WRITTEN STATEMENT SUBMITTED BY THE EUROPEAN CENTRE FOR LAW AND JUSTICE REGARDING THE UN GENERAL ASSEMBLY'S REQUEST FOR AN ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE WITH RESPECT TO "ISRAELI PRACTICES AFFECTING THE HUMAN RIGHTS OF THE PALESTINIAN PEOPLE IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM"

Respectfully submitted to the International Court of Justice
by the
European Centre for Law and Justice
on
20 March 2023

Submitted Pursuant to Practice Direction XII
of the Court's Practice Directions

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EXECUTIVE SUMMARY

The UN General Assembly has asked the International Court of Justice to render an advisory opinion to determine the "legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures".

No competent judicial body has ever determined the legality of the numerous indiscriminate attacks against Israel carried out from the Gaza Strip and the so-called "West Bank" or the illegality of Israel's military responses and security measures taken in self-defence. Yet, the General Assembly's questions falsely presume that Israeli policies and practices are unlawful.

The General Assembly and the International Court of Justice (in the Wall Advisory Opinion) both presume a Palestinian State's existence on the basis of the Partition Plan recommended in General Assembly Resolution 181(II), which was rejected by the Arabs, was never implemented, and has no legal validity. They further falsely presume that the Palestinian State's borders coincide with the 1949 armistice lines. Both of these presumptions are legally flawed.

Moreover, the presumption that Israel is unlawfully occupying "Palestinian territory" further disregards the League of Nations' Mandate for Palestine, a legally binding document that called for the establishment of a national home for the Jewish people in the territory of the Mandate. It also disregards the customary law principle called *uti possidetis juris* ("*UPJ*"). Both the Mandate for Palestine and *UPJ* individually and separately established Israeli sovereignty over the Mandate's territory (including the Gaza Strip, the West Bank, and East Jerusalem) when the British Mandatory departed and Israel declared independence in May 1948. Israel did not "occupy" the Gaza Strip and the West Bank (including East Jerusalem) in 1967 when it liberated those areas from the unlawful belligerent military occupation by Egypt and Jordan, respectively. A State cannot unlawfully occupy its own territory as the term "occupation" is understood in the Hague and the Geneva Conventions. The conventions deal with the territory of a High Contracting Party (a State).

Furthermore, Israel's continued control over parts of the West Bank and its measures *vis-à-vis* the West Bank, the Gaza Strip, and the residents therein are consistent with the Law of Armed Conflict. Palestinian groups like Hamas, Palestinian Islamic Jihad, and their allies continue to commit grave war crimes by indiscriminately attacking Israeli population centres every year with thousands of rocket attacks, mortar attacks, suicide bombings, shootings, knife attacks, incendiary balloons, etc. In response to such attacks, Israel must take security measures like the security fence, check points, the naval blockade, military tribunals, and necessary and proportionate armed responses—all of which are permitted under international law.

Unlike political bodies, such as the General Assembly, a court of law must not rely on unsubstantiated presumptions or disregard applicable international law.

INTRODUCTION

On 30 December 2022, the United Nations ("UN") General Assembly adopted resolution A/RES/77/247 requesting the International Court of Justice ("Court" or "ICJ") to render an advisory opinion answering the following questions.

> (a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?
>
> (b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

Pursuant to Practice Direction XII of the Court's Practice Directions, the European Centre for Law and Justice ("ECLJ")[1] submits this written statement on issues we believe to be germane in assisting the Court as it formulates a response to the above questions.

STATEMENT OF FACTS

The land we call "Palestine" today was for millennia the historical homeland of the Jews.[2] In modern times, the area had been a component part of the Ottoman Empire for approximately 400 years. It was ruled by the Ottoman Turks until 1917, when forces under British General Sir Edmund Allenby's command captured Jerusalem and the rest of Palestine

[1]The ECLJ is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007. *Consultative Status for the European Centre for Law and Justice*, U.N. DEP'T ECON. & SOC. AFF., http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010 (last visited 22 Jan. 2023).

[2]*See e.g.*, Mandate for Palestine, 24 July 1922, 3 L.O.N.O.J. 1007 (Supp. 1923), Preamble ("Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country . . . ."); Exodus 23:31 (setting out metes and bounds of the Promised Land); Ezekiel 47:14-20 (directions for dividing the land amongst the Tribes of Israel); ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QUR'AN 20:80 (10th ed. 2003) ("O ye Children of Israel! We delivered you from Your enemy, and We Made a Covenant with you On the right side of Mount (Sinai), and We sent Down to You Manna And quails") [hereinafter "QUR'AN]; QUR'AN 17:104 ("And We said thereafter To The Children of Israel, 'Dwell securely in the land (Of promise)'"); QUR'AN 10:93 ("We settled the Children Of Israel in a beautiful Dwelling place"); QUR'AN 5:21 ("O my people! enter The holy land which Allah hath assigned unto you"). Islam's two most notable scholars who translated the Qur'an into English also provide some insights into Jewish historical ties to the land. Commenting on QUR'AN 17:4 ("And We gave (clear) warning To the Children of Israel In the Book, that twice"), Abdullah Yusuf Ali states in note 2174 that "[i]t may be that 'twice' is a figure of speech for 'more than once', 'often'. Or it may be that the two occasions refer to (1) the destruction of the Temple by the Babylonian Nebuchadnezzar in 586 B.C., when the Jews were carried off into captivity, and (2) the destruction of Jerusalem by Titus in A.D. 70, after which the Temple was never rebuilt". Commenting on QUR'AN 17:6 in note 2176, Ali further states that "[t]he return of the Jews from the Captivity was about 520 B.C. They started life afresh. They rebuilt the temple". Muhammad Asad comments on the same verse stating in note 8 that "[The passage] apparently [contains] a reference to the return of the Jews from the Babylonian captivity in the last quarter of the sixth century B.C., the partial re-establishment of their state, and the building of a new temple in the place of the one that had been destroyed". MUHAMMAD ASAD, THE MESSAGE OF THE QUR'AN (5th ed. 2003). Accordingly, confirmation is found in secular documents as well as in the Bible and the Qur'an.

during the First World War. During the war, the British and other allied powers were fighting the Ottoman Turks, who had allied themselves with the German and the Austro-Hungarian Empires against Great Britain, France, and Russia. In the Middle East, Great Britain had encouraged the Arabs to revolt against their Turkish rulers and had promised to assist them in gaining their own independence after the war. Britain and its Arab allies were ultimately successful in driving the Turks out of the Arabian Peninsula and back towards Anatolia, the core of the Turkish homeland.

At the end of the First World War, instead of annexing the conquered lands, as was the custom at the time, the victorious allied powers decided to embrace the liberal principles of democracy and self-determination. The Allies recognised some of the conquered lands as independent nations, and for those that were not yet ready for independence, they held the lands in trust for the people who would someday achieve independence.[3]

To achieve that goal with respect to the Middle East, the international community, under the auspices of the League of Nations, instituted a system of Mandates. This included, *inter alia*, the Mandates for Syria, Mesopotamia, and Palestine. In July 1922, incorporating the text of the Balfour Declaration of 2 November 1917 into the terms of the Mandate,[4] the League of Nations assigned the Mandate for Palestine to Great Britain for the "establishment in Palestine of a national home for the Jewish people", including "facilitat[ing] Jewish immigration" and "close settlement by Jews on the land".[5]

Instead of establishing the Jewish national home in the entirety of the Mandate's territory, the British Mandatory divided the territory and ultimately created an Arab State on 78% of the territory, which became the Hashemite Kingdom of Jordan,[6] leaving only the remaining 22% in which to establish a Jewish national home.

All of the Mandates formed out of the former Ottoman territories in the Middle East, except for the portion of the Mandate for Palestine lying between the Mediterranean Sea and the Jordan Rift Valley, became independent States upon the departure of their respective Mandatories. Britain granted Iraq (originally known as Mesopotamia) its independence in

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[3]Douglas J. Feith, *US Policy on The Legal Status of Israel's West Bank Settlements*, HUDSON INST. (27 Jan. 2020), https://www.hudson.org/research/15674-us-policy-on-the-legal-status-of-israel-s-west-bank-settlements; *See also* Eugene V. Rostow, *"Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 YALE STUD. WORLD PUB. ORD. 147, 154-55 (1979) [hereinafter Palestinian Self-Determination]:

> After the First World War, the Allied powers did not annex the territory of their defeated enemies on a large scale, in the pattern of practice throughout history. Instead, in the name of the self-determination of peoples, they restored Poland, and established several new states in Europe, largely at the expense of the Austro-Hungarian Empire and the Soviet Union. Outside Europe, the Allies took over the administration of a number of territories which had been parts of the Turkish and German empires as Mandates of the League of Nations. . . . [*The Mandate system*] *was viewed with high hope as an instrument of justice*. The founders of the League established the Mandate system in order to liberate peoples who had lived in the colonies and protectorates of empire, and to launch their new states on a footing of dignity and equality.

Id. at 154–55 (emphasis added).

[4]Letter from Arthur James Balfour, Foreign Secretary, to Lord Rothschild, (2 Nov. 1917), https://avalon.law.yale.edu/20th_century/balfour.asp [hereinafter Balfour Declaration].

[5]Mandate for Palestine, *supra* note 2, pmbl, art. 6.

[6]Hence, one must recognise that the first "Palestinian State" to achieve independence was Jordan, and it did so as an *Arab* Palestinian State. This refutes any claims that no viable, independent Arab "Palestinian State" exists. The truth is that those identifying themselves today as "Palestinians" are actually seeking to form a *second* Arab Palestinian State—a future *State of Palestine*—out of the territory of the original Mandate for Palestine.

1932.[7] Britain granted Jordan its independence in 1946[8] in the 78% of the original Mandate for Palestine lying to the east of the Jordan rift valley. France granted Lebanon its independence in 1943[9] and Syria its independence in 1946.[10] Only the portion of the Mandate for Palestine lying between the Mediterranean Sea and the Jordan rift valley remained under British Mandatory's control after 1946.

Unlike what Britain did with respect to Iraq and Jordan, when the British ultimately departed Palestine in 1948, Britain did not recognise the independence of the Jewish people in their homeland, despite the Mandate's explicit purpose of reconstituting in Palestine the homeland for the Jewish people. Instead, in 1947, Britain notified the UN of its intention to depart Palestine in 1948 and asked the UN to decide territorial ownership.[11] In response to the British notice, the UN General Assembly formed the UN Special Committee on Palestine ("UNSCOP") to recommend how to decide the issue.[12] UNSCOP ultimately proposed dividing the territory into three parts: an Arab State, a Jewish State, and an area around greater Jerusalem under international control.[13]

Although the Partition Plan was embodied in UN General Assembly Resolution 181(II), as the ICJ noted in the Wall Advisory Opinion,[14] it was rejected by the Arab leadership and never implemented. *Further, because the Plan arose from the General Assembly, pursuant to the explicit terms of the UN Charter regarding what the General Assembly has authority to do, the Partition Plan and the Resolution that embodied it were merely a recommendation that lacked any enforcement mechanism.*[15] Nonetheless, had both Jewish and Arab inhabitants of

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[7]*Iraq*, WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/iraq/ (last updated 14 Mar. 2022).
[8]*Jordan*, WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/jordan/ (last updated 7 Mar. 2022).
[9]*Lebanon*, WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/lebanon/ (last updated 10 Mar. 2022).
[10]*Syria*, WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/syria/ (last updated Mar. 14, 2022).
[11]*History of the Question of Palestine*, U.N., https://tinyurl.com/2v2e4rrb (last visited Mar. 23, 2022) ("In 1947, the UK turned the Palestine problem over to the UN").
[12]G.A. Res. 181(II), at 131 (29 Nov. 1947).
[13]*Id.* at 133.
[14]Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 71 (9 July) [hereinafter Wall Advisory Opinion].
[15]The U.N. Charter limits General Assembly responsibilities to discussing issues and making recommendations; the Charter grants no authority to the General Assembly to make legal decisions with respect to issues of global concern or compel compliance with its resolutions: U.N. Charter art. 10 ("The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and . . . *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters") (emphasis added); U.N. Charter art. 11, ¶ 1 ("The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security . . . and *may make recommendations* with regard to such principles to the Members or to the Security Council or to both") (emphasis added); U.N. Charter art. 12, ¶ 1 ("While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests"); U.N. Charter art. 13, ¶ 1 ("The General Assembly shall initiate studies and *make recommendations* for the purpose of: 1. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; 2. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights . . ."") (emphasis added); U.N. Charter art. 14 ("Subject to the provisions of Article 12, the General Assembly *may recommend* measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations . . .") (emphasis added); U.N. Charter art. 96, ¶ 1 ("The General Assembly or the Security Council may request the International Court of Justice *to give an advisory opinion* on any legal question") (emphasis added)).

Palestine agreed to accept its terms, it could have resolved the territorial conflict between Arabs and Jews in Palestine. Jewish Palestinians were willing to accept the plan's terms, whereas Arab Palestinians and their Arab allies rejected them. Absent a meeting of the minds between Palestinian Jews and Palestinian Arabs *vis-à-vis* the plan, it was dead—and remains dead to this day, despite periodic attempts to resurrect portions of it.[16]

Upon Britain's departure from Palestine in May 1948, Israel declared its independence. The general principle of customary international law, *uti possidetis juris*, applies to determining borders as well as sovereignty within such borders when a State gains its independence from either a prior state of subservience to some other State (as was the case with former colonies and mandates) or the break-up of former States (as was the case with Yugoslavia, Czechoslovakia, and the Soviet Union).[17] As the only State to emerge in the remaining territory of the Mandate for Palestine upon Britain's departure in May 1948, Israel became a sovereign State over the remaining 22% of the Mandate's territory, which included the Gaza Strip, the so-called "West Bank", and East Jerusalem.

The day following Israel's declaring its independence, the nascent State of Israel was attacked by its Arab neighbours, thereby triggering the 1948-1949 Arab-Israeli war. The war continued into 1949, when armistice agreements were signed to end hostilities.[18] At war's end,

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[16]Proponents of Palestinian statehood periodically cite Resolution 181's language calling for an Arab State as evidence that the international community recognises the right of an Arab State to exist in Palestine. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136, 251 (July 9) (separate opinion of Judge Elaraby) ("On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was 'by virtue of [Israel's] natural and historic right' and based 'on the strength of the resolution of the United Nations General Assembly'. *The independence of the Palestinian Arab State has not yet materialized*"). Yet, even as they rely on UNGA Resolution 181's language referring to an Arab State, many of those same persons reject explicit language in the resolution calling for a "Jewish" State. Further, Arab Palestinians claim that Jerusalem is the capital of the Arab State, despite Resolution 181's clear language placing Jerusalem and its environs under international control. G.A. Res. 181(II), *supra* note 12, at 146. Accordingly, any argument for an Arab State predicated on Resolution 181 is built on wishful thinking—especially since Arabs rejected the Plan at the time.

[17]Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (Dec. 22).

[18]Armistice lines are not concrete boundaries. In fact, armistice lines simply reflect the relative position of opposing forces when an armistice agreement is concluded. The specific language in these armistice agreements is significant because the language illustrates that border and territorial issues were to be determined at some future date. In fact, *it was at Arab insistence* that the lines be simply armistice lines, not internationally recognised borders. *See* Howard L. Bressler, *Wrong Conclusion, No Resolution: United Nations Security Council Resolution 2334's Erroneous Conclusions on the Legality of Israeli Settlements in Judea, Samaria and Jerusalem*, 2 INT'L COMP. POL'Y & ETHICS L. REV. 37, (2018). The Egyptian-Israeli General Armistice Agreement of 24 February 1949, for example, stated the following:

> It is further recognized that rights, claims or interests of a nonmilitary character in the area of Palestine covered by this Agreement may be asserted by either Party, and that these, by mutual agreement being excluded from the Armistice negotiations, shall be, at the discretion of the Parties, the subject of later settlement. It is emphasized that it is not the purpose of this Agreement to establish, to recognize, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights, claims or interests which may be asserted by either Party in the area of Palestine or any part or locality thereof covered by this Agreement. . . . *The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice.*

Egypt-Isr. Armistice art. IV, ¶ 3. The agreement further stated: "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question". *Id.* art. V, ¶ 2. And the purpose of the lines was to "delineate the line beyond which the armed forces of the respective Parties shall not move". *Id.* art V, ¶ 3. Similar language was used in the following armistice agreements.

portions of the territory of the Mandate for Palestine (i.e., the Gaza Strip and the West Bank (which included East Jerusalem)) were under unlawful military occupation by the military forces of Egypt and Jordan, respectively, and remained so until 1967.

During those eighteen years, Israel had established itself as a viable independent State on the territory it physically controlled. The Arab forces unlawfully occupying the Gaza Strip and the West Bank, on the other hand, had ethnically cleansed all Jews from the territory they controlled by either killing them or driving them from their homes. Because both Jordan and Egypt opposed the establishment of the Jewish homeland anywhere in Palestine and were thus against the Mandate, both Jordanian and Egyptian authorities enforced a *judenrein* policy in the occupied territories they controlled.[19]

Tensions remained high in the region after the Arab-Israeli War of 1948-49.[20] Between 1949 and 1967, Arab terrorists continually infiltrated Israel from all sides.[21] They infiltrated from Arab-controlled territories and carried out attacks on Israeli settlements located adjacent to the borders of Israel.[22] This was especially egregious along the Syrian border and periodically resulted in clashes between conventional armed forces.

The next Arab-Israeli war occurred in 1956. The 1956 Arab-Israeli War, also commonly known as the Suez Crisis, broke out after Egyptian President Gamal Abdel Nasser had nationalised the Suez Canal.[23] Nationalising the Canal was an act taken by Nasser to enhance Egypt's reputation as a rising Arab power and to throw off the yoke of western control

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The Israel-Jordan Armistice Agreement of 3 April 1949, for example, stated the following: "It is also recognized that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations". Isr.-Jordan Armistice art. II, ¶ 2. Similar to the 1949 Egyptian-Israeli General Armistice Agreement, the purpose of the Israel-Jordan armistice lines was to "delineate the lines beyond which the armed forces of the respective Parties shall not move". *Id.* art. IV, ¶ 2. The agreement further explained that the armistice lines were "agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines* or to claims of either Party relating thereto". *Id.* art. VI, ¶ 9. Clearly, these armistice agreements were not intended to (and did not) establish national borders. The Israel-Syria Armistice Agreement to follow further illustrates this.

The Israel–Syria Armistice Agreement of 20 July 1949 set forth the following: "[N]o provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military, and not by political, considerations". Isr.-Syria Armistice, art. II, ¶ 2. It further set forth that "the following arrangements for the Armistice Demarcation Line between the Israeli and Syrian armed forces and for the Demilitarized Zone *are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties* to this Agreement". *Id.* art. V, ¶ 1.

Based on the language in these armistice agreements, border and territorial issues were separate and distinct from the temporary armistice lines established in 1949. Moreover, *it was at Arab insistence that the 1949 lines be designated as mere armistice lines*, not international boundaries, because the Arab world did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel.

[19]*See* Michael J. Totten, *Between the Green Line and the Blue Line*, CITY J. (Sum. 2011), https://www.city-journal.org/html/between-green-line-and-blue-line-13397.html. ("Jews caught on the Jordanian side were even less fortunate; those who weren't expelled were killed or taken to prison camps, and their property was confiscated or destroyed").

[20]Jeremy Bowen, *1967 War: Six Days That Changed the Middle East*, BBC (June 4, 2017), https://www.bbc.com/news/world-middle-east-39960461.

[21]*Id.*

[22]*Id.*

[23]*The Suez Crisis, 1956*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1953-1960/suez (last visited 5 Apr. 2022).

of Egypt's principal financial asset.[24] In response, the British and the French met secretly with the Israelis (who also had serious, ongoing grievances against Egypt[25]) and encouraged the Israelis to attack the Egyptians. The British and the French intended the Israeli attack to create the pretext for British and French forces to insert themselves into the conflict to impose peace between Israel and Egypt to protect the Suez Canal, by which they meant regain control of the Canal.[26] Although the plan was a tactical military success, it was a catastrophic strategic failure for the British and the French. The United States, having just condemned the Soviet invasion of Hungary, pressured the British and the French to withdraw their forces, negating whatever success they had achieved.[27] Moreover, because the British and French did not regain control of the Canal, Nasser in fact achieved a strategic victory and improved his stature throughout the Arab world. The important issue for our analysis here is to analyse how hostilities ended between Israel and Egypt.

The war between Israel and Egypt ended in 1957 with an informal agreement with each nation promising to do certain things: "[T]he Israelis agreed to withdraw from the Sinai, and Egypt promised to open the Strait of Tiran and the Suez Canal to Israeli shipping; to prevent guerrillas from operating against Israel from its territory; and in due course, to make peace".[28] Yet, once Israel had fulfilled its obligation to withdraw from the Sinai, Egypt refused to carry out its end of the bargain.[29] This refusal by Egypt to abide by its treaty obligations following the 1956 Suez campaign played a key role in how the UN Security Council crafted and viewed Security Council Resolution 242, the document that dealt with the 1967 Arab-Israeli war.

After Egypt reneged on its promises to Israel following the Suez War, tensions continued to rise in the region.[30] When Syria threatened Israel's water supply by making efforts to "exploit[] the waters of the Jordan River and the [Sea of Galilee]", the conflict between Israel and Syria rapidly escalated.[31] The Arab States also encouraged widespread terror attacks by Palestinian *fedayeen* on Israeli border settlements and *kibbutzim*.[32] Several of Israel's Arab neighbours, including Egypt, Jordan, and Syria, formed a military alliance.[33] Egypt moved additional military forces into the Sinai Peninsula and closed the Straits of Tiran to Israeli shipping, thereby blockading Israel's port city of Eilat and interdicting its only direct sea route to the Red Sea, the Indian Ocean, and beyond.[34] It also expelled UN peacekeeping forces that had been stationed along the Egypt-Israel border to maintain peace between the two countries.[35]

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[24]*Id.*
[25]*Id.*; Pnina Lahav, *A Small Nation Goes to War: Israel's Cabinet Authorization of the 1956 War*, 15 ISR. STUD. 61, 66 (2010) (outlining David Ben-Gurion's reasons to justify military action, which included violations of international resolutions and terrorist raids into Israeli territory organised by Egyptian forces).
[26]Ian Black, *Secrets and Lies at the Heart of Britain's Middle Eastern Folly*, THE GUARDIAN (11 July 2006), https://www.theguardian.com/uk/2006/jul/11/egypt.past.
[27]*The Suez Crisis*, *supra* note 23.
[28]Rostow, *supra* note 3, at 165.
[29]*Id.*
[30]Jeremy Bowen, *1967 War: Six Days That Changed the Middle East*, BBC (4 June 2017), https://www.bbc.com/news/world-middle-east-39960461.
[31]*Events Leading to the Six Day War*, ISR. MINISTRY OF FOR. AFF. (11 July 2021), https://www.gov.il/en/departments/general/events-leading-to-the-six-day-war.
[32]*The Six-Day War*, ISR. MINISTRY OF FOR. AFF. *https*://www.mfa.gov.il/mfa/aboutisrael/history/pages/the%20six-day%20war%20-%20june%201967.aspx (last visited 5 Apr. 2022).
[33]Bowen, *supra* note 30; *Events Leading to the Six Day War*, *supra* note 31.
[34]Bowen, *supra* note 30. The blockading of the Straits of Tiran constituted an act of war by Egypt against Israel.
[35]*Id.*

On 7 April 1967, Syria and Israel engaged in a short artillery and air battle, during which Israel roundly defeated Syrian forces.[36]

The Soviets contributed to the rising tensions by passing along faulty intelligence to Arab leaders on 13 May 1967, that claimed Israelis were planning a military campaign against Syria within the next week.[37] It became obvious that the Arabs were mobilising for war against Israel. On 5 June 1967, in anticipation of an imminent military attack by its neighbours, Israel launched pre-emptive strikes on the belligerents and crippled their respective air forces.[38] Israel destroyed most of Egypt's air force while it was on the tarmac and devastated Syria's air force in a similar air assault, thereby establishing clear air superiority during the war.[39] Hostilities lasted six days.

After the hostilities ceased on 10 June 1967, Israel had gained control of the entire West Bank (from Jordan), the Gaza Strip and the Sinai Peninsula (from Egypt), and the Golan Heights (from Syria).[40] UN Security Council Resolution 242 resulted.

Following their decisive defeat in the 1967 war, the Arab States, aided by the Soviet Union, began to rebuild their armed forces to redeem the honour they lost in 1967. By 1973, the Arabs were ready to take on Israel again. In 1973, on Yom Kippur, the holiest day of the year for Jews and a day when Israeli society would be shut down with no radio or television service and virtually all businesses closed, Israel's Arab neighbours—*seeking to take full advantage of the situation*—initiated a surprise attack on Israel. Although the Arabs were significantly better prepared and armed than in 1967, Israel once again prevailed in the war (though at a very high cost). UN Security Council Resolution 338 resulted.

In 1978, thirty years after Israel declared its independence, the Camp David Agreement led to peace between Israel and Egypt. At that time, Israel proposed Palestinian autonomy during an interim period, leading to an eventual possibility of full sovereignty for a future Palestinian State.[41] Palestinian representatives refused to participate in the peace discussions.[42]

In 1988, the Palestine National Council declared the "*establishment* of the State of Palestine".[43] It did so from exile because it controlled no territory of the former Mandate for Palestine. Palestinians finally agreed to meet with Israelis beginning in 1991.[44] When the Palestinians did not get all that they demanded, they called for a series of *intifada* (shaking off, rebellion, or uprising) against Israel.[45] This led to attacks against Israelis throughout Israel and spurred Israeli construction of the separation wall.[46] The erection of the wall proved to be a

[36]*Id.*
[37]*Id.*
[38]*Id.*
[39]*Id.*
[40]*Id.*
[41]*Camp David Accords and the Arab-Israeli Peace Process*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1977-1980/camp-david (last visited 22 Feb. 2022).
[42]*Id.*
[43]Declaration of State of Palestine – Palestine National Council, 15 Nov. 1988, *available at* https://www.un.org/unispal/document/auto-insert-178680/ (emphasis added).
[44]THE MADRID CONFERENCE, 1991, OFFICE OF THE HISTORIAN, U.S. DEPT. OF STATE, https://history.state.gov/milestones/1989-1992/madrid-conference (last visited 13 Mar. 2023).
[45]*Intifada, Palestinian-Israeli History*, BRITANNICA, https://www.britannica.com/topic/intifada (last updated 22 Feb. 2023)
[46]*Id.* Raphael Benaroya, *What's Israel's Border Wall Experience Tells Us*, REALCLEAR POLITICS (14 Mar. 2019),

great success at stopping Palestinian suicide bombers targeting Israelis.[47] Nonetheless, in 2004, the ICJ ruled that the Israeli "wall" could not be justified by Article 51 of the UN Charter because Israel was not defending itself against a "State",[48] thereby in effect establishing that no Palestinian State existed at that time.

In the 1995 Oslo Accords, Israel recognised another possible two-State plan.[49] Under the Oslo Accords, the Palestinian Authority ("PA") and Israel agreed on a framework for dividing authority and jurisdiction as steps toward an eventual peace between them.[50] After implementing initial measures, it also stalled.

During the two-week-long Camp David conference in July 2000, Israel proposed a plan that offered almost all of what the PA had ever demanded, but the PA refused to even consider it.[51] Israeli Prime Minister Ehud Barak proposed the dismantling of most settlements in the West Bank, the establishment of a Palestinian State including 92% of the West Bank and all the Gaza Strip, a land bridge between the two regions, a Palestinian capital in East Jerusalem, and Palestinian sovereignty over Jerusalem's Old City.[52] Barak noted, regarding Yasser Arafat, the PA leader, that "[h]e did not negotiate in good faith; indeed, he did not negotiate at all. He just kept saying no".[53] Even after the PA's rejection of the Camp David Accords, Barak reiterated his "readiness to renew peace negotiations".[54]

In 2005, Israel unilaterally withdrew from the Gaza Strip.[55] Israel removed all 8,500 Jewish residents from the territory and completely withdrew its military forces.[56] Disengagement cost Israel eleven billion shekels (approximately three billion in U.S. dollars).[57] Rather than use the opportunity to begin building a Palestinian State, the Palestinian terrorist organisation, Hamas, converted the Gaza Strip into a base from which to attack Israel.

In 2008, then Israeli Prime Minister Ehud Olmert entered into peace talks, offering to give the Palestinians 93.7 percent of the West Bank, plus the Gaza Strip.[58] Abbas rejected the offer because he wanted a "contiguous Palestinian state with Jerusalem as its capital".[59] That

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https://www.realclearpolitics.com/articles/2019/03/14/what_israels_border_wall_experience_tells_us_139735.html#!.

[47]Benaroya, *supra* note 46.

[48]Wall Advisory Opinion, *supra* note 14, ¶ 139.

[49]Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., 28 Sept. 1995, 36 I.L.M. 551, 561 [hereinafter Oslo II].

[50]Eugene Kontorovich, *The Apartheid Accusation Against Israel is Baseless – and Agenda-Driven*, EJIL: TALK! (8 July 2021), https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-driven/.

[51]Benny Morris, *Arafat Didn't Negotiate – He Just Kept Saying No*, THE GUARDIAN (22 May 2002), https://www.theguardian.com/world/2002/may/23/israel3.

[52]*Id.*

[53]*Id.*

[54]*Id.*

[55]Luke Baker, *Shadow of Israel's Pullout from Gaza Hangs Heavy 10 Years On*, REUTERS (10 Aug. 2015, 12:28 PM), https://www.reuters.com/article/us-israel-gaza-disengagement-insight/shadow-of-israels-pullout-from-gaza-hangs-heavy-10-years-on-idUSKCN0QF1QQ20150810.

[56]*Id.*

[57]*Id.*

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

[59]*Palestinians Reject Proposal by Israeli PM*, REUTERS (12 Aug. 2008, 7:36 am), https://www.reuters.com/article/us-palestinians-israel/palestinians-reject-proposal-by-israeli-pm-idUSLC6231820080812.

proposed agreement would also have provided the new Palestinian State with additional territory adjacent to the Gaza Strip.[60] The deal would have included a link between the Gaza Strip and the West Bank.[61] It also would have divided Jerusalem into Israeli and Palestinian-controlled cities and relinquished Israeli sovereignty over the Old City.[62] Olmert described his offer to give up the Old City as "the hardest day of his life".[63] Nonetheless, the Palestinians once again rejected the offer.

In April 2012, the then Prosecutor of the International Criminal Court ("ICC") refused to allow "Palestine" to accede to jurisdiction of the ICC because it was not a State.[64] In November 2012, the UN General Assembly changed the designation of Palestine *at the UN* from entity with observer status to non-party "state" with observer status. Nothing, however, changed on the ground following that simple change in moniker used at the UN.

In 2020, Israel pushed again for peace.[65] The Palestinian Authority rejected the plan outright.[66] This offer was only the latest in the long history of Israel's quest for peace and the Palestinians' rejection of peace.

While Israeli leaders have been pushing for peace, Israel is continuously attacked from the Gaza Strip and the West Bank by Palestinian armed groups and terrorist organisations, such as Hamas and Palestinian Isalmic Jihad. Every year, Israel faces numerous attacks, including thousands of indiscriminate rocket attacks, suicide bombings, mortar attacks, incendiary balloons, gun attacks, knife attacks, etc. In order to protect its civilian population against such armed attacks, Israel responds and takes security measures, such as building the security fence, installing check points, etc. Further, while not obligated to do so, Israel voluntarily complies with the Law of Armed Conflict as enshrined in, *inter alia*, Articles 2(4) and 51 of the UN Charter and the Hague and the Geneva Conventions, which allow necessary defensive and proportionate military response, naval blockades, military tribunals, security check points, and other measures.

[60]Lazar Berman, *"Abbas Never Said No" to 2008 Peace Deal, Says Former PM Olmert*, TIMES OF ISRAEL (25 June 2021), https://www.timesofisrael.com/abbas-never-said-no-to-2008-peace-deal-says-former-pm-olmert/.
[61]*Id.*
[62]*Id.*
[63]*Id.*
[64]Situation in Palestine, The Office of the Prosecutor, International Criminal Court, 3 April 2012, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.
[65]Jeffrey Heller, *Long Line of Israeli-Palestinian Peace Bids Precede Trump Push*, REUTERS (27 Jan. 2020), https://www.reuters.com/article/us-israel-palestinians-plan-history/long-line-of-israeli-palestinian-peace-bids-precede-trump-push-idUSKBN1ZQ0RQ.
[66]*Id.*

ARGUMENT AND ANALYSIS

I. THE UN GENERAL ASSEMBLY'S QUESTIONS CONTAIN UNSUBSTANTIATED AND FALSE PRESUMPTIONS THAT THE GENERAL ASSEMBLY WANTS THE ICJ SIMPLY TO ACCEPT AS TRUE IN ITS DELIBERATIONS, SOMETHING THE ICJ DID IN ITS WALL OPINION

The General Assembly is asking the ICJ to render an advisory opinion based on allegations of serious violations of international law on the part of Israel. The General Assembly is not asking the Court to determine if such violations are actually occurring. Instead, the General Assembly simply presumes wrongdoing and asks the Court to assess the legal consequences of such presumed wrongdoing. This approach is wrong in any fair system of justice. No competent *court of law* has determined that Israel is guilty of any wrongdoing, much less the illegal activity the General Assembly questions *presume*. To act as a legitimate court of justice, the ICJ cannot simply presume that Israeli actions are unlawful—*as the questions do*—but it needs to determine the validity of the General Assembly's presumptions under applicable international law.

The questions presume, for example, "an ongoing violation by Israel" due to its control over certain geographical areas. The first presumption is based on two other presumptions, that a "State of Palestine" (or at least, the right to a State) exists *and* that certain areas, specifically the Gaza Strip, the West Bank, and East Jerusalem (i.e., areas Israel captured from Egyptian and Jordanian control, respectively, in 1967) belong to that "State". Based on the foregoing false presumptions, the General Assembly has fabricated another presumption that Israel's continuing control over such areas is in violation of international law. Essentially, the General Assembly desires the Court simply to accept its false presumptions as true and find Israel guilty of the wrongdoing alleged in the questions. This is no more than a cynical attempt by Israel's adversaries to use the ICJ to delegitimise and isolate Israel politically.

This is not the first attempt to delegitimise and isolate Israel politically. The first attempt resulted in the Court's so-called "Wall Advisory Opinion".[67] The ICJ, in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("Wall Advisory Opinion"), accepted similar false presumptions to those in the General Assembly's current questions. The title of the Wall Advisory Opinion presumed two things: an Israeli occupation and the existence of Palestinian territory. Both issues hang on the extent of lawful Israeli sovereignty, or a claim thereto, over the territory of the Mandate for Palestine as it existed at the emergence of Israel in May 1948, the only State to emerge from the territory of the Mandate for Palestine upon Britain's departure. The Wall Advisory Opinion was rendered without answering the preliminary questions we address below. Accordingly, it resolved nothing and simply hardened positions between the two sides. The Palestinians generally approved of the decision, while the Israelis viewed the Court as a politicised weapon of the General Assembly which acted in disregard of the rules of international law. Israel also questioned the authority of the ICJ to determine Israel's borders (to wit, the lines that delineate the extent of sovereign Israeli territory) without its explicit, prior consent.[68]

[67]Wall Advisory Opinion, *supra* note 14.

[68]It would have been different if there were a true, recognised State of Palestine and Israel had agreed that the ICJ should sort out the territorial disputes between them, but that is not the case. There is no Palestinian State under customary international law, and Israel has not agreed to submit any disagreement to the ICJ for resolution.

The Court's reasoning in the Wall Advisory Opinion was highly problematic and has been justifiably criticised for being legally flawed. In that opinion, the Court noted the following: (1) the Arabs rejected the Partition Plan enshrined in Resolution 181(II), and it was never implemented; (2) Israel declared its independence upon Britain's departure in May 1948; (3) surrounding Arab States initiated armed hostilities against the nascent State of Israel on the day after Israel declared its independence;[69] and (4) the 1949 armistice lines were *not* borders.[70] ***Despite noting the foregoing facts,* the ICJ, nonetheless, simply posited the existence of Arab Palestinian territory coinciding with the 1949 armistice lines**. It concluded that, "[i]n the 1967 armed conflict, Israeli forces occupied all the *territories which had constituted Palestine*"[71] and, hence, "Israel had the status of occupying Power" under the Hague and the Geneva Conventions.[72] The conclusion drawn by the Court based on its observations is problematic on many levels. For example, the ICJ's entire analysis in the Wall Advisory Opinion presumed the continuing applicability of General Assembly Resolution 181(II), which had called for the creation of an Arab State. Yet, Resolution 181(II) was simply a recommendation when adopted, since the General Assembly can only make recommendations under the UN Charter. At no time was it a binding resolution. Its only efficacy would have been if both Arabs and Jews had agreed to its terms. That did not occur. Hence, when the Arabs rejected its terms, the resolution died and has no effect today.

Further, the ICJ's "territories-which-had-constituted-Palestine" language has no basis in law or fact. The West Bank and the Gaza Strip had been under continuous belligerent foreign military occupation from 1949 to 1967 by Jordan and Egypt, respectively. Those territories had never constituted "Palestine" nor been seen to constitute "Palestine". Jordan and Egypt were focused on destroying Israel, not creating an Arab State of Palestine. Jordan and Egypt certainly did not treat the territories they occupied as belonging to a State of Palestine. Moreover, following the 1967 Six-Day Arab-Israeli War, no "Palestinians" were invited to participate in the drafting of UN Security Council Resolution 242. The former unlawful occupiers Jordan and Egypt were invited instead, indicating that no Member States at the UN considered Palestine to be a State. The Court also entirely disregarded the Mandate for Palestine and other international treaties, which called for the establishment of a Jewish national home in the entire territory of the Mandate.

Based on these flawed presumptions, the General Assemby's questions further falsely presume illegality in Israel's annexation of the so-called "Palestinian territory". If there is no legal basis to say that a certain geographical area is "Palestinian territory", then Israel's annexation of that area cannot be, *ipso facto*, unlawful. As such, this presumtion is based on a previous baseless presumption. Further, the General Assembly's presumption that Israel is unlawfully changing the "character and status of the Holy City of Jerusalem" is equally, if not more, problematic. One must first determine the status of Jerusalem before accusing Israel of unlawfully changing its status. The character and status of Jerusalem that the General Assembly's questions presume appears to be based on its status recommended in Resolution 181(II), which called for Jerusalem to be *corpus separatum* under international control. Since the resolution was never implemented as it was not agreed to by one party, Jerusalem did not become *corpus separatum* and did not come under "international control".

[69]Wall Advisory Opinion, *supra* note 14, ¶ 71 (emphasis added).
[70]*Id.* ¶ 72.
[71]*Id.* ¶ 73 (emphasis added).
[72]*Id.* ¶ 78.

Finally, the allegation of "adoption of discriminatory legislation and measures" by Israel is not only couched in the preceeding presumptions but also inherently inconsistent with the General Assembly's, the UN Commission of Inquiry's,[73] and the ICJ's positions. On the one hand all three claim that the Gaza Strip, the West Bank, and East Jerusalem are "occupied Palestinian territory" where the Geneva Conventions apply. On the other hand, the General Assembly and the Commission of Inquiry claim that Israeli legislation and security measures (which are consistent with the Geneva Conventions) are discriminatory against the Palestinians residing in those areas. Lawful measures, such as military tribunals, naval blockades, security check points, administrative detentions, necessary and proportionate defensive military responses, etc., permitted by the same Geneva Conventions (*lex specialis*) cannot at the same time be unlawful even though they may not be permitted in peace time under *lex generalis*.

After concluding that Israel is violating international law in the first "question" without any legal determination or allowing the Court to engage in determining the lawfulness of Israeli policies and practices, the General Assembly has asked the Court to determine how the presumed unlawful policies and practices "affect the legal status of the occupation" and "what are the legal consequences that arise for all States and the United Nations from this status".

Hence, ***our main concern is that the underlying premises of the General Assembly's questions have never been validated by any competent body acting in accordance with international law***. Israel is the only country in the world that receives this kind of treatment. Legal determination of serious allegations of international law violations ought not be addressed like this in any civilised society, let alone at the International Court of Justice.

One of the major problems with the ICJ's rendering advisory opinions, especially concerning highly charged and extremely complicated political issues like the Palestinian-Israeli conflict, is that the Court often receives input from only one side, thereby making it difficult if not impossible to accurately and fairly render a balanced opinion that does not appear to be political rather than legal in its reasoning.

That fact was alluded to by Judge Buergenthal in the Wall Advisory Opinion. Judge Buergenthal criticised the opinion as lacking credibility because the Court failed to examine "Israel's legitimate right of self-defence [as well as its] military necessity and security needs".[74] He called "legally dubious" the Court's conclusion that Israel's right to self-defence was "not applicable in the present case".[75] And he criticised the Court for "barely address[ing] the summaries of Israel's position . . . which contradict or cast doubt on the material the Court claims to rely on".[76]

In light of Israel's experience with the Wall Advisory Opinion, there are many who view the current quest for an advisory opinion as another politically motivated witch hunt intended to delegitimise Israel and its legitimate national interests. Accordingly, Israel has understandably decided not to be a participant in its own "lynching". To remain credible, the ICJ should reconsider its agreement to render an advisory opinion on such a politically charged

[73]REPORT OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND ISRAEL, HUMAN RIGHTS COUNCIL, A/HRC/50/21, 9 May 2022.
[74]Declaration of Judge Buergenthal, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 131, ¶ 3 (July 9) [hereinafter Declaration of Judge Buergenthal].
[75]*Id.* ¶ 5.
[76]*Id.* ¶ 7.

issue and, given the overlapping claims to the same territory, withdraw its acceptance and decline to render an advisory opinion.

It is uncontested that Israel has asserted long-standing claims over territory in the West Bank, territory which the Palestinians claim belongs wholly to them. The issue of land ownership and sovereignty are fundamentally *political questions* going to the heart of what constitutes a State. Accordingly, the ongoing conflict between Israel and the Palestinians is primarily a political conflict, not a legal conflict. Hence, true resolution must come via political processes, not legal processes. In fact, Palestinian officials have entered into agreements with Israel to resolve the issues between them. Negotiations require give and take. Both sides must be willing to make sacrifices to attain peace. To date, Palestinian officials have been unwilling to make any concessions and have pursued an all-or-nothing strategy, not conducive to true good faith negotiating.

Alternatively, at the very least, the ICJ should not rely on false presumptions alluded to above, but understand the applicable law regarding Israeli measures in the disputed territories. Unlike the UN General Assembly or the UN Security Council, the ICJ is a court, not a political body. As a judicial body, the ICJ is required to apply the law to the facts, fairly, objectively, and without predetermined conclusions.

II. CRITICAL PRELIMINARY QUESTIONS RAISED BY THE GENERAL ASSEMBLY'S PRESUMPTIONS

Because every international institution, including every international court, is limited by the terms of the charter by which it was created, no international institution has plenary authority to act. When such institutions act beyond the limits set forth in their respective charters, their actions are, by definition, *ultra vires*. The UN General Assembly and the ICJ are such institutions. Hence, when the General Assembly requests the ICJ to answer specific questions put to it by the General Assembly, the Court must first ensure that the presumptions in the questions are factually and legally sound. Just as the Court has the duty and competence to determine whether it has actual competence to act (so-called Kompetenz-kompetenz), it also has the duty to validate the presumptions made by the General Assembly. As discussed above, the General Assembly's questions presume the current existence of a "State of Palestine", whose international borders coincide exactly with the 1949 armistice lines. Given those presumptions, it also presumes Israel's occupation of "Palestinian territory". Yet, those presumptions are disputed by Israel, a party of interest to this dispute, as well as by other States who continue to maintain that a Palestinian State can only come into existence via good faith bilateral negotiations between the parties to the dispute, i.e., Israelis and Palestinians.

Accordingly, this Court needs to answer the following questions before it proceeds further:

1. Regarding the existence of a "State of Palestine": What international institution determined that a "State of Palestine" currently exists, from where did such institution derive its legal authority to make such a determination, and how were Israel's historical territorial claims resolved?
2. Regarding the borders of a "State of Palestine": What international institution determined that the 1949 armistice lines had morphed into international borders for a "State of Palestine", from where did such institution derive its legal authority to

modify the terms of existing armistice agreements, and why were the concerns of Israel, a party to each of the agreements, not considered?

3. Regarding the charge of unlawful occupation: What international institution determined that Israel is unlawfully occupying territory belonging to a "State of Palestine", from where did such institution derive its legal authority to make such a determination, and why were the ongoing attacks on Israel by Islamist terrorist groups discounted so as to imply that Israel's responses to attacks were unjustified?

Addressing such issues that are germane to the dispute in light of the evidence and applicable law would signal to Palestinian leaders once and for all that their intransigence at entering into good faith negotiations with the Israelis has achieved nothing but inflict hardship upon their own people and that the time has come to end hostilities, negotiate in good faith, and make peace.

This submission provides information and analysis regarding issues that are germane to reaching a *just* conclusion and understanding of the situation consistent with international law.

III. ISRAEL IS NOT A FOREIGN OCCUPIER AS THE TERM IS UNDERSTOOD IN THE HAGUE AND THE GENEVA CONVENTIONS BECAUSE ISRAEL GAINED TITLE TO THE ENTIRE TERRITORY OF THE MANDATE FOR PALESTINE AS IT EXISTED IN MAY 1948 PURSUANT TO THE PRINCIPLE OF *UTI POSSIDETIS JURIS* UPON BRITAIN'S DEPARTURE; ADDITIONALLY, ISRAEL'S CLAIMS ARE GROUNDED IN THE TERMS OF THE MANDATE AND ARTICLE 80 OF THE UN CHARTER

A. Title During the Mandate for Palestine Resided with the League of Nations as Trustee

1. The Balfour Declaration

During the First World War, the British Government issued the "Balfour Declaration" on 2 November 1917. The Declaration read as follows:

> His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[77]

Although the Declaration was simply an aspirational statement of policy by the British Government when published, it gained considerable international support in the post-World War I period, when its language and principles were enshrined in a number of international treaties and other agreements, thereby reflecting its broad international acceptance in legally binding instruments.

[77]Letter from Arthur James Balfour, Foreign Secretary, to Lord Rothschild, (2 Nov. 1917), https://avalon.law.yale.edu/20th_century/balfour.asp [hereinafter Balfour Declaration].

2. The San Remo Conference

In April 1920, representatives of Great Britain, France, Italy, Japan, and the United States (as a neutral observer) met in San Remo, Italy, to draft the various mandates. During the conference, the Allies decided to include the language of the Balfour Declaration in the Mandate for Palestine and put Palestine under British Mandatory rule.[78] The resolution at San Remo states that the "High Contracting Parties agree to entrust, by application of the provisions of Article 22 [of the Covenant of the League of Nations], the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory, to be selected by the said Powers".[79] It further stated that the "Mandatory will be responsible for putting into effect the declaration originally made on November [2], 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish People . . .".[80] This resolution became one of the first international legal documents that incorporated the Balfour Declaration, "transforming it from a letter of intent into a legally-binding foundational document under international law".[81]

3. The Treaty of Sèvres

At the end of hostilities in World War I, the victorious Allied Powers negotiated separate peace treaties with the defeated foes of the so-called Central Powers.[82] The Treaty of Sèvres was negotiated between the victorious Allied Powers and the Ottoman Empire to end the hostilities between them following World War I. Although the Treaty's harsh terms decimated the Ottoman Empire, it was nonetheless accepted by Sultan Mehmet VI, the then-reigning Ottoman Sultan.[83] The first section of the Treaty of Sèvres incorporated, by reference, articles 1 through 26, inclusive, of the Treaty of Versailles,[84] the treaty of peace with the defeated German Empire. The incorporated articles contained the text of the Covenant of the League of Nations, including Article 22, which established the legal basis in international law for the system of Mandates, which applied, *inter alia*, to former Ottoman territory.

Article 22 read, in pertinent part:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the

[78]*Pre-State Israel: The San Remo Conference*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/the-san-remo-conference (last visited 16 Mar. 2022).
[79]San Remo Resolution, 25 Apr. 1920, https://content.ecf.org.il/files/M00309_SanRemoConferenceResolutionEnglishRetyped.pdf.
[80]*Id.*
[81]Dan Adler, *Why You Should Know San Remo*, ISR. FOREVER FOUND., https://israelforever.org/interact/blog/why_you_should_know_san_remo/ (last visited 17 Feb. 2023).
[82]Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919, 225 C.T.S. 188; Treaty of Peace between the Allied and Associated Powers and Austria (Treaty of Saint-Germain-en-Laye), 10 Sept. 1919, 226 C.T.S. 182; Treaty of Peace between the Allied and Associated Powers and Hungary (Treaty of Trianon), 4 June 1920, S. T. Doc. No. 67-348; Treaty of Peace Between the Allied and Associated Powers and Turkey (Treaty of Sèvres), 10 Aug. 1920, 113 Brit. & Foreign St. Papers 652; Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), 24 July 1923, 28 L.N.T.S. 11.
[83]Representatives of Sultan Mehmet VI signed the treaty on 10 August 1920. Hamza Karcic, *Sèvres at 100: The Treaty that Partitioned the Ottoman Empire*, https://www.trtworld.com/opinion/sevres-at-100-the-treaty-that-partitioned-the-ottoman-empire-38782 (last visited 17 Feb. 2023).
[84]Treaty of Sèvres, *supra* note 82.

> principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> The character of the Mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> *Certain communities formerly belonging to the Turkish Empire* have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.[85]

Section VII of the Treaty of Sèvres, entitled "Syria, Mesopotamia, Palestine", identified which of the "communities formerly belonging to the Turkish Empire" qualified for provisional recognition as independent nations and which did not. Article 94 of the Treaty of Sèvres stated that

> [t]he High Contracting Parties agree that *Syria and Mesopotamia* [Iraq] shall, in accordance with the fourth paragraph of Article 22, Part I (Covenant of the League of Nations), be provisionally recognised as independent States subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.[86]

Article 94 made no mention of Palestine whatsoever.

Instead, Palestine was dealt with in Article 95 of the Treaty of Sèvres. What is especially notable about Article 95 is that it lacked any mention whatsoever of "provisional[] recogni[tion] as [an] independent State[]" regarding Palestine. Instead, Article 95 read, in pertinent part, as follows:

> The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. *The Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people*, it being clearly understood

[85]Treaty of Versailles, *supra* note 82, art. 22 (emphasis added); Treaty of Sèvres, *supra* note 82, art. 22 (emphasis added).
[86]Treaty of Sèvres, *supra* note 82, art. 94 (emphasis added). The Syrian Mandate was divided into Syria and Lebanon, and Mesopotamia later became known as Iraq.

> that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.[87]

As such, Article 95 established an additional legal basis in international law for implementing the Balfour Declaration in Palestine.[88] No longer was the Balfour Declaration merely the stated policy of a single government. The principles of the Balfour Declaration became rooted in international law, *inter alia*, by virtue of Article 95 of the Treaty of Sèvres as well as by the Mandate for Palestine (which will be discussed more fully below).

Nowhere in Section VII did the Treaty of Sèvres explicitly state, or otherwise suggest, that Palestine was one of the communities formerly belonging to the Turkish Empire that qualified for provisional recognition of statehood. As will be seen below, that omission is also reflected in the specific language of the Mandate for Palestine assigned to Great Britain. In effect, Palestine and the Mandate for Palestine were *sui generis*. The explicit charge to Great Britain as Mandatory was not to prepare the inhabitants of Palestine for independence as was the case with the other Mandates dealing with former Ottoman territories. Instead, it was to implement the specific terms of the Balfour Declaration, to wit, to establish a national homeland for the Jewish people in the Mandate's territory. Future independence was implied for the "Jewish national home" that would be established under the Mandate's terms.[89]

4. The Mandate for Palestine Called for Establishment of the Jewish National Home in the Entire Territory of the Mandate

In July 1922, the League of Nations assigned the Mandate for Palestine to Great Britain,[90] the nation whose armies had driven the Turks out of Palestine in 1917.[91] Britain had retained control of the region since its capture from the Ottomans. The Mandate for Palestine was the international legal document which provided authority for the Mandatory, Great Britain, to act on behalf of the League of Nations in Palestine. The Mandate directed that Britain take a number of specific steps to implement the Balfour Declaration in Palestine, thereby confirming yet again that the terms of the Balfour Declaration had been incorporated into international law. Note, first, language in the preamble:

> Whereas *the Principal Allied Powers have* [] *agreed that the Mandatory should be responsible for putting into effect the declaration originally made on*

[87]*Id.* art. 95 (emphasis added). Note that the Declaration of 2 November 1917 is the Balfour Declaration. Here, the Balfour Declaration is enshrined in an international treaty, thereby making it a recognised part of international law. It remains so to this day. Moreover, consistent with Article 94 of the Treaty of Sèvres (which provisionally recognised Syria and Mesopotamia as independent States), Article 1 of the French Mandate for Syria and Lebanon required the following: "The Mandatory shall [] enact measures to facilitate the progressive development of Syria and the Lebanon *as independent states*"; French Mandate for Syria and the Lebanon art. 1, 3 L.O.N.O.J. 1013 (emphasis added); and Article 1 of the British Mandate for Mesopotamia required the following: "The Mandatory will frame . . . provisions designed to facilitate the progressive development of Mesopotamia *as an independent State*". *The British Mandate in Mesopotamia*, 112 NATION 465, 491 (1921), https://archive.org/details/draftmandatesfor00leagrich/page/n3/mode/2up (emphasis added).

[88]It was not the only international document to do so. The Mandate for Palestine itself incorporated the Declaration and directed that the Mandatory implement its terms.

[89]*See, e.g., infra* Section III.A.4.

[90]Mandate for Palestine, *supra* note 2.

[91]*Palestine Campaign*, NEW ZEALAND HISTORY, https://nzhistory.govt.nz/war/palestine-campaign (last visited 16 Mar. 2022).

> *November 2nd, 1917, by the Government of His Britannic Majesty* [i.e., the Balfour Declaration], *and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people*, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country . . . .[92]

The preamble also explicitly recognised the historic connection of Jews to Palestine: "Whereas recognition has thereby been given to the *historical connection of the Jewish people with Palestine* and to the grounds for *reconstituting* their national home in that country".[93] In the Balfour Declaration itself, the British Government had committed to use its "best endeavours" to "*facilitate*" "the establishment in Palestine of a national home for the Jewish people".[94] In the preamble to the Mandate, the international community not only recognised the historical connection of the Jewish people to Palestine, but it went a significant step farther and called for "*reconstituting*" the Jewish national home in Palestine,[95] thereby publicly recognising and confirming the fact that Palestine was indeed the historic homeland of the Jewish people.[96] Note that "the Allies did not presume to *grant* that right to the Jews"; rather, "they made a point of specifying that right derived from history—from 'the historical connection of the Jewish people with Palestine'".[97]

Article 2 of the Mandate required Great Britain to implement the Balfour Declaration's call for a Jewish homeland:

> The *Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home*, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.[98]

Note Article 2's explicit call to develop "self-governing institutions", a prerequisite for the Jewish people to rule in their own "national home". Note also that Article 2 *required* Britain to

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[92]Mandate for Palestine, *supra* note 2, pmbl (emphasis added).
[93]*Id.* (emphasis added). Note that the preamble called for "reconstituting" the national home of the Jews in Palestine. That is even stronger than the Balfour Declaration's call for "establishment" of such a national home.
[94]Balfour Declaration, *supra* note 77 (emphasis added).
[95]Mandate for Palestine, *supra* note 2, pmbl. (emphasis added) (noting that recognition has been given "to the grounds for reconstituting [the Jewish people's] national home in [Palestine]").
[96]This is contrary to statements frequently made by Palestinian officials who claim that there are no historic ties between Palestine and the Jewish people. *See, e.g.*, *Hamas Covenant 1988: The Covenant of the Islamic Resistance Movement* (18 Aug. 1988), https://avalon.law.yale.edu/20th_century/hamas.asp ("The Islamic Resistance Movement believes that the land of Palestine is an Islamic Waqf consecrated for future Moslem generations until Judgement Day. It, or any part of it, should not be squandered: it, or any part of it, should not be given up"); *Palestinian National Charter, Resolutions of the Palestine National Council* art. 20, MINISTRY OF FOREIGN AFFAIRS (17 July 1968), https://avalon.law.yale.edu/20th_century/plocov.asp ("Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong"). Although such statements are ludicrous on their face, that does not seem to discourage such statements from being uttered. Yet, even the Qu'ran recognises the Jews' historical presence in Palestine. *See supra* note 2.
[97]Feith, *supra* note 3 (emphasis added).
[98]Mandate for Palestine, *supra* note 2, art. 2 (emphasis added).

secure "the *civil and religious* rights" of all inhabitants. The term "civil rights" refers to people's individual rights and not collective political rights.[99] That was a significant omission, which also indicated that the Palestinian Mandate was *sui generis*, since the Syrian and Mesopotamian Mandates spoke in terms of States and statehood, which language implicitly included *political* rights.[100] The only mention of collective *political* matters in the Mandate for Palestine referred to the establishment of the Jewish national home.[101]

Of paramount importance and interest is the fact that there is no reference by name to any people group other than the Jewish people in the entire text of the Mandate for Palestine. Every affirmative aspect of the Palestinian Mandate concerns establishing the *Jewish* national home in "the *country*" of Palestine.[102] With respect to treatment of other inhabitants, the Mandatory is charged simply with securing their civil and religious rights.

Article 4 of the Mandate required the Mandatory to work with an appropriate Jewish organisation to effectuate the establishment of the Jewish national home in Palestine:

> An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters *as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine*, and, subject always to the control of the Administration, to assist and take part in the development of the country.
>
> The Zionist organisation, so long as its organisation and constitution are in the opinion of the Mandatory appropriate, shall be recognised as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the co-operation of all Jews who are willing to assist in the establishment of the Jewish national home.[103]

Notably, once again, there was no mention of a similar entity in the Mandate for any other population group with which the Mandatory must or should cooperate, thereby emphasising that the preeminent concern was the creation of a Jewish homeland.

Article 6 of the Mandate required the Mandatory to assist Jewish immigration and settlement: "[The Mandatory] *shall facilitate Jewish immigration* under suitable conditions and *shall encourage*, in co-operation with the Jewish agency referred to in Article 4, *close settlement by Jews on the land*, including State lands and waste lands not required for public purposes".[104] Once again, there was no mention in the Mandate of any requirement for the Mandatory to similarly assist immigration and settlement of any other population group. The

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[99]*Civil Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (17 Jan. 2022) ("The term 'civil rights' came to refer, not to the full set of claims constitutive of free and equal citizenship, but to rights against discrimination . . .").
[100]*See, e.g.* French Mandate, *supra* note 87 ("The Mandatory shall [] enact measures to facilitate the progressive development of Syria and the Lebanon *as independent states*") (emphasis added); Mesopotamia Mandate, *supra* note 87 ("The mandatory will frame within the shortest possible time, not exceeding three years from the date of the coming into force of this Mandate, an Organic Law for Mesopotamia. This organic law shall be framed *in consultation with the native authorities* . . .") (emphasis added).
[101]Mandate for Palestine, *supra* note 2, pmbl, arts. 2 & 4.
[102]*See, e.g., id.* (emphasis added).
[103]*Id.* art. 4 (emphasis added).
[104]*Id.* art. 6 (emphasis added).

sole focus on affirmative action by the Mandatory concerns the Jewish people. Note also the use of strong, unambiguous language in "*shall* facilitate" and "*shall* encourage".

One article in the Mandate, however, authorised the Mandatory to limit Jewish settlement in the territories lying between the Jordan and the eastern boundary of Palestine. Article 25 states:

> In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions . . . .[105]

At first glance, the inclusion of Article 25 in the Mandate appears to be an anomaly because it runs counter to the Mandate's stated purpose of reconstituting a Jewish homeland in "Palestine", which had always been understood to include territory to the east of the Jordan River. The language of Article 25, however, must be understood in the context of Great Britain's desire to compensate its Hashemite Arab allies for their help against the Ottomans in World War I. As such, Britain sought to include in the Mandate a mechanism to limit Jewish settlement in the eastern three-quarters of the Palestinian Mandate to achieve that goal.[106] Accordingly, subject to League of Nations approval, Article 25 of the Palestinian Mandate authorised Great Britain to refrain from implementing the terms of the Mandate to the portion of the Mandate lying to the east of the Jordan River.

Great Britain sought and received permission to withhold application of the Mandate's provisions from the League of Nations in 1922.[107] Shortly thereafter, Britain did the following: it treated the territory of the Mandate lying to the east of the Jordan River differently from the territory lying between the Jordan River and the Mediterranean Sea; it retained the name "Palestine" for the territory lying between the Jordan River and the Mediterranean Sea; it renamed the larger, eastern territory "Transjordan"; and it forbade implementation of the Mandate's terms regarding Jewish immigration, settlement, and establishment of a Jewish homeland in Transjordan.[108] In effect, Britain created a *de facto* (though not *de jure*) second

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[105]*Id.* art. 25.

[106]The British had made contradictory promises to the Arabs, the Jews, and others concerning what would happen in the Middle East after World War I. Emir Hussein, the Sharif of Mecca, had sided with the British against the Ottomans in World War I based on the promise of obtaining British support for creating an Arab State encompassing the entire Arab Middle East north of the Hejaz, with its capital in Damascus to be under the control of his son Feisal. Feisal had led the Arab armies allied with Britain against the Ottomans. Although Arab and British forces captured Damascus, the Arab-British plan did not come to fruition. Damascus came under French control when France became the Mandatory of the Mandate for Syria, and the French had their own plans for Damascus. To compensate Hussein and the Hashemites for their help against the Ottomans, the British installed Hussein's son Feisal as leader in Iraq and Hussein's son Abdullah as leader in Transjordan.

[107]Mandate for Palestine, *supra* note 2, art. 25. There is some question about whether the authority granted to Britain to withhold application of the provisions of the Mandate to the eastern three-quarters of the territory was of a permanent or temporary nature. AARON KLIEMAN, FOUNDATIONS OF BRITISH POLICY IN THE ARAB WORLD: THE CAIRO CONFERENCE OF 1921, 123 (1970). Yet, whatever the original intent of the provision was meant to be, it became permanent and is not directly on point to the issue in this submission.

[108]Palestine Mandate: Memorandum by the British Representative, League of Nations Doc. C.529.M.314.1922. VI 7 (1922). The territory that became Transjordan constituted approximately 78% of the original Mandate of Palestine. The remaining 22% of the territory retained the name Palestine, and it was in that 22% portion that

Mandate constituting approximately 78% of the original Mandate's territory solely to benefit the *Arabs*. By doing so, Britain appears to have betrayed the "sacred trust" bestowed upon it by the international community to carry out the terms of the Balfour Declaration, which required reconstituting "in" (which implied "throughout") Palestine a national homeland for the Jewish people, and, instead, acted in favour of the Arabs by giving them three-quarters of the territory—territory recognised as part of the *Jews'* indigenous homeland.[109] That 78% of the territory ultimately became the *Arab* ("Palestinian") State called Jordan. While Article 25 allowed Britain to limit Jewish settlement in the Mandate's territory *east* of the Jordan River, no article in the Mandate permits even a temporary suspension of the Jewish right of settlement *west* of the Jordan River.[110]

5. The Treaty of Lausanne

Although the then-reigning Ottoman Sultan, Sultan Mehmet VI, had negotiated and agreed to abide by the harsh terms of the Treaty of Sèvres, members of the Turkish army led by Mustafa Kemal Pasha (known in Turkey today as Mustafa Kemal Atatürk or simply "Atatürk") rejected the harshness of the Treaty of Sèvres and rebelled against its implementation *in the territory that comprises the present-day State of Turkey*.[111] Atatürk and his forces refused to allow Turkey to be sliced up and its territory given to the Turks' historic enemies and to others.[112] Atatürk's forces ultimately prevailed, the Sultan was deposed and sent into exile, the Ottoman Sultanate was abolished, and Atatürk demanded the negotiation of a new treaty of peace.[113] The 1923, Treaty of Lausanne resulted.

In the Treaty of Lausanne, the new Turkish government formally renounced Turkish claims to all territories outside the renegotiated boundaries of Turkey as enumerated in the new Treaty.[114] Specifically, Article 16 of the Treaty of Lausanne read: "Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty".[115] The Turkish renunciation included the territory that had, by then, already become the Mandate for Palestine, with Great Britain as Mandatory. Hence, as of 1923, the prior lawful sovereign of Palestine, the Ottoman Empire, had officially departed the scene, had renounced any claim to Palestine, and had been replaced by the League of Nations' designated Mandatory, Great Britain. Yet, Britain did not assume or possess sovereignty over Palestine.[116] In effect, the League of Nations acted as custodian of the sovereignty for Palestine

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the Jewish homeland was to be established. In 1948, the *Jewish* Palestinian State of Israel was carved out of part of that 22%.

[109]*See*, Balfour Declaration, *supra* note 77.

[110]Eugene V, Rostow, *Resolved: Are the Settlements Legal?*, NEW REPUBLIC (21 Oct. 1991) (emphasis added).

[111]*Treaty of Sèvres*, BRITANNICA, https://www.britannica.com/event/Treaty-of-Sevres (last visited 22 Mar. 2022).

[112]The Treaty of Sèvres had required Turkey to cede national territory to Armenia, Greece, France, and Great Britain. Additional territory was to fall within French, British, Italian, and international zones of influence. Treaty of Sèvres, *supra* note 82.

[113]BRITANNICA, *supra* note 111.

[114]Treaty of Lausanne, *supra* note 82.

[115]*Id.* art. 16.

[116]Nor did the inhabitants of Palestine exercise sovereignty. Once again, unlike the Mandates for Syria and Mesopotamia, which were provisionally recognised as States, the Mandate for Palestine was *sui generis*. Palestine was not provisionally recognised as a State, and the Mandate for Palestine called for the Mandatory to assist in *reconstituting* the Jewish homeland in Palestine. Until the inhabitants of Palestine—whether Jewish or Arab—achieved actual independence and began to exercise self-rule, no Palestinian national was exercising sovereignty over Palestine.

as evidenced by its creation of the Mandate for Palestine, by its requirements that the Mandatory render periodic reports to the League, and by its retention of authority for ultimate decisions outside of the day-to-day administration of the Mandate.[117]

6. The Anglo-American Treaty Concerning Palestine

Heeding President George Washington's and President Thomas Jefferson's mistrust of foreign alliances,[118] during World War I, in accordance with U.S. custom at the time, when the United States had declared war on Germany and its allies, it had refused to become an "Allied" Power and had, instead, designated itself an "Associated" Power. At the war's end, although President Woodrow Wilson had been instrumental in establishing certain principles that guided post-World War I diplomacy,[119] the United States reverted to its tradition of isolationism and declined to join the League of Nations. As such, the United States did not directly engage in the proceedings regarding the various Mandates in the former Ottoman territories. Instead, the United States was an observer rather than an active participant. Nonetheless, as a rising world power, it was important that the United States be consulted on a number of post-war issues. Among those issues was the issue of establishing the Mandate for Palestine.

The text of the Mandate for Palestine was incorporated verbatim into the language of the Anglo-American Treaty of 1924, thereby confirming support by the United States for the establishment in Palestine of the homeland for the Jews in accordance with the principles set forth in the Mandate.[120] Accordingly, the principal victorious powers from World War I concurred in reconstituting the Jewish homeland in Palestine, and that position was endorsed by the League of Nations. Even though the Anglo-American Treaty was simply a treaty between Great Britain and the United States, by incorporating the text of the Mandate for Palestine into its terms, the United States expressed its full concurrence in the decision adopted by the League of Nations regarding Palestine. The treaty constitutes additional confirmation that the decision regarding Palestine enjoyed widespread international acceptance as legally binding.[121]

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[117]League of Nations Covenant art. 22. With the demise of the League of Nations, responsibility for the mandates fell under the newly created United Nations. *See, e.g.*, U.N. Charter art. 80.

[118]David Fromkin, *Entangling Alliances*, FOREIGN AFFAIRS (July 1970), https://www.foreignaffairs.com/articles/1970-07-01/entangling-alliances (noting America's mistrust of foreign alliances, and their ability to "involve us in obscure quarrels and sordid rivalries which were none of our concern"). As George Washington put it in his Farewell Address, "[i]t is our true policy to steer clear of permanent alliance with any portion of the foreign world". *Farewell Address* (1796), *reprinted in* 35 WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed., 1940). Thomas Jefferson expressed similar concern in his inaugural address: "Peace, commerce, and honest friendship with all nations, entangling alliances with none". Inaugural Addresses of the Presidents of the United States, S.Doc. 101–10, 17 (1989).

[119]*See, e.g.*, Woodrow Wilson's Fourteen Points. *An Address to the Senate, in* WOODROW WILSON, 61 THE PAPERS OF WOODROW WILSON 434 (Arthur S. Link, ed., 1989).

[120]Convention between the United States and Great Britain in Respect to Rights in Palestine, 3 Dec. 1924, 44 Stat. 2184.

[121]The Anglo-American Treaty Concerning Palestine is also significant because it was ratified by the United States, the very country that had advocated the principle of self-determination of peoples. Ratification by the United States confirms that the United States did not regard the terms of the Mandate as violating the rights of non-Jewish inhabitants of Palestine (perhaps because, at that time, there was no independent notion or claim of a collective non-Jewish Palestinian identity and individual resident non-Jews' rights were explicitly protected and perhaps due to the designation of over three-fourths of the territory as part of Transjordan, which was reserved solely for the Arabs).

In summary, in the post-World War I period, the once aspirational provisions of the Balfour Declaration became part and parcel of legally binding instruments in public international law. **Hence, *reconstituting a Jewish homeland in Palestine* (*which included the Gaza Strip, Judea and Samaria*[122] (*often referred to as the "West Bank"*[123])) *became an affirmative legal obligation of the international community firmly anchored in international law*.**

B. The Importance of Intertemporal Law

As with most law, international law and its requirements may change over time. Intertemporal law determines which principles of law to apply when a legal question arises today about an issue that had been decided in accordance with the law as it existed in the past. As Judge Max Huber expressed in the 1928 decision on the Island of Palmas arbitration case, "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[124] In other words, if an action was lawful when it occurred, it must be evaluated in that light. Were that not the case, applying current law to past acts that were fully lawful at the time they occurred but would be questioned today would create considerable confusion and chaos and would undermine the continuity and legitimacy of the rule of law over time. Further, "[i]nternational law as a general proposition does not permit retroactive application . . . . International law could hardly develop if states believed that by accepting newly developed norms of international law, the result would be to hold them liable under today's norms for behavior acceptable under yesterday's".[125] As a result, legal systems of nations around the world eschew applying current law to situations decided in the past under different law.[126] *When legal rights vest under past*

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[122]Oded Revivi, *It's Time to Learn the Facts about Judea and Samaria*, JERUS. POST (7 Sep. 2014), https://www.jpost.com/opinion/its-time-to-learn-the-facts-about-judea-and-samaria-374704.

[123]The phrase "West Bank" was coined to describe the territory Jordan had captured in 1948–49 and had unlawfully occupied in the former Mandate for Palestine from 1949–67. The territory was across the Jordan River on the western bank of the Jordan River. Hence, it came to be called the "West Bank", referring to the west bank of the Jordan River. It also appears to have been preferred because it deemphasises the historical Jewish ties to the land and helps create a new storyline more favourable to Arab claims.

[124]Island of Palmas (Netherlands v. U.S.), 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928).

[125]In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 81–82 (E.D.N.Y. 2005), *as amended* (28 Mar. 2005), *aff'd sub nom.* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008) (internal citation omitted). *See also* Andrew Kent, *Evaluating the Palestinians' Claimed Right of Return*, 34 U. PA. J. INT'L L. 149, 177, 235 (2012) (noting that customary international law "by definition does not apply retroactively. . . . Palestinians have sought to retroactively judge Israeli actions in the 1940s under new norms developing in the late twentieth and early twenty-first centuries. *But international law does not work like that*") (emphasis added); Anthony D'Amato, *International Law, Intertemporal Problems*, *in* 2 ENCYC. OF PUB. INT'L L. 1234 (1992) (noting that "when changes occur in rules of international law, the changes are normally expected to apply prospectively and not retroactively").

[126]Numerous States have incorporated the non-retroactivity principle into their legal systems. *E.g.*, Constitución Política de los Estados Unidos Mexicanos, CP, art. 14, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (The Constitution of Mexico, reading as follows: "No law will have retroactive effect in detriment of any person"); República de Paraguay Constitución Política de 1992 [Cn.] tit. II, ch. II, art. 38 (Par.) (The Constitution of Paraguay, providing that "[n]o law may have a retroactive effect, unless it is more favorable to the accused"); Constitución Política del Perú 1993 Con Reformas Hasta 2005 [Cn.] tit. IV, ch. II, art. 103 (Per.) (The Constitution of Peru, setting forth that "[a]fter its entry into force, the law is applied to the consequences of existing legal relations and situations, and it does not have retroactive force or effect"); Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 13 (S. Kor.) (The Constitution of the Republic of Korea, reading as follows: "No restrictions shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation"); Undang-Undang Dasar

law, they cannot be undone or declared unlawful simply because a similar issue might be decided differently today under law as it currently exists.[127]

In the case of Palestine, the Jewish people's right to reconstitute their homeland in Palestine vested in the post-First World War period by virtue of the various World War I peace treaties, whose terms included, *inter alia*, the Covenant of the League of Nations, the organisation to which the responsibility for the various mandates was given, as well as by the terms of the Mandate for Palestine itself, whose Mandatory, Great Britain, was chosen to serve as the agent of the League of Nations to implement the terms of the Mandate for Palestine on behalf of the Jewish people. The Anglo-American Treaty of 1924 confirmed the concurrence of the United States *vis-à-vis* plans for Palestine.

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As noted earlier, the Mandate system in the former Ottoman territories was viewed at the time as a progressive means to prepare former Ottoman territories for self-rule and independence while simultaneously recognising and meeting both Arab *and* Jewish aspirations for self-determination.[128] ***Arab self-determination aspirations were to be met by respecting the independence of the Hejaz as well as by preparing the Arabs of Mesopotamia* (Iraq), *Syria, and Lebanon for independence. Jewish self-determination was to be met by reconstituting the Jewish homeland in their ancestral territory encompassed by the Mandate for Palestine***. Yet, with respect to Palestine, as mentioned earlier, the British Mandatory took action that ran counter to the goal of Jewish self-determination enshrined in both the Balfour Declaration and the Mandate for Palestine itself. In 1922, the British *de facto* divided the territory of the Mandate, in effect laying the foundation to establish an *Arab* State in 78% of the territory that had been originally designated for the Jewish homeland, thereby leaving only 22% of the original territory for Jewish settlement and for reconstituting the Jewish homeland.

And today, the people collectively and commonly referred to as the "Palestinians",[129] the *Arab* inhabitants of the West Bank and the Gaza Strip in the western portion of the original

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Negara Republik Indonesia Tahun 1945 [Cn.] art. 281(I) (Ind.) (The Constitution of Indonesia, providing that the "right not to be tried under a law with retrospective effect . . . cannot be limited under any circumstances"); Kongeriket Norges Grunnlov [Cn.] art. 97 (Nor.) (The Constitution of Norway, setting forth that "[n]o law must be given retroactive effect"); Code civil [C. civ.] [Civil Code] art. 2 (Fr.) (The French Civil Code, stating that "[l]egislation provides only for the future; it has no retrospective operation"); Codice civile [C.c.] [Civil Code] art. 11. (Ita.) (The Italian Civil Code, providing that "[t]he law only provides for the future: it has no retroactive effect").

[127]While there is increased discussion today about reparations for issues such as colonialism and slavery, which used to be legal but are now illegal, such a development has not occurred to the extent of dismantling existing States. Contrary to changes in law that occurred regarding colonialism and slavery, nothing has changed regarding the Mandate system, including the Mandate for Palestine, which was legal under previously existing international law and is still legal. As such, Jewish settlement in Mandatory Palestine, which includes the West Bank, was legal under previously accepted international law and continues to be legal because international law has not changed regarding the legality of the Mandates.

[128]*See, e.g.*, Rostow, *supra* note 3.

[129]Note that the term "Palestinians" applied historically to *all* inhabitants of the Mandate for Palestine—Jews, Christians, and Muslims alike. *Id.* at 153. Since the creation of the State of Israel, *Jewish* Palestinians chose to refer to themselves as Israelis, whereas Arab Palestinians currently refer to themselves as Palestinians. This difference in names has been exploited by Arab Palestinians to suggest to the historically ignorant that Israelis are foreigners who have come to unlawfully colonise Arab land, when, in fact, in 1948, Israelis were actually the Jewish inhabitants of the rump portion of Palestine as it existed when the British departed. Moreover, Jews have lived continuously in the land for millennia, even during times of hostile foreign occupation and attempts by foreigners to expel them from the land.

Mandate for Palestine— *i.e., the remaining 22% of the original territory*—are seeking to establish yet another Arab State. The current Palestinian claim that Jewish settlement in the West Bank is unlawful is part of the strategy being pursued by Palestinian Arabs that would result in the emergence of two separate Arab States—*the already established Hashemite Kingdom of Jordan as well as a future "State of Palestine"*[130]—from the original territory of the Mandate for Palestine.

C. Pursuant to *Uti Possidetis Juris*, Title to the Territory Covered by the Mandate for Palestine Passed to Israel Upon Britain's Departure in May 1948

ICJ jurisprudence has established that *uti possidetis juris* is the customary international law principle that serves to determine the borders of newly emerging States. The principle evolved during the period of decolonisation in Latin America and is generally accepted today as the customary international law rule that applies in determining the borders of newly emerging States.[131] "Stated simply, *uti possidetis* [*juris*] provides that states emerging from decolonisation shall presumptively inherit the colonial administrative borders that they held at the time of independence".[132] As the ICJ noted, even though the principle of *uti possidetis juris* appears to conflict with the right of peoples to self-determination,[133] it accords pre-eminence to "legal title over effective possession as a basis of sovereignty".[134] "The essence of the

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[130]Admittedly, there are Arabs who continue to call for a State of Palestine encompassing all territory "from the river to the sea". *See* @RashaMK, TWITTER (29 Nov. 2020, 2:45 PM), https://twitter.com/RashaMK/status/1333134943526989828. Such rhetoric is not uncommon and helps keep tensions high in the region. Even the seal of the PLO depicts all of the western portion of the original Mandate for Palestine as belonging to Palestine; Israel is not shown at all:

[131]*See* Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (Dec. 22). Note the following:

> Although there is no need . . . to show that this is a firmly established principle of international law where decolonization is concerned, *the Chamber nonetheless wishes to emphasize its general scope*, in view of its exceptional importance for the African continent and for the two Parties. . . .
>
> [T]he principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs*. . . .
>
> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, *but as the application in Africa of a rule of general scope*. . . .
>
> *Hence, the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by organs of the Organization of African Unity itself, are evidently declaratory rather than constitutive: they recognize and confirm an existing principle*, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent.

Id. at 565–66 (emphasis added). *Uti possidetis juris* was also applied to the former Ottoman territories when they gained their independence. *See infra*, Section III.D.

[132]Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

[133]Frontier Dispute, *supra* note 131, at 567, ¶ 25.

[134]*Id.* at 566, ¶ 23.

principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved".[135] The principle is no longer limited to situations of decolonisation. *Uti possidetis juris* now applies "to all cases where the borders of new states have to be determined, and not just in its original context of decolonization".[136] It has been applied, for example, to States emerging from former mandates[137] (including the Middle East Mandates created out of the former Ottoman territories) as well as to the break-up of previously existing States, like Yugoslavia,[138] Czechoslovakia,[139] and the Soviet Union.[140] As the ICJ noted in the *Case Concerning the Frontier Dispute* (*Burkina Faso/Republic of Mali*),

> the principle of *uti possidetis* [*juris*] seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.*[141]

Accordingly, as a long-standing, well-established "general principle" of international law, which was applied to each of the States that emerged from the Middle East mandates prior to the emergence of Israel as a State in 1948, *uti possidetis juris* is the international law principle which also governed the emergence of the State of Israel in May 1948. Further, *the principle remains valid and controlling under international law to this day*.

As noted above, *uti possidetis juris* establishes the borders and sovereign rights of the State that emerges from a previously non-independent condition, whether by decolonisation, the termination of a mandate, or the break-up of a previously-existing State into new States. Sometimes—*as was the case with Israel* vis-à-vis *the West Bank and the Gaza Strip in 1948-1949*—the emerging State is unable at the onset of its independence to exercise full, sovereign control over all portions of the territory to which it had attained lawful sovereignty upon its coming into being. For example, for eighteen years, from 1949 to 1967, the West Bank and the Gaza Strip were under the unlawful belligerent military occupation of Jordanian and Egyptian armed forces, respectively. Notwithstanding the eighteen-year unlawful belligerent military occupation of Israeli territory by foreign armies, pursuant to *uti possidetis juris*, the occupied territories remained the continuous sovereign possession of the State of Israel, the only State that emerged from the Mandate for Palestine upon the departure of the British in 1948.[142] In other words,

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[135] *Id.*

[136] Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635 (2016); *see also*, Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession? in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95–137 (Christian Walter et al. eds., 2014).

[137] Bell & Kontorovich, *supra* note 136, at 646–48.

[138] PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 5–6 (2002).

[139] Ratner, *supra* note 132, at 597–98.

[140] *See* Justin A. Evison, *MIGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 MIL. L. REV. 90, 95–96 (2014).

[141] Frontier Dispute, *supra* note 131, at 565, ¶ 20 (emphasis added).

[142] *Id.* at 566, ¶ 23 ("The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved"). Israel declared its independence on 14 May 1948. The following day, Israel was attacked by its Arab neighbours. On 15 November 1988—*forty years after Israel*

> where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state *even where the new state did not actually possess the territory*. Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory.[143]

Moreover, "[t]he essence of the [*uti possidetis juris*] principle lies in its primary aim of securing respect for the territorial boundaries *at the moment when independence is achieved*".[144] That moment for Israel was 14 May 1948, thereby fixing the borders of the Mandate for Palestine as they existed on that date as the borders of the nascent State of Israel—which included the West Bank, the Gaza Strip, and East Jerusalem.

D. *Uti Possidetis Juris* Was Applied to the Emergence of States from the Former Ottoman Territories That Had Been Designated as Mandates by the League of Nations and Governed What Occurred Upon Israel's Emergence as a State

Not only was *uti possidetis juris* the guiding principle that was applied as the States in Latin America emerged as independent States in the 19th Century, it was also applied to the numerous States in Africa that emerged from decolonisation in the 20th Century and to the States that emerged from the break-up of the former Yugoslavia, the former Czechoslovakia, and the former Soviet Union.[145] Further, it was applied to the States in the Middle East that emerged from the former Mandates carved out of the former Ottoman Empire—the Mandates for Mesopotamia (Iraq), Syria (including Lebanon), and Palestine.[146]

1. Application of *uti possidetis juris* to Mesopotamia (Iraq)

The Mandate for Mesopotamia (Iraq), for example, was the first of the three Middle East Mandates to achieve its independence. In 1932, Iraq obtained its independence from Great Britain, the Mandatory for Mesopotamia. At the time Iraq became independent, there was an

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came into being—the Palestine Liberation Organisation (the PLO) proclaimed its independence in Algeria, despite the fact that the PLO did not control—*and had never controlled*—one iota of territory belonging to the British Mandate. Moreover, Israel and the Palestinian Authority have yet to reach any type of settlement with respect to the Gaza Strip and the West Bank. As such, Israel remains the only State to emerge upon the British departure in 1948.

[143]Bell & Kontorovich, *supra* note 136, at 642 (emphasis added); *see also* Frontier Dispute, *supra* note 131, at 565, ¶ 20 ("Its [i.e., *uti possidetis juris*'] obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power"). Further,

> [t]he essence of the [*uti possidetis juris*] principle lies in its *primary aim of securing respect for the territorial boundaries at the moment when independence is achieved*. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* [*juris*] resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.

Id. at 566, ¶ 23 (emphasis added).

[144]*Id.* (emphasis added).

[145]*See* Frontier Dispute, *supra* note 131, at 564; RADAN, *supra* note 138, at 5–6; Ratner, *supra* note 132, at 597–98; Evison, *supra* note 140, at 95–96.

[146]Bell & Kontorovich, *supra* note 136, at 647–57.

ongoing border dispute between the British Mandatory and Turkey over the oil-rich region around Mosul.[147] There were also self-determination claims raised by the Kurds for the same region.[148] Although disagreements over the border led to periodic hostilities with both Kurds and Turks while the border was being negotiated, upon Iraq's independence, pursuant to *uti possidetis juris*, the Mandatory borders *as they existed at the time Iraq emerged as an independent State* (borders which included Mosul as part of Iraq) became the internationally recognised borders between Iraq and Turkey.[149] They remain so today. Additionally, and importantly, *uti possidetis juris* was given precedence over conflicting Kurdish self-determination claims.

2. Application of *uti possidetis juris* to Syria

There were a number of border disputes regarding the Syrian Mandate as well. Some focused internally on where to draw the line to delineate Lebanon from Syria.[150] Another key area of dispute concerned the Hatay/Alexandretta region ("Hatay region"), an area lying along the eastern Mediterranean Sea adjacent to Turkey and of great interest to Turkey because of the large number of ethnic Turks living there.[151] The Hatay region dispute provides considerable insight into how *uti possidetis juris* functions *vis-à-vis* determination of an emerging State's borders. In 1936, France, the Mandatory for Syria, had announced that it would be giving Syria (which, at the time, included the Hatay region) independence in a few years.[152] Then, as French concerns about the rise of Hitler and the Nazis grew, France became more accommodating to Turkey *vis-à-vis* its concerns about the Hatay region and decided to cede the Hatay region to Turkey in an attempt to diminish rising German influence in Turkey and the Middle East. France's formal transfer of the region to Turkey was completed in June 1939 in clear violation of Article 4 of the Syrian Mandate that explicitly forbade placing territory from the Mandate under the control of a foreign power without the approval of the League of Nations.[153] France's decision to transfer the Hatay region to Turkey was criticised by the League's Mandates Commission, but the outbreak of World War II prevented the League from taking any action.[154]

Following the war, in April 1946, the Syrian Mandate was terminated, and Syria emerged as an independent State. Pursuant to *uti possidetis juris*, the borders of the newly independent State of Syria excluded the Hatay region, since that region was—*albeit in violation of the express terms of the Syrian Mandate*—no longer part of the Mandate at the emergence of the newly independent State of Syria.[155] The Hatay region episode is significant because, pursuant to *uti possidetis juris* and despite Syrian complaints about the illegality of the land transfer, the international community has recognised the finality of *uti possidetis juris* in

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[147]PETER SLUGLETT, BRITAIN IN IRAQ: CONTRIVING KING AND COUNTRY 75–76, 83–84, 155–56 (2007) (noting that, prior to the British Mandate ending in 1932, border disputes with Turkey had been occurring since the end of World War I).
[148]*Id.* at 77.
[149]Bell & Kontorovich, *supra* note 136, at 650.
[150]*Id.* at 653–54.
[151]*Id.* at 654.
[152]*Id.* at 655.
[153]French Mandate, *supra* note 87, at 1014, art. 4 (Aug. 1922) ("The Mandatory shall be responsible for seeing that no part of the territory of Syria and the Lebanon is ceded or leased or in any way placed under the control of a foreign Power").
[154]Bell & Kontorovich, *supra* note 136, at 656.
[155]Emma Lundgren Jorum, *Syria's Lost Province: The Hatay Question Returns*, CARNEGIE MIDDLE EAST CTR. (28 Jan. 2014), http://carnegieendowment.org/syriaincrisis/?fa=54340.

determining an emerging State's borders and, hence, does not dispute Turkish sovereignty over the Hatay region.[156]

3. Application of *uti possidetis juris* to Palestine

The case of the Mandate for Palestine likewise confirms the role played by *uti possidetis juris* in establishing an emerging State's borders. As noted earlier, when one speaks of the "Mandate for Palestine" today, one often thinks only of the territory lying generally between the Mediterranean Sea and the Jordan rift valley. Yet, the original Mandate for Palestine also included what we know today as the Hashemite Kingdom of Jordan. Although the stated purpose of the Mandate for Palestine was to implement the terms of the Balfour Declaration in Palestine (meaning the entirety of the Mandate's territory), Article 25 of the Mandate gave Great Britain the authority to limit Jewish settlement in the area of the Mandate to the east of the Jordan rift valley.[157] Britain exercised that authority in September 1922.[158] Although there was no *formal* split of the Mandate at that time into two separate Mandates, Britain nonetheless renamed the larger eastern portion "Transjordan" and retained the name "Palestine" for the smaller, western portion.[159] Britain also placed Abdullah, son of Emir Hussein, the former Sharif of Mecca and British ally against the Ottomans in World War I, as nominal ruler of Transjordan.[160] From its actions on behalf of its former Hashemite allies, it seems clear that Great Britain never intended to allow the Jews to regain any right to settle in the eastern portion of the original Mandate created to be part of the Jewish homeland.

Britain was never authorised by the League of Nations to divide the Mandate in two. Nonetheless, in 1946, Britain did in fact do so when it recognised the independence of Jordan and terminated the Mandate in the east.[161] Pursuant to *uti possidetis juris* and despite the fact that Britain had no authority to divide the Mandate into two parts, the prior *administrative* boundary between the two parts of the Mandate for Palestine, generally running north to south along the Jordan rift valley, became the internationally recognised western border of the newly independent Hashemite Kingdom of Jordan as well as the new eastern boundary of the remaining portion of the original Mandate for Palestine.

From 1946 to 1948, the Mandate for Palestine was limited to the smaller, western portion of the original Mandate stretching from the Jordan rift valley to the Mediterranean Sea. When Britain withdrew its forces in May 1948, *only one State emerged from the remaining portion of the Mandate for Palestine*—the State of Israel.[162] The nascent State of Israel was

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[156]*Id.*

[157]Mandate for Palestine, *supra* note 2, art. 25, stating:

> In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.

[158]Palestine Mandate: Memorandum by the British Representative, League of Nations Doc. C.667.M.396.1922. VI 7 (1922).

[159]MARTIN GILBERT, THE ROUTLEDGE ATLAS OF THE ARAB-ISRAEL CONFLICT 7 (9th ed. 2008).

[160]*Abdullah I*, BRITANNICA, https://www.britannica.com/biography/Abdullah-I (last visited 23 Mar. 2022).

[161]Bell & Kontorovich, *supra* note 136, at 674.

[162]*See* Joel Beinin & Lisa Hajjar, Palestine, Israel and the Arab-Israeli Conflict: A Primer, MIDDLE E. RSCH. & INFO. PROJECT, http://merip.org/wp-content/uploads/2017/02/Primer_on_Palestine-IsraelMERIP_February2014final.pdf

immediately attacked by its Arab neighbours. The fighting raged into 1949, when it was ended by a series of armistice agreements between Israel and various Arab neighbours.[163] When the fighting ended, the West Bank (including East Jerusalem) and the Gaza Strip remained under the unlawful belligerent military occupation of Jordan and Egypt, respectively. The military forces of both sides were separated by an armistice line, and each armistice agreement—*at Arab insistence*—specifically ruled out identifying the armistice line as an international border.[164]

Although Israel's Arab enemies controlled the Gaza Strip and the West Bank from 1949 to 1967,

> [t]he doctrine of *uti possidetis juris* . . . rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate. . . . Israel was the only state that emerged from Mandatory Palestine, and *it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories*. There was therefore no rival state that could lay claim to using internal Palestinian district lines as the basis for borders. … Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948.[165]

Accordingly, applying the customary international law principle *uti possidetis juris* to the Mandate for Palestine means that Israel, as the sole State to emerge from the Mandate for Palestine upon the departure of the British Mandatory, attained sovereignty over the entirety of the territory of the Mandate within the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan rift valley, including the West Bank and the Gaza Strip).

(last visited 5 Apr. 2022). Note that the PLO did not declare Palestinian independence until 1988 and was forced to do so from exile in Algiers. At no time during the intervening 40 years since Israel had become a State had the Palestinians exercised sovereign control over a single square centimeter of territory belonging to the Mandate for Palestine.

[163]*See* General Armistice Agreement, Isr.-Syria, 20 Jul. 1949, 42 U.N.T.S. 327 [hereinafter Isr.-Syria Armistice]; General Armistice Agreement, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303 [hereinafter Isr.-Jordan Armistice]; General Armistice Agreement, Isr.-Leb., 23 Mar. 1949, 42 U.N.T.S. 287 [hereinafter Isr.-Leb. Armistice]; General Armistice Agreement, Egypt-Isr., 24 Feb. 1949, 42 U.N.T.S. 251 [hereinafter Egypt-Isr. Armistice].

[164]Isr.-Syria Armistice, art. V, ¶ 1 (noting that the armistice line does not enshrine an "ultimate territorial arrangement"); Isr.-Jordan Armistice, art. VI, ¶ 9 (noting that the armistice line is "without prejudice to future territorial settlements or boundary lines"); Isr.-Leb. Armistice, art. IV, ¶ 2 (noting that the "basic purpose" of the armistice line is to "delineate the line beyond which the armed forces of the respective Parties shall not move"); Egypt-Isr. Armistice, art. V, ¶ 2 (noting that the armistice line is "not to be construed . . . as a political or territorial boundary" and that the line is "delineated without prejudice" to the "ultimate settlement of the Palestine question").

[165]Bell & Kontorovich, *supra* note 136, at 681–82 (emphasis added). Note that UN General Assembly's attempts to divide Palestine into three parts—a Jewish State, an Arab State, and an area around Jerusalem under international control—were rejected outright by the Arab States and Arab Palestinians, thereby torpedoing the plan altogether. As such, the proposed borders never enjoyed political legitimacy and have no validity today, despite some attempts by the Palestinians to resurrect them.

There is no principled reason in either law or logic why uti possidetis juris *applied to each of the Mandates created out of former Ottoman territories*—to include the creation of Jordan out of the Mandate for Palestine—*but somehow did not apply upon the departure of the British to the remaining portion of the Mandate*.

As such, pursuant to *uti possidetis juris*, claims by other parties over any territory within the borders of the Mandate as they existed on 15 May 1948 are legally baseless (including claims of creation of a Palestinian State in the territories unlawfully occupied by foreign aggressors from 1949 to 1967).[166]

* * * * *

Having established the legal basis for Israeli sovereignty over the entirety of the Mandate's territory pursuant to *uti possidetis juris*, no legal impediments prevent Israel, as a sovereign State, from treating some of its territory as being potentially subject to a change of status for its own purposes, including for the sake of achieving peace with a group or confederation of Arabs who long for a separate State of their own. *What it does mean, however, is that Israel, as the current lawful sovereign over all such territory, cannot be compelled to yield territory for such a purpose or be prevented from exercising sovereign rights throughout the territory in the meantime, including with respect to permitting the establishment of Jewish settlements in its sovereign territory.*

IV. ISRAEL DID NOT UNLAWFULLY OCCUPY THE GAZA STRIP, THE WEST BANK, OR EAST JERUSALEM IN 1967 AS THE TERM "OCCUPATION" IS UNDERSTOOD IN THE HAGUE AND THE GENEVA CONVENTIONS; INSTEAD, IT FREED ITS OWN TERRITORY FROM UNLAWFUL OCCUPATION BY EGYPT AND JORDAN

No "State of Palestine" has ever existed. The name "Palestine" was given to the territory by the Romans due to their hatred for the Jews.[167] As stated above, in the modern times, the area had been a component part of the Ottoman Empire for about 400 years. Pursuant to the

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[166]*See supra* Section III.C. Note also that the system of Mandates itself was viewed as meeting the self-determination interests of both Arabs and Jews. Further, Arab Palestinians assert that they have an inherent, natural law claim to the West Bank, but

> [n]either customary international law nor the United Nations Charter acknowledges that every group of people claiming to be a nation has the right to a state of its own. International law rests on the altogether different principle of the sovereign equality of states. And nearly every state inherited from history contains more than one ethnic, religious, or cultural group . . . . Therefore, it is a rule essential to international peace that claims of national self-determination be asserted only through peaceful means.

EUGENE V. ROSTOW, THE FUTURE OF PALESTINE 11–12 (Nov. 1993). Professor Rostow further notes that,

> [d]espite its great political appeal, the idea of "self-determination" for all "peoples" is a puzzling and complex factor in the political life of an international system based on the existence and sanctity of states. Most states include more than one people: Spain has Basques and Catalans; France, Bretons; Belgium, Walloons and Flemish; Canada a considerable French-speaking population. . . . Almost all the African states include a number of tribes. . . . .
>
> It is clear that the principle of self-determination can hardly be regarded as an absolute, either in international law or in international politics. . . . [T]here can be no justification for claiming that it is the only principle to be applied in for resolving the future of the West Bank . . . .

Rostow, *supra* note 3, at 153–54.

[167]*See*, *Roman Palestine*, BRITANNICA, https://www.britannica.com/place/Palestine/Roman-Palestine (last visited 11 Mar. 2023).

League of Nations Mandate for Palestine, the principle *uti possidetis juris*, and because the General Assembly's Partition Plan was never implemented, the only State that emerged in the Mandate's territory in May 1948 was the State of Israel. Israel, therefore, gained sovereignty over that territory and, as a result, fulfilled the Mandate's purpose. For eighteen years, Egypt and Jordan had unlawfully occupied portions of that territory, namely the Gaza Strip, the West Bank, and East Jerusalem. When Israel captured those portions from Jordan and Egypt, it simply took control over its own territory. No Palestinian State had been created during those eighteen years or thereafter.

The Palestinian National Council did not even declare the "*establishment* of the State of Palestine" until November 1988.[168] The then-Prosecutor of the ICC did not consider Palestine a State in April 2012.[169] As recently as January 2020, eight years after the UN General Assembly, through Resolution 67/19, had accorded the Palestinian Authority the status of non-member observer "State" at the UN—which resolution itself referred to Palestinian statehood in aspirational terms[170]—the then-Prosecutor of the ICC considered "Palestine . . . to be a 'State' [only] for the purposes of article 12(2)" of the Rome Statute.[171] Moreover, the Prosecutor indirectly asked the ICC Pre-Trial Chamber I to avoid conducting an "independent assessment of whether Palestine satisfies the normative criteria of statehood under international law . . . ".[172] This is significant because it indicates once again that Palestine does not, in fact, meet the criteria for statehood under international law. Nonetheless, the ICC Prosecutor asked the ICC Pre-Trial Chamber I judges to grant her authority to investigate and exercise jurisdiction over Israel anyway, something not permitted under the Rome Statute in the absence of the "State" of Palestine.

Further, many, including various UN bodies, presume that a Palestinian State exists on the basis of Resolution 181(II) and its borders coincide with the armistice lines of 1949. Yet, such presumptions have no legal basis because Resolution 181(II) was rejected by the Arabs and was never implemented, and armistice lines are not borders.

In the Wall Advisory Opinion, the ICJ also seems to use Resolution 181(II) as a basis for delineating a Palestinian State's territory. The Court stated that "Israel proclaimed its independence on the strength of the General Assembly . . . [Resolution 181(II)]".[173] This is simply not correct. Yet, even assuming such were the case, as a dead document, which was never implemented, Resolution 181(II) did not create an Arab State or convey to the Arab population title to any areas of the Mandate for Palestine. Further, if the West Bank and the Gaza Strip are considered Palestinian territories based on Resolution 181(II), on what basis is

[168]Declaration of State of Palestine – Palestine National Council, 15 Nov. 1988, *available at* https://www.un.org/unispal/document/auto-insert-178680/ (emphasis added).
[169]Situation in Palestine, The Office of the Prosecutor, International Criminal Court (3 Apr. 2012), https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.
[170]G.A. Res. 67/19, ¶¶ 5–6 (29 Nov. 2012) (expressing the need "for the resumption and acceleration of negotiations within the Middle East peace process . . . for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water" and urging "all States . . . to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom").
[171]Situation in the State of Palestine, ICC-01/18-12 22-01-2020, Prosecution Request Pursuant to Art. 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, Situation in the State of Palestine, ¶ 41 (22 Jan. 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00161.PDF.
[172]*Id.* at ¶ 9.
[173]Wall Advisory Opinion, *supra* note 14, ¶ 71.

East Jerusalem considered Palestinian territory, as the same resolution designated Jerusalem to be *corpus separatum* under international control.[174] Accusing Israel of unlawfully annexing "Palestinian territory", i.e., East Jerusalem, violates basic logic. Neither the General Assembly nor the Security Council has any answer for this. Yet, these political bodies have been able to convince even judicial bodies, such as the ICJ and the ICC, to assume that a Palestinian State came into existence based on a non-binding resolution that was rejected by one party and never implemented. At the same time, they disregard some provisions (i.e., regarding the status of Jerusalem) of that dead resolution and inconsistently consider some provisions (i.e., recommending creation of an Arab State) of the same dead resolution as binding law.

The UN bodies' conclusion that the 1949 armistice lines now constitute internationally recognised "borders" suffers from a more fatal flaw. The 1949 Armistice Agreements had explicitly included a caveat, *at Arab insistence*, that the respective armistice lines should *not* be considered borders. To argue today (1) that the 1949 armistice lines are pre-1967 "borders", and (2) that territories within those lines which had been under unlawful belligerent occupation by Jordanian and Egyptian armed forces constitute a "Palestinian State" violates international law and is ludicrous.

In its Wall Advisory Opinion, the ICJ generated a considerable amount of "analysis" in trying to declare the *de jure* applicability of Geneva Convention IV to the so-called occupation of the disputed territories. This was done to declare Israel a foreign occupier without determining the territories' ownership. That analysis, however, suffered from numerous flaws. The ICJ noted that Geneva Convention IV supplements Sections II and III of the Hague Regulations.[175] The ICJ noted that Section III's language, "'Military authority over the *territory of the* hostile *State*'", "is particularly pertinent" here.[176] Yet, when discussing the Fourth Geneva Convention, the ICJ disregarded the language, "*territory of a* High Contracting Party",[177] and concluded that, as long as there exists an armed conflict between two contracting parties, "the Convention applies, in particular, in *any* territory occupied in the course of the conflict by one of the contracting parties".[178] The ICJ further stated: "Whilst the drafters of the Hague Regulations . . . were as much concerned with protecting the rights of a State whose territory is occupied, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories".[179] This reading of the Convention's plain language is only partially correct as explained below.

The ICJ's conclusion irresponsibly or intentionally neglected the key limiting factor in the applicable articles, to wit, that the occupied territory must belong to a High Contracting Party (i.e., a State). The Court neglected key language in Article 2 of the Fourth Geneva Convention by picking and choosing the language that supported its conclusion. The Court focused on *only* the following bold portions of Article 2 of the Fourth Geneva Convention taken out of their context. (1) the "Convention shall apply to all cases of declared war or of any other **armed conflict which may arise between two or more of the High Contracting Parties**, even if the state of war is not recognized by one of them", and (2) **the "Convention**

[174]G.A. Res. 181(II), *supra* note 12, at 146.
[175]Wall Advisory Opinion, *supra* note 14, ¶ 89.
[176]*Id.* ¶ 89 (emphasis added).
[177]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287 [hereinafter Geneva Convention IV]. Article 2 of the Fourth Geneva Convention reads that the Convention shall "apply to all cases of partial or total occupation of *the territory of a High Contracting Party*." *Id.* art. 2 (emphasis added).
[178]Wall Advisory Opinion, *supra* note 14, ¶ 95.
[179]*Id.*

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**".[180]

By doing that, the ICJ disregarded the language, "*territory of a* High Contracting Party", which is virtually identical to the Hague Regulation Section III ("*territory of the* hostile State"). As the ICJ noted, "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose".[181] Nonetheless, the ICJ disregarded the ordinary meaning of the language, "of the *territory of* a High Contracting Party", and hence took the words out of their context. Further, the *travaux préparatoires* the ICJ quoted in support of its conclusion also did not support the Court's interpretation. The ICJ stated that the Conference of Government experts convened by the ICRC recommended that the Geneva Conventions "be applicable to any armed conflict 'whether [it] is or is not recognized as a state of war by the parties' and 'in cases of occupation of territories in the absence of any state of war'".[182] These recommendations, which became part of common Article 2 of the Geneva Conventions, did not change the fact that the Conventions talk about "*the territory of a* High Contracting Party". In terms of the application of Article 2, Article 6 further clarifies which "occupied territory" is the subject of the Convention. It states, "[i]n the *territory of Parties to the conflict*".[183] In 1967, the conflict occurred between, *inter alia*, Israel, Jordan, and Egypt, satisfying the first requirement, the existence of an international armed conflict. But the territories in question were not Jordanian or Egyptian even though they were captured during an international armed conflict with Jordan and Egypt. Regardless of whether Israel had captured the West Bank and the Gaza Strip in an armed conflict or with or without an armed resistance, these considerations have no bearing on whether Israel is a foreign occupier. In the case of territorial "occupation", the Geneva Conventions apply *de jure* when one State occupies "the territory *of*" another State. The *de facto* application of the Fourth Geneva Convention (as is the case here), however, does not answer the question of ownership to the territory.

As the ICJ noted, the purpose of the Fourth Geneva Convention is "to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories".[184] To fulfil its object and purpose, Israel *de facto* and voluntarily applies the Convention in the territory it liberated from unlawful foreign military occupation in 1967. Neither Geneva Convention IV nor Hague Convention IV and its Regulations provide any direction to determine territorial ownership or legality of the occupation. The question is not whether the Fourth Geneva Convention applies to the Israeli-Palestinian conflict—it certainly applies in order to determine the legality of Israeli security measures as well as the legality of Hamas' and other Palestinians' attacks against Israel. Instead, the pertinent question is whether the mere application of the Fourth Geneva Convention renders Israel's control over the disputed territories illegal or whether such application determines the ownership of the territories. It does not. Hence, the question of title to the disputed territories remains even if the Fourth Geneva Convention applies. Yet, in the Wall Advisory Opinion, the ICJ stated that, since the Fourth Geneva Convention applies to the 1967 armed conflict as Israel and Jordan were parties to the Convention, there is no need to further "enquir[e] into the precise prior status of th[e disputed] territories".[185] That is incorrect. **There most certainly is reason to enquire because**

[180] *Id.* ¶ 92.
[181] *Id.* ¶ 94.
[182] *Id.* ¶ 95.
[183] Geneva Convention IV, *supra* note 177, art. 6.
[184] Wall Advisory Opinion, *supra* note 14, ¶ 95.
[185] *Id.* ¶ 101.

Jordan was an unlawful occupier and, hence, could not legitimately claim the territory it occupied as its own. Accordingly, it would be the prior sovereign over that territory that matters, and, pursuant to *uti possidetis juris*, that sovereign is Israel. In other words, Israel is occupying its own territory.

Because a sovereign cannot unlawfully occupy its own territory as the term is understood in the Hague and the Geneva Conventions, the conventions presuppose (expressly by the language "territory *of* a High Contracting Party) one sovereign occupying the territory of another sovereign.[186] Here, the territories in question did not belong to either Egypt or Jordan or a "State of Palestine" because none existed in 1967 nor came into existance thereafter. Egypt and Jordan unlawfully occupied the Gaza Strip and the West Bank, respectively, in a war of aggression in violation of the UN Charter.[187] Having legal title to the entire territory of the Mandate for Palestine under the Mandate and the *uti possidetis juris* principle, in 1967, Israel simply liberated its own sovereign territory from unlawful occupiers. Although the following is not the case here, even if one sovereign occupies another sovereign's territory, the mere fact of occupation does not render it unlawful. Occupation of another sovereign's territory in self-defence as a result of an armed attack or an imminent armed attack is not unlawful.[188] "A state acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense".[189] Here, Israel did not occupy foreign territory, all claims to the contrary notwithstanding, but if it had, its occupation would be lawful.

V. THE MANDATE FOR PALESTINE CONTINUED TO APPLY IN THE GAZA STRIP AND THE WEST BANK (INCLUDING EAST JERUSALEM) BECAUSE THEY HAD BEEN UNDER UNLAWFUL OCCUPATION BY FOREIGN ARMIES FROM 1949-1967

A. According to the ICJ, a League of Nations Mandate Creates Fiduciary Obligations on the Part of the International Community That Continue Until the Mandate's Terms Are Fulfilled

The ICJ has declared that a League of Nations Mandate "is a binding international instrument like a Treaty, which continues as a *fiduciary obligation* of the international community *until its terms are fulfilled*".[190] The ICJ concluded:

> [T]he League of Nations was the international organisation entrusted with the exercise of the supervisory functions of the Mandate. Those functions were an indispensable element of the Mandate. But that does not mean that the mandates institution was to collapse with the disappearance of the original supervisory machinery. To the question whether the continuance of a mandate was

[186]Geneva Convention IV, *supra* note 177, art. 2. Article 2 of the Fourth Geneva Convention reads that the Convention shall "apply to all cases of partial or total occupation of *the territory of a High Contracting Party*" (emphasis added). This article clarifies that the occupied territory must belong to a High Contracting Party, to wit, a sovereign State. Article 3 further clarifies that Article 49 does not apply in a situation in which the occupied territory is not of a foreign sovereign. *See also* Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 Oct. 1907, art. 2 [hereinafter Hague Convention (IV)].
[187]UN Charter, art. 2(4).
[188]*See* UN Charter, arts. 2(4) & 51.
[189]Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970).
[190]Rostow, *supra* note 3, at 157.

> inseparably linked with the existence of the League, the *answer must be that an institution established for the fulfillment of a sacred trust cannot be presumed to lapse before the achievement of its purpose*.[191]

The UN, as successor to the League of Nations, also recognised its continuing obligation *vis-à-vis* Mandates by incorporating Article 80 into the UN Charter. Article 80 reads, in pertinent part: "[N]othing in this Chapter shall be construed in or of itself *to alter in any manner* the rights whatsoever of . . . any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties".[192] Accordingly, under international law, the Mandate for Palestine did not automatically cease to exist over the West Bank (including East Jerusalem) and the Gaza Strip during the 18-year-long unlawful foreign belligerent military occupation, which impeded the fulfilment of the Mandate's terms in those territories.

B. The Mandate for Palestine Continued to Apply in the West Bank (including East Jerusalem) and the Gaza Strip Even Though They Were Unlawfully Occupied by Foreign Armies From 1949-1967 and, hence, the Terms of the Mandate Were Yet to Be Met in Those Territories

Jordan's and Egypt's aggression and unlawful occupation of the West Bank and the Gaza Strip, respectively, directly violated UN Charter principles against unlawful use of force and, hence, did not vest legal title to the land they occupied to either aggressor. Under the then applicable, as well as current, international law, aggressive invasion is illegal, no matter how long the illegal occupation lasts.[193] As unlawful aggressors, the Jordanian and Egyptian occupiers had no legal right to any of the territory they occupied in Mandatory Palestine.

The invasion of Israel by foreign Arab armies is an important event with respect to the fulfilment of the Mandate for Palestine in 1948. *The invasion, in fact, constituted an unlawful, intervening act which made impossible the fulfilment of the Mandate's terms that called for both Jewish settlement of, and reconstituting the Jewish homeland in, Palestine*.

The Arab armies' invasion forcibly prevented the terms of the Mandate from being fulfilled in the West Bank and the Gaza Strip. During Jordan's and Egypt's subsequent 18-year illegal occupation of the respective territories, their illegal occupation thwarted the imperatives of international law requiring that the succession of treaties be respected and enforced.

As such, because of the foreign Arab invasion and unlawful occupation, the sacred trust obligations embodied in the Mandate for Palestine could not be fulfilled in the West Bank and the Gaza Strip. Yet, as the ICJ noted regarding the nature of the Mandates as sacred trusts, the eighteen-year lapse created by Jordanian and Egyptian unlawful occupation of and control over the West Bank and the Gaza Strip, respectively, did not extinguish the Mandate's terms and purpose. The Mandate continued to apply to those territories and was protected by Article 80

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[191]Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 32 (21 June) (emphasis added).

[192]U.N. Charter art. 80 (emphasis added). Article 80 was specifically included with Palestine in mind. In fact, it was called the "Palestine Article". Matthijs de Blois, *The Unique Character of the Mandate for Palestine*, 49 ISR. L. REV. 365 (2016).

[193]U.N. Charter art. 2(4).

of the UN Charter,[194] even though foreign armies unlawfully restricted the fulfilment of its terms during that time. One of the key terms whose fulfilment they thwarted was Article 6 of the Mandate, *which sanctioned and encouraged Jewish settlement throughout the territory of the Mandate*.

C. As Territories Subject to a League of Nations Mandate, the West Bank and the Gaza Strip Remain Subject to the Terms of the Mandate for Palestine Until Such Terms Are Fulfilled

The unlawful Jordanian and Egyptian military occupation of territory subject to the Mandate for Palestine ended in 1967, when Israeli armed forces forcibly expelled Egyptian and Jordanian forces from the Gaza Strip and the West Bank, respectively, during the Six-Day Arab-Israeli War. Recall once again the ICJ's ruling that a League of Nations mandate terminates only when its terms have been fulfilled. As such, due to the unlawful Jordanian and Egyptian military occupation which made impossible the fulfilment of the Palestine Mandate's terms in the West Bank and the Gaza Strip, those territories remained subject to the Mandate's terms.

Once Israel had regained control of the Gaza Strip and the West Bank, the opportunity to fulfil the Mandate's terms was once again possible, including re-establishing Jewish presence and settlement throughout the territory of the Mandate for Palestine as was its right under the terms of the Mandate.[195] Until its terms are fulfilled or the Mandate is lawfully superseded by some other legal instrument approved by those for whom the sacred trust was created (in this case, the Jewish people), the Mandate remains the controlling document over those portions of the Mandate where the terms have yet to be fulfilled. Moreover, despite the fact that the issue of Jewish settlements in the West Bank is quite controversial in some circles, note that Article 6 of the Mandate *required* the Administering Authority to "encourage . . . close settlement by Jews on the land, including State lands and waste lands not required for public purposes". Because Article 6 of the Mandate encourages Jewish settlement in Palestine and because the Arab attack not only unlawfully interrupted, but prohibited and reversed, Jewish settlement in the West Bank during the period of unlawful occupation by Jordanian military forces, current Jewish settlements in the West Bank are validated by the terms of the Mandate for Palestine and are fully lawful.

VI. BECAUSE THE PRIOR SOVEREIGN, TURKEY, RENOUNCED ALL CLAIMS TO TERRITORY IN PALESTINE IN THE TREATY OF LAUSANNE, SOVEREIGNTY DEVOLVED UPON THE PEOPLE OF PALESTINE, THEREBY GIVING BOTH JEWS AND ARABS COLOURABLE CLAIMS TO THE TERRITORY; ACCORDINGLY, ISRAELI CONTROL OVER, AND JEWISH SETTLEMENTS IN, THE WEST BANK ARE NOT UNLAWFUL *PER SE*

Even if, for the sake of argument, one concludes that Israel did not receive any legal right to establish a national home for the Jewish people under the Mandate for Palestine and

[194] *Id.* art. 80 ("[N]othing in this Chapter shall be construed in or of itself *to alter in any manner* the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties") (emphasis added). According to Article 80, the Arabs' attack on Israel and Mandate territory did not "alter in any manner" the rights of the Jewish people to closely settle in the land in Palestine west of the Jordan rift valley.

[195] Mandate for Palestine, *supra* note 2, art. 6.

one further concludes that Israel did not gain title to the Mandate's territory (including the West Bank and the Gaza Strip) under the well-established *uti possidetis juris* principle upon the departure of the British in 1948, then, one may logically argue that ownership of the West Bank and the Gaza Strip would revert to the inhabitants of the Mandate for Palestine upon the Mandatory's departure. Yet, as discussed below, even that argument does not establish that the West Bank and the Gaza Strip belong to its Arab inhabitants to the exclusion of all others or that Jews cannot settle there.

A. Arguments Made in Support of Arab Palestinian Sovereignty over the Disputed Territories Disregard Colourable Jewish Claims to the Land

Some have attempted to refute Israeli claims to the West Bank and the Gaza Strip by arguing that sovereignty over the West Bank devolved upon its Arab inhabitants upon Britain's departure in 1948.[196] Their argument proceeds as follows: During the Mandate, the British were merely holding sovereignty over Palestine in trust for the Palestinian people. Thus, when the British departed, sovereignty over Palestine reverted to the Palestinian people.[197] Proponents of this argument, however, consider Arab Palestinians to be the sole inhabitants to whom sovereignty reverted. Yet, such assertions ignore that inhabitants of the Palestine Mandate included both Arabs and Jews, not just its Arab inhabitants.[198] Hence, under this legal approach, the "Palestinian people" to whom sovereignty purportedly reverted upon the departure of the British would have included both *Jews and Arabs*. Accordingly, under this reversion theory, sovereignty over the Mandate's territory reverted to both its Jewish and Arab inhabitants (thereby establishing colourable *Jewish*—as well as Arab—claims to the West Bank and Gaza Strip[199]). Moreover, if sovereignty did indeed devolve upon the inhabitants of the territory, it means that claims to the territory are *at best* disputed, since both Jews and Arabs have laid claim to the same territory.

Some have also asserted that Arab Palestinians have a better title to the West Bank because there are no competing claims to the territory.[200] Yet, such assertions are patently false. First, recall that Israel (the *Jewish* Palestinian successor State to the British Mandate) not only claims the entire City of Jerusalem (including East Jerusalem, which was a constituent part of

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[196]*See, e.g.*, John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 8–9 (2009) (citations omitted).

[197]*Id.*

[198]Article 7 of the Mandate for Palestine stated that "[t]he Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine". Mandate for Palestine, *supra* note 2, art. 7. As the administrator of the Mandate, the British Government enacted the Palestinian Citizenship Order 1925 which defined citizenship for the region (excluding Transjordan, which was governed through a separate citizenship law). Under the law concerning the territory called "Palestine", all former Turkish subjects habitually residing in the Mandate's territory as of 1 August 1925, were declared citizens of the Mandate for Palestine, without religious or ethnic limitations whatsoever. *Id.* § 1(1). In addition to this clear statement regarding the residents of the region, the naturalisation process the British set up in the law provided that not only were people born in the area citizens, but if someone lived in Mandatory Palestine for 2 years, intended to remain, and spoke English, Arabic, or Hebrew, he or she could become a naturalised citizen. *Id.* § 7(1). The title of the law should not be mistaken with the notion of a State of Palestine. "Palestine" simply referred to the Mandate's territory held in trust for the establishment of the Jewish national home.

[199]If one were to argue that the Palestinian Jews' acceptance of the partition plan constituted the waiving of any future legal claim of sovereignty over any remaining portions of Palestine, it would logically follow that the Palestinian Arabs' rejection of sovereignty over the portions allocated to them by the plan would likewise have a legal effect on their sovereign rights over such territory.

[200]*See, e.g.*, Quigley, *supra* note 196, at 5.

the West Bank) as its historic capital,[201] but has also incorporated the Old City and some of its neighbourhoods into Israel proper. Second, UN Security Council Resolution 242 foresees that final territorial questions (including the issue of establishing defensible borders) will be resolved as part of the final negotiations to resolve the Arab-Israeli conflict, and establishing *defensible* borders will undoubtedly require retention of land by Israel in the West Bank.[202]

The drafters of Resolution 242 did not deal with the Arab inhabitants of the West Bank or the Gaza Strip (the so-called "Palestinians") as a party to the 1967 war. No Arab inhabitants of the West Bank or the Gaza Strip were invited to testify as would normally be the case when a party's interests are implicated. Instead, the Security Council dealt with the issue as a conflict between the State of Israel and surrounding Arab *States*. Jordan was considered the effected State for purposes of the West Bank and the Arabs residing there.

Third, there have been—and continue to be—large and influential segments of Jewish society, both in Israel and around the world, who view Judea and Samaria (i.e., the so-called "West Bank") as a component part of sovereign Israel, regardless of its formal legal classification as "Administered Territory".[203] Such an argument is *enhanced* when one takes into account that 78% of the original Mandate for Palestine has already been provided *at Jewish expense* to constitute an Arab State (Jordan).

B. Jewish Settlements in the West Bank Are Not Unlawful Because Article 49 of the Fourth Geneva Convention of 1949 Does Not Apply to Them

Arab Palestinians' claims that Jewish settlements are unlawful are based on two false assertions. First, as discussed above, they incorrectly claim that the West Bank and the Gaza Strip are "occupied Palestinian territories", by which they mean such territories *belong to* a (to date, non-existent) "State" of Palestine.[204] Second, they erroneously claim that Article 49 of the Fourth Geneva Convention applies to the Jewish settlements in the West Bank.

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[201]*See* ROGER FRIEDLAND & RICHARD HECHT, TO RULE JERUSALEM 8-9 (2000).

[202]*See* Eugene Rostow, *Correspondence*, 84 AM. J. INT'L L. 717, 718 (1990) (responding to Adam Roberts, *Prolonged Military Operations: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990)) ("The right of the Jewish people to settle in Palestine has never been terminated for the West Bank"), [hereinafter Rostow, *Correspondence*]. *See generally* Meir Rosenne, *Understanding UN Security Council Resolution 242 of November 22, 1967, on the Middle East*, *in* DEFENSIBLE BORDERS FOR A LASTING PEACE 45 (Jerusalem Ctr. for Pub. Affairs ed., 2008), http://www. defensibleborders.org/db_rosenneb.pdf.

[203]*See, e.g.*, Moshe Arens, *A Matter We Must Solve Ourselves*, HAARETZ (29 July 2009), http://www.haaretz.com/hasen/spages/1103397.html ("[A] reading of that convention and an acquaintance with the history of Palestine since the Balfour Declaration and the League of Nations Mandate for Palestine, as well as with the circumstances of the occupation of Judea and Samaria by the Jordanian army in the years between 1948 and 1967, make it clear that that Geneva Convention is not applicable to Israel's presence in these territories").

[204]Palestinian leaders did not declare the independence of Palestine until 15 November 1988, fully 40 years after Israel came into existence. Their proclamation reads, in pertinent part, as follows: "The Palestine National Council . . . hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem". *Palestinian Declaration of Independence*, INTERACTIVE ENCYCLOPEDIA OF THE PALESTINE QUESTION (15 Nov. 1988), https://www.palquest.org/en/historictext/9673/palestinian-declaration-independence. Note that the Arabs governed no territory and possessed no land at the time of their proclamation, forcing them to make their declaration from abroad. The "State" they claim exists fails to meet the customary international law definition of State as set forth in the Montevideo Convention—and never has. Their proclamation was simply aspirational, as indicated by their leaders at the time and since. For example, on 22 June 2009, twenty-some years after Palestinian leaders declared independence, Palestinian Prime Minister Salam Fayyad "called for the *establishment of a Palestinian state within two years*". Howard Schneider, *Palestinian Premier Sets Timeline for Establishing State, Asks Constituents to A 'Roll Up Their Sleeves'*, WASH. POST (23 June 2009),

Yet, for the settlements to be unlawful, Israeli control over the West Bank must be unlawful in terms of Article 49 of the Fourth Geneva Convention, which states, in pertinent part, that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".[205] For Article 49 to apply, three conditions must apply. First, there must be an *international* armed conflict;[206] if there is no international armed conflict, the Fourth Convention (except for common Article 3) does not apply. Second, the territory occupied must belong to a foreign sovereign involved in the armed conflict, as indicated in Articles 2 and 3 of the Convention.[207] Third, the occupying power must *forcibly* transfer its own population to the occupied territory.[208]

The ICRC Commentary explained the intent of Article 49(6) as follows:

> It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.[209]

Ambassador Alan Baker, an Israeli diplomat and a frequent member of Israeli delegations negotiating issues with Arab delegations, including the Oslo Accords,[210] noted the following regarding Article 49(6):

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

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http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202962.html (emphasis added). It is obvious that one does not call for establishing a State "within two years" (or any other time limit) when such a State already exists. In the same speech, he called on all Palestinians to "help create the institutions that will 'embody' *the future state*". *Id.* (emphasis added). More recently, a Palestinian negotiator spoke of the desire "[t]o achieve statehood and to achieve the desired right of self-determination that we have been working on". AP, *Israeli and Palestinian Figures Propose a Plan for an Independent State of Palestine*, NPR (7 Feb. 2022), https://www.npr.org/2022/02/07/1078258023/independent-state-palestine-proposal-two-state-confederation-israel.

[205]Geneva Convention IV, *supra* note 177, art. 49.

[206]*Id.* art. 2.

[207]Article 2 of the Geneva Convention IV reads that the Convention shall "apply to all cases of partial or total occupation of *the territory of a High Contracting Party*" (emphasis added). *Id.* This article clarifies that the occupied territory must belong to a High Contracting Party, to wit, a sovereign State. Article 3 further clarifies that Article 49 does not apply in a situation in which the occupied territory is not of a foreign sovereign. *Id.* art. 3.

[208]*Id.* art. 49 (prohibiting "[i]ndividual or mass forcible transfers").

[209]Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Comment. of 1958 on art. 49, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

[210]Ambassador Alan Baker has served as Director of the Institute for Contemporary Affairs at the Jerusalem Center and the head of the Global Law Forum. He participated in the negotiation and drafting of the Oslo Accords with the Palestinians, as well as agreements and peace treaties with Egypt, Jordan, and Lebanon. He served as legal adviser and deputy director-general of Israel's Ministry of Foreign Affairs and as Israel's ambassador to Canada. *Alan Baker*, JERUS. CTR. FOR PUB. AFF., https://jcpa.org/researcher/alan-baker/ (last visited 5 Apr. 2022).

> million Germans, 5 million Soviet citizens, and millions of Poles, Ukrainians and Hungarians.[211]

According to Professor Eugene V. Rostow, former U.S. Under Secretary of State:

> [T]he [Fourth Geneva] Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War – the mass transfer of people into and out of occupied territories for purposes of extermination, slave labor or colonization . . . . The Jewish settlers in the West Bank are most emphatically volunteers. They have not been "deported" or "transferred" to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent.[212]

Ambassador Morris Abram, who served at the Nuremburg Tribunal and assisted in drafting the Fourth Geneva Convention, rejected outright the notion that the convention was even intended "to cover situations like Israeli settlements in the occupied territories, but rather the forcible transfer, deportation or resettlement of large numbers of people".[213]

Finally, Professor Julius Stone noted the absurdity of considering Israeli settlements as a violation of Article 49(6):

> Irony would . . . be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that . . . the West Bank . . . must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants. Common sense as well as correct historical and functional context excludes so tyrannical a reading of Article 49(6).[214]

The recognition that Article 49(6) forbids only *compelled* population movements led opponents of Israeli settlements to seek a way to circumvent that legal obstacle. That led to *redefining* the crime in the Rome Statute in an attempt to ensnare the policy of allowing *voluntary* Jewish settlements in the West Bank in the ICC's jurisdictional web.

The Rome Statute includes as a punishable war crime: "The transfer, directly or *indirectly*, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory".[215] Note the intentional addition of the word "indirectly" as a means to circumvent the language of Article 49(6) of the Fourth Geneva Convention. Yet, the amended language used in the Rome Statute only serves to reinforce the fact that Article 49(6) of the Fourth Geneva Convention refers to *forcible* transfers. By altering the definition, the

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[211]Ambassador Alan Baker, *The Settlements Issue: Distorting the Geneva Convention and the Oslo Accords*, 23 JEW. POL. STUD. REV. 32, 34 (2011).
[212]Rostow, *Correspondence*, *supra* note 202, at 719.
[213]Baker, *supra* note 211 (quoting Ambassador Morris Abram, in a discussion with Arab ambassadors in Geneva, 1 Feb. 1990).
[214]David M. Phillips, *The Illegal Settlements Myth*, COMMENTARY (Dec. 2009), https://www.commentary.org/articles/david-phillips/the-illegal-settlements-myth/.
[215]Rome Statute of the International Criminal Court art. 8(2)(b)(viii), open for signature 17 July 1998, 37 I.L.M. 999, 1016 (entered into force 1 July 2002) (emphasis added).

Rome Statute is attempting to invent new international law. Yet, even the Rome Statute does not overcome the fact that even the *indirect* transfer must happen in the territory of another sovereign, the key legal requirement for the settlements to be unlawful.

For the Jewish settlements in the West Bank to be unlawful under Article 49 of the Fourth Geneva Convention, Israel must have captured the territory of a *High Contracting Party* to the Fourth Geneva Convention who could claim ownership of the territory, *and* Israel must have *forcibly* transferred its own population therein. Neither condition is present here.

Tackling the issue of settlements is important because the persistent attacks directed against Jewish settlements in territory of the Mandate for Palestine (i.e., the West Bank) are part of a long-term strategy being pursued by Palestinian Arab groups and their allies to rewrite history and wholly delegitimise Israel's existence. Their reasoning is as follows: if Jewish settlements are unlawful, then so must be the document that sanctioned and encouraged them, to wit, the Mandate for Palestine itself. And, if the Mandate for Palestine is illegitimate, then so must be the Jewish State that came into existence by its sanction.[216]

Nonetheless, as noted above regarding intertemporal law, it is the law that existed at the time of the creation of the Mandate for Palestine that governs the legality of Jewish settlements throughout the Mandate's territory, the independence of the State of Israel, and determination of ownership of territories jointly claimed today by Israel and Arab Palestinians. Nothing in that law has changed, despite political pronouncements by bodies like the UN General Assembly, the UN Security Council, the UN Human Rights Council, and pro-Palestinian organisations. Even if for whatever reason there were a change in law today that would preclude what was lawful in the past, that new principle would not retroactively render the creation of the Jewish homeland and Jewish settlement in any part of Mandatory Palestine unlawful because the new principle would not govern actions taken under the previous law. Yet, no new principle has emerged in international law contradicting the Mandate for Palestine or its terms and purposes.

C. Since the Creation of the Mandate for Palestine, No Arab Palestinian Entity Has Ever Exercised Even a Modicum of Sovereign Control Over the West Bank and the Gaza Strip That Would Render Israeli Control and Jewish Settlements Unlawful Under International Law

The last legitimate sovereign over the territory of the Palestine Mandate, Turkey, renounced all claims to such territory in the Treaty of Lausanne in 1923. The British Mandatory only served as the agent of the League of Nations, not as the sovereign over the Mandate's territory. The British allocated 78% of the Mandate's territory east of the Jordan River for the Arabs and granted Jordan independence in 1946. At Britain's departure in 1948 from the remaining 22% of the original Palestine Mandate, Israel declared independence and was attacked by foreign armies, including armies from Jordan and Egypt, who invaded the West Bank and the Gaza Strip, respectively, and unlawfully occupied these territories until 1967, when Israel liberated them. Jordan's and Egypt's unlawful occupation did not vest in them any title to the territories, and, as such, they did not constitute legitimate sovereigns to whom the territories could be returned. Further, since Britain's departure and during the eighteen years of Jordanian and Egyptian unlawful belligerent occupation, no Arab Palestinian State had

[216]Feith, *supra* note 3.

emerged and exercised sovereign control over these territories.[217] "In the telling phrase of Professor Yehuda Blum, the reversioner was missing".[218] In our view, pursuant to *uti possidetis juris*, the legitimate reversioner was the State of Israel.

What Professor Blum had noted was that the international laws of occupation "deal only with military occupation by one state of territory belonging to another [state]",[219] and, since the West Bank did not then belong to any *State*, such laws simply do not apply. Accordingly, because there was no prior legitimate Sovereign—the "reversioner" in Professor Blum's parlance—to whom the West Bank could someday be returned, the conventions' terms and obligations do not apply.

Israel took over territory over which Palestinian Arabs had never exercised any degree of sovereign control. Nonetheless, Arab Palestinians, several UN bodies, well-known NGOs, and some States continue to wrongfully label the disputed territories "occupied Palestinian territories". This is simply false under international law. Those who repeatedly use that mendacious phrase hope that the constant repetition of their claim will delegitimise historical and legal Jewish and Israeli claims to the land and lead to an eventual *fait accompli*, allowing a future State of Palestine to come into existence based on a fabricated narrative of a unique, pre-existing, non-Jewish Palestinian identity and without those non-Jewish Palestinians having to make the painful decisions and compromises bilateral negotiations would most certainly require.[220]

Finally, given that the State of Israel, the political entity representing the interests of Jewish Palestinians, has a strong, colourable claim to the territories it liberated in the 1967 Six-Day War from Egypt and Jordan, Israel should *not* be viewed as a *de jure* "occupying power" under the Fourth Geneva Convention. One must recognise that Israel chose, *as a matter of policy*, to administer the West Bank and the Gaza Strip according to the laws of belligerent occupation, *despite having no legal obligation to do so*.[221] Israel had no *legal obligation* to do

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[217]Despite continuous attempts to declare that a State of Palestine exists and that its national territory consists of the West Bank (including east Jerusalem) and the Gaza Strip, no independent Arab Palestinian political entity has ever exercised sovereign control over any of the land that it claims to be "Palestine". Notably, the Palestinian Arabs did not even declare their independence until 1988, *Palestinian Declaration*, JUST VISION, https://justvision.org/glossary/palestinian-declaration-independence#:~:text=On%20November%2015%2C%201988%2C%20the,Bank%20and%20the%20Gaza%20Strip (last visited 5 Apr. 2022), forty years after Israel came into being, and the Palestinians did so from exile in Algiers, *Id.*, because they did not control a single piece of land from the Mandate for Palestine. *See* Steven Erlanger, *An Egyptian Border Town's Commerce, Conducted Via Tunnels, Comes to a Halt*, N.Y. TIMES (1 Jan. 2009), https://www.nytimes.com/2009/01/01/world/middleeast/01rafah.html; *see also Q&A on Hostilities Between Israel and Hamas, What International Humanitarian Law Applies to the Current Conflict Between Israel and Hamas?*, HUM. RTS. WATCH (31 Dec. 2008), http://www.hrw.org/en/news/2008/12/31/q-hostilities-between-israel-and-hamas#_What_international_humanitarian.

[218]Rostow, *supra* note 3, at 160 (citing to Y. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 294 (1968)).

[219]*Id.*

[220]As another example of hypocrisy on the part of those who continuously claim that Israel's occupation of the West Bank is somehow unlawful, it should be noted that Jordan, whose occupation was achieved through unlawful aggression, was not subjected to such constant criticism during its 18-year unlawful belligerent occupation of the West Bank. *Id.*

[221]For an interesting, in-depth discussion of this topic, *see generally* Avinoam Sharon, *Keeping Occupied: The Evolving Law of Occupation*, 1 REGENT J.L. & PUB. POL'Y 145, 152–59 (2009). Sharon argues:

> Upon assumption of control of the territories, Israel had to make a decision as to the applicable law. There were several reasons for Israel not to wish to view the captured territories as occupied, and therefore subject to the provisions of the Fourth Geneva Convention. From a legal

so for the simple reason that a State cannot "occupy" territory (in the sense of the Fourth Geneva Convention) over which it has colourable "sovereign" claims and which had no legitimate prior sovereign to whom the territory could be returned.

In 1967, Israel captured territory over which it (1) had *the only legitimate claim* of sovereignty as compared to the Arab *States* that had illegally occupied the land for 18 years; (2) has *at least as great* a claim of sovereignty as compared to any other Arabs, including those then or previously residing in the territory; and (3) arguably, *an even stronger* claim, in light of the fact that the Mandate for Palestine was created expressly to support reconstituting the *Jewish* national home and over three-quarters of the territory originally identified for that purpose was intentionally diverted to create an Arab State instead. The diversion was a result neither foreseen nor explicitly sanctioned by the language of the Mandate for Palestine. Moreover, Israeli control of the territories it captured in 1967, including the West Bank, is sanctioned by UN Security Council Resolutions 242 and 338 and remains legally binding until such time as peace has been achieved and secure and recognised international borders have been negotiated and agreed to.

D. UN Security Council Resolutions 242 and 338 Sanction Israel's Control Over the West Bank until Peace is Achieved and Recognised, Defensible Borders are Agreed to Between Israel and its Arab Neighbours

As discussed in detail in the Statement of Facts, since the British departed the territory of the Mandate for Palestine in 1948, Arabs and Israelis have fought a number of major wars, including the 1956 Suez Crisis, the 1967 Six-Day War, and the 1973 Yom Kippur War.

After the 1967 Six-Day War, the UN Security Council adopted Resolution 242, urging "the establishing of a just and lasting peace in the Middle East".[222] The Resolution stated that establishing a just and lasting peace required two things: first, it required "[w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict"; and second, "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of *every State in the area* and *their* right to live in peace within secure and recognised boundaries free from threats or acts of force".[223] An often overlooked third provision required that the two goals be achieved via a "peaceful and accepted settlement",[224] to wit, through good faith negotiations.

Much of the focus has been on the issue that Resolution 242 does not require Israeli withdrawal from "the" or "all the" territories it captured, which is correct. Israeli withdrawal

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> standpoint, Israel took the view that in the absence of a prior sovereign, Israel's control of the West Bank and Gaza did not fall within the definition of "occupation" inasmuch as a fundamental premise of the law of occupation—a prior legitimate sovereign—was lacking.
>
> Israel's argument concerning de jure application of the law of occupation did not, however, deter it from declaring its intention to act in accordance with customary international law and the humanitarian provisions of the Fourth Geneva Convention . . . . This intention seems consistent with the view of [Yehuda Z.] Blum:
>
> > The conclusion to be drawn from all this is that whenever, for one reason or another, there is no concurrence of a normal "legitimate sovereign" with that of a "belligerent occupant" of the territory, only that part of the law of occupation applies which is intended to safeguard the humanitarian rights of the population.

Id. at 153–54 (citations omitted).

[222] S.C. Res. 242, ¶ 1 (22 Nov. 1967).

[223] *Id.*

[224] *Id.*

from territories occupied in 1967 must be read in concert with the second provision, which mentions "*respect for and acknowledgement of the sovereignty, territorial integrity, and political independence of* every *State* in the area".[225] Notably, the Resolution does not mention any "Arab Palestinian territory" whatsoever from which to withdraw in order to acknowledge its sovereignty or territorial integrity. In fact, the Resolution does not even mention a "Palestinian" party to the conflict. As such, withdrawal from territories must be read in the context that there was no Palestinian "State"[226] in the area (having any territorial integrity or political independence) and, since Jordan was unlawfully occupying the West Bank prior to the war, it could not assert a valid claim of sovereignty. "Withdrawal of Israeli armed forces from territories occupied" read with "acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries" does not even remotely suggest that the Resolution required total Israeli withdrawal from the West Bank. At best, given the desire of Arabs who remained in the Mandate's territory west of the Jordan River to form another Arab State,[227] and Israel's willingness to consider it in order to make peace with its neighbours, some territorial adjustments are to be expected. After all, Resolution 242 did not require Israeli withdrawal from any territory it captured without reaching peace settlements with its neighbours.

According to Eugene Rostow, who, as U.S. Under Secretary of State, was intimately involved in the drafting of UN Security Council Resolution 242 in the months following the Six-Day War,

> [i]n view of the refusal of the Arabs to carry out their earlier commitments to make peace with Israel, Resolution 242 was based on the principle that Israel had no obligation to withdraw from any territory occupied in the course of the [1967] war until the Arab States concerned actually made peace.[228]

He noted further that Resolution 242 provided that,

> *when peace was made*, the Israelis should withdraw to "secure and recognized" boundaries, which need not be the same as the Armistice Demarcation Lines of 1949, as the Armistice Agreements themselves had contemplated. The "secure and recognized" boundaries were to be reached by agreement . . . tak[ing] into account considerations of security; guarantees of maritime rights . . .; factors of equity in rectifying the armistice lines . . .; and the respective legal claims of the parties to the territory in question.[229]

As Lord Caradon, then-UK Permanent Representative to the United Nations and chief drafter of Resolution 242, has confirmed:

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[225]*Id.* (emphasis added).
[226]The entire issue of Palestinian identity as a separate Arab identity tied to the land of "Palestine" is of relatively recent origin. Recall that the PLO did not come into existence until 1964, *Palestine Liberation Organization*, BRITANNICA, https://www.britannica.com/topic/Palestine-Liberation-Organization (last visited 6 Apr. 2022), and its initial focus was expelling Jews, not creating a State of Palestine. *Id.* Moreover, it was not until 1988 that the independence of a State of Palestine was declared. *Declaration of Independence*, *supra* note 204.
[227]Recall that an Arab Palestinian State—the Hashemite Kingdom of Jordan—had already been created on the larger eastern portion of the Mandate's original territory.
[228]Rostow, *supra* note 3, at 165.
[229]*Id*. at 165-66 (emphasis added).

> Much play has been made of the fact that we didn't say "the" territories or "all the" territories. But that was deliberate. I myself knew very well the 1967 boundaries and if *we had put in the "the" or "all the" that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend.*[230]

Ambassador Arthur Goldberg, U.S. Permanent Representative to the United Nations and another key player in drafting Resolution 242, noted the following with respect to Israel's withdrawal from territory it occupied in relation to the secure and recognised boundaries to be negotiated:

> The resolution does not explicitly require that Israel withdraw to the lines that it occupied on June 5, 1967, before the outbreak of the war. The Arab states urged such language; the Soviet Union proposed such a resolution to the Security Council in June 1967; and Yugoslavia and other nations made a similar proposal to the special session of the General Assembly that followed the adjournment of the Security Council. But those views were rejected. Instead, Resolution 242 endorses the principle of the "withdrawal of Israeli armed forces from territories occupied in the recent conflict" and juxtaposes the principle that every state in the area is entitled to live in peace within "secure and recognized boundaries".
>
> . . .
>
> The notable omissions in language used to refer to withdrawal are the words the, all, and the June 5, 1967, lines. I refer to the English text of the resolution. The French and Soviet texts differ from the English in this respect, but the English text was voted on by the Security Council, and thus it is determinative. In other words, there is lacking a declaration requiring Israel to withdraw from the (or all the) territories occupied by it on and after June 5, 1967. Instead, the resolution stipulates withdrawal from occupied territories without defining the extent of withdrawal. And *it can be inferred from the incorporation of the words secure and recognized boundaries that the territorial adjustments to be made by the parties in their peace settlements could encompass less than a complete withdrawal of Israeli forces from occupied territories*.[231]

Accordingly, until peace is made *and* secure and recognised borders are negotiated, Israel's control over and settlements in the West Bank are legal: *first*, because Article 49 of the Fourth Geneva Convention does not apply since there is no recognised foreign sovereign to whom the territory can be returned and since Israel has its own claims to the territory, and *second*, because Israel has the sanction of the UN Security Council to control the territories it captured in 1967, including the West Bank, until peace and defensible borders are negotiated. Note that since 1967, both Egypt and Jordan have made peace with Israel and have established recognised national boundaries between them and Israel.[232] Further, as part of making peace

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[230] YORAM MEITAL, EGYPT'S STRUGGLE FOR PEACE: CONTINUITY AND CHANGE, 1967–1977, 49 (1997).

[231] Arthur Goldberg, *What Resolution 242 Really Said*, 33 AM. FOREIGN POL'Y INTS. 44 (1988) (emphasis added).

[232] Treaty of Peace Between the State of Israel and the Arab Republic of Egypt, Isr.-Egypt, art. II, 26 Mar. 1979, 1138 U.N.T.S. 59 ("The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine"); Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, art. III(2), 26 Oct. 1994, 2042 U.N.T.S. 393 ("The boundary, as set out in Annex I (a), is the permanent, secure and recognised international boundary between Israel and Jordan").

with Egypt, Israel returned the entirety of the Sinai to Egyptian control. In the meantime, Lebanon, Syria, Iraq, and other Arab countries remain in a state of war with Israel.

The Arab participants who collaborated in drafting Security Council Resolution 242 all represented existing Arab States. The interests of the Arab inhabitants of the West Bank and the Gaza Strip were represented by already existing Arab States and not by the inhabitants themselves. To the extent that the Arab inhabitants played any role at all, it was on the periphery of events playing out in the Security Council. *Ever since the creation of Israel and the invasion by Arab States in 1948, the Arab inhabitants of the Mandate's territory have served primarily as pawns in the Arab strategy against Israel*. It is quite telling that, concerning the drafting and adoption of Resolution 242, there is no mention of either an identifiable Palestinian Arab people or an Arab Palestinian State, especially given current claims that sovereignty over the West Bank and Gaza Strip devolved upon their Arab inhabitants upon Britain's withdrawal in 1948.

Further, in 1973, on Yom Kippur, when the entire Israeli society was shut down with no radio or television service, its Arab neighbours initiated a surprise attack on Israel. Like the 1967 war, Israel prevailed again. UN Security Council Resolution 338 resulted. Resolution 338 called for a ceasefire and reaffirmed that peace should be sought and achieved via the formula set forth in Security Council Resolution 242.[233] By reaffirming the continued force of Resolution 242, Resolution 338 reconfirmed Israel's right to continue its control over territory it captured in the 1967 war until peace was achieved and secure and recognised borders were negotiated. Consequently, Israel's control continues to enjoy the sanction of the UN Security Council over those territories—to wit, the West Bank and the Gaza Strip—whose ownership and status have not been resolved via a treaty of peace.

Accordingly, even if one ignores (1) that Israel is the only legitimate sovereign over the West Bank and the Gaza Strip pursuant to the Mandate for Palestine and *uti possidetis juris* and/or (2) that the Mandate's terms will continue to apply *vis-à-vis* the West Bank and the Gaza Strip until such terms are fulfilled, the only remaining, logical position to argue is that ownership of these territories remains disputed between its Jewish and Arab claimants. *Until the territorial dispute is resolved, there is no legal basis to determine to whom individual portions of the disputed territory would eventually belong. Until that occurs, Israel's control over the disputed territories cannot be viewed as unlawful. To claim otherwise defies reason as well as basic principles of international law*.

E. Peace Negotiations Are the Mutually Agreed-To Means to Resolve the Territorial Dispute and Status of Jewish Settlements in the West Bank

Note that from the *original* territory of the Mandate for Palestine (which included territory on both sides of the Jordan rift valley), both

> Israel and Jordan already exist as states, and only the Gaza Strip and the West Bank remain as unallocated parts of the Mandate. The reasoning of the *Namibia* decisions requires that the future of these two territories be arranged by peaceful international agreement in ways *which fulfill the policies of the Mandate*.[234]

[233]S.C. Res. 338 (22 Oct. 1973).
[234]Rostow, *supra* note 3, at 159 (emphasis added).

As was noted in the Statement of Facts, successive Israeli governments have recognised the desire of some resident Arab Palestinians to form their own independent State of Palestine. Israel has consistently and repeatedly shown its willingness to enter into agreements with Palestinian leaders to engage in bilateral negotiations to resolve the various disputes between them on a path to achieving peace and creating an independent Palestinian State. In fact, Israelis have entered into agreements with Palestinians for negotiations to resolve the issues between them and, furthermore, have given considerable control of the territories to the Palestinains in an effort to find a peaceful resolution. To date, all such efforts have failed, primarily due to intransigence or political dysfunctionality on the Palestinian side, where an all-or-nothing approach has consistently held sway. For the entirety of its existence as a State, Israel has sought peace with its Arab neighbours. Israeli leaders have anguished and struggled to offer concessions that would bring an end to hostilities, even offering virtually everything the Palestinians could legitimately ask for, only to be rebuffed again and again. To offer more would undermine and devalue the spirit and undeniable intention of the Mandate.

Such agreements, however, specifically exclude resort to outside institutions like the UN or international courts to resolve the impasse. In fact, resort to such institutions creates multiple problems. First, Israelis conclude that Palestinians are not serious about seeking peace. Second, good faith negotiations between the parties appear increasingly futile. Third, resort to such institutions unrealistically raises the hopes of Palestinians that they can achieve what they want without having to make the difficult choices that serious negotiations will require. As a result, their refusal delays any chance of achieving peace and creating a viable Palestinian State. Fourth, well-intentioned individuals and groups pushing for "justice for the Palestinians" may unwittingly be retarding its achievement by convincing the Palestinians that some institution will arise to give them what they demand without having to make compromises.

As the Oslo Accords show, both Israeli and Palestinian Authority officials have recognised the need to resolve the impasse with respect to determining land ownership in the West Bank and the Gaza Strip. A whole series of agreements[235] has been made, laying out the path to accomplish that task—and others (such as determining the status of Jerusalem and the fate of non-Jewish Palestinian refugees). The means mutually agreed upon by both sides for resolving such issues—*made under the auspices of the international community*—are good faith, bilateral negotiations between the parties.

In the interim, ***Israel physically controls the West Bank, not as a foreign occupier, but as a party that has valid claims to the territory. As such, Israeli control over, and the Jewish settlements in, the West Bank*** **are** ***lawful***. When Arab leaders are finally ready to negotiate peace in good faith and make the painful decisions that negotiations require, only then can the land dispute, including the issue of final borders, as well as the status of individual Jewish settlements in the West Bank be resolved. To date, there is no evidence that those claiming to speak for the Arab side of the conflict have ever had any intention to make the compromises and hard choices such negotiations require to resolve the outstanding issues between the parties.

[235]Oslo II, *supra* note 49; Baker, *supra* note 55; Berman, *supra* note 60; *Camp David Accords*, *supra* note 41.

VII. ISRAEL'S CONTINUED CONTROL OVER AND ITS POLICIES IN THE DISPUTED TERRITORIES ARE LAWFUL AS THEY ARE NECESSITATED BY SELF-DEFENCE AND ARE CONSISTENT WITH THE LAW OF ARMED CONFLICT

Even if one were to ignore both history and the law, presume that the West Bank and the Gaza Strip constitute a State of Palestine, and label Israel as a foreign occupier in those territories, *which is not the case*, "occupation" of foreign territory is a lawful method in armed conflict.[236] In fact, such occupation's legality is to be determined by *jus ad bellum* (particularly Articles 2(4) and 51 of the UN Charter) in the first place, and a prolonged occupation's legality is to be determined by *jus in bello* (particularly the Hague and the Geneva Conventions) in the second place. There is no serious dispute that Israel lawfully captured those territories in a defensive war recognised as an inherent right by Article 51 of the UN Charter. The only question that remains is the legality of the ongoing, or as the General Assembly has put it before the ICJ, "prolonged occupation" of the disputed territories by Israel.

Before determining the legality of the so-called "prolonged occupation" of the Gaza Strip and the West Bank by Israel, a few important observations must be made. First, in 2005, Israel dismantled the Jewish settlements in, and relinquished "effective control" over, the Gaza Strip to the Palestinians. Hamas currently controls the Gaza Strip. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".[237] As such, after 2005, Israel cannot be considered occupying the Gaza Strip (even if one were falsely to assume it as a foreign territory) in the sense of the Hague and the Geneva Conventions. Second, the current Jewish settlements in the West Bank are not an impediment to a peaceful resolution nor do they convey Israel's alleged lack of good faith intent to not end the "occupation" as similar settlements were no such impediment in Gaza or in the Sinai. Instead, dismantling the Jewish settlements in Gaza and relinquishing its control to the Palestinians show the exact opposite intent, i.e., good faith efforts to reach a peaceful resolution. The settlements in the Sinai were removed pursuant to the peace treaty between Israel and Egypt.

To determine the legality of the "prolonged occupation", one must not disregard Israel's continued necessity of self-defence, recognised under Article 51 of the UN Charter (*jus ad bellum*), and the legality of its security measures permitted under the Geneva Conventions (*jus in bello*). A cursory look at the news reports readily available in the public domain shows the lethality of indiscriminate armed attacks from the Gaza Strip and the West Bank directed toward Israel's civilian population. These attacks not only justify an armed response by Israel but the measures it has put in place *vis-à-vis* the Palestinian population in the disputed territories.

Interestingly, in its Wall Advisory Opinion, the ICJ stated that, since "Israel does not claim that the attacks against it are imputable to a foreign State, . . . Article 51 of the Charter

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[236]SARDA M.A. WAQAR KHAN ARIF, PROLONGED OCCUPATION: AN ANALYSIS OF OBLIGATIONS OF THE OCCUPYING POWERS IN AN OCCUPIED TERRITORY AND CONTEMPORARY CHALLENGES, JOURNAL OF HUMANITIES, SOCIAL AND MANAGEMENT SCIENCES, Vol. 2, No. 1 (Jan.-June 2021), 24-37, *available at* https://www.researchgate.net/publication/354297977_Prolonged_occupation_An_analysis_of_obligations_of_the_occupying_powers_in_an_occupied_territory_and_contemporary_challenges.

[237]Hague Convention (IV), *supra* note 186, art. 42.

has no relevance in this case".[238] The Court's conclusion was based on its interpretation that Article 51 only covers "the case of armed attack by one State against another State".[239] To conclude that a State has no inherent right to defend itself if attacked by a non-State actor has no legal basis. Moreover, ***the Court took contradictory approaches in interpreting two different treaties. It disregarded the plain language of one treaty and added its own words to another. It read Article 51 of the UN Charter to cover only armed attack by a State against another State when no express words are provided in the Charter for such an interpretation. Nor does the context of Article 51 or its object and purpose support that interpretation. At the same time, when interpreting Article 2 of the Fourth Geneva Convention, despite its express contrary language ("the territory of a High Contracting Party"), the ICJ concluded that it covers any territory that is occupied during an international armed conflict even though the territory does not belong to a High Contracting Party to the conflict.***

Further, by concluding that Israel had no right to self-defence because the armed attacks against it were not imputable to a State, the Court contradicted itself. *When reasoning that the West Bank and the Gaza Strip are occupied Palestinian territories, the ICJ considered Palestine a State, but when reasoning that Israel had no right to self-defence, the ICJ did not consider Palestine a State.* As for the customary rule of state of necessity for self-defence, the ICJ simply stated that it did not have sufficient material before it to conclude that Israeli measures were justified[240] without providing any evidence whatsoever to rebut Israel's claims of military necessity. Sufficient material about the numerous indiscriminate attacks against Israel is available in the public domain, and whether those attacks come from a State or a non-State terrorist group, Israel's response and security measures are fully justified under the Geneva Conventions. As mentioned earlier, measures permitted under the Law of Armed Conflict (*lex specialis* in this case) cannot, at the same time, be unlawful even though such measures may not be allowed in times of peace under *lex generalis*. To conclude otherwise would lead to an inherent contradiction, a result often ignored in political opinions, but should not be ignored by courts of law. Yet, the General Assembly's questions presuppose the illegality of Israeli security measures, which are allowed under the Law of Armed Conflict. This is a glaring, inherent contradiction. On the one hand, the General Assembly and the Court consider the areas in question to belong to a State of Palestine occupied by Israel and, thus, expect Israel to follow the Law of Armed Conflict. On the other hand, they presuppose Israeli measures necessitated by numerous armed attacks to be unlawful, even though the measures are permitted and even required under the same Law of Armed Conflict.

Hamas, an organisation designated as a foreign terrorist organisation by the United States Department of State,[241] maintains effective control over the Gaza Strip and has turned it into a launching pad to attack Israel. The Hamas Charter specifically proclaims: "Israel will exist and will continue to exist *until Islam obliterates it*".[242] It calls the existence of the State of Israel on the land that was formerly held by Muslims a "Zionist invasion".[243] The Hamas Charter further pledges to wage "*jihad* in the face of the oppressors, so that they would rid the land and the people of their uncleanliness, vileness and evil"[244] in order to "[return the

[238]Wall Advisory Opinion, *supra* note 14, ¶ 139.
[239]*Id.*
[240]*Id.* ¶ 140.
[241]FOREIGN TERRORIST ORGANIZATIONS, BUREAU OF COUNTERTERRORISM, U.S. DEPT. OF STATE, https://www.state.gov/foreign-terrorist-organizations/ (last visited 15 Feb. 2023).
[242]Hamas Charter preamble, ¶ 2.
https://avalon.law.yale.edu/20th_century/hamas.asp.
[243]*Id.* art. 28, 35.
[244]*Id.* art. 3.

homeland to its rightful owner]" and "to raise the banner of Allah over every inch of Palestine"[245] "no matter how long that should take".[246] It further states: "Initiatives, and so-called peaceful solutions and international conferences, are in contradiction to the principles of the Islamic Resistance Movement. Abusing any part of Palestine is abuse directed against part of religion. . . . These conferences are only ways of setting the infidels in the land of the Moslems as arbitrat[o]rs".[247]

In carrying out their purpose, Hamas and its allied organisations continue to commit war crimes by indiscriminately attacking Israeli territory and civilians. Following are just a few examples of their attacks on Israel and Israeli civilians, justifying Israeli measures as self-defence.

- 1987: Hamas was created at the start of the first Palestinian Intifada, or uprising, against Israel's "occupation" of the West Bank and Gaza Strip. Two years later, Hamas carried out its first attacks on Israeli military targets, including the kidnapping and murder of two Israeli soldiers.[248]
- 6 April 1994: Eight people were killed in a car bomb attack on a bus in the centre of Afula. Hamas claimed responsibility for the attack.[249]
- 25 February 1996: In two separate attacks in Israel, Palestinian suicide bombers killed at least twenty-five people, including two Americans, and injured more than eighty.[250]
- 3 March 1996: Twenty people were killed and at least ten were injured in a terrorist attack on the No. 18 bus in the heart of the nation's capital. Hamas claimed responsibility.[251]
- 1 January 2001: A car bomb exploded near a bus stop in Netanya, Israel, injuring about sixty people. Hamas claimed responsibility for the attack.[252]
- 27 March 2001: Twenty-eight people were injured in a suicide bombing directed at a bus in the French Hill neighbourhood of Jerusalem. Hamas claimed responsibility for that attack.[253]
- 18 May 2001: Five people were killed and more than 100 were wounded when a Palestinian suicide bomber struck outside a shopping mall in Netanya. Hamas claimed responsibility for the attack.[254]
- 4 September 2001: Twenty people were injured when a suicide bomber—disguised in ultra-Orthodox Jewish garb—blew himself up on a Jerusalem street. Hamas claimed responsibility for the attack.[255]

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[245]*Id.* art. 6.
[246]*Id.* art. 7.
[247]*Id.* art. 13.
[248]*Hamas and Israel: A History of Confrontation*, REUTERS (14 May 2021), https://www.reuters.com/world/middle-east/hamas-israel-history-confrontation-2021-05-14/.
[249]David Hoffman, *8 Killed, 40 Injured in Car Bomb Blast at Israeli Bus Stop*, THE WASHINGTON POST (7 Apr. 1994), https://www.washingtonpost.com/archive/politics/1994/04/07/8-killed-40-injured-in-car-bomb-blast-at-israeli-bus-stop/6feb4aef-1e8f-4d32-bfe5-79bf5d468760/. *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, ISRAELI MISSIONS AROUND THE WORLD, https://embassies.gov.il/MFA/FOREIGNPOLICY/Terrorism/Palestinian/Pages/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since.aspx (last visited 16 Feb. 2023).
[250]*Jerusalem Bombing*, NPR (25 Feb. 1996), https://www.npr.org/1996/02/25/1008898/jerusalem-bombing.
[251]Marjorie Miller & Mary Curtius, *20 Killed, 10 Injured in Jerusalem Bus Explosion*, LOS ANGELES TIMES, (3 March 1996), https://www.latimes.com/archives/la-xpm-1996-03-03-mn-42559-story.html.
[252]*Attacks Since State of Al Aqsa Intifada*, A CNN Timeline, CNN (21 June 2002), https://www.cnn.com/2002/WORLD/meast/06/20/terror.attacks.chronology/.
[253]*Id.*
[254]*Id.*
[255]*Id.*

- 9 September 2001: Three people were killed and ninety were injured by a suicide bomber who detonated explosives as passengers were exiting a train station in northern Israel. Hamas claimed responsibility for the attack.[256]
- 2 December 2001: Fifteen people were killed and forty were injured by a suicide bomber on a bus in Haifa. Hamas claimed responsibility for the attack.[257]
- 9 March 2002: Eleven people were killed and fifty-four were injured when a suicide bomber blew himself up in a crowded Jerusalem cafe. Hamas claimed responsibility for the attack.[258]
- 27 March 2002: A suicide bomber killed at least nineteen people and injured 172 at a popular seaside hotel in Natanya, Israel.[259]
- 31 March 2002: Fourteen people were killed and thirty-nine were injured in a suicide bombing in Haifa Restaurant. Hamas claimed responsibility.[260]
- 18 June 2002: A suicide bomber struck aboard a bus in Jerusalem at rush hour, killing nineteen people and injuring seventy-four. Hamas claimed responsibility for the attack.[261]
- 31 July 2002: Seven people were killed and dozens more were injured by a bomb placed by Hamas in a cafeteria at the Hebrew University of Jerusalem.[262]
- March 2003: A Palestinian suicide bombing of a bus killed at least fifteen people, many of them students. Hamas did not claim responsibility but praised the attack.[263]
- 11 June 2003: At least seventeen people were killed by a suicide bomber on a bus in central Jerusalem. Hamas claimed responsibility for the attack.[264]
- 19 August 2003: Twenty-three people were killed and over 130 wounded when a Palestinian suicide bomber believed to be inspired by Hamas detonated a five-kilogram device packed with ball-bearings on a crowded No. 2 Egged bus in Jerusalem.[265]
- January 2008: Over the course of eleven days, Israel experienced thirty identified rocket hits, for most of which Hamas claimed responsibility.[266]
- 5 February 2008: Two boys in Sderot were wounded when a rocket fired from Gaza struck the border town.[267]
- 27 February 2008: Approximately fifty rockets were fired by Hamas, the Popular Resistance Committees, and the Palestinian Islamic Jihad towards the Negev.[268]

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[256]*Id.*
[257]*Id.*
[258]*Id.*
[259]Israel Netanya, *'Passover Massacre' at Israeli Hotel Kills 19*, CNN, (27 March 2002), https://www.cnn.com/2002/WORLD/meast/03/27/mideast/.
[260]Haim Shadmi & David Ratner, *14 Killed, 39 Hurt in Suicide Bombing in Haifa Restaurant*, HAARETZ, (31 March 2002), https://www.haaretz.com/2002-03-31/ty-article/14-killed-39-hurt-in-suicide-bombing-in-haifa-restaurant/0000017f-eeff-d4cd-af7f-efff60ab0000.
[261]*Attacks Since State of Al Aqsa Intifada*, *supra* note 252.
[262]David Horovitz, *Seven Killed in Hebrew University Bombing*, THE IRISH TIMES, (1 Aug. 2002), https://www.irishtimes.com/news/seven-killed-in-hebrew-university-bombing-1.1090477.
[263]*Israel Attacks Gaza as Bus Bomb Kills 15*, THE GUARDIAN, (6 March 2003), https://www.theguardian.com/world/2003/mar/06/israel.
[264]*Suicide Blast Hits Jerusalem Bus*, BBC, (11 June 2003), http://news.bbc.co.uk/2/hi/2982068.stm.
[265]*Suicide Bombing of No 2 Egged Bus in Jerusalem*, ISRAELI MISSIONS AROUND THE WORLD, (19 Aug. 2003), https://embassies.gov.il/MFA/FOREIGNPOLICY/Terrorism/Palestinian/Pages/Suicide%20bombing%20of%20No%202%20Egged%20bus%20in%20Jerusalem%20-%201.aspx.
[266]*Rocket & Mortar Attacks Against Israel by Date (2001 – Present)*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/palestinian-rocket-and-mortar-attacks-against-israel (last visited 14 Mar. 2023).
[267]*Id.*
[268]*Id.*

- 22 April 2008: A missile fired from northern Gaza struck Ashkelon.[269]
- 30 April 2008: The town of Sderot experienced a rocket attack from Gaza while residents attended a Holocaust memorial ceremony.[270]
- 15 May 2008: A rocket fired from Gaza hit an Ashkelon shopping mall, injuring over thirty people.[271]
- 5 June 2008: One Israeli was killed and five more were injured in Kibutz Nir Oz by three mortar shells fired by Hamas.[272]
- 10 June 2008: Hamas fired eighteen mortar shells towards Israel.[273]
- 18 June 2008: Over forty rockets and mortar shells were fired toward the town of Sderot from Gaza.[274]
- 4 November 2008: Hamas fired thirty rockets at Israel.[275]
- 19-21 December 2008: Over fifty rockets and mortar shells hit Israel since the end of the cease-fire with Hamas.[276]
- 2008: At least 1,500 rockets were fired from Gaza into Israel.[277]
- August 2014: Over the course of twenty-nine days, Gaza militants fired 3,356 rockets on Israel.[278]
- 8 June 2016: Two Palestinian terrorists opened fire "at a Max Brenner restaurant in Tel Aviv's downtown Sarona Market".[279] Four Israelis were killed, and sixteen were injured.[280] Hamas "claimed responsibility for the attack in an official Twitter statement, acknowledging the two terrorists as Hamas members and calling the shooting 'heroic'".[281]
- November 2019: "More than 200 rockets fired into Israel from Gaza after Islamic Jihad leader killed".[282]
- May 2021: Over 3,150 rockets were fired by Hamas from Gaza into southern and central Israel.[283] These rockets targeted both Israeli population centres and border villages. Approximately 90% of the rockets were intercepted by Israel's Iron Dome missile defence system.[284]

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[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' Rocket Attacks*, HUM. RTS. WATCH, (6 Aug. 2009), https://www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks.
[278] Yoav Zitun, *IDF Operation Protective Edge, in Numbers*, YNETNEWS.COM, (5 Aug. 2014), https://www.ynetnews.com/articles/0,7340,L-4555441,00.html.
[279] Abra Forman, *UN is "Schocked" That Hamas is Celebrating its Own Terror Attack*, ISRAEL 365 NEWS, (9 June 2016), https://www.israel365news.com/307960/uns-ban-ki-moon-expresses-shock-hamas-celebrations-tel-aviv-terror-bloodbath/.
[280] *Id.*
[281] *Id.*
[282] Talia Kaplan, *More Than 200 Rockets Fired Into Israel From Gaza After Islamic Jihad Leader Killed*, FOX NEWS, (12 Nov. 2019), https://www.foxnews.com/world/more-than-200-rockets-fired-into-israel-after-islamic-jihad-leader-killed.
[283] Shayna Freisleben, *Israel's Iron Dome has Blocked Thousands of Incoming Rockets. Here's How it Works.*, CBS NEWS, (19 May 2021), https://www.cbsnews.com/news/israel-iron-dome-rockets-gaza-hamas/.
[284] *Id.*

- 6 August 2022: Over 350 rockets were launched from the Gaza Strip in the first two days of Operation Breaking Dawn.[285]

These attacks patently refute the conclusion that Israel is not justified either under Article 51 of the UN Charter or under the customary "state of necessity" rule to take measures in self-defence. A state of ongoing armed conflict exists between Israel and Hamas and its allies. Israel is often under indiscriminate attacks by Palestinian terrorist groups. This includes, *inter alia*, thousands of indiscriminate rocket attacks, suicide bombings, use of incendiary balloons, mortar attacks, shootings, and knife attacks directed at Israeli civilians.

Disregarding these attacks when analysing Israel's so-called "prolonged occupation" of, and security measures required by military necessity and self-defence in the disputed territories is not only unreasonable, but legal malfeasance. Israel's response to indiscriminate attacks from the Gaza Strip and the West Bank must be analysed under Articles 2(4) and 51 of the UN Charter, rules of necessity and proportionality, as well as the Geneva Conventions (that allow Israel's security measures, such as the naval blockade of Gaza, check points, the security barrier, judicially supervised administrative detentions of captured unlawful enemy combatants, military tribunals, etc.), which not only *allow* Israel to take the measures it takes, but *require* Israel to do so in order to protect its territory and civilians, which include both Jews and Arabs. Because Israeli security measures comply with the Geneva Conventions, they cannot be unlawful discrimination under general human rights law. Calling Israel's security measures allowed under the Geneva Conventions discriminatory or policies of apartheid is not only against the facts and law but antisemitic rhetoric designed to malign Israel and create a false narrative to achieve, by wrongful means, the fulfilment of the Arabs' desire for a Palestinian State. The Mandate was designed to provide a safe haven for Jews. Therefore, Israel's reasonable security measures are an imperative of fulfilling the Mandate's purpose.

CONCLUSION

Despite the fact that many of the world's actors (including international political and legal bodies and NGOs) continue to assert that the West Bank and the Gaza Strip are "occupied Palestinian territory", as a matter of international law, those territories are not occupied within the meaning of the Hague and the Geneva Conventions. The Fourth Geneva Convention prohibits a "foreign" occupying power from forcibly transferring its own population to another State's occupied territory. Contrary to the widespread, but false, rhetoric, Israel is neither a foreign occupier nor is it forcibly transferring its own population to a foreign sovereign's occupied territory.

In this submission, we have thoroughly discussed three different legal theories, each of which individually and independently establishes the legality of Israeli control over the Gaza Strip, the West Bank, and East Jerusalem. As part of that analysis, we also pointed out that successive Israeli governments have recognised Arab Palestinians' desire for a State of their own and have, in good faith, voluntarily sought to establish conditions where Arabs and Jews

[285]Emanuel Fabian & TOI Staff, *Israel Hits Gaza Targets, After Rockets Launched at South for 2nd Straight Night*, THE TIMES OF ISRAEL, (6 Aug. 2022), https://www.timesofisrael.com/liveblog-august-6-2022/. Nidal Al-Mughrabi & Maayan Lubell, *Air Strikes, Rocket Attacks Push Israel, Gaza Into Second Day of Fighting*, REUTERS, (6 Aug. 2022), https://www.reuters.com/world/middle-east/israel-gaza-fighting-spills-into-second-day-with-air-strikes-rockets-2022-08-06/.

can resolve their differences via good faith bilateral negotiations. The result of such good faith bilateral negotiations could be the creation of a State of Palestine.

Negotiations involving important issues are never easy. They require painful compromises and difficult decisions by both sides. Neither side can expect to get everything it desires. Until both sides recognise and accept that fact, negotiations will not be possible. Moreover, neither side can demand fulfilment of prior conditions or agreement to specific proposals as a condition of negotiating.

Israel has repeatedly reached out to resolve the outstanding issues, only to be rebuffed repeatedly by the Palestinian side. Until Palestinian leaders are prepared to engage seriously in negotiations, it is clear that resolution of the central issue of statehood is impossible. As a result, Israel is forced to assert its sovereignty on a continuing basis in accordance with the Mandate, supporting treaties, and UN resolutions. Consequently, the *status quo* will continue to rule the lives of both Israelis and Palestinians. Nonetheless, the bottom line is this: Despite the incessant propaganda falsely labelling Jews and Israel as wrongdoers *vis-à-vis* the Palestinians for "occupying" "Palestinian territory" and unlawfully building settlements in Judea and Samaria (the so-called "West Bank"), Israeli control over the disputed territories and Jewish settlements in the West Bank remain entirely lawful under international law. The incessant claims that such actions violate the Law of Armed Conflict are nothing more than cynical distortions and manipulations aimed at politically achieving a result contrary to all international legal rules and precedents.

Therefore, the ICJ is unwise to involve itself by providing an opinion that Palestinian Arabs and enemies of Israel will weaponise against Israel. Moreover, if the ICJ does engage in this extra-legal exercise, then fundamental interests of justice require setting political considerations aside. It would also require the Court to gather fairly and diligently arguments from both sides, and formulate a response to the General Assembly's questions on the basis of actual facts and applicable international law instead of presupposed conclusions based on unsubstantiated and false presuppositions as found in the General Assembly's questions.

Rarely if ever should judicial bodies ignore the law. When they do so, they undermine the concept of law itself and discredit their own authority.