan would certainly be considered as the legitimate power, even under the Armistice Agreement of April 3, 1949.”¹⁴⁷ Meron references Article 43 of the Hague Convention (IV), which refers to “the authority of the legitimate power having in fact passed into the hands of the occupant.”¹⁴⁸ Meron is probably the only legal authority that did not accept Schwebel’s position: Jordan was an illegitimate occupier. A position that has been agreed with by all scholars who wrote on the Six Day War and the occupation of the West Bank that followed. With the exception of the United Kingdom and Pakistan, Jordan’s annexation of the Palestinian territory it occupied was not accepted by the world community.¹⁴⁹ Jordan later officially renounced¹⁵⁰ any claim of any part of the West Bank, which must also be taken into consideration.

However, Meron goes further and claims, with reference to Article 42, that a “territory is considered occupied when it is actually placed under the authority of the hostile army.”¹⁵¹ That “a hostile army in this context means, of course, the armed forces of Israel.”¹⁵² This is a total denial of the fact that Israel’s army entered the West Bank in order to save the State of Israel and its population from annihilation by the invading Arab armies. The Arab armies of Egypt, Syria, and Jordan were the aggressive and hostile armies,¹⁵³ whereas Israel’s army was a defensive army.¹⁵⁴ This is clear from the various legal authorities referred to above.¹⁵⁵ Meron lived in Israel at the time of that treacherous attack and should know better. The same way Israel’s army is not a “hostile army,” the West Bank is not a “hostile state,” as Meron puts it, regarding the obligation established by the Hague Convention to “safeguard the real estate belonging to

¹⁴⁷ Meron, *supra* note 6, at 363.

¹⁴⁸ Convention Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277 [hereinafter *Hague Convention (IV)*].

¹⁴⁹ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 204 (2012).

¹⁵⁰ *Id.*

¹⁵¹ *Hague Convention (IV)*, *supra* note 87, art. 42.

¹⁵² Meron, *supra* note 6, at 362–63.

¹⁵³ Einhorn, *supra* note 132, § 3.4.

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g.*, Einhorn, *supra* note 132, § 3.4.

the hostile state.”¹⁵⁶ The West Bank was not a state in 1967 and is not a state today, and so, it cannot be considered a “hostile state.”

When Meron refers to the Fourth Geneva Convention rules regarding the occupier’s obligation “to assume active responsibility for the welfare of the population under its control,”¹⁵⁷ he seems to be unaware that presently, the West Bank’s Arab population is under the control of the Palestinian governmental organizations that have total freedom to act according to their policies. These Palestinian governmental organizations maintain a tremendously hostile educational, religious, and propaganda regime towards the State of Israel and the Israeli settlers in the West Bank. Meron prefers to rely on non-governmental organizations like Human Rights Watch and B’Tselem,¹⁵⁸ which are known for their formidable prejudice against the State of Israel.¹⁵⁹ Meron claims that “individual Palestinians’ human rights, as well as their rights under the Fourth Geneva Convention, are being violated.”¹⁶⁰ That is true, but the violator is the Palestinian Liberation Organization (PLO), not the State of Israel. The PLO does not allow freedom of press, freedom of expression, or all other fundamental human rights in the areas under its control.¹⁶¹ In the areas that were subjected to the Israeli authorities’ control until the mid-1990s, the restrictions suffered by Palestinians were exclusively related to Israeli security measures, in order to provide defense from terrorist acts.¹⁶² The same holds for the fence raised by Israel around Arab centers of population.¹⁶³ This

¹⁵⁶ Meron, *supra* note 6, at 359–60, 365, 369.

¹⁵⁷ *Id.* at 367; *see also Geneva Convention, supra* note 47.

¹⁵⁸ Meron, *supra* note 6, at 357.

¹⁵⁹ *See, e.g.,* Human Rights Watch, *Israel: 50 Years of Occupation Abuses*, HUMAN RIGHTS WATCH, (June 4, 2017, 1:01 AM), <https://www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses> (highlighting how Human Rights Watch has ramped up pressure on Israel throughout the years to cease settlement activities).

¹⁶⁰ Meron, *supra* note 6, at 375.

¹⁶¹ Freedom House, *West Bank Freedom Rating: Not Free*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2018/west-bank> (last visited Oct. 12, 2018) (“The PA itself has grown more authoritarian, engaging in crackdowns on the media and human rights activists who criticize its rule.”).

¹⁶² Federation of American Scientists, *Patterns of Global Terrorism: 1990, Middle East Overview*, FAS https://fas.org/irp/threat/terror_90/mideast.html (last visited Oct. 12, 2018).

¹⁶³ *Beit Sourik Village, supra* note 65.

fence was exclusively for security protection as clearly established by the Israeli Supreme Court's decisions *supra*.¹⁶⁴

To sum up, between 1947 and 1948, the Palestinian Arabs had a chance to proclaim their state as the Jews proclaimed the State of Israel. But the Palestinian Arabs refused to accept the General Assembly's Resolution 181. The Palestinian Arabs did not proclaim their state and so did not achieve independence. Additionally, Jordan illegally occupied that part of the Mandatory Palestine. Therefore, we must go back in history and accept that the so called "territories" do belong to Israel. These territories became the home for the Jewish people via the Balfour Declaration, confirmed by the League of Nations' mandate of the British, and inherited by the United Nations as successor of the League of Nations. This follows the doctrine accepted in customary international law of *Uti possidetis iuris* which determines the territorial sovereignty in the era of decolonization.¹⁶⁵ This doctrine states that those "emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence."¹⁶⁶ Bell and Kontorovich state that "applied to the case of Israel, *uti possidetis juris* would dictate that Israel inherit the boundaries of the Mandate of Palestine as they existed in May, 1948. The doctrine, thus, would support Israeli claims to any or all of the currently hotly disputed areas of Jerusalem (including East Jerusalem), the West Bank, and even potentially the Gaza Strip (though not the Golan heights)."¹⁶⁷

As I stated before, the refusal of the Palestinians to accept Resolution 181 annulled Israel's renunciation to those parts of the British Mandate territories. Consequently, the territories returned to their original status as established by the Mandate and confirmed by the UN Charter.¹⁶⁸ To characterize Israel's presence in the territories

¹⁶⁴ *Id.*

¹⁶⁵ Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635 (2016) ("*Uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization.>").

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 633.

¹⁶⁸ See Stone, *supra* note 128, at 117. (explaining that if one does not consider the historical-legal background, it could also be argued that the refusal of the Palestinians to accept Resolution 181 annulled Israel's renunciation to those parts of

as an “illegal occupation,” as alleged by the Security Council and accepted by Meron, contradicts the legal international declarations and resolutions from the last one hundred years, which confirmed the history of thousands of years.

THE NATURE OF THE “OCCUPATION”

After examining the historical and legal matters involved, the Levy Report asserted that they:

[R]estored the legal status of the territory to its original status, i.e., territory designated to serve as the national home of the Jewish people, which retained its ‘right of possession’ during the period of the Jordanian control, but was absent from the area for a number of years due to the war that was forced on it, but has since returned.”¹⁶⁹

The Report adds that though “Israel has had every right to claim sovereignty over these territories, . . . [Israel] opted to adopt a pragmatic approach in order to enable peace negotiation with the representatives of the Palestinian people and the Arab states.”¹⁷⁰ The Report adds that Israel “has never viewed itself as an occupying power in the classic sense of the term, and subsequently, has never taken upon itself to apply the Fourth Geneva Convention to the territories of Judea, Samaria and Gaza.”¹⁷¹

Indeed, the territories are not “occupied” in the sense of the Geneva Convention. They are not “occupied” because this agreement is designed to assure the reversion of the former legitimate sovereign, which in the case of the territories does not exist as the territories had been illegally occupied by the state of Jordan.¹⁷² Another argument has been invoked: because the parties to the conflict were

the Mandate and consequently the territories turned to be what is known in international law as “sovereignty vacuum”)

¹⁶⁹ E.E. LEVY, TEHIYA SHAPIRA & ALAN BAKER, THE LEVY COMMISSION REPORT ON THE LEGAL STATUS OF BUILDING IN JUDEA AND SAMARIA 12 (Regavim, trans., 2012).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Schwebel, *supra* note 121, at 346.

Israel, Egypt, and Jordan and they signed peace agreements, not being anymore belligerent, there is no more belligerent occupation.¹⁷³

We shall see further down that the Ten Point Plan of the PLO denies the application of international agreements to the situation in the territories; logically, this also denies the application of the Geneva Conference Agreements.¹⁷⁴

However, the pretension to apply Article 49 of the Fourth Geneva Convention,¹⁷⁵ which prohibits the occupying power from deporting or transferring parts of its civil population into the territory it occupies, does not apply to the Palestinian territories because the settlers came to the territories on their own initiative and occupy mostly non-privately owned land to build their homes, under the protection of the Israeli authorities.

Alan Baker clearly explained Israel's interpretation of Article 49:

The prohibition concerning the transfer of the occupying power's nationals to the occupied territory refers to forcible transfers, along the lines of what the Nazis did. Article 49 was drafted after World War II and is aimed at preventing the kind of mass population transfers the Germans carried out to alter the demographic character of the territories they occupied. Israel's policies ban forcible population transfers but do sanction voluntary ones; Israel has refrained from expropriating private land; the scale of the transfers is too small to affect the territory's character; and what is most the transfers are not permanent.¹⁷⁶

Eugene Rostov stated that "the Jewish settlers in the West Bank are most emphatically volunteers. They have not been 'deported' or 'transferred' to the area by the Government of Israel, and their

¹⁷³ Yoram Dinstein, *The International Legal Status of the West Bank and Gaza Strip*, 28 ISR. YEARBOOK OF HUMAN RIGHTS 37, 41–42 (1998).

¹⁷⁴ *Geneva Convention*, *supra* note 47.

¹⁷⁵ *Id.* art. 49.

¹⁷⁶ Moshe Goral, *Legality is in the Eye of the Beholder*, HAARETZ (Sept. 25, 2003, 12:00 AM), <http://www.haaretz.com/print-edition/business/legality-is-in-the-eye-of-the-beholder-1.101181>.

movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.”¹⁷⁷ In the words of Julius Stone:

Irony would be pushed to the absurdity of claiming that Article 49(6) designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein* has now come to mean that the West Bank must be made *judenrein* and must be so maintained if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).¹⁷⁸

As the war of 1967 was a defensive war, to save Israel from the murderous intentions of the Arab States when they brought their armies to the armistice lines with the declared intention of invading and destroying the State of Israel, the same goes for the presence of Israel in the West Bank territory – an absolute necessity to protect Israel from further attacks, if not from foreign state armies, then from the armies of terrorists, Fatah, Hamas, Hizbollah, and their allies and supporters, in sum, to replace the armistice lines that separated the Jewish from the Arab States, which Abba Eban defined as the “Auschwitz borders.”¹⁷⁹

Indeed, the occupation is actually a protective measure. Considering the thousands of victims murdered and maimed by the terrorist attacks throughout the years, the Israeli population is much more in need of humanitarian measures than the Palestinian people. Between 2000 and 2009, Palestinians killed around 1,200 and wounded 8,100

¹⁷⁷ Eugene Rostov, *Correspondence*, 84(3) AM. J. INT’L L. 716, 719 (1990).

¹⁷⁸ LEVY ET AL., *supra* note 169, at 9.

¹⁷⁹ David Bedein, *Abba Eban: the June 1967 map represented Israel’s “Auschwitz” borders*, ISRAEL BEHIND THE NEWS (November 17, 2002), <http://israelbehindthenews.com/abba-eban-the-june-1967-map-represented-israels-auschwitz-borders/3838/>. Abba Eban, the Ambassador of Israel to the UN before and immediately after the 1967 war, referred to “Auschwitz borders” as an indication of the permanent, imminent danger the Israelis lived under due to the proximity of the Arabs - a few miles away from the most populated area of the country and from its main airport. *Id.*

Israelis in terror attacks.¹⁸⁰ One can imagine what would happen if Israel was not protected by the belt of the settlements. The Palestinians' argument that the attacks are a reaction to the occupation is unacceptable as the attacks have been occurring from the earliest days of the State of Israel as well as before that, during the years of the British mandate.¹⁸¹ All this leads to the conclusion that International Humanitarian Law demanded that Israel allow the settlements as means to avoid new military attacks, more terrorist waves.

After Jordan and the Palestinians adopted the policy of executing any Arab who sold land to Jews, Israel allocated state lands for the establishment of settlements, in keeping with the Mandate of the League of Nations, which called for the facilitation of "close settlement by Jews on the land, including State lands and waste lands not required for public purposes" as stated in the League of Nations Mandate for Palestine, Article Six.

The Security Council refers to "the inadmissibility of the acquisition of territory by force," and, in the next paragraph, it calls Israel "the occupying power."¹⁸² A state cannot be seen as having acquired territory by force and be seen as an occupying power at the same time. The contradiction reveals the lack of precision and the carelessness with which the highest organ of the United Nations treats the conflict.

HISTORY AND PUBLIC INTERNATIONAL LAW

The fundamental conflict between Israel and the Palestinians turns on history: Who previously inhabited the territories? This question brings out the conflict between both sides' narratives and raises the issue of whether history matters in the field of public international law.

In his comment on the 2334 Resolution, Theodor Meron declares that he "will discuss the situation of the West Bank as a matter of public international law," while refusing to address arguments "based on grounds of religious or biblical entitlements."¹⁸³ However, in the case of the West Bank, like in any matter concerning the

¹⁸⁰ GLICK, *supra* note 74, at xxiv.

¹⁸¹ *See id.* at 24–48.

¹⁸² *See* S.C. Res. 2334, *supra* note 2.

¹⁸³ Meron, *supra* note 6, at 361.

Holy Land, the Bible and religion are intimately connected with history which is a fundamental factor in international law.

The importance of history in the development of Public International Law, specifically the history of Judaism and the Bible, is demonstrated in an essay published by the Netherlands International Law Review. The author, the eminent Israeli internationalist Professor, Shabtai Rosenne, goes back to many of the worldly recognized authorities of the last five centuries and quotes their statements on the subject.¹⁸⁴

Dominican Francisco de Vitoria and his successor Jesuit Francisco Suarez, Spanish Catholic writers known as the leading internationalists of the 16th century, "based many of their theories and deductions upon classical history and literature, using to some extent also the Old Testament." In the 17th century, the Dutchman Hugo Grotius, "in the view of many the real father of modern international law," cites the Old Testament fifty times and cites thirty post-biblical Hebrew sources (including the Talmudim, Targumim, and Midrashim).¹⁸⁵

Shabtai Rosenne then refers to the Englishman John Selden, a profound connoisseur of Jewish law and religion and shows how his writing on the Seven Commandments of the Sons of Noahides lead to the modern concept of human rights.¹⁸⁶

Rosenne states that Selden "was the nearest any scholar has approached, before or since, to a comprehensive evaluation of the Jewish element in the basic notions of European international law."¹⁸⁷ Rosenne proceeds to discuss Samuel Pufendorf, who followed Selden in the references to Jewish law, having made "some 300 direct citations from the Old Testament and from the Jewish Apocrypha."¹⁸⁸ From these facts, Rosenne concludes that "in the formative or classical period of modern international law, nearly all the leading figures, both Catholic and Protestant, deliberately drew upon Jewish

¹⁸⁴ See Shabtai Rosenne, *The Influence of Judaism on the Development of International Law*, 5(2) NETH. INT'L L. REV. 119, 119-49 (1958).

¹⁸⁵ *Id.* at 123-25.

¹⁸⁶ *Id.* at 128.

¹⁸⁷ *Id.* at 129; see also Dr. Isaac Herzog, *John Selden and Jewish Law*, 13(4) J. COMP. LEGISL. & INT'L L. 236, 236-45 (1931); see generally ISAAC HERZOG, *JUDAISM: LAW AND ETHICS* 1-227 (Chaim Herzog ed. 1974).

¹⁸⁸ Rosenne, *supra* note 184, at 130.

legal and moral source-material, so that a definite influence of Jewish legal and moral thought derived principally, though not exclusively, from the Bible.”¹⁸⁹ Laws of war, maritime frontiers, innocent passage, and attainment of peace are matters of public international law that Rosenne connects to biblical and more recent sources of Jewish law.¹⁹⁰ It may be concluded that when addressing the legal aspects of the presence of Israelis in the West Bank, Israeli leaders offer arguments based on religious and biblical sources, they are certainly in very good company.

We find a similar attitude in the great Catholic thinker Saint Augustine who wrote the following about law in general: “He who would lay down temporal laws, will wisely consult the law eternal, that he may discern amid its immutable rules what should be commanded and what forbidden.”¹⁹¹ Meron misses an important source of international law when he refuses to address arguments based on religious and biblical entitlements. Such a subject is critical when considering matters related to a land that is so important in the histories of the three Abrahamic religions, especially considering that Judaism and Islam have a history of conflict and tension.

Parallel to the Bible, the Qur’an must also be consulted. Abdul Hadi Palazzi, professor and director of Rome’s Cultural Institute of the Italian Islamic Community, quotes various passages of the Holy Book of the Muslims about the intimate connection of the Jewish people with the Holy Land:

“O my people, enter the Holy Land which God has assigned unto you . . . (Sura V, vv 22-23)”¹⁹²

“And thereafter We said to the Children of Israel – ‘Dwell securely in the Promised Land.’ (Sura XVII v. 104).”¹⁹³

¹⁸⁹ *Id.* at 131.

¹⁹⁰ *Id.* at 144–45.

¹⁹¹ Gordon E. Sherman, *The Nature and Sources of International Law*, 15(3) AM. J. INT’L L. 349, 357 (1921).

¹⁹² Sheikh Abdul Hadi Palazzi, *Jerusalem: Three-Fold Religious Heritage for a Contemporary Single Administration*, in CRACKING THE QUR’AN CODE: GOD’S LAND, TORAH AND PEOPLE COVENANTS WITH ISRAEL IN THE QUR’AN AND ISLAMIC TRADITION 65, 69 (2010).

¹⁹³ *Id.*

He also quotes various other passages of the Qur'an which connect the Jewish people to Jerusalem.¹⁹⁴

Meron also stresses that he will not address "defense or strategic issues."¹⁹⁵ However, defense issues are closely connected to humanitarian law. Why deal with the application of humanitarian law to the Palestinian Arabs and not to the Jewish and non-Jewish Israelis, who were victims of thousands of terrorist acts by the Palestinian Arabs throughout the five decades since the Six-Day War, which was a matter intimately connected with defense?

Chaim Perelman, a modern legal philosopher, exposed the fundamental importance of history in every field of law. He wrote that "rationality, as it presents itself in law, is always a form of continuity – conformity to previous rules or justification of the new by means of old values. That which is without attachment to the past can only be imposed by force, not by reason."¹⁹⁶ Those with an interest in the origins of modern law, of both the civil and common law systems, are aware of the strong influence that Roman Law played in their development, the interconnections between Roman and Canon Laws, and the influence of the Old Testament on these systems.¹⁹⁷ History of law, with its constant developments, is intimately connected with the history of humanity.¹⁹⁸

¹⁹⁴ See *id.* at 65.

¹⁹⁵ Meron, *supra* note 6, at 361.

¹⁹⁶ CHAIM PERELMAN, JUSTICE 104 (V.C. Chappell ed., 1st ed. 1967).

¹⁹⁷ See ALAN WATSON, ANCIENT LAW AND MODERN UNDERSTANDING: AT THE EDGES 106 (1998) (noting that "[t]he theme of these essays is that a knowledge of law is important. And if knowledge of law is important, then so is knowledge of legal history, for law in large measure is shaped by its past"); see also OLIVER WENDELL HOLMES, THE COMMON LAW (1991); see Sir William Holdsworth, *The Place of English Legal History in the Education of English Lawyers*, in ESSAYS IN LAW AND HISTORY 20 (A.L. Goodhart, H.G. Hanbury eds., 1995) (noting that "legal history, if thus generally taught, will come to be recognized by the profession as the basis of a scientific knowledge of the law"); see REV. M. HYAMSON, MOSAICARUM ET ROMANARUM LEGUM COLLATIO (1913) (noting the basic source on the relationship between Roman and the Mosaic laws); see BOAZ COHEN, JEWISH AND ROMAN LAW: A COMPARATIVE STUDY IN TWO VOLUMES (1966) (offering a comparison of those two great systems).

¹⁹⁸ See WATSON, *supra* note 197 (noting that "[o]ne will not understand law and society from abstract philosophical studies unless they are founded on historical reality").

THE PEACE DESIDERATUM

Resolution 2334,¹⁹⁹ a long list of previous Security Council's and General Assembly's resolutions, various European initiatives including the Quartet Roadmap referred to by Resolution 2334, and innumerable initiatives of the U.S. government have all insisted on the need to work towards the attainment of peace between Israel and the Palestinians. Resolution 242 of 1967, the basic United Nations Security Resolution on the territories, recommends that "immediately and concurrently with the cease-fire, negotiations shall start between the parties . . . aimed at establishing a just and durable peace in the Middle East."²⁰⁰ Is peace between Israel and the Palestinians attainable?

ISRAEL'S PROCLAMATION

Israel's Declaration of Independence states the following:

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.²⁰¹

Further, the Declaration proclaims:

¹⁹⁹ S.C. Res. 2334, *supra* note 2.

²⁰⁰ S.C. Res. 242, ¶ 1 (Nov. 22, 1967).

²⁰¹ The Declaration of the Establishment of the State of Israel, Official Gazette, No. 1 of the 5th Iyar, 5708, May 14, 1948, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>.

WE APPEAL - in the very midst of the onslaught launched against us now for months - to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.

WE EXTEND our hand to all neighboring states and their peoples in an offer of peace and good neighborliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land. The State of Israel is prepared to do its share in a common effort for the advancement of the entire Middle East.²⁰²

PALESTINIAN PROCLAMATIONS

The Palestinian National Charter of 1968 includes the Resolutions of the Palestine National Council approved from July 1 to July 17 of that year,²⁰³ which contain extremely aggressive statements regarding the State of Israel.

Before referring to the aggressiveness, it is interesting to note the uncertainty of the way the Charter of 1968 presents its people. That comes out clearly in Article One, which states the following: "Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation."²⁰⁴ Article Four refers to "Palestinian identity," Article Seven refers to the "Palestinian community," and Article Nine refers to the "Palestinian Arab people."²⁰⁵ Article 15 goes back to "Arab nation" and refers to "Arab people of Palestine."²⁰⁶ Article 22 repeats "Arab nation."²⁰⁷ So, we have "Arab Palestinian people," "Palestinian people," "Palestinian Arab

²⁰² *Id.*

²⁰³ Palestinian National Charter: Resolutions of the Palestine National Council, July 1-17, 1968, http://avalon.law.yale.edu/20th_century/plocov.asp [hereinafter *Charter of 1968*].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

people,” “Arab nation,” “Palestinian identity,” “Palestinian community,” “Arab people of Palestine,” and regarding the land, we have “Arab homeland.” This uncertain self-identification stems from the fact that there is no such thing as Palestinian people. The majority of the Arabs that live in the West Bank are descendants from Armenia, Turkey, Syria, and various other Arab countries attracted by the Zionist pioneers that offered to pay for their work in the fields at the end of the 19th century if they came to the Holy Land. Later, Arabs encouraged by British authorities in the early 1900s migrated from neighboring Arab countries.²⁰⁸ The presence of the so called “Palestinian Arabs” in Palestine “from time immemorial” is therefore an absolute fiction.²⁰⁹

On March 3, 1977, the head of the Palestinian Liberation Organization Military Operations Department, Zuhair Muhsin, told the Netherlands daily paper *Trouw*:

There are no differences between Jordanians, Palestinians, Syrians and Lebanese . . . We are one people. Only for political reasons do we carefully underline our Palestinian identity. For it is of national interest for the Arabs to encourage the existence of the Palestinians against Zionism. Yes, the existence of a separate Palestinian identity is there only for tactical reasons. The establishment of a Palestinian state is a new expedient to continue the fight against Zionism and for Arab unity.²¹⁰

Romans named Palestine, which was invaded by different peoples of diverse religions; whereas Jews maintained their permanent connection to the land throughout all of history.²¹¹ In the time of the British Mandate, Jews, Christians, and Muslims were all known as Palestinians. As such, they carried identity cards and passports. In

²⁰⁸ JOAN PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE 29 (1984) (demonstrating that most Arabs arrived in the Land of Israel following the Jewish immigration waves that started in 1882).

²⁰⁹ *Id.* at 240–51.

²¹⁰ STONE, *supra* note 128, at 11.

²¹¹ See PETERS, *supra* note 208, at 139; see also GLICK, *supra* note 74, at 184–87.

sum, it is a total misrepresentation to intuit an exclusive connection of Arabs with Palestine.

The total lack of historic-geographic reality is present in Article Two of the Palestinian National Charter, which states the following: "Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit."²¹² During the British Mandate, England detached the larger part of Palestine to create what is known today as Jordan, which eliminated the pretended "indivisible unit."²¹³ The Charter also asserts a repetitious set of aggressive statements regarding Zionism and the Jewish State.²¹⁴ Article Four states the "Zionist occupation," Article Six states "Zionist invasion," and Article Eight states "the forces of Zionism and of imperialism."²¹⁵

Article 9:

Armed struggle is the only way to liberate Palestine. Thus, it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.²¹⁶

Article 15:

The liberation of Palestine from an Arab viewpoint, is a national duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine. Absolute responsibility for this falls upon the Arab nation—peoples and governments—with the Arab people of Palestine in the vanguard²¹⁷

²¹² See *Charter of 1968*, *supra* note 203.

²¹³ See GLICK, *supra* note 74, at 24.

²¹⁴ See *Charter of 1968*, *supra* note 203.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

Article 19:

The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations; particularly the right to self-determination.²¹⁸

Article 20:

The Balfour Declaration, the Mandate for Palestine, and everything that has been based upon them, are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens to the States to which they belong.²¹⁹

Article 21:

The Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine and reject all proposals aiming at the liquidation of the Palestinian problem, or its internationalization.²²⁰

Finally, Article 22 provided the characterization to the Jewish presence in the Holy Land:

Zionism is a political movement organically associated with international imperialism and antagonistic

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

to all action for liberation and to progressive movements in the world. It is racist and fanatic in its nature, aggressive, expansionist, and colonial in its aims, and fascist in its methods. Israel is the instrument of the Zionist movement and geographical base for world imperialism placed strategically in the midst of the Arab homeland to combat the hopes of the Arab nation for liberation, unity and progress. Israel is a constant source of threat vis-a-vis peace in the Middle East and the whole world²²¹

This is a very special document because it is unique in its absurdities and aggressiveness. The Palestinian National Charter of 1964 preceded this charter and proclaimed the following: "Palestine, with its boundaries at the time of the British Mandate, is a[n] indivisible territorial unit."²²² Articles 17 and 18 denounce and classify the Balfour Declaration, the "Palestine Mandate System," and all that has been based on them as "illegal, null and void."²²³ Finally, Article 19 denounces Zionism as a "colonialist movement in its goal, racist in its configurations and fascist in its means and aims, a permanent source of tension and turmoil in the Middle East in particular, and to the international community in general."²²⁴

In 1974, the Palestine Liberation Organization came out with another document, denominated "Ten Point Plan," confirming and reaffirming the points contained in the Charter of 1968.²²⁵ Some of the objectives of this Plan are the following:

Article 1:

To reaffirm the Palestine Liberation Organization's previous attitude to Resolution 242, which obliterates the national right of our people and deals with

²²¹ *Id.*

²²² *Palestine Liberation Organization: The Original Palestine National Charter*, JEWISH VIRTUAL LIBRARY (1964), <https://www.jewishvirtuallibrary.org/the-original-palestine-national-charter-1964>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Palestine Liberation Organization (PLO): Ten Point Plan*, JEWISH VIRTUAL LIBRARY (June 8, 1974), <https://www.jewishvirtuallibrary.org/ten-point-plan-of-the-plo-june-1974>.

the cause of our people as a problem of refugees. The Council therefore refuses to have anything to do with this resolution at any level, Arab or international, including the Geneva Conference.²²⁶

Article 2:

The Palestine Liberation Organization will employ all means, and first and foremost armed struggle, to liberate Palestinian territory and to establish the independent combatant national authority for the people over every part of Palestinian territory that is liberated. This will require further changes being effected in the balance of power in favor of our people and their struggle.²²⁷

Article 3:

The Liberation Organization will struggle against any proposal for a Palestinian entity the price of which is recognition, peace, secure frontiers, renunciation of national rights and the deprivation of our people of their right to return and their right to self-determination on the soil of their homeland.²²⁸

In 1957, Fatah, the military branch of the Palestinian organization, issued its founding document, which declares, among others, the following points:

Article 12: "Complete liberation of Palestine, and eradication of Zionist economic, political, military and cultural existence."²²⁹

Article 19: "Armed struggle is a strategy and not a tactic, and the Palestinian Arab People's armed revolution is a decisive factor in the liberation fight and in uprooting the Zionist existence, and this struggle will not cease unless the Zionist state is demolished and Palestine is completely liberated."²³⁰

²²⁶ *Id.* ¶ 1.

²²⁷ *Id.* ¶ 2.

²²⁸ *Id.* ¶ 3.

²²⁹ MICHAEL BRONING, POLITICAL PARTIES IN PALESTINE: LEADERSHIP AND THOUGHT 92 (2013) (citing Fatah CONST. art. 12).

²³⁰ *Id.* (citing Fatah CONST. art. 19).

Article 22: "Opposing any political solution offered as an alternative to demolishing the Zionist occupation in Palestine, as well as any project intended to liquidate the Palestinian case or impose any international mandate on its people."²³¹

Going back to the original Charter of 1968, it is interesting to quote Article 24 which states that "the Palestinian people believe in the principles of justice, freedom, sovereignty, self-determination, human dignity and the right of all peoples to exercise them."²³² Unfortunately, among the Palestinian Arabs as among most of the Arab peoples the following is a reality: (1) there is no justice as individuals suspected of treason are executed without any court of law judgment; (2) there is no freedom as media is totally controlled by the governing forces; and (3) there is no human dignity as women are dominated by men and by the local dictatorships, homosexuals are not allowed to live, and whole populations are submitted to the diktat of those who managed to get hold of power.

Then comes the vehement, fanatical, hateful "Covenant of the Islamic Resistance Movement" (Hamas Covenant) of August 18, 1988, pretending to represent authentic Muslim religious beliefs and principles, an eye-opener to the murderous, terrorist mentality which inspires this organization; Hamas is a close ally of the PLO, at least as far as the war against Israel is concerned.²³³

Here are some of the statements contained in the Introduction of the Hamas Covenant:

Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it Our struggle against the Jews is very great and very serious. It needs all sincere efforts. It is a step that inevitably should be followed by other steps. The Movement is but one squadron that should be supported by more and more squadrons from this

²³¹ *Id.* (citing Fatah CONST. art. 22).

²³² *Charter of 1968*, *supra* note 203, art. 24.

²³³ Covenant of the Islamic Resistance Movement art. 28, August 18, 1988, http://avalon.law.yale.edu/20th_century/hamas.asp [hereinafter *HAMAS Covenant*].

vast Arab and Islamic world, until the enemy is vanquished and Allah's victory is realised.²³⁴

In Article Two, the Covenant proclaims that its movement is "one of the wings of Moslem Brotherhood in Palestine."²³⁵ Article 7 includes the famous call against the Jews that proclaims, "The day of Judgment will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say: 'O Moslems, O Abdulla, there is a Jew behind me, come and kill him.'"²³⁶ Article 22 accuses the Jews of having been behind all important events of the last centuries, including the French Revolution, the Communist Revolution, the First World War, and the Second World War. "It was they who instigated the replacement of the League of Nations with the United Nations and the Security Council to enable them to rule the world through them. There is no war going on anywhere without having their finger in it."²³⁷

Article 28 is the best demonstration of how hate can blind:

The Zionist invasion is a vicious invasion. It does not refrain from resorting to all methods, using all evil and contemptible ways to achieve its end. It relies greatly in its infiltration and espionage operation on the secret organizations it gave rise to, such as the Freemasons, the Rotary and Lions clubs and other sabotage groups. All these organizations, whether secret or open, work in the interest of Zionism and according to its instructions. They aim at undermining societies, destroying values, corrupting consciences, deteriorating character and annihilating Islam. It is behind the drug trade and alcoholism in all its kinds so as to facilitate its control and expansion.²³⁸

²³⁴ *Palestine Liberation Organization (PLO): Ten Point Plan*, JEWISH VIRTUAL LIBRARY (June 8, 1974), <https://www.jewishvirtuallibrary.org/ten-point-plan-of-the-plo-june-1974>.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* art. 22.

²³⁸ *Id.* art. 28.

Article 28 closes with the following jewel: “We should not forget to remind every Moslem that when the Jews conquered the Holy City in 1967, they stood on the threshold of the Aqsa Mosque and proclaimed that ‘Mohammed is dead and his descendants are all women.’”²³⁹

Article 31 states that “The Zionist Nazi activities against our people will not last for long.”²⁴⁰

Hamas’ opposition to any peace agreement with Israel materializes in Article 32, which condemns the peace agreement achieved between Israel and Egypt and declares:

World Zionism together with imperialistic powers try through a studied plan and an intelligent strategy to remove one Arab state after another from the circle of struggle against Zionism, in order to have it finally face the Palestinian people only. Egypt was, to a great extent, removed from the circle of the struggle, through the treacherous Camp David Agreement. They are trying to draw other Arab countries into similar agreements and to bring them outside the circle of struggle.²⁴¹

Under the title of “The Testimony of History,” the Charter of Hamas goes back to the war between the Crusaders and the Muslims and the liberation of Palestine, which came after a twenty-year-war against the Christians.²⁴²

To know the truth about the PLO, Fatah, and Hamas, to know of their intentions, desiderata, policies, and to estimate the possibility of any kind of peace agreement with Israel, one has to read their Charters, which are full of hate, venom, and clearly determined to

²³⁹ *HAMAS Covenant*, *supra* note 233. However, when the Israeli Army entered the Old City of Jerusalem, the Defense Minister Moshe Dayan handed the control of the Aqsa Mosque and the whole plateau where it is located to the Muslim religious authorities, a deed which has been criticized considering the difficulties that the Jews are having since then to enter the location which is holy to them for many more centuries than for the Muslims. *Id.*

²⁴⁰ *Id.* art. 31.

²⁴¹ *Id.* art. 32.

²⁴² *Id.* art. 34.

the destruction of the state of Israel. These Charters recall the succession of terrorist acts they have committed throughout seventy years since the proclamation of the Jewish State, and the financial prizes that the terrorists and their families receive from the Palestinian establishment.²⁴³ To be convinced of the Palestinian maintenance of their warring spirit, one should listen to the speeches of their leaders Arafat and Abu Mazen, especially those made in Arab and directed to their people.

What is important for the analysis of the conflict and to estimate the possibility of attaining peace—as the Security Council insists in all its Resolutions—is that, Israel accepted Resolution 181 of the UN General Assembly,²⁴⁴ which decided upon the partition between Jews and Arabs of what was left of Palestine and for each to create its own state, and Israel also accepted Resolution 242 of the Security Council, which decided on devolution of territories conditioned to the establishment of peace between the warring sides.²⁴⁵ On the other hand, the Palestinian Arabs have declared the illegality of all documents, starting from the Balfour Declaration through Resolution 181 and Resolution 242.²⁴⁶

As already noted before, considering the Arabs' refusal to accept Resolution 181,²⁴⁷ the resolution became invalid. The Jewish right to its state goes back to article 80 of the UN Charter and, before that, to all international legal acts that preceded it, from the Balfour Dec-

²⁴³ *HAMAS Covenant*, *supra* note 233; *Charter of 1968*, *supra* note 203; *see BRONING*, *supra* note 229 (citing Fatah CONST.).

²⁴⁴ G.A. Res. 181 (II) A, Future Government of Palestine (Nov. 29, 1947).

²⁴⁵ S.C. Res. 242, *supra* note 10, ¶ 1 (establishing the principle of Israel armed forces' withdrawal from territories occupied in the conflict and "termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force").

²⁴⁶ *See* Eric Black, *Resolution 242 and the Aftermath of 1967*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/oslo/parallel/8.html> (last visited Oct. 13, 2018) ("For all of these shortcomings, the PLO rejected Resolution 242 for 20 years.").

²⁴⁷ *Id.*

laration to the creation by the League of Nations of the British Mandate for Palestine;²⁴⁸ that right covers the whole territory from the Mediterranean Sea to the Jordan River.²⁴⁹

Eugen Rostov put it very emphatically when he asked “how can the (Geneva) Convention be deemed to apply to Jews who do have a right to settle in the territories under international law? – a legal right assured by treaty and specifically protected by Article 80 of the United Nations Charter, generally known as the ‘the Palestinian article.’”²⁵⁰

The Arab Palestinians have been coherent and consistent throughout the long conflict because they do not recognize the right of Jews to any part of the Holy Land and consider the Zionist movement which created the state of Israel imperialist and fascist, and as they vow to destroy the “Zionist entity,” they must declare the “illegality” of the Balfour Declaration and the UN resolutions, beginning with the Partition Plan of 1947²⁵¹ and proceeding with the refusal to accept Resolution 242 which resulted from the Six Day War of 1967.²⁵²

Based on this review of the Palestinian’s official positions, it is easier to understand why all trials to attain peace have failed. The historic consensus is that, whereas in all the meetings, starting from Madrid in 1991,²⁵³ Israeli’s Prime Minister Rabin’s offer in 1993,²⁵⁴ his successor Ehud Barak’s propositions in Camp David in 2000²⁵⁵

²⁴⁸ *Palestine Mandate*, *supra* note 133, at 81.

²⁴⁹ *Id.*

²⁵⁰ Rostov, *supra* note 50, at 719–20.

²⁵¹ Moshe Ma’oz, *The UN Partition Resolution of 1947: Why Was it Not Implemented?* 9(4) PALESTINE-ISRAEL J. OF POL., ECON., & CULTURE 15, 15 (2002) (“While the Jewish community accepted the 1937 and 1947 partition plans, the Palestinian Arab leadership, dominated by the Husseini family, rejected both plans categorically.”).

²⁵² S.C. Res. 242, *supra* note 10, ¶ 1; Black, *supra* note 246.

²⁵³ *The Madrid Conference, 1991*, U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1989-1992/madrid-conference> (last visited Oct. 13, 2018) (explaining that it “failed to yield results”).

²⁵⁴ *The Oslo Accords and the Arab-Israeli Peace Process*, U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/oslo> (last visited Oct. 13, 2018).

²⁵⁵ Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, The N.Y. Rev. of Books, Aug. 9, 2001, <https://www.nybooks.com/arti>

and in Taba in 2001,²⁵⁶ Prime Minister Ariel Sharon's meeting with Abbas in Aqaba,²⁵⁷ the retreat of Israel from Gaza in 2005,²⁵⁸ and Prime Minister Olmert's peace offer to Abbas in Annapolis,²⁵⁹ Israel was ready with offers containing serious wide-ranging concessions, but the Palestinian Arabs systematically rejected them, never offering any counteroffers and never ready for any concessions.

In his autobiography, Bill Clinton tells how four days before he left office—six months after the Camp David meeting between Israeli prime minister Barak and PLO leader Arafat, under the U.S. President's chairmanship—he made a last trial to achieve a peace agreement, presenting to Israel and to the Palestinians what he called “parameters” which were all in favor of the Palestinians, even handing them the Temple Mount—the holiest site for the Jewish people—besides conceding all their other demands. He reports how Israel accepted the “parameters” and the Palestinians refused to agree.²⁶⁰

In the last decade of the 20th century, the Palestinians proclaimed that they had adopted decisions to abrogate those provision of the PLO Charter that contradict the correspondence exchanged between Yasser Arafat and Israel's Prime Minister Yitzhak Rabin,

cles/2001/08/09/camp-david-the-tragedy-of-errors/ (“In accounts of what happened at the July 2000 Camp David summit and the following months of Israeli-Palestinian negotiations, we often hear about Ehud Barak's unprecedented offer and Yasser Arafat's uncompromising no.”).

²⁵⁶ *Id.*

²⁵⁷ *The Middle East Peace Summit at Aqaba*, ISRAEL MINISTRY OF FOREIGN AFF., June 4, 2003, <http://www.mfa.gov.il/mfa/aboutisrael/history/pages/the%20middle%20east%20peace%20summit%20at%20aqaba%20-%20june%204-%202020.aspx>.

²⁵⁸ Steven Erlanger, *Tearfully but Forcefully, Israel Removes Gaza Settlers*, N.Y. TIMES (Aug. 18, 2005), <https://www.nytimes.com/2005/08/18/world/middleeast/tearfully-but-forcefully-israel-removes-gaza-settlers.html>.

²⁵⁹ Josef Federman, *Abbas Admits He Rejected 2008 Peace Offer From Olmert*, THE TIMES OF ISRAEL (Nov. 19, 2015, 3:46AM), <https://www.timesofisrael.com/abbas-admits-he-rejected-2008-peace-offer-from-olmert/>.

²⁶⁰ GLICK, *supra* note 74, at 20–21 (citing BILL CLINTON, MY LIFE 865–69 (2005)).

but no new Charter was ever drawn.²⁶¹ In the early years of the 21st century, various Palestinian leaders came out with clear statements that their Charter continues in effect.²⁶²

At the 6th Conference of the PLO in 2009, President Abu Mazen (known as Abbas) declared that the PLO Charter of 1968 constitutes part of the identity of the Palestine Liberation Organization and formed the basis of the organization's political program,²⁶³ and as recently as 2013, on the occasion of the 49th anniversary of the founding of the PLO, he made clear that the original goal of the movement—the destruction of Israel—remains the goal of the movement.²⁶⁴ Glick adds that in a post on Abbas' official Facebook page from October 11, 2012, Abbas referred to all of Israel as occupied Palestine, making clear that he rejected Israel's right to exist within any borders.²⁶⁵

While negotiations were going on, the education of the Palestinian children in school and the indoctrination of the Palestinian population in their mosques and on their television proceeded with its continuous, perverse incitement against Israel, which is in the exact spirit of their official documents. How could a Palestinian leader reach a peace accord in contradiction with their Charters and against the understanding and the feelings prevailing in his people as a consequence of the education that the same leader has ordered? The example of the Egyptian President Anwar Sadat who signed the peace treaty with Israel and was murdered by the Muslim Brotherhood remains an unforgettable lesson for any future Palestinian leader that might adopt a different approach.²⁶⁶

²⁶¹ Khaled Abu Toameh, *Kaddoumi: PLO Charter Was Never Changed*, JERUSALEM POST, Apr. 22, 2004, <http://www.freerepublic.com/focus/f-news/1122629/posts>.

²⁶² See *Charter of 1968*, *supra* note 203.

²⁶³ Einhorn, *supra* note 132, § 4.2.

²⁶⁴ GLICK, *supra* note 74, at 248–49 (quoting Evelyn Gordon, *Abas PLO Charter Reflects What Palestinians Want*, COMMENTARY (June 3, 2013), <https://www.commentarymagazine.com/foreign-policy/middle-east/israel/abbas-plo-charter-reflects-what-palestinians-want/>).

²⁶⁵ *Id.* at 73.

²⁶⁶ KENNETH W. STEIN, HEROIC DIPLOMACY: SADAT, KISSINGER, CARTER, BEGIN, AND THE QUEST FOR ARAB-ISRAELI PEACE xi (1999) (“Along the way, he put his political and personal life on the line and was assassinated in October 1981.

That the UN organs continue insisting on peace is understandable; it is a simple manifestation of the hypocrisy that rules the world organization, a hostage of the Muslim-Asian-African conglomerate. What is not comprehensible is that an experienced legal scholar as Theodor Meron adheres to such a phantasy when he writes that Israel's "disrespect of an international convention would have such a direct impact on the elimination of any realistic prospects for reconciliation, not to mention peace."²⁶⁷

One cannot take the UN Resolutions seriously after blaming Israel for its occupation of the West Bank, condemning it as an illegal occupier. It is obvious that the occupation is not illegal because it happened in a defensive war and its permanence is equally so because the Security Council—in Resolution 242—conditioned the return of occupied territories (not all occupied territories) to the attainment of peace.²⁶⁸

RESOLUTION 2334 VERSUS RESOLUTION 242

Resolution 242, which followed the Six Day War and to which all further Security Resolutions allude, did not even refer to the establishment of a Palestinian state besides the one already in existence on the East Bank of the Jordan river, the state of Jordan.²⁶⁹ Resolution 242 states that the fulfillment of United Nations Charter principles requires the establishment of a just and lasting peace in the Middle East which includes the following:

[W]ithdrawal of Israel armed forces from territories (not all territories) occupied in the recent conflict, termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of

For a decade, Sadat's accommodation with Israel had made Egypt a pariah among Arab states.").

²⁶⁷ Meron, *supra* note 6, at 360.

²⁶⁸ S.C. Res. 242, *supra* note 10, ¶ 1.

²⁶⁹ *Id.*; see also GLICK, *supra* note 74, at 61 (discussing how when the 1967 war ended, the Palestinians were so marginal that they were not even mentioned in UN Security Council Resolution 242 and that this Resolution, which notes that all states in the region had the "right to live in peace within secure and recognized boundaries," assumed that Israel could not return to the 1949 armistice lines).

every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.²⁷⁰

When Resolution 2334 classifies Israel's presence in the territories as illegal, it blatantly contradicts Resolution 242 which did not demand the withdrawal of all territories and did not even refer expressly to the territories in Palestine (the withdrawal could refer exclusively to the presence of Israeli troops in Egyptian and Syrian territories) and conditioned these withdrawals to the attainment of just and lasting peace.²⁷¹

As Joseph Spoerl wrote:

It is highly significant that Resolution 2334 begins with an explicit re-affirmation of Resolution 242. In doing so, it imposes a (historically false) reinterpretation on the text of Resolution 242. According to this inaccurate reinterpretation, Resolution 242 calls for Israel to withdraw from all the territories occupied in 1967 and presupposes the sacrosanctity of the 1949 armistice lines as if they were the agreed-upon international frontiers between Israel and her neighbors.²⁷²

A strong position was enunciated by Eugene V. Rostov when he wrote that "the Israeli occupation of those areas is not only sanctioned, but in effect directed, by the international agreements embodied in Security Council Resolutions 242 and 338"²⁷³ "These two resolutions," Rostov explains, "constitute a legally binding 'decision' that the Israeli occupation should continue until Israel and the Arab states of the region establish 'a just and lasting peace in the Middle East.'"²⁷⁴

²⁷⁰ S.C. Res. 242, *supra* note 10, ¶ 1.

²⁷¹ *Id.*

²⁷² Joseph S. Spoerl, *Understanding Resolution 2334: Did the Obama Administration Betray Israel at the UN?*, JERUSALEM CTR. FOR PUB. AFF. (Mar. 14, 2017), <http://jcpa.org/article/understanding-resolution-2334-obama-administration-betray-israel-un/>.

²⁷³ Rostov, *supra* note 50, at 717.

²⁷⁴ *Id.*

It is indeed striking how Resolution 2334, though opening with the reiteration of Resolution 242 (and all the other Resolutions of the Security Council), flagrantly contradicts that first and basic resolution and the successive agreements between the parties.²⁷⁵ As Ambassador Alan Baker writes:

Obama and Kerry are running counter to the 1967 Security Council resolution 242, which is the basis for all of the Arab-Israeli peace process which calls for negotiation of ‘secure and recognized boundaries’. The Israeli-Palestinian Oslo Accords make no specific reference to the 1967 lines. As such this reference would appear to be an attempt to prejudge or unduly influence the negotiating issue of borders.²⁷⁶

Baker adds:

this position taken by the United States (as well as the other members of the Security Council) also undermines the basic obligation of the Oslo Accords, signed by the PLO and witnessed by the United States (as well as the EU, Russia, Egypt and others) that the permanent status of the territories, the issues of Jerusalem, and borders are to be negotiated.

Gorali quotes Baker, stating that “after we signed those accords, we are no longer an occupying power, but we are instead present in the territories with their consent and subject to the outcome of negotiations.”²⁷⁷

Another severe critique on Resolution 2334 was authored by Colin Rubinstein who sustains that:

[I]t has made peacemaking between Israel and the Palestinians immeasurably more difficult by empowering the Palestinian strategy of refusing to negotiate with Israel and “internationalising” the conflict – that

²⁷⁵ S.C. Res. 2334, *supra* note 2.

²⁷⁶ Alan Baker, *The Dangers of UN Security Council Resolution 2334 (2016)*, JERUSALEM CTR. FOR PUB. AFF. (Dec. 26, 2016), <http://jcpa.org/dangers-un-security-council-resolution-2334-2016/>.

²⁷⁷ Gorali, *supra* note 176; *see also* S.C. Res. 242, *supra* note 10, ¶ 1.

is, bypassing negotiating entirely and leveraging international pressure to achieve Palestinian nationalistic and territorial objectives on their behalf and without having to accept Israel as a Jewish state, make genuine concessions or end the conflict.²⁷⁸

And then he quotes another statement of Alan Baker: “Why would the Palestinians want to negotiate with Israel on these things if they’ve got a Security Council resolution that basically determines that east Jerusalem and all the territories belong to them?”²⁷⁹

Also, the following is a very important observation contained in the same analysis of the resolution:

It fails to distinguish between settlement blocs near Jerusalem and Tel Aviv – where most Israeli settlers live and all serious observers concede will remain part of Israel under any conceivable two state outcome – and isolated outposts Even worse, it includes Jewish neighbourhoods in Jerusalem, home to hundreds of thousands of people and, absurdly, even the Jewish Quarter of the Old City and the Western Wall of the biblical Jewish temple, to be ‘Palestinian territory occupied since 1967.’ In short the language of Resolution 2334 is a major setback for peace because it erases hard-earned compromises on a number of issues made in previous rounds of negotiations.²⁸⁰

The basic point of 242 was the obligation that “Israel withdraws its armed forces from territories occupied in the recent conflict.” All interpretations coincide that the withdrawal would be from “territories” but not from “the territories.”²⁸¹ There is unanimity among

²⁷⁸ Colin Rubinstein, *Two-state outcome damaged by United Nations Security Council Resolution 2334 on Israel-Palestine*, THE SYDNEY MORNING HERALD (Jan. 2, 2017, 6:59 PM), <http://www.smh.com.au/comment/twostate-outcome-damaged-by-united-nations-security-council-resolution-2334-on-israel-palestine-20170102-gtkm47>.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 96 (2004); see also Gold, *supra* note 89, at 173–74.

scholars and historians, as well as among the diplomats that participated in the negotiations for the drafting of the 1967 resolution that Israel's armed forces would not have to withdraw from all territories occupied by its army. One of the basic points of 242 is that the withdrawal of Israel's armed forces would occur as per an agreement to be made as stated in paragraph 3 of the Resolution.²⁸²

A simple reading of the Resolution leads to the understanding that the withdrawal established in article 1 (i) is connected and depends of the materialization of article 1 (ii) – termination of all claims or states of belligerency and respect and acknowledgment of the right of every State in the area to live in peace within secure and recognized boundaries free from threats of acts of force.²⁸³

Moreover, the withdrawal referred to in the 1967 Resolution is of “armed forces” which does not affect settlements where civilians live and work.²⁸⁴

As the Arabs in the so called “territories” have not given Israel a moment of peace with their continuous murderous terrorist attacks, in frontal disrespect of letter (ii) and maintain the criminal intent of destroying the Jewish State as established in their charters, the withdrawal of Israeli armed forces from territories occupied in the conflict equally does not apply.²⁸⁵

In sum there is no obligation for Israel to withdraw armed forces and or civilian settlements from the area.

A NEW PALESTINIAN STATE

The UN Resolutions and the Quartet Roadmap all insist that their main objective is the establishment of peace. Well, as Talia Einhorn stresses, “the dangers threatening Israel from the establishment of a Palestinian state on land to the west of the Jordan River should deter anyone, desiring and seeking a true peace, from supporting such a ‘solution’ to the Arab-Israel dispute, before the conditions to peaceful co-existence are met”²⁸⁶

²⁸² S.C. Res. 242, *supra* note 10, ¶ 3.

²⁸³ *Id.* ¶ 1.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Einhorn, *supra* note 132, at 3.

Since its establishment, Israel has met not peace but violence of the worst kind. As the same scholar writes:

[T]he establishment of the Palestinian Authority should serve as a guide to the grave risks posed by such an Arab state, which may eventually lead to the destruction of the Jewish state The preconditions for a true peace require the Palestinians to lay down their arms and renounce terror and violence; to draft a new charter to replace the Palestinian National Charter of 1968, to recognize Israel as the state of the Jewish people and put an end to incitement against it and to anti-Jewish hate propaganda Palestinians must be ready for true peace and mutual respect in speech and deed. As long as these conditions are not fulfilled, the coming into effect of any agreement should be suspended on grounds of *ordre public international*.²⁸⁷

The basic problem is the Palestinian's rejection of the Jewish people's national rights as they are not willing to accept that Israel is the state of the Jewish people. This has been their consistent view and policy throughout the whole conflict. That explains their recent initiative to demand from the English government a retraction of the 1917 Balfour Declaration.²⁸⁸ Without a total change of attitude, there is no possibility of peace.

After such fundamental changes are implemented in the Palestinian mind and in their system, at least 20 years would have to go by, until a new generation, with a new mentality regarding Israel and the Jews in general would come up, ready to concede and to make peace.

²⁸⁷ *Id.* at 4.

²⁸⁸ Alan D. Abbey & Benjamin Emmerich, *Balfour Declaration: A Century Old and as Disputed as Ever*, THE TIMES OF ISRAEL (Nov. 1, 2017, 2:46 PM), <https://www.timesofisrael.com/the-balfour-declaration-a-century-old-and-as-disputed-as-ever/>.

CONCLUSIONS

Israel's presence in the territories is in compliance with the international documents that established the right of the Jewish people over this territory. The concession made by the Jews to the Palestinians by accepting Resolution 181 of the UN General Assembly in 1947 expired due to the Arabs' refusal, which turned the legal status of the territory back to the Jewish people and consequently to the State of Israel.

Resolution 242, on which Resolution 2334 pretends to base itself, does not refer to "Palestinian territory," nor to "1967 lines," both of which constitute innovations of the more recent resolution and are without any factual support and are devoid of any legal basis.

Even for those who divorce law from history, Israel is still not an occupying power in the sense of the Geneva Convention as its presence in the territories derived from a defensive war into which she was forced by the attacking Arab armies. So, even if we were not to accept that the territories belong exclusively to the Jewish State, the belligerent attitude of the Palestinians demands that Israel and the settlements continue in the territories as a defense against terrorist attacks.

The application of the Fourth Geneva Convention to the situation in the territories has become a non-issue since 1995 (Oslo Accords) when the government of the territories was transferred to the PLO. Moreover, the Convention establishes various exceptions to its basic principle of protection of inhabitants of occupied territories whenever a matter of security is involved.²⁸⁹

The International Court of Justice Advisory Opinion has no legal basis, and it is a worthless document totally divorced from the historical facts recognized by historians and legal scholars and without any reference to legal sources as demanded in its statute.

The Palestinians' standards of living improved considerably as long as they were under the administration of Israel, which committed no violation of humanitarian law. Regarding "demolition of homes and displacement of Palestinian civilians" referred to in the

²⁸⁹ *Id.* The security exceptions are established in articles 5 and 27.

Preamble of the Resolution,²⁹⁰ any confiscation of Palestinian property was duly compensated, as well described by the Israeli Supreme Court in one of its important judgment connected to the erection of the protective fence as reported above.²⁹¹ The suffering of the Palestinian people derives from the treatment they receive from the leadership of their organizations, especially since 1995 when Israel transferred to them the administration of the territories.

A “two-State solution” is only possible when there is such a will in both parties. The Charters of all Palestinian organizations are clear about their refusal to accept the State of Israel, declaring the intention of destroying it. Throughout all the years of the “occupation,” the leaders of the Palestinians have coherently maintained the aims of their Charters. A promise to change the main Charter has never been accomplished. So there is no possibility of a “two-State solution.”

The vision of the Security Council of “two democratic states living side by side in peace”²⁹² is a ludicrous dream. Is there a Palestinian democratic state or any plan to create one? To what Palestinian organization does the Security Council address this illusion—to the Palestinian Liberation Organization (PLO) or to Hamas? Does the Security Council not know that after Yasir Arafat’s dictatorship, his heir Abu Mazen (Abbas) proceeds in the same path? Does the Security Council not realize the lack of democratic life amongst the Palestinians—the wide-ranging violations of basic human rights under which they live?

And how does the Security Council foresee Palestine and Israel “living side by side in peace”²⁹³ and establishing the two-State solution? Do the Palestinians wish to live in peace with Israel? What about the incitement in their schools, mosques and the press against Israel, against the Jews, and against peace? The Resolution’s condemnation of “all acts of violence against civilians, acts of terror, provocation, incitement and destruction”²⁹⁴ should have been addressed exclusively to the Palestinian organizations, to their school

²⁹⁰ S.C. Res. 2334, *supra* note 2, pmbl.

²⁹¹ *See supra* notes 76–77.

²⁹² S.C. Res. 2334, *supra* note 2, pmbl.

²⁹³ *Id.*

²⁹⁴ *Id.* ¶ 6.

system, religious and cultural propaganda viewing terror and destruction, and to their patronizing the terrorists whom they “compensate” for their criminal actions by showering them and the families of dead terrorists (whom they treat as “martyrs”) with ultra-generous monthly subsidies and by honoring their memories.

The Security Council became a loyal serf of the radical Islamic states and submissive to the systematic falsities and lies of the Palestinians, which are supported by a large and democratic group of states that, for one reason or another, accept blindly a false narrative and remain hostages to legal terrorism.

The Security Council does not invoke one source, one authority, one scholarly work to base its repetitive claim that settlements constitute a “flagrant violation under international law.”²⁹⁵ The contrary is true; all the great authorities of public international law not only recognized the validity of Israel’s military defense in the Six-Day War, but accepted Israel’s permanence in the territories. Between a military occupation and the settlements, the second option is the pacific one. The Security Council does not explain why the presence of Israeli settlers is an obstacle to peace and to a “two-state solution.” A million and a half Palestinians live in Israel, earn a reasonable living, and have all civil and political rights. So, why cannot half a million Israelis live in the Palestinian “democratic state” that the UN fools itself about?

The reference to “4 June 1967 lines”²⁹⁶ is a total absurdity as there were never such lines. The Security Council accepts any falsity that is put in front of it by the Palestinian and or the Arab states. Moreover, Resolution 242 calls for the negotiation of “secure and recognized boundaries” and the Israeli-Palestinian Oslo Accords make no specific reference to the 1967 lines. As such, this reference would appear to be an attempt to prejudge or unduly influence the negotiating issue. When the Security Council “calls upon all States . . . to distinguish, in their dealings, between the territory of the State of Israel and the territories occupied since 1967,”²⁹⁷ it is expressing a clear support of the BDS campaign, a manifest call for boycotting. The Arab leadership does not care for the well-being of

²⁹⁵ *Id.* ¶ 1.

²⁹⁶ *Id.* ¶ 3.

²⁹⁷ S.C. Res. 2334, *supra* note 2, ¶ 5.

its people which improves with the presence of Israeli enterprises in the territories. The Security Council follows the Palestinians' policies as it does not mind to harm them, provided it can follow the demonization of the State of Israel.

The Security Council refrains from naming who are the practitioners of acts of violence against civilians—including the terrorists, the organizers and executors of the Intifadas, the inciters, the provocateurs, the cruel leaders of the PLO, of Fatah, of Hamas, and the brothers of the Muslim Brotherhood—that have conducted attacks of all sorts against the Israeli population, that have killed children in kindergartens and civilian passengers in buses, that invaded homes and murdered whole families, and stormed into synagogues and killed people during their prayers. These practitioners have committed thousands of terrorist acts that have resulted in thousands of deaths and many thousands of incapacitated civilians. Regarding this atrocious campaign, the Security Council is numb.²⁹⁸

And so, Resolution 2234 will go down in the history of the UN as one of the most absurd, illegal, unfair, and unjust acts of the world organization, prisoner of the Muslim-Arab-African-Asian conglomerate that has succeeded in bringing many democratic states to their knees.

The UN started its illegal and invalid persecution of the State of Israel with the General Assembly's Resolution 2253 of July 4, 1967, which stated the following:

“The General Assembly

²⁹⁸ See Kristina Daugirdas & Julian D. Mortenson, *United States Abstains on Security Council Resolution Criticizing Israeli Settlements*, 111(2) AM. J. INT'L L. 476, 476 (2017). Samantha Power, the U.S. delegate to the UN explained that her country could not veto Resolution 2334 as it had done with former resolutions because this one “condemns violence, terrorism and incitement, which also pose grave risks to the two-State solution.” *Id.* The same “justification” for not vetoing the Resolution was given by Secretary of State John Kerry; however, this part of the Resolution deserved as much, if not more rejection because it hides the fact that violence, terrorism, and incitement has been the *modus operandi* of the Palestinians exclusively, whereas the Resolution was drafted and approved as if both sides were equally condemned for these atrocities. *Id.* at 478-81.

Deeply concerned at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City,

1. Considers that these measures are invalid;
2. Calls upon Israel to rescind all measures already taken and to desist forthwith from taking action which would alter the status of Jerusalem.”²⁹⁹

The Jordanian government was the one that changed the status of Jerusalem with its occupation of the Old City, violating Resolution 181 that had established an international regime for the city. On this prejudiced approach, I have written the following:

When the events are contrary to the interests of Israel, when the Arabs disrespect rules established by the UN, no measures are taken, no resolutions are approved regarding their violations. But when Israel defends its security and its interests, a shower of resolutions rains down from the United Nations, proclaiming the illegality of the new situation created by the Jewish State. This is political terrorism.³⁰⁰

²⁹⁹ G.A. Res. 2253 (ES-V) A, Measures Taken by Israel to Change the Status of the City of Jerusalem (July 4, 1967).

³⁰⁰ JACOB DOLINGER, *THE CASE FOR CLOSING THE UNITED NATIONS: INTERNATIONAL HUMAN RIGHTS – A STUDY IN HYPOCRISY* 352 (2016).