MENDING THE “FENCE”: HOW TREATMENT OF THE ISRAELI-PALESTINIAN CONFLICT BY THE INTERNATIONAL COURT OF JUSTICE AT THE HAGUE HAS REDEFINED THE DOCTRINE OF SELF-DEFENSE

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“The problem [of Palestine] is mainly one of human relationship and political rights. Few countries have been the subject of so many general or detailed enquires . . . .”

I. Introduction

While the United States has not been wholly immune from terrorism in recent decades, the tragedy of September 11, 2001 awakened the American conscience to the harsh reality that a new war between the

forces of democracy and fundamentalism had spread to American soil.\footnote{September 11 was a “nightmare scenario . . . [that] even the experts had not imagined.” Dan Balz, Bush Confronts a Nightmare Scenario: Crisis Looms as Defining Test of President’s Leadership, WASH. POST, Sept. 12, 2001, at A2. Congress and the White House, “[s]tunned by the magnitude of [the] terrorist attacks[,] . . . reassess[ed] an approach to fighting terrorism that until this week has favored the tools of law enforcement over those of war.” John Lancaster & Susan Schmidt, U.S. Rethinks Strategy for Coping With Terrorists: Policy Shift Would Favor Military Action, Tribunal over Pursuing Suspects Through American Courts, WASH. POST, Sept. 14, 2001, at A9.} September 11 was an attack against Americans not unlike the Palestinian suicide bombings of Israeli civilians.\footnote{On September 12, one journalist wrote, “Do you get it now? . . . [Y]ou can’t avoid the question when . . . you have seen the human wreckage [in Israel] caused by the suicide bombs that go off with sickening frequency. You ask it because Jerusalem offers a glimpse of what New York may become.” Clyde Haberman, When the Unimaginable Happens, and It’s Right Outside Your Window, N.Y. TIMES, Sept. 12, 2001, at A10. Haberman added, “[F]ear . . . grips Israelis . . . as the ambulances keep coming, they reach for cell phones . . . to make sure that loved ones are all right. Often, they cannot get through because so many people are phoning at the same time . . . . All of that happened in New York yesterday.” Id.} The United States response to terrorism has, in many ways, emulated Israel’s attempts to protect its citizens from acts of violence.\footnote{Perhaps the most significant repudiation of Israel’s right to defend itself against Palestinian terror was articulated by the International Court of Justice at the Hague (Hague Court) on July 9, 2004.} The overwhelming response to Israel’s efforts, however, remains highly critical.\footnote{The Israeli Supreme Court stated that Palestinian terrorism “embod[i]es all the characteristics of armed conflict.” H.C. 2056/04, Beit Sourik Vill. Council v. Gov’t of Israel, at *3, available at http://62.90.71.124/eng/verdict/framesetSrch.html. President George W. Bush declared that the September 11 attack and previous attacks “created a state of armed conflict.” Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).} Perhaps the most significant repudiation of Israel’s right to defend itself against Palestinian terror was articulated by the International Court of Justice at the Hague (Hague Court) on July 9, 2004.\footnote{Despite condemnation of Israel’s attempts to ensure its security, “[t]he world was quick to welcome [American] strikes on Afghanistan . . . . [T]here were few dissenting voices . . . .” How the World Sees It: Global Support as the War on Terror Begins, DAILY REC. (Scotland), Oct. 8, 2001, at 12. The U.N. General Assembly “[a]rgently call[ed] for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September 2001.” U.N. GAOR, 56th Sess., Agenda Item 8, at 1, U.N. Doc. A/56/L.1 (2001). The Security Council expressed its “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism.” S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368(2001) (2001); see also John D. Becker, The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter’s Limitations on the Use of Force, 32 DENV. J. INT’L L. & POL’Y 583, 583 (2004) (noting “lack of support” for American use of force based upon the customary international law of self-defense and Article 51 in the U.N. Charter). Israel’s justification of self-defense under Article 51 of the U.N. Charter, however, was rejected by the International Court of Justice (Hague Court). See infra Part V.D.} Perhaps the most significant repudiation of Israel’s right to defend itself against Palestinian terror was articulated by the International Court of Justice at the Hague (Hague Court) on July 9, 2004.\footnote{See infra Parts IV.D, V, VI. The day the Hague Court issued its advisory opinion has been described as “a dark day in the history of international law.” 150 CONG. REC. H5465 (daily ed. July 9, 2004) (statement of Rep. Pence).}
This Note assesses the legality of Israel’s construction of a security structure as part of its counterterrorism initiative. To discuss the Israeli security structure in context, Part II provides a history of the Intifada and Israel’s recent campaign to defend itself from acts of terror against its citizens. Part III traces the history of the Israeli-Palestinian conflict beginning in the early twentieth century, the development of the two-state solution in Palestine, and the Arab-Israeli wars that reflected and defined the region’s volatile dynamic. Part IV explores the relationship between Israel and the United Nations (U.N.). Part V evaluates the Hague Court’s interpretation of international law principles relative to both the Israeli-Palestinian conflict and Israel’s counterterrorism initiative. Lastly, Part VI assesses the ramifications of the Hague Court’s advisory opinion with respect to the law of self-defense and the corpus of international law.

II. PALESTINIAN TERRORISM IN ISRAEL AND ISRAEL’S COUNTERTERRORISM INITIATIVE

Prior to 1988, both Palestinians and Israelis engaged in armed struggle that often resulted in “open warfare.” The National Covenant proclaiming the founding of the Palestine Liberation Organization (PLO) denounced Zionism as colonialism and advocated the destruction of Israel. At the conclusion of the 1967 Six-Day War, the PLO emerged

8. See infra note 48 and accompanying text.
9. The conflict has produced a rich oeuvre of scholarship and literature advancing both perspectives. “Approaches to the Palestine question have varied in accordance with the beliefs and ideologies of [those who] have sought to engage in and resolve it.” ABD AL-FATTAH MUHAMMAD EL-AWAISI, THE MUSLIM BROTHERS AND THE PALESTINE QUESTION 1928-1947 1 (1998). This Note does not attempt to advance one particular historical interpretation.
12. ANDREW S. BUCHANAN, PEACE WITH JUSTICE: A HISTORY OF THE ISRAELI-PALESTINIAN DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS § 1.2, at 3 (2000). The author characterized the nature of the conflict as “inter-ethnic” and “existential”: “The Israeli-Palestinian conflict, until 1988, . . . failed to attain . . . the destruction of the other side’s claim to legitimacy and to exist as a sovereign entity in the land of Israel/Palestine.” Id.
14. See infra notes 75-76 and accompanying text.
15. First Arab Palestine Cong., The Palestinian National Covenant (1964), in 1 PALESTINE:
as the leader of an independent Palestinian liberation movement. When Palestinians mounted protests against Israel beginning in 1987, the PLO “hurried to take charge . . . and turn it into a PLO-directed civil resistance movement.”

A. Palestinian Movements of Self-Determination, 1987-Present

While previous declarations recognized the Palestinian people, Palestinian national identity was defined in the Palestinian National Charter of 1968. Following the Charter’s adoption, “the number of Palestinian resistance groups mushroomed.” The primary objective of these groups was to engage in acts of international terrorism against Israelis in order to “publicise their cause.” As many of these groups
began to decline in the 1980s, several factors facilitated an atmosphere ripe for Palestinians to develop a united protest movement against Israel.  

1. The First Palestinian Intifada

On December 8, 1987, several Palestinians were injured and killed in a traffic accident with an Israeli vehicle near the Jebaliya refugee camp in Gaza. The incident served as a catalyst for the first Intifada against Israel’s presence in both Gaza and the West Bank. The movement “galvanized the Palestinian people, impressed international public opinion, and, most importantly, convinced a sizeable number of Israelis that they could not indefinitely maintain a presence in the West Bank and Gaza strip.” Over the course of approximately six years, Palestinians staged mass demonstrations and engaged in acts of noncooperation against Israel. In 1988, as the first Intifada gained momentum, the PLO declared


26. O’Ballance, supra note 13, at 26; Israeli Troops Kill 2 in Clashes with Arabs, CHI. TRIB., Dec. 10, 1987, at C13. Palestinians claimed that the accident was a deliberate act of Israeli aggression. Id.

27. O’Ballance, supra note 13, at 26. This “Intifada,” or uprising, represented the first significant and unified Palestinian attempt to protest Israel’s presence in both Gaza and the West Bank. See Andrew Rigby, Living the Intifada 1 (1991). “Intifada” is derived from the Arabic “Nafada,” which means “the action of ‘shaking off’ or ‘shaking out.’” Id. at 2.

28. O’Ballance, supra note 13, at 26. The struggle rapidly spread to the West Bank within twenty-four hours. Id. For a discussion of the historical antecedents to and causes of the first Intifada, see Rigby, supra note 27, at 1-17.


30. Palestinian resistance included rock throwing, demonstrations, and the construction of illegal roadblocks. Amit-Kohn et al., supra note 25, at 27. Although both Israelis and Palestinians incurred casualties, the first Intifada has nonetheless been characterized as an “unarmed form of resistance, insofar as the tools of confrontation used by the Palestinians have not been lethal.” Rigby, supra note 27, at 1. As a political and social movement, the first Intifada was “an unprecedented, full-scale civilian uprising . . . . and the main weapon . . . . was an unprecedented level of mass participation in every conceivable act of resistance . . . . The emerging Intifada was basically non-violent . . . . An unarmed civilian population . . . . confront[ed] an army . . . . and create[ed] . . . . an alternative source of power.” Kaminer, supra note 17, at 42. As a result, the first Intifada has been referred to as “the war of stones.” Nationmaster.com, Encyclopedia: First Intifada, at http://www.nationmaster.com/encyclopedia/First-Intifada (last visited May 9, 2005).
Palestinian independence. When the first Intifada formally concluded in 1993, an era of peaceful co-existence and an end to decades of violence between Palestinians and Israelis seemed forthcoming.

2. Violence in Israel, Gaza, and the West Bank, 1993-2000

As the 1990s progressed, the peace process that seemed within reach rapidly began to unravel. In April 1994, the first in a series of suicide bombings that continued throughout the 1990s and into the new millennium erupted within the West Bank and Israel. Assassinations of

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32. The PLO and Israeli Government exchanged letters of mutual recognition in 1993. Chairman Arafat wrote to Israeli Prime Minister Rabin that the PLO “recognizes the right of the State of Israel to exist in peace and security,” “commits itself to the Middle East peace process,” and “renounces the use of terrorism and other acts of violence.” Letter from Yassar Arafat, Chairman, PLO, to Yitzhak Rabin, Prime Minister, Israel (Sept. 9, 1993), in 2 PALESTINE DOCUMENTS, supra note 15, at 142, 142. In response, Prime Minister Rabin stated that Israel would “recognize the PLO as the representative of the Palestinian people” and negotiate with it to achieve peace in the region. Letter from Yitzhak Rabin, Prime Minister, Israel, to Yassar Arafat, Chairman, PLO (Sept. 9, 1993), in id. at 142, 142; see O’BALLANCE, supra note 13, at 157 (stating that Arafat “wanted the Intifada to end”). At least one Palestinian characterized the unilateral cancellation of the Intifada, as well as the PLO’s recognition of Israel, as a “series of renunciations of the PLO Charter, of violence and terrorism.” BUCHANAN, supra note 12, at 215.


34. Both parties slowly implemented the Oslo Accords. See O’BALLANCE, supra note 13, at 175, 179. Israeli troop redeployment in anticipation of full withdrawal from Gaza was scheduled to take place thereafter. Steve Rodan, Agreement Not to Disagree Keeps Meeting Friendly, JERUSALEM POST, May 12, 1995, at 11.

35. The militant Palestinian group Hamas claimed responsibility for attacks that resulted in at least eighteen Israeli deaths within the first three months of the Oslo Accords. David Hoffman, Palestinian Militants’ Exile in Lebanon Ends: Rabin’s Move Failed to Break Hamas, WASH. POST, Dec. 16, 1993, at A35.

36. See O’BALLANCE, supra note 13, at 171-79; Bob Hepburn, Israel Seals off West Bank, Gaza Arab Militants Yves More Attacks, TORONTO STAR, Apr. 8, 1994, at A1; Bill Hutman & Alon Pinkas, Terrorist Was Wanted Hamas Member, JERUSALEM POST, Apr. 7, 1994, at 1. Following an October 1994 suicide bombing, a terrorism expert stated: “For this atrocity to happen in the heart of Tel Aviv means that the arm of terrorism is long” and that Hamas “appears to be willing to take greater risks… to weaken the peace process.” David Rudge, Newsline with Prof. Yonah Alexander, JERUSALEM POST, Oct. 20, 1994, at 2. For further descriptions of numerous suicide bombings in Israel between 1994 and 1998, see Israel Foreign Ministry, Suicide Bombings, available at http://www.aish.com/Israel/articles/Suicide_Bombings_p.asp (last visited May 9, 2005).
both Palestinian\textsuperscript{37} and Israeli\textsuperscript{38} leaders, discontent among Palestinians with their own leadership,\textsuperscript{39} and a breakdown in negotiations between Israeli and Palestinian officials\textsuperscript{40} contributed to an atmosphere of uncertainty that weakened any prospect for peace.\textsuperscript{41}

3. The Second Palestinian Intifada

The causes of the second Intifada\textsuperscript{42} remain in dispute.\textsuperscript{43} Although the second Intifada mirrored its predecessor by featuring “thousands of Arabs hurling rocks, burning tires, and blocking highways,” it became increasingly violent.\textsuperscript{44} The second Intifada incorporated the use of suicide bombings\textsuperscript{45} designed to inflict casualties among Israeli civilians.\textsuperscript{46}

\textsuperscript{37} Israeli assassinated leaders of the Fatah Black Hawks, Islamic Jihad, and Hamas militant groups in 1995 and 1996. O’BALLANCE, supra note 13, at 194, 198, 201.

\textsuperscript{38} Prime Minister Rabin was assassinated by an Israeli while he attended a peace rally in November 1995. \textit{Id.} at 199; see Serge Schmemann, \textit{The Israeli Vote: The Overview: Netanyahu, Set to Lead Israel, to Seek ‘Peace with Security,’} N.Y. TIMES, May 31, 1996, at A1. Palestinian responses to Rabin’s death were mixed. See Youssef M. Ibrahim, \textit{Assassination in Israel: The Palestinians: In the West Bank and Gaza, Mixed Feelings}, N.Y. TIMES, Nov. 6, 1995, at A11.


\textsuperscript{40} \textit{See, e.g.,} Dore Gold, \textit{Closing the Deal}, \textit{JERUSALEM POST}, Dec. 22, 2000, at 3B (noting Israeli Prime Minister Ehud Barak’s willingness to make concessions during the 2000 Camp David Summit and Chairman Arafat’s refusal to reach an agreement); Leslie Susser, \textit{Digging In}, \textit{JERUSALEM REP.}, Dec. 18, 2000, at 12 (citing reasons for the Summit’s collapse).

\textsuperscript{41} David Makovsky wrote that any resolution to the conflict “seem[ed] out of reach for the foreseeable future” and that “the upsurge in Palestinian violence . . . has only exacerbated these sentiments.” \textit{DAVID MAKOVSKY, A DEFENSIBLE FENCE: FIGHTING TERROR AND ENABLING A TWO-STATE SOLUTION}, at xv (2004).

\textsuperscript{42} The second Intifada became known as the al-Aqsa Intifada because Palestinians traced its origin to the date on which current Israeli Prime Minister Ariel Sharon entered the al-Aqsa mosque in Jerusalem, which Muslims regard as the third most holy site in Islam. Aljazeera, \textit{The Second Intifada}, at http://english.aljazeera.net/NR/exeres/ED8317B4-626C-498B-8AD2-F9274D510D99.htm (last visited May 9, 2005).

\textsuperscript{43} Israeli claimed that the second Intifada was preplanned by the Palestinian Authority and commenced after the breakdown of the Camp David Summit during the summer of 2000. \textit{See generally SHARM EL-SHEIKH FACT-FINDING COMM., SHARM EL-SHEIKH FACT-FINDING COMM. REPORT} (2001), \textit{available at} http://www.jewishvirtuallibrary.org/jsource/Peace/Mitchellrep.html; supra note 40 and accompanying text.

\textsuperscript{44} \textit{DANIEL DOR, INTIFADA HITS THE HEADLINES} 18 (2004).

\textsuperscript{45} The Israel Defense Forces (IDF) cited a total of 22,406 Palestinian terrorist attacks since the second Intifada began. Israel Defense Forces, \textit{Total of Attacks in the West Bank, Gaza Strip and Home Front Since September 2000}, \textit{available at} http://www1.idf.il/SIP_STORAGE/DOVER/files/
the Israeli Supreme Court described the all-encompassing reach of the attacks: “These suicide bombers reach every place where Israelis are to be found.”

B. *Israel’s Counterterrorism Initiative* 48

The notion of “physically separating the Israeli and Palestinian peoples is an old one,”49 Israel responded to the second Palestinian *Intifada* and the accompanying terrorist attacks50 by erecting a security structure separating Israel from the West Bank and Gaza beginning in 2000.51 According to the


47. H.C. 7015/02, Ajuri v. IDF Commander, 56(6) P.D. 352, at *2, available at http://62.90.71.124/eng/verdict/framesetSrch.html. The court added, “Palestinians use ... guided human bombs. These suicide bombers ... are terrorists [who] hide among the civilian Palestinian population in the territories ... they are supported by part of the civilian population, and by their families.” Id.

48. The terms used to describe Israel’s security structure depend upon whether it is being referred to by those who support it or by those who oppose it. Opponents employ the term “wall” to accentuate portions of the structure that appear permanent in nature. See, e.g., THE WALL IN PALESTINE: FACTS, TESTIMONIES, ANALYSIS AND CALL TO ACTION 10-13 (Palestinian Environmental NGOs Network (PENGON) ed., 2003). But see DORON ALMOG, *THE WEST BANK FENCE: A VITAL COMPONENT IN ISRAEL’S STRATEGY OF DEFENSE* 3 n.4 (Wash. Inst. Policy Focus, No. 47, 2004) (stating that walls comprise only 8.5 kilometers of the entire structure); infra notes 56-58, 64 and accompanying text. Proponents of the structure utilize the term “fence.” See, e.g., David Makovsky, *A Fence That Makes Sense: The Barrier Protects Israel While Pointing to a Two-State Solution*, L.A. TIMES, Feb. 24, 2004, at B15. The legal question presented to the Hague Court by the General Assembly utilized the term “wall.” See infra note 207 and accompanying text. A physical description of the structure is contained in Part II.B.2. In an effort to maintain objectivity, this Note uses the terms “counterterrorism initiative” and “security structure.”

49. MAKOVSKY, supra note 41, at 3; see infra Part III.B.

50. Approximately 900 Israelis were killed between September 2000 and March 2004 as a result of Palestinian terrorism. ALMOG, supra note 48, at 1. The Israeli Supreme Court noted that over “6000 were injured, some with serious wounds that have left [victims] severely handicapped.” H.C. 2056/04, Beit Sourik Vill. Council v. Gov’t of Israel, at *2, available at http://62.90.71.124/eng/verdict/framesetSrch.html.

51. See infra note 62 and accompanying text.
Israeli Supreme Court, the “separation fence is a project of utmost national importance.”

1. Recognizing the Need for a Security Structure

Prime Minister Rabin, in response to a suicide bombing in 1994, asserted, “‘There has to be a separation, not just a technical closure . . . . We have to decide on separation as a philosophy.’” Israel subsequently erected an electronic fence around the Gaza Strip pursuant to military deployment requirements set forth under the Oslo Accords, but it was demolished when the second Intifada erupted in 2000. In July 2000, prior to the start of the second Intifada, Israeli Prime Minister Ehud Barak emphasized that a physical separation between Israel and the Palestinians would mutually benefit both nations. Shortly thereafter, the Israel Defense Forces (IDF) adopted a philosophy of “separation between the two entities together with . . . cooperation” while simultaneously constructing “‘a border that breathes’” in order to recognize Palestinian concerns and needs.

Although current Prime Minister Ariel Sharon originally opposed constructing a security structure, he succumbed to growing public sentiments demanding protection against suicide bombings. A poll of Israelis found that eighty-four percent of those surveyed supported the construction of a security structure. Most Israelis were united in their confidence that such an initiative would significantly reduce the number of terrorist attacks and violence perpetrated against them.
2. Elements of the Israeli Security Structure

On April 14, 2002, the Ministers’ Committee for National Security authorized the IDF to commence construction of the structure. The Israeli Supreme Court noted that careful consideration was given to Palestinian interests when the Israeli Government determined the location and composition of the security structure. The structure included an elaborate network of electronic fences, a bulldozed security buffer zone, high-tech sensors equipped with interception capabilities, electronically enhanced observation posts, patrol roads, a “trace” road composed of sand to detect footprints, barbed wire, and secured gates designed to ensure safe passage. While no security measure could be entirely impenetrable, recent evidence suggests that this elaborate security network has been


63. “[I]n planning the route of the separation fence, great weight was given to the interests of the residents of the area.” Beit Sourik Vill. Council, at *8. The court elaborated, “[C]onsideration is given to . . . Palestinian[s] and . . . the needs of the residents.” Id. at *8-9. The court assessed whether the “least injurious’ means” were implemented to protect Palestinian interests: “[T]he proportionality of the [structure’s] route . . . relates to the severity of the injury caused to . . . local inhabitants.” Id. at *26, *29. The question was, “[I]s the injury caused to local inhabitants . . . proportionate, or is it . . . possible to satisfy . . . security considerations while establishing a fence route whose injury to the local inhabitants is lesser?” Id. at *30. Based upon evidence presented in the Beit Sourik Village Council case, the court ordered the relocation of a portion of the structure’s route because its position was “not proportionate.” Id. at *35; see also Mark D. Allison, Note, The Hamas Deportation: Israel’s Response to Terrorism During the Middle East Peace Process, 10 Am. U. Int’l L. & Pol’y 397, 433-36 (1994) (discussing the Israeli Supreme Court’s standard of proportionality). Ruth Wedgwood acknowledged that “[t]he fence presents hard questions of proportionality and balancing.” Ruth Wedgwood, Ill-Advised Advisory, WALL ST. J., Feb. 18, 2004, at A14. But see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 I.L.M. 1009, 1072 (I.C.J. 2004) [hereinafter Legal Consequences] (separate opinion of Judge Kooijmans) (noting the Hague Court’s failure to apply the proportionality test).

64. See Legal Consequences, supra note 63, at 1033; ALMOG, supra note 48, at 8; MAKOVSKY, supra note 41, at 27. For a visual cross-section of the security structure, see Ministry of Defence, Israel’s Security Fence: Operational Concept, at http://www.securityfence.mod.gov.il/Pages/ENG/operational.htm (last updated Jan. 27, 2005) (last visited May 14, 2005).

65. MAKOVSKY, supra note 41, at 17 (stating that although “terrorists may still find ways to circumvent the West Bank fence . . . even a less-than-perfect success rate would still save many lives”).
effective.\textsuperscript{66} As of July 2004, Israel reported a ninety percent decrease in terrorist attacks and a seventy percent decrease in terrorist-related deaths.\textsuperscript{67}

III. **Historical Developments Defining the Arab-Israeli Conflict**

The juxtaposition of the Jewish and Palestinian peoples\textsuperscript{68} lies at the heart of the conflict.\textsuperscript{69} While Arabs and Jews coexisted in a state of mutual cooperation under Ottoman rule during the close of the nineteenth century,\textsuperscript{70} the last century witnessed their violent collision over Palestine. Notwithstanding Biblical commands to the contrary,\textsuperscript{71} the idea to separate the Jewish and Palestinian peoples, whether by a security structure or by other permanent means, “is an old one.”\textsuperscript{72}

A. **Zionist Aspirations and Mandatory Palestine**

The Israeli-Palestinian conflict “is one of the most complex of our time.”\textsuperscript{73} This reality is due, in part, to the historical importance of the territory for peoples of both Jewish and Muslim faiths.\textsuperscript{74} In the waning years of the nineteenth century, European Jews founded a political movement\textsuperscript{75} designed to re-establish a Jewish homeland in Palestine.\textsuperscript{76}

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66. *Id.* Attempts to infiltrate Israeli population centers from the West Bank decreased by approximately ninety-five percent since the structure’s construction. *Id.*


68. The common ancestry of both nations is described in Scripture: “I will make them one nation, on the mountains of Israel. . . . [A]nd they will never again be two nations or be divided into two kingdoms.” *Ezekiel* 37:22 (New International).


71. See *supra* note 68 and accompanying text.


74. “Both sides feel that they have a legitimate, exclusive claim over the same piece of land in the Middle East.” *Id.* at 3. Abraham, “considered by Jews to be [the] first Jew and by Muslims to be [the] first Muslim,” bore Isaac and Ishmael, of whom Jews and Muslims believe they are descendants; respectively, Weiner, *supra* note 69, at 230 n.4. The Lord told Abraham, “To your offspring I will give” the land of Canaan. *Genesis* 12:4-7 (New International). As such, “both sides stubbornly believe that their own religion and history has given them the right to the land.” Jasmine Jordaan, Note, *Proposal of Dispute Resolution Mechanisms for the Israeli-Palestinian Interim Agreement: A Crucial Step in Establishing Long-Term Economic Stability in Palestine and a Lasting Peace*, 23 BROOK. J. INT’L L. 555, 555 (1997).

75. Zionism “is an international political movement which aspires to link all Jews . . . into a . . . political and cultural centre [in] the state of Israel.” Sami Hadawi, *Bitter Harvest:
Palestinian Arabs simultaneously began forging a national identity separate and distinct from other Arabs in the region. An increased presence of Jewish settlers in Palestine, the British Government’s political promises to Zionist leaders, and the creation of Transjordan in 1923 heightened tensions between Jews and Palestinian Arabs.

B. The Derivation of a Two-State Solution

The modern history of the Middle East can be described as one of a series of divisions. The first occurred when Britain and France implemented the Sykes-Picot Agreement after World War I. The Balfour

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76. Martin Gilbert, Israel: A History 3, 16 (1998). For a discussion of political Zionism, see Mark Tessier, A History of the Israeli-Palestinian Conflict 7-68 (1994). Zionism inspired Jewish immigrants to arrive steadily in Palestine throughout the early part of the twentieth century. See George E. Bisharat, Land, Law, and Legitimacy in Israel and the Occupied Territories, 43 Am. U. L. Rev. 467, 476-502 (1994) (recounting a history of Jewish land acquisition in Palestine prior to 1948 and suggesting that “the conquest of land’ was one of the pillars of the Zionist effort”). But see Joan Peters, From Time Immemorial: The Origins of the Arab-Jewish Conflict over Palestine 101 (1984) (arguing that the conception that Jews expelled Arabs from their lands was a “myth” because “Arabs were immigrating to Israel, as much as the Jews”).


78. See supra note 76 and accompanying text.


80. The Allies’ partition of the Ottoman Empire facilitated the creation of the Palestine Mandate. See Sykes-Picot Agreement of 1916, in 1 Palestine: Documents, supra note 15, at 20, 20; Sachar, supra note 70, at 95 (depicting a map of the region under the Sykes-Picot Agreement). In 1923, the British Government reorganized Transjordan and, as a result, “Transjordan and Palestine . . . evolved in very different ways. The latter became the scene of increasingly bitter confrontations between Jews and Arabs.” Tessier, supra note 76, at 164-65. For a critique of the legal validity of the Palestine Mandate, see Henry Cattan, Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict 65-68 (2d ed. 1976).

81. For a discussion of violence during the Palestine Mandate, see generally J. Bowyer Bell, Terror out of Zion (1977).

82. Even before the Allies defeated the Ottoman Empire, Constantinople administered Palestine by dividing the territory into geographical sub-units. Bisharat, supra note 76, at 471 n.6.

83. See supra note 80 and accompanying text. Despite assurances by Britain that it would support Arab independence from the Ottoman Empire, the “secret” agreement between France and
Declaration facilitated a second division. On two separate occasions, preceding and following World War II, European governments attempted to divide Palestine into independent Arab and Jewish states. Ultimately, these efforts led to the outbreak of a series of hostilities that began in 1948 and continue today.

1. The Peel Commission Partition Plan of 1937

The modern dilemma in Palestine “started with the adoption by the United Nations [in 1947] of the Palestine partition plan which provided for the establishment of a ‘Jewish state’, an ‘Arab state,’ and an ‘International Zone of Jerusalem.’” The two-state solution had been first articulated ten years prior in the Peel Commission Partition Plan of 1937. The Peel Commission Plan was ultimately set aside due to British concerns over implementation and the practical need to gain both Jewish and Arab support for the Allies against the Axis Powers.

2. The United Nations Partition Resolution of 1947

Resistance against British Mandatory rule in Palestine escalated between 1945 and 1947, as did clashes between Palestinian Jews and Arabs. In 1947, the British Government recognized the “unworkable”
nature of the mandate and referred the matter to the U.N.93 The U.N. formed the Special Committee on Palestine (UNSCOP) to seek a viable resolution to the conflict.94 UNSCOP’s initial recommendations included the termination of the Palestine Mandate95 and the grant of Palestinian independence96 “at the earliest practicable date,”97 the establishment of a “transitional period preceding the grant of independence in Palestine” under U.N. auspices,98 the preservation of democratic principles and protection of minorities,99 and the cessation of violence in the region.100 On November 29, 1947, the U.N. General Assembly adopted Resolution 181, which provided for the end of the mandate and partition of Palestine into independent Jewish and Arab states alongside a special international regime for Jerusalem.101

C. The First Arab-Israeli War of 1948

Both the Arab and British responses to the U.N. Partition Resolution were negative.102 Jewish leaders generally supported the recommendation

93. FRANK GERVASI, THE CASE FOR ISRAEL 72 (1967); UNITED NATIONS SPECIAL COMM. ON PALESTINE, supra note 1, at 1; David John Ball, Note, Toss the Travaux?: Application of Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment, 79 N.Y.U. L. REV. 990, 993-94 (2004).

94. UNITED NATIONS SPECIAL COMM. ON PALESTINE, supra note 1, at 1-8.

95. Id. at 140.

96. Id. at 142.

97. Id. at 140, 142.

98. Id. at 143-44.

99. Id. at 148-49.

100. Id. at 153. For a critique of the UNSCOP Report, see MARTIN JONES, FAILURE IN PALESTINE: BRITISH AND UNITED STATES POLICY AFTER THE SECOND WORLD WAR 282-307 (1986).

101. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 322-43, U.N. Doc. A/RES/181(II) (1947). The resolution stipulated, “When the independence of either the Arab or the Jewish State . . . has become effective . . . sympathetic consideration should be given to its application for admission to membership in the United Nations.” Id. The resolution detailed boundaries of separate Arab and Jewish states as well as territory surrounding Jerusalem that “shall be established as a corpus separatum under a special international regime” administered by the U.N. Id.

102. Arabs rejected the resolution on the grounds that it violated the U.N. Charter and established a Jewish state with a Jewish government presiding over Arab ownership of approximately ninety percent of the state’s land. HADAWI, supra note 75, at 73; see PALESTINE PARTITIONED 1947-1958 (EXCERSPTS & DOCUMENTS), supra note 86, at 2. But see MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 34-35 (2002) (stating that an Arab majority existed throughout Palestine and that over seventy percent of the land that became Israel in 1948 belonged to the Mandate government, not Arab landowners). In response to the resolution, the British government refused to cooperate in order “to avoid provoking the Arab world . . . when Britain’s foothold in the Middle East was already precarious.” SACHAR, supra note 70, at 296.
for partition. Violence immediately escalated between Palestinian Jews and Arabs, and the British Mandatory Government contemplated advancing the timeline for its withdrawal of forces from the region. The U.N. Security Council established a Truce Commission and adopted several resolutions calling for a restoration of order. On May 14, 1948, one day prior to the anticipated termination of the British Mandate over Palestine, Jewish leaders proclaimed the establishment of the State of Israel within territories designated for a Jewish state under the U.N. Partition Plan.

The War of 1948 engaged regular military forces from Egypt, Transjordan, Syria, Lebanon, Iraq, “irregular” Palestinian forces, the Arab Liberation Army sponsored by the Arab League, and the IDF. Between May and December 1948 the U.N. Security Council issued nine resolutions urging cease-fires and diplomatic solutions to the conflict.

103. Letter from Dr. Chaim Weizmann to the Chairman of UNSCOP (July 14, 1947), in THE JEWISH PLAN FOR PALESTINE, supra note 79, at 556, 559 (“[E]quality and independence can be reconciled . . . with co-operation between a Jewish State and as many Arab States as will wish to collaborate with it . . . for the benefit of the area as a whole.”).

104. See TESSLER, supra note 76, at 261. The British Government believed that war was “the only way that any stable settlement could be reached.” JONES, supra note 100, at 308-09.

105. JONES, supra note 100, at 320.


108. The declaration stated, “We hereby proclaim the establishment of the Jewish State in Palestine . . . which shall be known as Israel.” Israeli Proclamation of Independence (May 14, 1948), in 1 PALESTINE: DOCUMENTS, supra note 15, at 185, 185-86. A Palestinian Proclamation of Independence was issued by the Palestine Arab Higher Committee approximately five months later: “[T]he Arab people of Palestine . . . proclaim . . . the full independence of . . . Palestine as bounded by Syria and Lebanon from the north, by Syria and Transjordan from the east, by the Mediterranean from the west, and by Egypt from the south.” Palestinian Arab Higher Comm., Palestinian Proclamation of Independence, in 1 PALESTINE: DOCUMENTS, supra note 15, at 189, 189-90.

109. TESSLER, supra note 76, at 263; Weiner, supra note 69, at 234.

110. Israelis refer to the conflict as their War of Independence, whereas Arabs describe it as “al-Nakba,” or “the disaster.” SHLAIM, supra note 92, at 28; see TESSLER, supra note 76, at 273.

111. SHLAIM, supra note 92, at 34.

When armistice agreements were concluded in 1949, Israel had increased its territory by approximately twenty percent over those lands designated for a Jewish state under the Partition Plan. Territories of Palestine that did not become part of Israel “fell under the control of neighboring Arab states.” The border between Israel and Jordan, as contained in the General Armistice Agreement concluded between the two nations on April 3, 1949, has been commonly referred to as the “Green Line,” which separated Israel from the West Bank between 1949 and 1967. Notwithstanding an undeclared war of attrition during the 1950s and 1960s, as well as a brief war between Israel and Egypt over access to

113. The armistice agreements were intended “as temporary measures rapidly to be replaced by permanent peace treaties.” Gervasi, supra note 93, at 99. The “nonbinding nature of the armistice agreements left them devoid of legal or practical force.” Ball, supra note 93, at 995. The Arab states’ refusal to recognize and directly negotiate with Israel contributed to the failure of concluding permanent peace treaties. See Gervasi, supra note 93, at 101. Consequently, no peace ensued: “The 1949 armistice agreements . . . were signed ‘in order to facilitate the transition from the present truce to permanent peace’ . . . [but] the state of war continued.” Mordechai Nisan, Israel and the Territories: A Study in Control 1967-1977, at 11-12 (1978) (quoting the armistice agreements); see generally David M. Morris, From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations, 36 Va. J. Int’l L. 801 (1996) (discussing the legal significance of U.N. armistice agreements). A Palestinian perspective on the 1949 armistice agreements is contained in Hadawi, supra note 75, at 92-119.


the Suez Canal in 1956,\textsuperscript{118} no territorial changes occurred in the Middle East until 1967.

D. \textit{The Six-Day Arab-Israeli War of 1967}\textsuperscript{119}

Despite the 1949 armistice agreements,\textsuperscript{120} the 1956 Suez crisis\textsuperscript{121} and numerous border skirmishes prior to 1967 contributed to a “tense and explosive” situation.\textsuperscript{122} Pronouncements by Arab leaders throughout the 1960s,\textsuperscript{123} coupled with aerial engagements between the Syrian and Israeli air forces in the Spring of 1967, suggested the imminence of another Arab-Israeli conflict.\textsuperscript{124} The Six-Day War officially commenced on June 5, 1967, when Arab armies\textsuperscript{125} initiated a campaign against Israel.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize{119.} The Six-Day War had “the most wide-ranging political transformation in the Middle East since 1948.” Ardi Imseis, \textit{On the Fourth Geneva Convention and the Occupied Palestinian Territory}, 44 HARV. INT’L L.J. 65, 79 (2003).
\item \footnotesize{120.} \textit{See supra} notes 113, 116 and accompanying text.
\item \footnotesize{121.} \textit{See supra} note 118 and accompanying text.
\item \footnotesize{122.} \textit{Cattan, supra} note 80, at 25; \textit{see Gilbert, supra} note 76, at 361-68.
\item \footnotesize{123.} In 1960, Egyptian leader Gamal abdel-Nasser addressed the General Assembly: “‘The only solution to Palestine is . . . the annulment of Israel’s existence.’” \textit{Sachar, supra} note 70, at 615 (quoting Gamal abdel-Nasser, Address Before the U.N. General Assembly (Sept. 1960)); \textit{see also} Uri Shoham, \textit{Note, The Principle of Legality and the Israeli Military Government in the Territories}, 153 MIL. L. REV. 245, 247-48 (1996) (quoting statements by Nasser and other Arab leaders calling for the destruction of Israel). One week before the outbreak of war in 1967, the Jordanian representative to the Security Council noted that the 1949 armistice agreement “fixed the demarcation line” but “did not fix boundaries.” \textit{Nisan, supra} note 113, at 12; \textit{see supra} notes 113, 116, and accompanying text.
\item \footnotesize{125.} Military forces from Egypt, Iraq, Saudi Arabia, Syria, and Jordan fought against the IDF. \textit{Weiner, supra} note 69, at 235.
\end{enumerate}
\end{footnotesize}
When the war concluded on June 10, 1967, Israel had removed Egypt from the entire Sinai Peninsula and Gaza, Jordan from the West Bank and East Jerusalem, and Syria from the Golan Heights.127 Two days later, the U.N. Security Council passed Resolution 237, which called upon Israel to “ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place.”128 Having had neither an interest in conducting a war nor a desire to expand territorially,129 Israel offered to return all acquired territories in exchange for full peace accords with its Arab neighbors.130 The proposal was rejected by Arab countries.131 As a result, the 1967 Six-Day War was “the first war in history which . . . ended with the victors suing for peace and the vanquished calling for unconditional surrender.”132

E. United Nations Security Council Resolution 242

Immediately following the Six-Day War, the U.N. Security Council adopted Resolution 242,133 which has been described as “[t]he most
significant international pronouncement on the Arab-Israeli dispute.”

Although the Resolution essentially provided for Arab state recognition of Israel’s legitimacy and secured borders in exchange for Israel’s withdrawal from territories acquired during the 1967 war, it was nonetheless a “masterpiece of deliberate . . . ambiguity.” The Resolution referred to neither Israel nor the Palestinians by name. Additionally, the Resolution’s deliberate omission of the word “the” from the English translation of the phrase “from territories occupied in the recent

Id.

134. Shlaim, supra note 92, at 259-60. Israeli Diplomat Abba Eban noted that Resolution 242 became the “documentary basis for a peace treaty with Egypt, a peace treaty with Jordan, and a negotiation with Syria.” Abba Eban, DIPLOMACY FOR THE NEXT CENTURY 141 (1998).


136. In an effort to remain impartial, this Note uses the term “acquired” instead of “occupied” to describe the territories. Whether the territories are “occupied” remains disputed. See infra Part V.A.


138. Shlaim, supra note 92, at 260; see infra note 141 and accompanying text.

139. See S.C. Res. 242, supra note 133. The Resolution referred only to “Israel armed forces.” Id. The Resolution’s failure to include Israel by name “was distressing to many Israelis, who shared [First Israeli Prime Minister David] Ben-Gurion’s long-held suspicion . . . of any agreement which did not mention ‘Israel’ by name.” Gilbert, supra note 76, at 399.

140. See S.C. Res. 242, supra note 133. Resolution 242 refers to the Palestinians as refugees whose status would be resolved through “a just settlement of the refugee problem.” Id. Resolution 242 was “a solution for a humanitarian problem, but the Arab countries and the Palestinians themselves were seeking political solutions for the Palestinian people.” Sella & Yishai, supra note 135, at 12; see infra note 146 and accompanying text. Resolution 242 does not require that Palestinians be granted any territory or political recognition. Bard, supra note 102, at 68-69.

141. The omission was intentional: “[T]here is reference . . . both to withdrawal from territories and to secure and recognized boundaries . . . . [T]hese two things should be read concurrently and . . . the omission of the word ‘all’ before the word ‘territories’ is deliberate.” 1 PALESTINE: DOCUMENTS, supra note 15, at 211 (quoting Michael Stewart, Secretary of State for Foreign and Commonwealth Affairs). Efforts to revise the language of Resolution 242 failed: “It is . . . not legally possible to assert that the provision requires Israeli withdrawal from all the territories.” Id. (quoting Eugene V. Rostow, Professor of Law and Public Affairs, Yale University, U.S. Under-Secretary of State for Political Affairs).

142. The Soviet delegate sought to include the phrase “all the” in reference to the territories from which Israel’s armed forces would be required to withdraw. Bard, supra note 102, at 67.

143. The word had been intentionally excluded from the English version but appeared in the official French translation. Gilbert, supra note 76, at 399. Despite the discrepancy between the two versions, “the purposes are perfectly clear.” 1 PALESTINE: DOCUMENTS, supra note 15, at 210-11 (quoting Lord Caradon, sponsor of the draft of Resolution 242 that was adopted).
S. C. Res. 242, supra note 133.

145. The Resolution has several inconsistencies:

The preamble . . . emphasises . . . ‘inadmissibility of the acquisition of territory by war’, while section (i) speaks of ‘withdrawal of Israel armed forces from territories occupied in the recent conflict’. . . . If acquisition of territory by war was inadmissible, then Israel should have been instructed to withdraw from all the occupied territories . . . .

SELLA & YISHAI, supra note 135, at 12. Sella and Yishai added:

If, however, the spirit of the document was . . . that Israel must withdraw from all the occupied territories, why were these territories not named and/or indicated on accompanying maps? Then again if the intention was that there should be a total withdrawal, why were only the armed forces referred to?

Id.

146. Israel interpreted Resolution 242 as not requiring complete withdrawal from the acquired territories. BEN-YEHUDA & Sandler, supra note 137, at 108; see BARD, supra note 102, at 67 (quoting Lord Caradon: “It would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial.”). Furthermore, Israel refused to withdraw from any territories until direct negotiations facilitated a “contractual peace agreement that incorporated secure and recognized boundaries.” SHAIM, supra note 92, at 260.

Palestinians and Israel’s Arab neighbors held a different interpretation. Id. Arab acceptance of Resolution 242 has hinged upon an interpretation that Israel withdraw totally and unconditionally from the acquired territories. Id. The PLO immediately rejected it because it was “superficial . . . . The resolution more than once refers to Israel’s right to exist.” Statement Issued by the Palestine Liberation Organization Rejecting U.N. Resolution 242 (Nov. 23, 1967), in 1 PALESTINE: DOCUMENTS, supra note 15, at 212, 212. The statement concluded that the PLO rejected the resolution both “as a whole and in detail. In so doing it is . . . declaring the determination of the Palestinian people to continue their revolutionary struggle to liberate their homeland.” Id.


148. See GILBERT, supra note 76, at 426-524; SHAIM, supra note 92, at 289-351, 384-423; TESSLER, supra note 76, at 474-77, 568-77.

149. The Resolution has been described as completely “ misrepresented.” DISPUTED TERRITORIES: FORGOTTEN FACTS ABOUT THE WEST BANK AND GAZA STRIP 14-16 (2003)
demonstrates a pattern of U.N. involvement that exacerbated, rather than resolved, the contentious Israeli-Palestinian dynamic.\textsuperscript{150}

IV. ISRAEL AND THE UNITED NATIONS

“The danger of the Middle East situation imposes a positive responsibility upon the United Nations . . .”\textsuperscript{151} Despite the U.N.’s efforts to achieve peace in the region, its treatment of Israel has been far from objective and impartial. Israel has been described as “the United Nations’ favourite punching bag.”\textsuperscript{152} The contentious relationship between the U.N. and Israel began prior to Israel’s admission to the organization and was evident in the General Assembly’s treatment of Israel’s membership application.\textsuperscript{153} Several member nations, in an effort that was “unprecedented in the history of admissions to the United Nations,” launched a successful campaign to reject Israel’s initial application.\textsuperscript{154} The General Assembly admitted Israel to the U.N. only upon re-application the following year.\textsuperscript{155}

Although the sovereign equality of states is a fundamental principle of the U.N., “Israel has suffered a state of inequality” at the U.N.\textsuperscript{156} In 1999, U.N. Secretary-General Kofi Annan acknowledged that the U.N. has been regarded as biased against Israel.\textsuperscript{157} The General Assembly has consistently pursued an anti-Israeli agenda that “can only be called an

\textsuperscript{150} See supra note 146 and accompanying text.
\textsuperscript{151} Wright, supra note 147, at 273.
\textsuperscript{152} The UN’s Blinkers, supra note 67; see also Michael J. Jordan, UN’s ‘Two Standards’ Under Fire: Critics Ask Why Some Nations Are Held to UN Resolutions and Others Are Not, CHRISTIAN SCI. MONITOR, Sept. 27, 2002, at 1 (noting that “the UN has painted the Jewish State as the world’s great pariah”). The U.N. “is the tool of those who would make Israel the archetypal human rights violator . . . [I]t is a breeding ground for anti-Semitism.” Morris B. Abram, Anti-Semitism in the United Nations (1998) (quoting Professor Anne Bayefsky of York University), at http://www.jewishvirtuallibrary.org/jsource/UN/unantisem.html (last visited May 9, 2005).
\textsuperscript{153} The General Assembly conducted a “severe investigation” during which the Israeli representative “was subjected to a searching cross-examination concerning his government’s views on a number of outstanding topics.” NAT’L STUDIES ON INT’L ORG., supra note 89, at 58.
\textsuperscript{154} Id. Israel’s initial request for admission was denied. Id. at 59. But see supra note 101 and accompanying text.
\textsuperscript{157} Arnold Beichman, U.N. Bias Against Israel, WASH. TIMES, June 27, 1999, at B3 (quoting Secretary-General Annan: “[T]he United Nations is regarded by many as biased against the state of Israel. I know that Israelis see hypocrisy and double standards in the intense scrutiny given to some of its actions, while other situations fail to elicit the world’s outrage.”).
obsession with the State of Israel” since Israel joined the U.N. Attempts by the General Assembly to internationalize Jerusalem nine months after Israel’s admission to the organization highlighted the beginning of Israel’s ongoing struggle to receive fair treatment within the organization.

A. Isolation of Israel Within the United Nations

Israel has been described as having received “second-class status” within the U.N. Israel has consistently been excluded from receiving the same benefits accorded to other nations, whether in terms of financial aid or membership in a regional group. For a member nation to serve on the Security Council or other U.N. committees, it first must belong to a regional group. Although Israel geographically belongs in the Asian Group, it has been barred from membership primarily by Arab states. As late as 1999, non-Arab states such as France have also

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158. AM. JEWISH COMM., ONE-SIDED: THE RELENTLESS CAMPAIGN AGAINST ISRAEL IN THE UNITED NATIONS, at i (2004); see also Treatment of Israel Hearing, supra note 156, at 10 (statement of the Honorable C. David Welch, Assistant Secretary, Bureau of International Organization Affairs, U.S. Department of State). The General Assembly’s treatment of the Israeli-Palestinian conflict “.touches directly upon Israel’s very right to existence.” NAT’L STUDIES ON INT’L ORG., supra note 89, at 60.

159. Despite Israel’s protests against any U.N. action that would jeopardize Israeli sovereignty over Jewish portions of Jerusalem, see NAT’L STUDIES ON INT’L ORG., supra note 89, at 133-34, the General Assembly sought to internationalize Jerusalem as a corpus separatum. G.A. Res. 303, U.N. GAOR, 4th Sess., 275th mtg., U.N. Doc. A/RES/303(IV) (1949); see supra note 101 and accompanying text.

160. One Israeli newspaper reported that “‘Israel will not be able to play a positive role in the family of nations if the [U.N.] ignores an issue vital to its existence.’” NAT’L STUDIES ON INT’L ORG., supra note 89, at 135 (quoting HA’ARETZ from Dec. 8, 1949).

The “family of nations” harnessed substantial support to condemn Israel throughout the past five decades. The House International Relations Committee noted that “no nation has been the subject of such . . . unusual emergency special session[s] except the State of Israel.” Treatment of Israel Hearing, supra note 156, at 1 (opening statement of Chairman Gilman); see also AM. JEWISH COMM., supra note 158, at iii (noting that “no other country was subject to the relentless, indeed obsessive, attention that was focused on Israel in the General Assembly and other UN bodies”).


162. See supra note 156-57 and accompanying text.


164. See H.R. 3236, 105th Cong. § 2(a) (1998) (recognizing that membership in a regional bloc serves as the basis for rotating service on the Security Council).

165. BARD, supra note 102, at 118; Mauritania, Israel Forge Diplomatic Ties: African Nation Becomes 3rd Arab Country with Full Relations with Jewish State, BALT. SUN, Oct. 29, 1999, at 12A. “Israel is the only longstanding member . . . to be denied acceptance into any of the United Nations regional blocs. . . .” H.R. 3236, § 2(a)(1). Attempts to deprive Israel of its rights to fully participate in the U.N. “have not enhanced Israeli respect for the Organization.” Roberts, supra note
expressed opposition to Israel’s admission into a regional group. In 1998, both Houses of Congress introduced bills urging equitable treatment of Israel in the U.N. In 2000, Israel, as the only U.N. member not belonging to a group, gained temporary membership to the Western Europe and Others Group (WEOG).

B. Anti-Semitic and Anti-Israeli Sentiment Within the United Nations

While providing an atmosphere in which member nations succeeded in restricting Israel’s full participation within the organization, the U.N. has also served as a forum for “open and emphatic displays of anti-Semitism.” Although the U.N. has condemned nearly all manifestations of racism, it has continually ignored, and in some instances encouraged, anti-Semitic expressions. Syrian representatives invoked the “blood libel” accusation against Jews during a session of the U.N. Commission

127, at 75.

166. See Treatment of Israel Hearing, supra note 156, at 28 (statement of C. David Welch). Most members of the European Union (EU) opposed admitting Israel into the Western Europe and Others Group (WEOG) regional bloc. Id. at 10.


168. Israel’s New UN Role, JERUSALEM POST, June 4, 2000, at 6; see Betsy Pisik, Tel Aviv Comes out of Wilderness Joins Regional Bloc at U.N. of Western, Other Democracies, WASH. TIMES, May 31, 2000, at A9.

169. The EU did not object to Israel’s inclusion within the WEOG provided that membership was conditioned on several terms. Nitzan Horowitz, Congress Threatens to Withhold UN Dues in Support of Israel Joining European Group, HA’ARETZ, Apr. 16, 2000, available at http://abbc2.com/historia/zionism/UN_Congress_isrl.html. Israel must re-apply for membership to the WEOG every four years and continue to seek admission into the Asian Group, cannot participate in WEOG activities outside the U.S., cannot seek election to the Security Council for at least three years, and is prohibited from presenting candidates for various elected positions for at least two years. BARD, supra note 102, at 119; Israel’s New UN Role, supra note 168.

170. Despite its temporary member status, Israel’s participation in the WEOG was a “breakthrough in Israel’s fifty-year exclusion from UN bodies,” BARD, supra note 102, at 118, that rectified “a long-standing, wholly inexcusable exclusion of one country, and one country only, from any regional group in the United Nations.” Pisik, supra note 168 (quoting American U.N. Ambassador Richard Holbrooke).

171. Treatment of Israel Hearing, supra note 156, app. at 56 (prepared statement of The Honorable Benjamin A. Gilman, a Representative in Congress from New York and Chairman, Committee on International Relations).


173. The ancient “blood libel” slander falsely accused Jews of using the blood of non-Jews to bake matzoh (unleavened bread) during the Passover holiday. Letter from Yehuda Lanercy,


177. \textit{Id.} The resolution noted that “the racist regime in occupied Palestine and the racist regimes in Zimbabwe and South Africa . . . [are] linked in their policy aimed at repression of the dignity and integrity of the human being.” \textit{Id.} “The General Assembly’s attitude to Israel has often been strident and denunciatory.” Roberts, supra note 127, at 75. Henry Cattan, however, praised the resolution as merely an example wherein “the truth hurts.” CATTAN, supra note 80, at 221.

Chaim Herzog, Israeli Ambassador to the U.N., admonished the General Assembly for adopting Resolution 3379: “[I]t is part of a dangerous anti-Semitic idiom which is being insinuated . . . to block the current move towards . . . peace in the Middle East.” Chaim Herzog, Address Before the U.N. General Assembly (Nov. 10, 1975), in 1 PALESTINE DOCUMENTS, supra note 15, at 236, 239.


178. The representative denounced Israel for “usurping Palestine”: “[W]e call upon the [Security] Council . . . to condemn the Nazi-like practices perpetuated daily by the Zionists in the occupied territories, which have been perfected by those who call themselves the victims of a holocaust at the hands of Nazi executioners and who now apply them perfectly against the Palestinians.” U.N. SCOR, 55th Sess., 4204th mtg. at 3, U.N. Doc. S/PV.4204 (Resumption 2) (2000) (statement of Libyan Arab Jamahiriya). Characterizing Israel as “the Nazi Zionist regime”
an accusation that re-emerged a year and a half later.\textsuperscript{179}

C. \textit{Imbalanced Treatment of the Israeli-Palestinian Conflict by the United Nations}

The core principle of direct negotiations between Israeli and Palestinian representatives was established during peace negotiations in 1991.\textsuperscript{180} Despite diplomatic statements that “it was ultimately up to the [Israelis and Palestinians] to take the necessary steps to make the process succeed,”\textsuperscript{181} the General Assembly engaged in a campaign to delegitimize Israel and undermine the peace process by adopting one-sided resolutions and committee reports.\textsuperscript{182} In 1998 alone, the General Assembly adopted twenty-one separate resolutions criticizing or condemning Israel.\textsuperscript{183}

Israel has been denounced for extreme violations of Palestinians’ human rights,\textsuperscript{184} and the Palestinian plight has been a central, if not
disproportionate, concern of the U.N.\textsuperscript{185} Although the U.N. High Commissioner for Refugees typically dispenses welfare and relief to refugee groups, a separate organization, the U.N. Relief and Works Agency for Palestinian Refugees (UNRWA), “has been an anomaly in the UN system, operating as the only UN organization devoted entirely to the plight of one group of refugees.”\textsuperscript{186} The General Assembly has never explicitly endorsed Palestinian violence against Israel,\textsuperscript{187} but it has nevertheless reaffirmed its “support to the Palestinian people . . . in [their] struggle to regain [their] right to self-determination and independence.”\textsuperscript{188} The Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People portrayed Israel as the sole source of the Palestinian plight while simultaneously remaining silent on Palestinian terror.\textsuperscript{189} Along with the skewed presentation\textsuperscript{190} of human and economic losses resulting from the second \textit{Intifada}, the General Assembly praised the Committee for promoting Palestinian rights and supporting the Middle East peace process.\textsuperscript{191}


\textsuperscript{185} The organization has been silent to the plight of Arabs, Muslims, and non-Palestinians in other regions of the world. \textsc{See Am. Jewish Comm.}, \textit{supra} note 158, at i. A former U.N. Ambassador of Finland noted that “[m]ore meetings have been held . . . more resolutions passed . . . on Palestinian refugees than on any other single cause.” \textit{Id.}

\textsuperscript{186} \textit{Id.} at iv.


\textsuperscript{190} The United States has vetoed several resolutions based upon their failure to “condemn Palestinian groups for enacting suicide bombings against Israelis.” Edith M. Lederer, \textit{PA Slams UN Resolution on Israeli Children}, \textsc{Jerusalem Post}, Nov. 12, 2003, at 6.

During its fifty-eighth Session, the General Assembly adopted a resolution entitled “Situation of and Assistance to Palestinian Children,” which condemned Israeli conduct as psychologically destructive to Palestinian youth.192 Although the resolution referenced “the safety and well-being of all children in the whole Middle East region,”193 Israel submitted a separate resolution.194 Calling upon the General Assembly to similarly condemn Palestinian suicide bombings that killed Israeli children,195 Israel’s resolution encountered significant opposition196 and modification.197 The resolution was eventually withdrawn.198

D. Setting Forth the Case Against Israel at the Hague

Israel’s counterterrorism initiative garnered the attention of the U.N. in 2003 and was characterized as a “racist wall which devours Palestinian territories.”199 Approximately one and a half years after Israel began construction of its security structure,200 four nations201 within the Security Council introduced a resolution condemning Israel.202 The United States vetoed its adoption.203 Following the defeat of the Security Council’s draft

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193. Id.
194. Israeli representatives introduced a separate resolution because the General Assembly resolution “pretends that one side . . . has a monopoly on the status of victim.” Herb Keinon, Israel Sees Win in UN Loss, JERUSALEM POST, Nov. 9, 2003, at 2. The General Assembly resolution “was overtly biased against Israel, completely ignoring the fate of scores of Israeli children wounded or killed by Palestinian terrorists.” David Goldberg, Edging Toward Irrelevancy: Canada’s Vote at the 57th UN General Assembly, CANADIAN JEWISH NEWS, Jan. 16, 2003, at 9.
196. Palestinians claimed that Israel’s resolution was “an anti-Palestinian resolution.” Lederer, supra note 190 (quoting Palestinian observer Nasser Al-Kidwa). Israel believed that the resolution’s failure would clearly demonstrate the U.N.’s bias against Israel. Id.
197. Members sympathetic to the Palestinian cause submitted amendments to the Israeli resolution that significantly altered its language and meaning. AM. JEWISH COMM., supra note 158, at iii.
198. AM. JEWISH COMM., supra note 158, at ii.
200. See supra note 62 and accompanying text.
202. The proposed resolution stated that “the construction by Israel, the occupying Power, of a wall in the Occupied Territories . . . is illegal under relevant provisions of international law.” Id.
203. The proposed resolution “was unbalanced and did not . . . address . . . the devastating
resolution, the General Assembly adopted a new resolution containing language nearly identical to its predecessor. The General Assembly subsequently adopted a second resolution expressing its belief that Israel’s actions violated international law. The resolution called upon the Hague Court to issue an advisory opinion on the following legal question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

The United States reiterated its objection and maintained that the General Assembly “misstate[d] the applicable international law” and


206. The General Assembly invoked its authority in accordance with Article 96 of the U.N. Charter. U.N. CHARTER art. 96(1). The Hague Court, pursuant to Article 65 of the Statute of the International Court of Justice, “may give an advisory opinion on any legal question.” STATUTE OF THE INT’L COURT OF JUSTICE art. 65(1).

207. G.A. Res. ES-10/14, supra note 205, at 3. The Hague Court “ha[d] never ruled on an issue of this magnitude relative to state practice in this area.” Tovah Lazaroff, Court Could Undermine Rules of Self-Defense, JERUSALEM POST, July 11, 2004, at 3. Given that Resolution ES-10/14 represented the “first time ever” that the U.N. consulted the Hague Court on any matter concerning the issue of Palestine suggests that the General Assembly sought to politicize the conflict and exert additional pressure on Israel. Legal Consequences, supra note 63, at 1083 (separate opinion of Judge Elaraby); see infra notes 208, 214-15, 297 and accompanying text. The General Assembly’s previous reluctance to consult the Hague Court may stem from the fact that “[t]he Court’s reply is only of an advisory character: as such, it has no binding force.” Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Mar. 30).


cloaked a “political proceeding . . . in legal garb.” Immediately following the Hague Court’s acceptance of the case, controversy engulfed the entire proceeding.

V. ISRAEL AND THE HAGUE COURT: A RE-ASSESSMENT OF THE APPLICABLE LAWS TO THE ISRAELI-PALESTINIAN CONFLICT

The Hague Court’s decision to issue an advisory opinion represented “a hostile act . . . against the Jewish state and not . . . a simple response to a simple request.” Israel, together with several nations, challenged the court’s jurisdictional authority to issue an advisory opinion and boycotted the proceedings. Israel further objected to the court’s decision that enabled Palestine to participate in the proceedings. Additionally,


212. “[T]he scale and intensity of Palestinian terrorist violence justify the application of international laws of war.” ALMOG, supra note 48, at xii.

213. Caroline B. Glick, Supreme Injustice, JERUSALEM POST, July 2, 2004, at 1. The court’s willingness to render an opinion rapidly represented “two sets of rules in international law . . . one set which is valid for the entire world and there is an international law applicable only to Israel.” Exclusive Interview with Meir Rosenne (IsraCast.com broadcast, Jan. 17, 2004) (transcript available at http://www.isracast.com/Transcripts/Rosenne_transcripts.htm (last visited May 9, 2005)).


215. Herb Keinon & Tovah Lazaroff, ICJ Rules on Security Fence Today, JERUSALEM POST, July 9, 2004, at 1. The United States and several European nations joined Israel by refusing to participate in oral proceedings since the matter was “outside the ICJ’s purview.” Id.

Israel questioned the court’s ability to render an objective and impartial opinion by arguing that its statute\textsuperscript{217} required that Judge Nabil Elaraby recuse himself from the case.\textsuperscript{218} The court rejected each of Israel’s positions.\textsuperscript{219}

A. Occupation Versus Administration: Conflicting Interpretations of the Fourth Hague Convention\textsuperscript{220}

The legal question submitted to the Hague Court by the General Assembly\textsuperscript{221} presupposed that, based upon the Fourth Hague Convention of 1907,\textsuperscript{222} Israel “occupied”\textsuperscript{223} the territories it acquired during the 1967
Six-Day War. The court concluded, without analysis, that Israel had and “has continued to have the status of occupying Power” over the territories. The Israeli Government rejected the term “occupied” and instead considered the territories as either “disputed” or “administered.” The use of and distinction between these terms dramatically reshapes the legal nature of the conflict. The court’s findings, however, concealed the inherent complexity that calls into obfuscate the history of the 1967 Six-Day War, particularly since Israel fought a defensive war. Dore Gold, From “Occupied Territories” to “Disputed Territories,” JERUSALEM LETTER/VIEWPOINT, Jan. 16, 2002, at http://www.jcpa.org/jl/vp470.htm (last visited May 9, 2005); see supra note 126 and accompanying text. But see Legal Consequences, supra note 63, at 1030 (describing the 1967 war as simply an “armed conflict” and ignoring Arab states’ aggression against Israel).

224. See supra note 127 and accompanying text. The term “Occupied Territories” has become synonymous with Gaza and the West Bank. See Ina Friedman, A Quiet Life on the Heights, JERUSALEM REP., Oct. 4, 2004, at 18. Israel’s presence in these territories “has attracted a vast amount of international attention.” Roberts, supra note 127, at 74. Although the Israeli Government objects to the use of this term, see infra notes 226-28 and accompanying text, Israeli courts have considered Gaza and the West Bank “occupied territory under the international law of belligerent occupation.” Bisharat, supra note 76, at 527; see KRETZMER, supra note 129, at 1.

225. Legal Consequences, supra note 63, at 1031. The court based its conclusion primarily upon the language of Article 42 of the Hague Convention. Id. The court also cited Resolution 242 because it explicitly contained the term “belligerency.” Id. at 1030; see supra note 133 and accompanying text. The repeated use of the term “occupied” throughout its opinion suggests that the court ascribed to the General Assembly’s language an “unrebutted presumption of accuracy” and “neglected its primary duty [to] prob[e] disputed issues.” Andrew C. McCarthy, The End of the Right of Self-Defense? Israel, the World Court, and the War on Terror, COMMENTARY, Nov. 2004, at 17, 20.

226. Israel has struggled to determine its role within the territories it acquired at the conclusion of the 1967 Six-Day War. See GILBERT, supra note 76, at 396.

227. DISPUTED TERRITORIES, supra note 149, at 5.

228. The Israeli Government “had always preferred to refer to the Territories as ‘administered,’ rather than occupied.” KRETZMER, supra note 129, at 33; see HANS P. RIDDER, INTERNATIONAL LAW AND BELLIGERENT OCCUPATION 42 (1968) (“[I]t is usually the occupier who determines whether belligerent occupation exists.”).

229. One scholar noted that “the legal nature of the territories at issue, specifically the sovereign rights over those territories, is fundamental to determining” whether laws of belligerent occupation apply to Israel’s administration of the territories. Ball, supra note 93, at 1016; see infra notes 230-41.

230. Israel’s Government “has not taken a . . . clear stand on [the] applicability of the Hague [Convention].” KRETZMER, supra note 129, at 35. Although scholars assert that the Convention “is widely accepted,” Roberts, supra note 127, at 63, the Israeli Government’s position on “occupation” suggests that the Fourth Hague Convention is inoperative over the territories. See supra notes 226-28 and accompanying text. But see Allison, supra note 63, at 407 (“Israel does not dispute the applicability of the Hague Regulations to the administration of the . . . territories.”).

The Israeli Government voluntarily engaged in “all the measures . . . [necessary] to . . . ensure . . . public order and safety” in the territories immediately after the 1967 war. See Fourth Hague Convention, supra note 222, at art. 43; infra note 240. Thus, Israel has balanced
question whether Israel is an occupying power under, and is therefore bound by, the Hague Convention. 231

The laws of belligerent occupation 232 operate only when two conditions are satisfied: (1) territory is “actually placed under the authority” of an army; and (2) that army is “hostile.” 233 Although Israel established a military government to administer the territories following the 1967 war, 234 Israel questioned whether it was a “hostile” army that entered former Palestine Mandate territories to which Jordan and Egypt did not have legal title between 1948 and 1967. 235 The Israeli Government has adopted the contradictory positions by voluntarily applying the Convention while simultaneously rejecting the principle of belligerent occupation. See Disputed Territories, supra note 149, at 5 (“[The West Bank and Gaza . . . should not be considered occupied territories.”); Falk & Weston, supra note 25, at 137 (stating that Israel has “announced its intention to adhere voluntarily to humanitarian legal standards” contained within the Hague Convention). The court never explained the duality of Israel’s position and instead stated that the Hague Convention was “part of customary law . . . recognized by all the participants in the proceedings before the Court.” Legal Consequences, supra note 63, at 1035. But see Written Statement of the Government of Israel on Jurisdiction and Propriety, 43 I.L.M. 1009, (Legal Consequences, supra note 63) (Jan. 30, 2004), available at http://www.icj-cij.org/icjwww/idocket/inwp/inwstatements/iWrittenStatement_17_Israel.pdf (last visited May 16, 2005) (containing no reference to the Israeli Government’s recognition of the Hague Convention’s application in the proceeding before the court).

231. Unlike the Israeli Government’s position, see supra note 230, the Israeli Supreme Court has recognized the applicability of the Hague Convention, see H.C. 2056/04, Beit Sourik Vill. Council v. Gov’t of Israel, at *13-14, available at http://62.90.71.124/eng/verdict/framesetSrch.html. Thus, the “applicability of the Hague Regulations . . . as customary international law in Israeli Courts have gained judicial recognition.” Kretzmer, supra note 129, at 40 (emphasis added).

232. “[T]he character of belligerent occupation always has been somewhat problematic. It has been complicated in the present instance by the confused and overlapping claims to sovereign identity that have attached . . . prior to and since the 1967 Six Day War.” Richard A. Falk & Burns H. Weston, The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza, in International Law and the Administration of Occupied Territories 125, 133 (Emma Playfair ed., 1992). “There [exists] no single authoritative exegesis of the various purposes served by that part of the laws of war relating to . . . the ‘law on occupations.’ ” Roberts, supra note 127, at 45. For a general history of the development of the laws of belligerent occupation, see Doris Appel Graber, The Development of the Law of Belligerent Occupation 1863-1914, at 13-69 (1949).

233. Fourth Hague Convention, supra note 222, at art. 42; see Ridder, supra note 228, at 37. 234. Because “there is no recognized ‘state’ government exerting sovereignty over a territory, Israel’s questioning the applicability of the law of belligerent occupancy may not be unfounded.” Ball, supra note 93, at 1001. An IDF proclamation issued immediately after the war stated that Israel “assumed responsibility for security and maintenance of public order.” Meir Shamgar, Legal Concepts and Problems of the Israeli Military Government—The Initial Stage, in 1 Military Government in the Territories Administered by Israel 1967-1980, at 13, 13 (Meir Shamgar ed., 1982). Portions of the proclamation “based on the assumption that under international law any territory outside the existing boundaries . . . would be regarded as occupied territory,” were revoked soon after the war. Kretzmer, supra note 129, at 32-33.

235. See supra note 115; infra notes 236-37, 254 and accompanying text. Israel contends that “[o]ccupied territories are territories captured in war from an established and recognized sovereign.” Disputed Territories, supra note 149, at 5. Since neither the West Bank nor Gaza
“Missing Reversioner” theory, which emphasizes that neither Egypt nor Jordan were “legitimate sovereign[s]” over Gaza and the West Bank, respectively, thereby defeating any of their potential reversionary rights to the territories. Thus, Israel’s government maintains that belligerent

were “under the legitimate and recognized sovereignty of any state prior to the Six Day War, they should not be considered occupied territories.” Id. Israel’s rejection of occupation supports the theory that de facto belligerent occupation is a legal fiction because an occupant “is under no legal obligation to institute a Hague occupation.” Riddler, supra note 228, at 45–46. Therefore, the Israeli Government adheres to a position that “‘no single part of the Land of Israel is occupied or conquered territory.’” W. Thomas Mallison & Sally V. Mallison, The Palestine Problem: In International Law and World Order 273 (1986) (quoting Menachem Begin, Address the Knesset (July 27, 1967)). But see H.C. 2056/04, Beit Sourik Vill. Council v. Gov’t of Israel, at *2, available at http://62.90.71.124/eng/verdict/framesetSrc.html (“Since 1967, Israel has been holding the areas of Judea and Samaria . . . in belligerent occupation.”); supra note 231 and accompanying text.

236. Yehuda Z. Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, 3 ISR. L. REV. 279, 281-82 (1968). The “Missing Reversioner” theory, articulated by Dr. Yehuda Z. Blum, was adopted by the Israeli Government. Mallison & Mallison, supra note 235, at 253. Blum traced the legal title of Palestinian lands to the British Mandate and noted the Hague Court previously recognized that “[t]he doctrine of sovereignty has no application’’ to the Mandate system. Blum, supra, at 279 (quoting Int’l Status of South-West Africa, 1950 I.C.J. 128, 150 (July 11) (separate opinion by Sir Arnold McNair)). Because “sovereignty over mandated territories is located somewhere,” the expiration of the British Mandate over Palestine did not leave the territory “open to acquisition by the first comer” that would exercise force over it. Id. at 283; see Eugene V. Rostow, “Palestinian Self-Determination”: Possible Futures for the Unallocated Territories of the Palestine Mandate, 5 YALE STUD. WORLD PUB. ORD. 147, 158-59 (1979) (stating that “the Palestine Mandate survived the termination of the Mandate administration as a trust” under the U.N. Charter). Once Israel declared its sovereignty over Mandate territories allotted to the Jewish state under the U.N. Partition Plan in 1948, see supra notes 108-09, 115-16 and accompanying text, Gaza and the West Bank became “unallocated parts of the Mandate.” Rostow, supra, at 158.

During the 1948-49 war, Egypt and Jordan, in violation of U.N. Charter Article 2 by their “use of force against the territorial integrity” of the remaining territories under the Palestine Mandate, became belligerent occupiers of the West Bank and Gaza. U.N. Charter art. 2(4); Allison, supra note 63, at 405 (“The international community refused to recognize the legitimacy of the Jordanian and Egyptian occupations . . . . Thus, no internationally recognized, legitimate authority occupied the territories before Israel.”); Blum, supra, at 280-84. Following the war, “[t]he illegality of the presence of the various invading forces on the soil of former Mandatory Palestine was not removed.” Blum, supra, at 287. But see Legal Consequences, supra note 63, at 1067 (separate opinion of Judge Kooijmans) (“[I]n my view . . . Jordan claimed sovereignty over the West Bank.”). Finding that Article 42 of the Convention was inoperative, Dr. Blum concluded that only those portions of the law of occupation designed to protect humanitarian rights of the population governed Israel’s possession of the territories. Blum, supra, at 294; see also Roberts, supra note 127, at 65-66 (stating that Israel has willingly observed humanitarian provisions through a de facto application but has “refus[ed] to accept the full de jure applicability”); supra note 230 and accompanying text. But see Legal Consequences, supra note 63, at 1031 (basing its conclusion on Article 42, not Article 43, of the Hague Convention).

237. By acquiring the territories from Egypt and Jordan, Israel “lawfully [assumed] control of territory in respect of which no other States can show a better title.” Blum, supra note 236, at
occupation occurs only when the occupying power displaces the “legitimate sovereign.” Based upon these principles, Israel fervently objected to the General Assembly’s use of the term “occupied Palestinian territories”\(^{238}\) in the legal question presented to the Hague Court.\(^{239}\) Regardless of whether the laws of belligerent occupation apply to the conflict,\(^{240}\) they “are violated on a regular basis [by both sides] rendering them inapplicable in fact, if not in law.”\(^{241}\)

B. Applicability of the Fourth Geneva Convention\(^{242}\)

Although Israel’s arguments supporting the inapplicability of the Fourth Hague Convention to the conflict may appear tenuous, Israel has advanced a formidable objection to the \textit{de jure} application of the Fourth Geneva Convention.\(^{243}\) Israel’s objection to application of the Convention


238. Use of the term “occupied territories” suggested that Israel had no legitimate claim to the land. Gold, \textit{supra} note 223 (noting that only Israel’s territorial dispute has been labeled an occupation); see Yossi Klein Halevi, \textit{The Real Danger of the Hague Ruling}, \textit{JERUSALEM POST}, July 23, 2004, at 23 (stating that the Hague Court found that Israel “had[d] no legitimate claim to any territory it won in 1967”). \textit{But see} Gold, \textit{supra} note 223 (noting that Resolution 242 implicitly recognized Israel’s right to retain part of the acquired territories); \textit{supra} Part III.E.

239. \textit{See supra} note 207 and accompanying text.

240. The Hague Convention is defined only in the context of a hostile state. \textit{See Fourth Hague Convention, supra} note 222, at arts. 42-56. Under the missing reversioner theory, \textit{see supra} notes 235-37, “[w]ithout a displaced sovereign power . . . the laws of belligerent occupation are reduced to extending humanitarian provisions directly to individual persons,” Ball, \textit{supra} note 93, at 1001. This interpretation supports Israel’s \textit{de facto} application of humanitarian provisions of the Convention. \textit{See supra} note 230. Because the “Palestinians lack full citizenship and a . . . sovereign government,” they are unable to be classified as “‘affected citizens.’” Ball, \textit{supra} note 93, at 1001-02.

241. Ball, \textit{supra} note 93 at 1002. The Hague Court and the U.N. focused primarily upon Israel’s obligations to respect civilians’ rights without referencing reciprocal, implicit requirements imposed upon the Palestinians under Article 43 to act in a manner that facilitates achieving those ends. \textit{See supra} note 230. Thus, “it could be argued that the actions of the [Palestinian] terrorist groups . . . amount to consistent material breaches of the inhabitants’ duty of obedience.” Ball, \textit{supra} note 93, at 1002; \textit{see also} GRABER, \textit{supra} note 232, at 70-109 (discussing the relationship between the people who fall under the control of an occupying power and the occupying power and whether occupied populations owe a duty to the occupant). \textit{But see} Beres, \textit{supra} note 10, at 243 (stating that the Palestinian Authority, a nonstate party to various peace accords, “cannot be held jurisprudentially to the same standards of accountability as the State of Israel”).


243. \textit{See Legal Consequences, supra} note 63, at 1035-36; \textit{infra} note 248 and accompanying
relies upon a “highly formalistic semantic” interpretation of the treaty’s language in Article 2. Despite evidence that strongly suggests that the Convention does not apply to Israel’s administration of the territories, the Hague Court determined otherwise and concluded that the Convention rendered Israel’s construction of its security structure illegal.

244. A semantic formalistic approach “seeks to discover the meaning of a provision exclusively by examining its wording, ignoring its background and drafting history.” Kretzmer, supra note 129, at 55. An “antiformalistic” approach “ignores the clear wording of the text and seeks its meaning in the assumed evil its authors sought to prevent.” Id. Either interpretation suggests that the Convention does not apply to Israel’s acquired territories. See infra Parts V.B.1-2.

245. Article 2 of the Fourth Geneva Convention states, in relevant part:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Fourth Geneva Convention, supra note 242, at art. 2. Israel “distinguish[es] a priori between the formal legal conclusions arising from its approach and the actual observance of the humanitarian provisions of the Convention.” Shamgar, supra note 234, at 32.

246. Allison, supra note 63, at 404-05; see infra Parts V.B.1-2.

247. The court quoted an Israeli order issued shortly after the 1967 war suggesting Israel’s adoption of the Geneva Convention. Legal Consequences, supra note 63, at 1035-36. The court ignored the fact that Israel immediately repealed the provision and replaced it “with another provision that had absolutely nothing to do with the Geneva Convention.” Kretzmer, supra note 129, at 32-33; see supra note 234.

248. Legal Consequences, supra note 63, at 1054. Although the Hague Court referenced the Convention’s travaux préparatoires and statements by the International Committee of the Red Cross (ICRC) to support its conclusion, it relied substantially upon the General Assembly’s conclusion that the Geneva Convention applied to the territories based upon Resolutions 60 and 97 and Security Council Resolutions 271, 446, 681, 799, and 904. Id. at 1036-37. Israel, however, “officially denies that the Fourth Geneva Convention applies de jure” to the territories and maintains that it applies the Convention on a de facto basis for humanitarian purposes. Imseis, supra note 119, at 68 & n.23; see also Kretzmer, supra note 129, at 33. Unlike its departure from the Government over applicability of the Hague Conventions, see supra note 231, the Israeli Supreme Court has refused to consider the Geneva Convention as part of customary international law, thereby rendering it unavailable for consideration by the Israeli judiciary. H.C. 785/87, Abd Al Nasser Al Aziz v. Commander of IDF Forces, 42(2) P.D. 1, at *37, 42-43, available at http://62.90.71.124/eng/verdict/framesetSrch.html (last visited Apr. 2, 2005); see also Ball, supra note 93, at 1016 (“[A]pplying the provisions of the Fourth Geneva Convention is not a legal question, but an empirical one outside the scope of Convention applicability in the first instance.”). But see Theodor Meron, The Geneva Conventions as Customary Law, 81 AM. J. INT’L L. 348, 349-50 (1987) (arguing that most nations have accepted the Geneva Conventions, thereby “invoking a certain norm” that makes it part of customary rather than conventional international law).
1. The Formalistic Approach

The “crux of the applicability debate rests, appropriately,” with Article 2 of the Convention.\(^{249}\) Article 2 applies when two conditions are satisfied: an armed conflict must exist, and such armed conflict must be waged between two or more “High Contracting Parties.”\(^{250}\) Both Israel and Jordan ratified the Convention in 1951.\(^{251}\) The language and structure of Article 2 has created considerable controversy\(^{252}\) that resembles the debate over language contained in Resolution 242.\(^{253}\) Israel maintained that the plain language of the second paragraph of Article 2 suggests that the Convention applies only to “territories falling under the sovereignty of a High Contracting Party.”\(^{254}\)

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\(^{249}\) Ball, supra note 93, at 1008.

\(^{250}\) Legal Consequences, supra note 63, at 1035-36. If both conditions are satisfied, “the Convention applies . . . in any territory occupied in the course of the conflict by one of the contracting parties.” Id. at 1036.

\(^{251}\) Id. at 1035. Some commentators suggest that Israel is bound by the Convention “via its relationship with Jordan.” Ball, supra note 93, at 1012; see Bisharat, supra note 237, at 339.

\(^{252}\) Ambiguity centers upon “whether the first and second paragraphs of Article 2 are . . . complementary or disjunctive,” or whether “there is no linkage between the two paragraphs and each has to be read and interpreted separately and independently, the first paragraph dealing with armed conflicts, except military occupation, and only the second paragraph referring to the occupation of territory.” Shamgar, supra note 234, at 38; see supra note 245 and accompanying text.

\(^{253}\) See supra Part III.E.

\(^{254}\) Legal Consequences, supra note 63, at 1036. Israel objects to de jure application of the Convention as it would grant Egypt and Jordan “the standing of an ousted sovereign whose reversionary rights have to be respected and safeguarded.” Shamgar, supra note 234, at 37. Because “‘[s]overeignty over a Mandated Territory is in abeyance . . . [and] will revive and vest in the new State,’” neither Egypt nor Jordan acquired legal title to the territories. Blum, supra note 236, at 283 (quoting Int’l Status of South-West Africa, 1950 I.C.J. 128, 150 (July 11) (separate opinion by Sir Arnold McNair)) (first alteration in original). Therefore, Israel’s presence in the territories cannot be described as a partial or complete occupation of “territory of a High Contracting Party” under the language of Article 2. See Caroline B. Glick, Our Self-Inflicted Wounds, JERUSALEM POST, Aug. 27, 2004, at 24 (quoting a statement by former U.N. Ambassador Dore Gold that the “Fourth Geneva Convention is not applicable in the West Bank and Gaza because previous occupants Jordan and Egypt entered those territories illegally in 1948”); see supra notes 236-37, 245, 248 and accompanying text.

Israel’s interpretation prescribes independent and separate meaning to the two paragraphs, which effects

the one and only conclusion . . . that the Convention applies merely to the occupation of the territory of a High Contracting Party and not generally to territories held under military occupation . . . [A]s a prima facie corollary, . . . not each and every occupation of territory turns it into territory to which the Convention applies.
Critics have maintained that Israel’s interpretation ignores language contained in the first paragraph of Article 2.255 The Hague Court wholeheartedly adopted the position that paragraph two supplements paragraph one256 despite contradictions in the Article’s sentence structure. The plain language of the two paragraphs substantiates Israel’s interpretation that each paragraph is “indeed independent”257 and renders the Convention inapplicable to the conflict.258

Shamgar, supra note 234, at 38. But see Roberts, supra note 127, at 64 (describing Israel’s interpretation of Article 2 as “a technical error”). “In an effort to dispatch” the “missing reversioner” theory, critics emphasize that the Convention never references that a High Contracting Party be a “legitimate sovereign.” Ball, supra note 93, at 1017-19, 1024. These critics, however, rely solely upon the Pictet Commentary and fail to consider both the plain language of the Convention and the drafters’ reports. Id. at 1024-25; see infra notes 260-61 and accompanying text.

255. See MALLISON & MALLISON, supra note 235, at 252-58; supra note 245. An alternative interpretation suggests that “the Convention applies to every armed conflict . . . including occupation.” Shamgar, supra note 234, at 38. Critics of Israel stress that the “second paragraph is irrelevant in cases of occupation arising from armed conflict, as these are covered by the first paragraph.” See, e.g., KRETZMER, supra note 129, at 34. Critics argue that the Fourth Geneva Convention is “designed to protect the lives of civilians by requiring belligerents uniformly to yield to humanitarian principles. Because Israel is considered a belligerent occupant of territory possessed as a result of armed conflict with . . . Jordan [,] the Convention applies.” See, e.g., Ball, supra note 93, at 1009 (footnote call number omitted). But see Shamgar, supra note 234, at 38 (stating that, even if this interpretation is valid, “this does not mean . . . that one can disregard the wording of the second paragraph”).

256. The court concluded that “the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph.” Legal Consequences, supra note 63, at 1036. The court based its interpretation on the travaux préparatoires from the Convention. Id.

Judge Buergenthal criticized “the Court’s sweeping conclusion that the wall as a whole . . . violates international humanitarian law and international human rights law.” Legal Consequences, supra note 63, at 1078 (declaration of Judge Buergenthal).

257. Ball, supra note 93, at 1025-26. Drafters of the Convention noted that “the wording of the paragraph is not very clear.” Shamgar, supra note 234, at 39. The language of the Article suggests that each paragraph was intended to be read independently. Ball, supra note 93, at 1025. Meir Shamgar concluded that “the second paragraph . . . refers only to the specific set of circumstances . . . which saw territories occupied without any preceding hostilities . . . [U]se of the word ‘even’ in the last clause of the second paragraph contradicts the argument that the second paragraph adds . . . only the specific situation mentioned in its last clause.” Shamgar, supra note 234, at 39. He added, “[T]he text adopted accords a more general meaning to the second paragraph than the one connected with its final clause only.” Id. David John Ball recognized that the second paragraph of Article 2, which employs the term “even if,” supports a general interpretation: “[C]ommon sense use of ‘even if,’ as any lawyer is aware, indicates an alternative to which the main proposition equally applies.” Ball, supra note 93, at 1027-28.

258. Ball, supra note 93, at 1028. “Article 2(1) . . . [T]he use of ‘High Contracting Party’ and ‘the territory of a High Contracting Party’ . . . establish the state-centric focus of the Convention that renders it inapplicable to the sui generis situation presented by the Middle East conflict.” Id.
2. The Antiformalistic Approach

Although the antiformalistic approach avoids consideration of the plain language of the Convention’s provisions, its application effects no alternative conclusion. The Hague Court noted that its conclusion that the Convention applied to the conflict was “confirmed by the Convention’s travaux préparatoires.” Reliance upon the positions advanced by the International Committee of the Red Cross (ICRC) during the drafting of the Convention and since 1967, however, is highly anachronistic and problematic. Article 31 of the Vienna Convention on the Law of Treaties requires that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” Since the ordinary reading of Article 2 of the Convention suggests that it is inapplicable to the conflict, the use of “supplementary

259. See supra note 244 and accompanying text. “[F]ew scholars adhere to a plain reading of the Fourth Geneva Convention.” Ball, supra note 93, at 992. The Hague Court similarly relied upon other sources of interpretation. See infra notes 260-62 and accompanying text.

260. Legal Consequences, supra note 63, at 1036. The court relied upon the commentary of Jean Pictet, an International Committee of the Red Cross (ICRC) director and a “driving force behind the creation of the Convention.” Ball, supra note 93, at 992. The court noted that the ICRC’s interpretation “must be ‘recognized and respected at all times.’” Legal Consequences, supra note 63, at 1037 (quoting Fourth Geneva Convention, supra note 242, at art. 142).

261. The ICRC has rejected Israel’s position that the Fourth Geneva Convention does not apply to the territories. Shamgar, supra note 234, at 32.

262. The position with which the Hague Court approached the legality of Israel’s counterterrorism initiative reflects a broader practice: “[C]ommentators analyze the . . . situation from a pre-1967 historical perspective . . . . Pictet’s study was ‘based solely on practical experience in the years before 1949’ . . . and . . . the ‘proper perspective [was] lacking’ since the Convention had not been applied yet.” Ball, supra note 93, at 992 (quoting OSCAR M. UHLER ET AL., COMMENTARY-IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 2, 9 (Jean S. Pictet ed., 1958)) (alteration in original) (footnote call number omitted).


265. Id. at art. 31 (emphasis added).

means of interpretation” only confirm that the court’s findings are erroneous.267

C. Conflicting Views of Palestine’s Legal Status

The Hague Court recognized that the “existence of a ‘Palestinian people’ [was] no longer in issue.”268 While the Palestinian people may not be a legal fiction,269 Palestine itself “does not fit easily into defined categories of international status.”270 The court accentuated this inherent ambiguity by simultaneously constructing different classifications for Palestine. The court accorded Palestine benefits resembling statehood271 when it permitted the Palestinian delegation to submit a written statement to the court without substantial justification.272 By doing so, the court ignored a significant corpus of legislation and statutory provisions suggesting that Palestine did not qualify for participation in the proceedings.273 Although it afforded Palestine full rights to participate in

267. Ball, supra note 93, at 1003.
268. Legal Consequences, supra note 63, at 1041.
269. The court noted that President Arafat and Prime Minister Rabin’s 1995 interim agreement expressed Palestine’s “legitimate rights.” Id. at 1041-42; see supra notes 32-33 and accompanying text. But see infra notes 271-73 and accompanying text.
270. Dajani, supra note 20, at 89-90. This ambiguity arises, in part, because Palestine is recognized as a separate and distinct entity that simultaneously lacks sovereignty. Id.
271. “[A] fascinating debate over Palestine’s existence as a subject of international law” began after the PLO signed the 1993 Oslo Accords. Ball, supra note 93, at 1004-05. Nevertheless, “it is an incontrovertible fact that the Occupied Palestinian Territory does not qualify as a sovereign state.” Id. at 1005.
272. See supra note 216 and accompanying text. Approximately sixty states have granted the PLO “full diplomatic status.” Math Noortmann, Non-State Actors in International Law, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, 68 (Bas Arts et al. eds., 2001). Although the General Assembly acknowledged the PLO’s “legal status under international law,” Palestine has remained a non-State actor under international law. Dajani, supra note 20, at 89 (“In order for an entity’s statehood to be ‘constituted’ by recognition, it must first be recognized [as] a State. . . . [N]o State or international body has recognized [Palestine] as an independent State.”); Noortmann, supra, at 68; see also McCarthy, supra note 225, at 18 (“[The PLO’s] metamorphosis into the Palestinian Authority (PA) in 1993 did not vest in the territories the legal standing of a sovereign.”).

a manner similar to U.N. member states, the court nonetheless recognized that Palestinian terrorist attacks against Israelis were not “imputable to a foreign State.”

D. Applicability of Article 51 of the United Nations Charter

The Hague Court’s contradictory treatment of Palestine was poignantly reflected in its determination that Israel could not invoke Article 51 of the U.N. Charter to justify its construction of the security structure. The court stated that Article 51 “recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.” Judge Kooijmans concluded that Israel could not invoke the U.N. Charter’s self-defense provision because Article 51 “is a rule of international law and thus relates to international phenomena.” Although the court referenced U.N. Security Council Resolutions 1368 and 1373, both of which were adopted immediately after the September 11 terrorist
attacks, the court characterized Israel’s security needs as “different from that contemplated” by the Security Council Resolutions.

Judge Buergenthal, however, declared that the court’s interpretation was a “legally dubious conclusion,” particularly because it never examined the terrorism to which Israel responded with its construction of the security structure. Judge Higgins similarly noted that Article 51 contained no express language suggesting that armed attacks must originate from another state. Regardless of the point of origin for acts of

280. Resolution 1368 recognizes “the inherent right of individual or collective self-defence” without reference to attacks perpetrated by state or nonstate actors. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1373 emphasized the “need to combat by all means . . . threats to international peace and security caused by terrorist acts,” regardless of state sponsorship. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). Judge Kooijmans recognized but ultimately dismissed a significant inconsistency in the court’s reasoning: “The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security . . . without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions.” Legal Consequences, supra note 63, at 1072 (separate opinion of Judge Kooijmans). Judge Kooijmans added, “This new element is not excluded by . . . Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State . . . . The Court has regrettably by-passed this new element.” Id. (separate opinion of Judge Kooijmans). But see infra note 282 and accompanying text.

281. Legal Consequences, supra note 63, at 1050. The court added that Israel’s security threat “originates within, and not outside, that territory.” Id. Judge Kooijmans emphasized that the Resolutions “refer to acts of international terrorism as constituting a threat to international peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts.” Id. at 1072 (separate opinion of Judge Kooijmans). But see Falk & Weston, supra note 232, at 138 (“Until recently . . . most of the violence directed against Israel has been planned and perpetrated . . . by exiled liberation forces outside Israel-controlled territory.”).

282. Legal Consequences, supra note 63, at 1079 (declaration of Judge Buergenthal). Judge Buergenthal noted that “[w]hether Israel’s right of self-defence is in play . . . depends . . . on an examination . . . of the deadly terrorist attacks” against Israel. Id. (declaration of Judge Buergenthal). The court failed to consider “facts bearing on that issue” and could not adequately determine the applicability of Article 51. Id. (declaration of Judge Buergenthal).

283. See Charles Krauthammer, Travesty at the Hague, WASH. POST, July 16, 2004, at A21 (“Israel finally finds a way to stop terrorism, and 14 eminences sitting in The Hague rule it illegal . . . in a 64-page opinion in which the word terrorism appears not once (except when citing Israeli claims).”); Benjamin Netanyahu, Why Israel Needs a Fence, N.Y. TIMES, July 13, 2004, at A19 (“Palestinian terrorists have . . . murder[ed] 1,000 of our citizens. Despite this unprecedented savagery, the court’s 60-page opinion mentions terrorism only twice, and only in citations of Israel’s own position on the fence.”); The UN’s Blinkers, supra note 67 (“The court[’s] . . . verdict . . . was breathtakingly one-sided. . . . [and] ignored the purpose for which the barrier was built: to stop Palestinian terrorist attacks inside Israel.”).

284. Legal Consequences, supra note 63, at 1063 (separate opinion of Judge Higgins). Judge Higgins stated, “I do not agree with all that the Court has to say on the question of the law of self-defence.” Id. (separate opinion of Judge Higgins). Judge Higgins noted, however, that the court’s
terrorism, Judge Buergenthal reiterated that Israel maintained its right to self-defense against any attack “provided the measures it takes are otherwise consistent with the legitimate exercise of that right.”

The court further rejected the argument that a “state of necessity” justified Israel’s construction of its security structure. Citing an earlier decision in which it determined that necessity could only be invoked “on an exceptional basis,” the court concluded that it was “not convinced” that Israel considered alternative measures that would “safeguard the interests of Israel against the peril.” Rather than assessing the relevant facts that precipitated construction of Israel’s counterterrorism initiative, the court relied exclusively on information provided by the U.N. The determination was derived from a 1986 opinion and not from any explicit language in Article 51.

Justice Higgins also noted that the majority stated that the court “is indeed aware that the question of the wall is part of a greater whole.” Id. at 1060 (separate opinion of Judge Higgins). Nonetheless, the court never addressed the “greater whole,” and “the ‘history’ as recounted by the Court . . . was neither balanced nor satisfactory.” Id. at 1060 (separate opinion of Judge Higgins). But see id. at 1066 (separate opinion of Judge Kooijmans) (stating that the court can “only examine other issues to the extent that is necessary for the consideration of the question put to it”).

See supra notes 280-81 and accompanying text.

Legal Consequences, supra note 63, at 1080 (declaration of Judge Buergenthal). Judge Buergenthal added that “the Court fails to address any facts or evidence specifically rebutting Israel’s claim of military exigencies or requirements of national security.” Id. (declaration of Judge Buergenthal); see supra note 63 and accompanying text.

Legal Consequences, supra note 63, at 1050.

Concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 40 (Sept. 25).

Legal Consequences, supra note 63, at 1050. Judge Buergenthal, however, rejected the court’s assessment and emphasized that the court “says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.” Id. at 1080 (declaration of Judge Buergenthal) (quoting supra note 63, at 1050).

See supra Parts II.A.2-3, B.1.

Legal Consequences, supra note 63, at 1064-65 (separate opinion of Judge Higgins). “The Court has based itself largely on the . . . Written Statement of the United Nations. It is not clear whether it has availed itself of other data . . . .” Id. (citation omitted). Moreover, “the Court barely address[ed] the summaries of Israel’s position . . . which contradict or cast doubt on the material the Court claims to rely on.” Id. at 1080 (separate opinion of Judge Buergenthal); see Anne Bayefsky, Had Enough?: The U.N. Handicaps Israel, Along with the Rest of Us, NAT’L. REV. ONLINE, July 17, 2004 (“Rather than . . . examin[ing] the facts for themselves, the Court relied heavily on prior biased U.N. reporting.”), at http://www.nationalreview.com/comment/bayefsky 200407171024.asp (last visited May 9, 2005).

Israel objected to the court’s adoption of the term “wall” because it “reflect[ed] a calculated media campaign to raise pejorative connotations . . . of great concrete constructions of separation such as the Berlin Wall.” Written Statement of the Government of Israel on Jurisdiction and Propriety, 43 I.L.M. 1000, (Legal Consequences, supra note 63) (Jan. 30, 2004), at *10-11, available at www.icj-cij.org/icjwww/idocket/imwp/imwp/statements/writtenstatement_17_Israel.pdf (last visited Apr. 2, 2005). Israel added that “[g]iven the intentionally pejorative use of the term ‘wall’, and the ready availability of the neutral term ‘barrier’ used in the Secretary-General’s report,
court’s conclusion that Israel could not act in self-defense was “an embarrassment for logic and common sense” and defied any sense of rationality.292

VI. RAMIFICATIONS OF THE HAGUE COURT ADVISORY OPINION

The Hague Court concluded that Israel’s construction of its counterterrorism initiative in “Occupied Palestinian Territory” violated international law.293 The court’s advisory opinion was immediately characterized as making “a mockery of Israel’s right to defend itself.”294 Following the release of the court’s opinion, several senators introduced a bill in the United States Senate condemning the court’s findings.295 The General Assembly reconvened an Emergency Session to adopt a resolution demanding Israel’s compliance with the decision.296 Israel has refused to

Israel . . . objected to the Court’s adoption of the term ‘wall.’” Id. at 11. Although the court recognized conflicting terminology used to refer to the security structure, see supra note 48 and accompanying text, it arbitrarily favored the General Assembly’s use of “wall”: “[T]he other terms . . . are no more accurate . . . . [T]he Court has therefore chosen to use the terminology employed by the General Assembly.” Legal Consequences, supra note 63, at 1029; see infra note 296 and accompanying text.

Israel provided little documentary support explaining the need for constructing its counterterrorism measure. Legal Consequences, supra note 63, at 1081 (declaration of Judge Buergenthal). Nevertheless, Judge Buergenthal noted that “Israel had no legal obligation to participate in these proceedings . . . . The Court may therefore not draw any adverse evidentiary conclusions.” Id.

292. Samuel Herman, The International Court of Injustice, J. NEWS (Westchester County, N.Y.), July 27, 2004, at 4B.

293. Legal Consequences, supra note 63, at 1054. The court required Israel to compensate Palestinians for damage resulting from the security structure and called upon all states “not to recognize the illegal situation resulting from the construction of the wall.” Id. at 1055. A PLO legal advisor called the opinion a “milestone in the Palestinian struggle.” Gregory Khalil, Just Say No to Vetoes, N.Y. TIMES, July 19, 2004, at A17.

294. Netanyahu, supra note 283. The court failed to consider any benefits the “fence” bestowed upon either the Israelis or the Palestinians: “[T]he fence . . . is a nonviolent defensive measure . . . . [I]t has saved hundreds of lives . . . and will benefit the Palestinian people by sparing them the reprisals . . . that come with the aftermath of a suicide bomb.” Herman, supra note 292. The decision, however, was not entirely surprising: “There is nothing new in the ICJ’s anti-Israel opinion that will . . . change the hostile . . . environment in which Israel has been operating.” Glick, supra note 254.


comply with the court’s advisory opinion, but has implemented changes to the structure based upon a recent ruling by the Israeli Supreme Court. Although the Hague Court’s opinion focused specifically on the legality of Israel’s security structure, the implications of its ruling extend beyond the Israeli-Palestinian conflict, particularly with respect to self-defense in a post-September 11 world.

A. A Flexible Approach to International Humanitarian Law

The Hague Court employed a flexible application of the Fourth Hague and Geneva Conventions to conclude that Israel was bound by both conventions and precluded from erecting its security structure. The Hague Convention, codified during a period of relative peace in Europe, contemplated a “classic case” of belligerent occupation. The Israeli-Palestinian conflict, however, “has contained many special features” that distinguish it from the classic situation contemplated by the Convention.


299. See Legal Consequences, supra note 63, at 1034-35, 1037-38. Although the conflict does not fit within the parameters of a typical occupation, the court was guided by the notion that “provisions of Hague and Geneva Law [were] still binding . . . even though [a conflict] does not meet the definition of armed conflict in those instruments.” Steven R. Ratner, Revising the Geneva Conventions to Regulate Force by and Against Terrorists: Four Fallacies, 1 ISR. DEF. FORCES L. REV. 7, 9 (2003).


301. Roberts, supra note 127, at 61 (enumerating at least five elements rendering the conflict unique).
By finding that Israel violated the Hague Convention, the court apparently believed that the Convention was “not considered outdated and superseded by newer developments in international law.” Humanitarian law, the court implied, “has a sizeable ‘place-holder’” for various types of conflicts, regardless of the participation of state or nonstate actors. By imposing upon Israel obligations under both the Hague and Geneva Conventions, the court ensured that, regardless of Israel’s voluntary consideration of Palestinian humanitarian rights, “basic principles of humanitarian law” applied to Israel de jure.

B. New Precedents for a State’s Inherent Right of Self-Defense

Unlike the flexible approach it utilized to apply international humanitarian law to the conflict, the Hague Court’s interpretation of Article 51 of the U.N. Charter represents a restrictive approach that establishes dangerous precedent in an era of global terrorism. In order to condemn Israel’s construction of its security structure, the court engaged in the “splitting of a legal hair” that defies legal reasoning,invalidates a state’s right to defend itself against terrorism, and enables terrorists to manipulate and operate outside of the international legal system. The court’s opinion established that “new rules” apply to and limit a state’s right of self-defense: (1) self-defense only applies to terrorist attacks that reach a certain level of devastation and destruction; (2) the U.N. Charter does not permit a state to engage in self-defense against an “armed attack” by terrorists who are not state actors; and (3) self-defense does not include

302. See Legal Consequences, supra note 63, at 1046-47.
304. Ratner, supra note 299, at 8. This was not the position the court adopted regarding a state’s right of self-defense. See infra Part VI.B.
305. Ratner, supra note 299, at 9; see Legal Consequences, supra note 63, at 1035-38. But see supra Part V.A.-B. The court’s analysis focused solely upon the hardships imposed upon Palestinians. See Editorial, A Disgraceful Ruling, WASH. TIMES, July 19, 2004, at A18. One critic noted the court’s hypocrisy: “[D]enial of Israel’s right to defend itself because doing so might violate ‘humanitarian’ rights was read in open court by the chief judge representing China, whose government massacred hundreds of its own citizens . . . .” Krauthammer, supra note 283.
307. McCarthy, supra note 225, at 17. The court’s advisory opinion “dealt a serious blow to the credibility of international law” because it demonstrated “the way in which those who practice terrorism have been allowed to manipulate the international legal system.” Andrew Apostolou, A Court in the Service of Terrorism: Playing Arafat’s Propaganda Game, NAT’L REV. ONLINE, at http://www.nationalreview.com/comment/apostolou200407190844.asp (last visited May 9, 2005).
nonviolent actions. Against the backdrop of September 11, these conclusions are highly problematic.

1. Calculating the Gravity of an Attack

The Hague Court’s declaration that Article 51 “has no relevance” to the case against Israel suggests that it predicates a state’s “inherent right” to self-defense upon the gravity of the attack waged against it. While the court implicitly recognized the September 11 terrorist attacks against the United States, it refused to acknowledge that Palestinian suicide bombings against Israelis constituted terrorist acts. In doing so, the court endorses a subjective standard as to what acts of terror rise to the level of an “armed attack.” The court had no difficulty concluding that the

308. Bayefsky, supra note 291.
309. Legal Consequences, supra note 63, at 1078 (declaration of Judge Buergenthal); see also id. at 1062-63 (separate opinion of Judge Higgins) (stating that “[i]t seems quite detached from reality . . . that it is the wall that presents a ‘serious impediment’” to Israeli self-defense and Palestinian self-determination).
310. Id. at 1050.
311. U.N. Charter art. 51.
313. The court cited Resolutions 1368 and 1373 adopted after the September 11 attacks but discussed neither their substance nor purpose. See Legal Consequences, supra note 63, at 1049-50.
314. The court merely stated that “Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population.” Id. at 1050. Judge Koroma justified such attacks: “[I]t is understandable that a prolonged occupation would engender resistance.” Id. at 1057 (separate opinion of Judge Koroma). Judge Elaraby added that “occupation has always been met with armed resistance.” Id. at 1088 (separate opinion of Judge Elaraby). Judge Owada went further by describing the violence as “so-called terrorist attacks by Palestinian suicide bombers against the Israeli civilian population.” Id. at 1098 (separate opinion of Judge Owada). But see supra Part II.A.2.3.
315. The court implied that a certain “scale and effect” was required in order for an action to constitute an “armed attack.” Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, 11 CARDOZO J. INT’L & COMP. L. 1, 23 (2003); see Matthew Scott King, Note & Comment, The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-up International War Crimes?, 9 ILSA J. Int’l & COMP. L. 457, 463 (2003) (“[F]actors such as the terrorist threat to a state’s safety . . . may be considered when trying to determine whether an attack constitutes an ‘armed attack.’”). Thus, a single hostile act or a series of isolated attacks, such as a suicide bombing, may or may not constitute an armed attack depending upon “‘its magnitude or severity.’” Marco Sassoli, Use and Abuse of the Laws of War in the “War on Terrorism,” 22 L. & INEQUALITY 195, 202 (2004) (quoting U.S. DEP’T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION 3 (2003)). A terrorist attack should be considered part of a larger scale of actions when determining whether such an attack rises to the level of an “armed attack.” See Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 Am. J. Int’l L. 1, 29 (2004)
September 11 attacks created a “situation [that] is . . . different” from the violence in Israel.316 By distinguishing between acts of terrorism, the court endorsed a highly subjective standard that trivialized loss of life and arbitrarily placed a higher value upon those lives it deemed worthy of protection.317 According separate standards of protection for Israelis and Palestinians “will only serve to further stoke the long-running . . . conflict and do nothing to bring it to an end.”318

2. Imputing an “Armed Attack” to a State Actor

The court’s limited interpretation of the language of Article 51 is based solely upon the assumption that the drafters of the U.N. Charter did not envision that an entity other than a state could engage in an armed attack.319 Although the U.N. Charter did not define an “armed attack,”320 the court determined that Article 51 permits self-defense only in “the case of armed attack by one State against another State.”321 While this approach may have rendered illegal Israel’s security structure, it severely limits any state’s right to defend itself against attack.322 Thus, the court’s conclusion
suggests that the United States could not have invoked its right of self-defense against al Qaeda absent specific authorization from the Security Council. This interpretation suggests that a state must seek U.N. authorization before engaging in an act of self-defense after a terrorist attack. Ultimately, the court distinguished between the American and Israeli attacks without elaboration and thereby applied a separate legal standard for Israel’s reliance upon self-defense.

The court’s limitation upon Israel’s “inherent right” to self-defense contemplated that Palestinian violence could not be imputed to a Palestinian state. Since Palestinian violence “originates within, and not outside” Israel, the court suggested that the location of a terrorist attack determines whether a state can act in self-defense. Notwithstanding of Article 51. See id. 323. The court suggests that, without Resolutions 1368 and 1373, the United States would have no right to act in self-defense against al Qaeda. See Legal Consequences, supra note 63, at 1049–50; see also McCarthy, supra note 225, at 24 (“If the new rule is that terrorist attacks by subnational actors are an insufficient predicate for . . . self-defense, then the U.S. has unlawfully invaded Afghanistan and Iraq.”). But see Jose E. Alvarez, Editorial Comment, Hegemonic International Law Revisited, 97 AM. J. INT’L L. 873, 879 (2003) (noting that the two resolutions responded specifically to the terrorist attacks against the U.S. and “were not directed at the membership as a whole”). Judge Kooijmans wrote that the court “rightly conclude[d] that the Israeli-Palestinian situation is different from that contemplated by resolutions 1368 and 1373.” Legal Consequences, supra note 63, at 1072 (separate opinion of Judge Kooijmans). But see Alvarez, supra, at 879 (“Through [Resolutions 1368 and 1373] the Council went out of its way to give its prior consent to the invocation of self-defense.”) (emphasis added); McCarthy, supra note 225, at 24 (“At a time when . . . terrorists scout high-profile targets,” the court’s interpretation “is suicidal.”).

324. This interpretation is in direct opposition to the language of Article 51 itself, which explicitly authorizes a state to act in self-defense before it reports its actions to the U.N.: “Nothing . . . shall impair the inherent right of . . . self-defence if an armed attack occurs against a Member of the United Nations . . . Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . . .” U.N. CHARTER art. 51 (emphasis added).

325. The court simply noted that the “situation is thus different.” Legal Consequences, supra note 63, at 1050; see supra note 322 and accompanying text.

326. See supra note 213 and accompanying text.


328. Legal Consequences, supra note 63, at 1050.

329. Id. Judge Higgins “fail[ed] to understand the Court’s view that [Israel] loses the right to defend [itself] . . . if the attacks emanate from the occupied territory.” Id. at 1063 (separate opinion of Judge Higgins).

330. See id. at 1050; see supra note 281 and accompanying text. This conclusion ignores the circumstances of September 11 when nineteen foreign nationals boarded four American civilian airliners at American airports. See Lippman, supra note 46, at 297; infra note 332. It also runs contrary to the language of the Security Council Resolutions 1373 and 1368. See S.C. Res. 1373, supra note 280; S.C. Res. 1368, supra note 280.
international law principles that govern interactions between states, a requirement that perpetrators of violence possess an “international personality” is not required. 331

Proponents of America’s exercise of force in self-defense after September 11 have argued that a close association between the al Qaeda network and Afghanistan renders the actions of the former “imputable to the state of Afghanistan.” 332 The international community generally accepted this conclusion and condoned the United States military’s campaign against the Taliban. 333 In many instances, however, the relationship between a terrorist network and a state sponsor of its activities is tenuous at best. 334 The court, however, ignored direct evidence that current and previous Palestinian attacks can be imputed to several Middle Eastern nations that harbor, finance, and support Palestinian terrorist activities. 335

3. Nonviolent Actions and Self-Defense

Anticipatory self-defense measures generally contemplate actions involving the use of force. 336 Article 2(4) of the U.N. Charter prohibits the use of force, “a peremptory norm from which no derogation is

331. Brown, supra note 315, at 3. Furthermore, “[w]hen a terrorist organization operates in a state illegally . . . customary international law imposes on states the duty” to prevent the commission of “wrongful acts.” Id. at 30; see infra note 332 and accompanying text.

332. Guruli, supra note 266, at 109. The U.S. directed its campaign against Afghanistan because the Taliban government both supported and protected al Qaeda leadership. Becker, supra note 6, at 583. But see S.C. Res. 1373, supra note 280; S.C. Res. 1368, supra note 280 (implying that September 11 constituted armed attacks regardless of the status of the actors).

333. See supra note 6 and accompanying text.

334. Guruli, supra note 266, at 109-10. “[E]vidence supporting [a] close link might not be available prior to the use of force in self-defense,” making it implausible to require that only a state actor may engage in an armed attack before the targeted state can invoke Article 51. Id. at 110. Such a conclusion suggests that “he who chooses to wait [for legal authorization] will . . . pay an unjust penalty before he can exact a just penalty.” Louis René Beres, In a Dark Time: The Expected Consequences of an India-Pakistan Nuclear War, 14 AM. U. INT’L L. REV. 497, 505 n.24 (1998) (quoting HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 96 (James Brown Scott ed., Gladys L. William & W. H. Zeydel trans., 1964)).

335. Scholars have identified numerous connections between terrorists and states, including financial aid and weapons. Antonio Cassese, The International Community’s “Legal” Response to Terrorism, 38 INT’L & COMP. L.Q. 589, 598 (1989); see also Bayefsky, supra note 291 (noting that Iran and Syria’s support of Palestinian suicide bombers “apparently slipped the judges’ minds”); Daoud Kuttab, Saddam and Palestine, JERUSALEM POST, Dec. 21, 2003, at 13 (noting Iraq’s cash payments to every suicide bomber’s family). The conflict has been fueled and perpetuated by forces external to Israel, the West Bank, and Gaza. See Emanuel Gross, The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?, 15 FLA. J. INT’L L. 389, 447-48 (2003).

336. See generally Brown, supra note 315 (arguing that the September 11 attacks established a new paradigm relating to the international law principles governing a state’s use of force).
Whereas the United States exercises force in its campaign to eradicate terror, Israel’s counterterrorism initiative represents a “non-forcible” measure. The court never addressed the nonviolent character of the structure itself. Judge Higgins determined that Article 51 did not contemplate the use of a nonforcible measure, such as a barrier, fence, or wall, as an exercise of self-defense. As a result, the court implicitly favored the exercise of force over endorsement of a state’s implementation of nonviolent measures designed to enhance its citizens’ safety and security.

VII. Conclusion

For the first time in the history of the Israeli-Palestinian conflict, the General Assembly invoked its authority to call upon the Hague Court to determine the legality of Israel’s construction of its security structure. The court’s advisory opinion reflected the extent to which anti-Israel sentiment has clouded judicial reasoning as the U.N. practice of “blaming Israel first” manifested itself through a proceeding during which the court “bound” itself to “censure” Israel and dismantle its efforts to combat terrorism. Although Israel represents one of approximately

337. Legal Consequences, supra note 63, at 1087 (separate opinion of Judge Elaraby). Article 2(4)’s prohibition on the use of force is “the most important principle that emerged in the twentieth century.” Id. (separate opinion of Judge Elaraby); see also Nabil Elaraby, The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?: Comment by Nabil Elaraby, 78 AM. SOC’Y INT’L. L. REV. 94, 94 (1984) (stating that “[t]he use of force must not be sanctioned under any circumstances”).

338. See McCarthy, supra note 225, at 22.

339. Instead, the court stated, “The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination . . . .” Legal Consequences, supra note 63, at 1041 (quoting a written statement submitted to the court).

340. Id. at 1063 (separate opinion of Judge Higgins). Judge Higgins added, “I remain unconvinced that non-forcible measures . . . fall within self-defence under Article 51 . . . . [E]ven if it were an act of self-defence . . . it would need to be justified as necessary and proportionate.” Id. (separate opinion of Judge Higgins). But see supra note 63 and accompanying text.

341. Such a conclusion “encourages lethal retaliation when more humane measures might suffice.” McCarthy, supra note 225, at 23; see also William C. Bradford, “The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventative War, 79 NOTRE DAME L. REV. 1365, 1433-34 (2004) (“Grotius implied the fundamental right of state self-defense at natural law to undertake . . . preventative measures” only after peaceful remedies were “exhausted.”).

342. See supra note 206 and accompanying text.

343. “The Arab drive to destroy the state of Israel has debased the U.N. . . . perverted the meaning of human rights, and ransacked international law and its highest Court.” Bayefsky, supra note 291.

344. Glick, supra note 213.

190 nations within the U.N., it has been isolated, defamed, and rebuked by the organization and its highest court. Israel’s counterterrorism initiative serves solely as a prophylactic measure designed to isolate Palestinian suicide bombers and insulate Israeli citizens from violence. While its counterterrorism initiative imposes hardships upon both Israelis and Palestinians, Israel’s primary objective has been to preserve lives on both sides of the conflict. The court, however, determined that Israel’s security structure violated the rights of Palestinians.

The court’s advisory opinion, which relied exclusively upon material provided by the U.N., failed to engage in an impartial assessment of the conflict. Instead, the Court engaged in revisionist history, advanced flawed legal reasoning, and succumbed to the same elements of bias and anti-Israel sentiment expressed within the General Assembly. Presented with a legally conclusive question framed to produce a predetermined answer, the court advanced an interpretation of legal principles that achieved the result sought by the General Assembly: Israel’s attempts to shield itself from terror violated international law.

In an advisory opinion designed to substantiate the illegality of Israel’s security structure, the Hague Court manipulated principles of international law in order to undermine Israel’s inherent right to defend itself against acts of terror. The unanticipated ramification of the court’s newly

346. See supra Part IV.A.
347. See supra Part IV.B.
348. See supra Part IV.D.
349. “[T]he Court’s decision w[as] crafted to apply to a party of one.” Bayefsky, supra note 291.
350. See supra Part II.B.
351. Palestinians “need freedom of movement . . . . Israeli Jews and . . . Arabs have a human right not to be blown to pieces by suicide bombers.” Wedgwood, supra note 63.
352. “[S]aving lives is more important than preserving the quality of life,” which “is always amenable to improvement. Death is permanent.” Netanyahu, supra note 283. But see supra notes 340-41 and accompanying text.
353. See Legal Consequences, supra note 63, at 1054-55.
354. See supra note 295 and accompanying text.
355. The court noted that Palestinian Arabs rejected the 1947 U.N. Partition Resolution because “it was unbalanced.” Legal Consequences, supra note 63, at 1030. But see supra note 102 and accompanying text.
356. The decision was described as one emanating from a “kangaroo court.” Krauthammer, supra note 283; see also Editorial, Europe and the ICJ, JERUSALEM POST, July 12, 2004, at 13.
358. See supra note 207 and accompanying text. The General Assembly “simply want[ed] to know ‘the legal consequences’ of Israel’s original sin.” Wedgwood, supra note 63.
359. See Legal Consequences, supra note 63, at 1054-55.
360. The court’s decision “raises still broader questions about the U.N.’s capacity to contribute
established precedent may preclude a nation targeted by terror from responding to and preventing security threats against its citizens. Thus, while the General Assembly may have sought to censure Israel by seeking an advisory opinion from the court, it effectively undermined all U.N. member nations’ rights to self-defense.