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Legal Considerations concerning Recognition of Israeli Sovereignty over the Golan Heights

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The United States of America, on 25 March 2019 under the administration of President Trump, formally recognised Israeli sovereignty over the Golan Heights.¹ Under President Biden, the State Department signalled continuing support for Israeli de facto control and recognition of sovereignty but that the latter could be reviewed if there were to be a change in the threat situation from Syria.² There has been little legal analysis of the international legal status of the Golan Heights, lost by Syria to Israel in June 1967, and this article evaluates de jure recognition of Israeli sovereignty there.

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LEGAL CONSIDERATIONS CONCERNING RECOGNITION OF ISRAELI SOVEREIGNTY OVER THE GOLAN HEIGHTS

GREGORY ROSE*

Abstract

The United States of America, on 25 March 2019 under the administration of President Trump, formally recognised Israeli sovereignty over the Golan Heights.¹ Under President Biden, the State Department signalled continuing support for Israeli *de facto* control and recognition of sovereignty but that the latter could be reviewed if there were to be a change in the threat situation from Syria.² There has been little legal analysis of the international legal status of the Golan Heights, lost by Syria to Israel in June 1967, and this article evaluates *de jure* recognition of Israeli sovereignty there.

I INTRODUCTION

We placed on Earth firm mountains, lest it should shake with them (Quran 21:31)

Peace hath her victories No less renowned than war. (John Milton 1652)

Let the mountains bring peace (Bible Psalm 72 v.3)

Was the United States' recognition of Israeli sovereignty over the Golan Heights sound under international law? Eleven international legal considerations relating to Israeli

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¹ The full text of the declaration of recognition of sovereignty reads as follows:
 RECOGNIZING THE GOLAN HEIGHTS AS PART OF THE STATE OF ISRAEL BY THE PRESIDENT OF THE UNITED STATES OF AMERICA - A PROCLAMATION
 The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats. Based on these unique circumstances, it is therefore appropriate to recognize Israeli sovereignty over the Golan Heights.
 NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim that, the United States recognizes that the Golan Heights are part of the State of Israel.
 IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of March, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.
 DONALD J. TRUMP, Proclamation No. 06199, 84 F.R. 11875 (25 March 2019).

² Reuters, 'Blinken stops short of endorsing Trump recognition of Golan Heights as Israel' (online, 9 February 2021) <<https://www.reuters.com/article/us-usa-israel-blinken-idUSKBN2A82N5>>.

annexation are analysed. The legal considerations here are bookended in the beginning by historical, natural resource, military and demographic contexts and at the end by a survey of strategic political, ethical and economic factors for or against recognition of Israeli sovereignty. The analysis finds that the Golan Heights are transitioning from a regime of lawful military occupation to Israel's *de jure* sovereign title. Eventually and in accord with their interests, other countries will likely formally recognise Israeli sovereignty.

II HISTORIC AND GEOGRAPHIC BACKGROUND

A brief evaluation of the relevant historic, geographic and strategic features of the Golan Heights indicates their continuing relevance to peace in the Middle East. Authority over the Golan Heights has long been shifting in regional power plays. In ancient history, the Golan Heights were controlled by various peoples: the Amorites (from about 2000 BCE), Israelites (1200 BCE) until depopulated by the Assyrian conquest (723 BCE) and revived under Judaea as part of the Persian, Greek Seleucid and then Roman empires (from 500 BCE).³ The Hebrew biblical book of Deuteronomy refers to 'Golan in Bashan, of Manasseh' (an Israelite tribe).⁴ The ruins of ancient and medieval Jewish villages in the Golan such as Gamla and Katzrin are currently archaeological parks there. During the Byzantine empire, the Christian Ghassanid kingdom ruled (250 CE) until medieval times, when the Golan Heights were conquered by Mohammedan forces (637 CE).⁵ In Damascus, they established regional administrations that governed the Golan Heights for well over a millennium, until 1917, for a succession of broader caliphates in the Levant that were Arab, Kurdish or Turkic such as the Ummayyad, Abassid, Fatimid, Seljuk, Ayubid, Mamluk and Ottoman caliphates.⁶

After Imperial Germany and the Ottoman and Austro-Hungarian empires fell in World War I, the 1920 San Remo Conference decided new administrative borders, among which the Golan Heights, in accordance with the 1920 British-French boundary agreement,⁷ formed an area to be administered by Britain. A British Mandate to establish a Jewish homeland including that area was authorised by the then newly established League of Nations.⁸ However, the Golan Heights were renegotiated by Britain to France in a land exchange in 1923⁹ and

³ Nadav Na'aman, 'The Kingdom of Geshur in History and Memory' (2012) 26(1) *Scandinavian Journal of the Old Testament* 88, 92; Michael Avi-Yonah, *The Holy Land – from the Persian to the Arab Conquests 536 B.C. to A.D. 640: A Historical Geography* (Baker Book House, rev ed, 1979) 170.

⁴ *Deuteronomy* 3.1, and 4.43. Bashan was the larger region within which the Golan is located. See also *Joshua* 13.29-30: 'And Moses gave inheritance unto the half tribe of Manasseh: and this was the possession of the half tribe of the children of Manasseh by their families. And their coast was from Mahanaim, all Bashan, all the kingdom of Og king of Bashan, and all the towns of Jair, which are in Bashan, threescore cities.'

⁵ Robert Gregg, 'Marking Religious and Ethnic Boundaries: Cases from the Ancient Golan Heights' (2000) 69 *Church History* 519, 520; Stephen Rubin, 'Discovering Jewish History on the Golan Heights' (2014) 13 *The Tower* (online, 2014) <<http://www.thetower.org/article/rebuilding-jewish-history-on-the-golan-heights/>>.

⁶ Bernard Lewis, *The Middle East: A Brief History of the Last 2,000 Years* (Scribner, 1995) 70-129.

⁷ The *Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia*, 23 December 1920, *League of Nations Treaty Series* no 564 (1924) 354, (entered into force 23 December 1920). Text available in (1922) 16(3) *American Journal of International Law* 122-6.

⁸ Walter Laqueur and Barry Rubin (eds), *The Israel Arab Reader: Documentary History of the Middle East* (Penguin, 2008) ('Laqueur and Rubin'), 'Introduction to the League of Nations British Mandate', 30.

⁹ *Agreement between His Majesty's Government and the French Government Respecting the Boundary Line between Syria and Palestine from the Mediterranean to El Hamma*, 7 March 1923, *League of Nations Treaty Series*, no 56, (1924) 364; (Paulet-Newcombe Agreement adopted pursuant to *Franco-British Boundary Commission Report*, 3 February 1922). These boundaries were the ones for the League of Nations Palestine and Syria Class A Mandates. As the Mandates' boundaries were set by League of Nations resolutions in 1922, based on multilateral decisions of the San Remo Con-

administered by France until they became part of independent Syria, which was decolonized by France in 1945. Syria controlled the Golan Heights as sovereign for 21 years from 1946 (when French troops left) until 1967. Israel has since controlled the Golan Heights as an occupying power.

Geographically, the Golan Heights is mostly a volcanic basalt plateau, where the peak of Mt Hermon rises to 2,814m.¹⁰ Its area is 1,800 km², of which Israel exercises control of the western two thirds, ie 1,200 km².¹¹ The region's precipitation is higher than the regional average, and includes winter snow that supplies much of the Jordan River watershed and the freshwater of the Sea of Galilee. It provides 30% of Israel's freshwater. Israel and neighbouring Arab States agreed to a water-sharing scheme under the Eric Johnston plan in the early 1960s, sponsored by the USA. Nevertheless, the Arab League commenced construction works in 1965 to divert away the Hasbani and Baniyas rivers from the Jordan River headwaters to the Yarmouk River in the State of Jordan specifically to eliminate what was the majority of the Israeli water supply. Consequently, in 1967, Israeli military air strikes hit the diversion works.¹² This history demonstrates that the Golan Heights are a strategically important source of freshwater.

In the twenty-first century, the majority of the population of the Israeli-controlled western Golan Heights is predominantly Druze, numbering 27,000, who share the Golan Heights with 22,000 Jewish citizens of Israel, comprising a total regional population of almost 50,000.¹³ The majority of other Arab and Muslim peoples fled the western Golan during and following the 1967 Arab-Israel war. The refugee numbers and circumstances are disputed but might be reckoned at about 50,000.¹⁴ About 10% of Druze have chosen Israeli

ference in 1920, the bilateral change by Britain and France in 1923 was of doubtful procedural legality, although this illegality can be regarded as cured by the subsequent League of Nations minutes adopted on 29 September 1923.

¹⁰ Central Intelligence Agency, *The World Fact Book* (online, 7 October 2019) <<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>>.

¹¹ Congressional Research Service (Alfred B Prados) *CRS Issue Brief for Congress: Syria: U.S. Relations and Bilateral Issues* (online, 19 January 2006) 4, <https://www.everycrsreport.com/files/20060119_IB92075_8946198a6994be1ef82149ca1b9588f41aaf53b5.pdf>.

¹² Masahiro Murakami, *Managing Water for Peace in the Middle East: Alternative Strategies* (United Nations University Press, 1995) 287.

¹³ Israel Central Bureau of Statistics (online, 4 April 2018) <https://www.cbs.gov.il/he/publications/doclib/2018/2.%20shnatonpopulation/st02_17.pdf>; BBC News, *Golan Heights Profile* (online, 25 March 2019) <<https://www.bbc.com/news/world-middle-east-14724842>>.

¹⁴ At an extreme is the Syrian government claim that 500,000 Arab villagers were uprooted; see Syrian Foreign Minister Farook Shara, 'Speech on the renewal of Syrian-Israeli negotiations', 15 December 1999 extracted in Laqueur and Rubin (n 8) 547. A more likely claim is 130,000: Tayseer Mara'i and Usama R Halabi, 'Life under Occupation in the Golan Heights' (1992) 22(1) *Journal of Palestine Studies* 78, 78-93, (online, 1992) <<https://www.jstor.org/stable/2537689>>; Nizar Ayoub, 'Introduction' in Al-Marsad, *Forgotten Occupation: Life in the Syrian Golan after 50 Years of Israeli Occupation* (Arab Human Rights Centre in the Golan Heights, 2013) 8. However, this number is given as political advocacy and it is likely inflated. The number of 50,000 is given by an esteemed academic author; see Martin Gilbert, *The Arab-Israeli Conflict: Its History in Maps* (Routledge, 10th ed, 2011) 96 ('Gilbert Atlas'). Furthermore, in 1974 Israel withdrew from areas it occupied in 1967, including the town of Quneitra – the main population Golan centre – and from an additional margin of territory taken in 1973, to which Syrian Arabs could return; see Gilbert *Atlas*, 96. As a further caution on the figures, the reader should note potential misleading conflation of the population numbers across different timeframes, and conflation of the eastern and the western Golan Heights populations. From another perspective, some exchange of populations can be considered to have taken place, as about 20,000 Syrian Jews left prior to 1948 amid increasing persecution and, following the establishment of Israel, the remaining 4,500 were hostage until released at the end of the Cold War, (see Gilbert *Atlas*, 48; Adam Entous, 'A Brief History of the Syrian Jewish Community' *Wall Street Journal* (online, 1 December 2014) <<https://www.wsj.com/articles/a-brief-history-of-the-syrian-jewish-community-1417491186>>); Harold Troper, *The Rescuer* (Lester, Mason & Begg, 2007).

citizenship while others have applied for Israeli residence cards, social security benefits and travel rights.¹⁵ The older generation tends to loyalty to Syrian Druze clans and Syria, while the younger generation inclines toward fellow Druze in Israel and are loyal to Israel. The Golan Druze gradual trend to take Israeli citizenship is growing together with prosperity, especially since 2011 when the Syrian civil war impacted Syrian Druze villages.¹⁶

The population of the Syrian western Golan Heights is difficult to assess since Syrian rebel groups took and then lost control there from 2012 to 2018, including the main town of Quneitra.¹⁷ These groups included the *Southern Front* (Syrian Democratic Forces), *Al Nusrah* (Al Qaeda faction), *Yarmouk Martyrs Brigade* and *Jaish Khalid ibn al Walid* (ISIS factions).¹⁸ From the second half of 2018, the Syrian government regained nominal control, dominated by Iran and Iranian proxies.¹⁹ The violent turbulence, ongoing instability and continuing efforts to install offensive armaments in the Syrian western Golan Heights demonstrate their enduring importance to regional and international peace and stability, discussed in the following section.

III MILITARY STRATEGIC SIGNIFICANCE

The military strategic importance of the Golan Heights is fundamental to Israel's security. Syria is still technically at war with Israel. It initiated three military ventures to eliminate the Jewish State in 1948, 1967 and 1973. There are no formal diplomatic or economic Syrian-Israeli interconnections. Armistice lines were agreed in 1949. The Israeli area of occupation 1967-1973 followed the 1967 ceasefire line.²⁰ From 1974, a demilitarized buffer zone was established, as discussed below.

The Golan Heights overlooks Israeli towns and villages southward and westward below them, providing dominating vantage points for surveillance and fortified positions for the launching of rockets and artillery into Israel below. A line of volcanic hills provides a natural line of defence for surveillance and fortification against attacks from Damascus in the north and east.²¹ A clear geostrategic case can be made for the defensive military necessity of Israeli

¹⁵ Amos Harel, 'Druze in the Golan Heights are warming up to Israel' *Haaretz* (online, 29 April 2020) <https://www.haaretz.com/israel-news/.premium.HIGHLIGHT-a-battle-for-hearts-and-minds-is-waging-in-the-golan-heights-and-israel-is-winning-1.9738339>. BBC News, *Golan Heights Profile* (online, 25 March 2019) <<https://www.bbc.com/news/world-middle-east-14724842>>.

¹⁶ Julian Cole Phillips, 'Anti-Assad Campaign in the Occupied Golan Heights, 2011-2012: reimagining Syrian nationalism in a contested borderland' (2015) 27 *Frontiers et Circulations au Moyens Orient* 3, (online, 2015) <<https://journals.openedition.org/espacepolitique/3576>>.

¹⁷ Sam Dagher and Joshua Mitnick, 'Rebels in Syria Capture Border Crossing With Israel', *The Wall Street Journal* (online, 27 August 2014) <<https://www.wsj.com/articles/rebels-in-syria-capture-border-crossing-by-israel-1409166944>>; Maayan Lubell and Suleiman al Khalidi, 'Syrian Flag Raised in Quneitra on Syrian Side of Golan Heights', *Reuters* (online, 26 July 2018) <<https://www.reuters.com/article/us-mideast-crisis-syria-quneitra/syrian-flag-raised-in-quneitra-on-syrian-side-of-golan-heights-idUSKBN1KG1Y5>>.

¹⁸ Syrian Observatory for Human Rights, *At least 38 militants were killed in Sabem al-Jolan and Quneitra countryside* (online, 29 April 2015) <<http://www.syriahr.com/en/?p=18423>>.

¹⁹ Syrian Observatory for Human Rights, *Syrian troops, Hezbollah launch offensive against rebels near Golan* (online, 13 February 2015) <<http://www.syriahr.com/en/?p=12405>>.

²⁰ *Report of the Secretary-General concerning the Agreement on Disengagement between Israel and Syrian Force*, UN Doc S/11302/Add.1 (30 May 1974).

²¹ Dore Gold, 'Statement of Ambassador Dore Gold to House Of Representatives Subcommittee on National Security of the Committee on Oversight and Government Reform', *A New Horizon in U.S.-Israel Relations: From An American Embassy In Jerusalem To Potential Recognition Of Israeli Sovereignty Over The Golan Heights*, Hearing Before the 115th Congress, Second Session, 17 July 2018, Serial Number 115-97, 23 <<https://oversight.house.gov/legislation/hear>>.

control of at least the slopes looking south and west into Israel, if not also for the territory up to and including the line of volcanic hills.

In the 1948 war against the establishment of Israel, Syria made use of the strategic advantages of the Golan Heights. Early in the war, Syria successfully advanced into and occupied two pockets of the former British Mandate along the low land south-east coast of the Sea of Galilee and east of the Jordan River. Under the armistice following the war, Syria withdrew its forces from these areas, which were demilitarised.²² The Golan region above was then fortified by networks of Syrian bunkers, tunnels and artillery positions that also provided launching positions for artillery attacks and raids into Israel.²³ From 1949 to 1967, there were thousands of incidents of Syrian shelling of Israeli agricultural collective farms, called kibbutzim, on the lowlands below, including Almagor, Shamir, Ein Gev, Dagan, Sha'ar HaGolan, moshav Dishon and other areas in the Galilee.²⁴

On 5 June, the first day of the 1967 June Six Day War, intensified Syrian military shelling of Israeli villages and military positions located on the lowlands below commenced,²⁵ augmented in the morning by 12 Syrian jet aircraft bombing Galilee collective farms.²⁶ Syria declared that it had attacked Israel.²⁷ In response, Israeli anti-aircraft guns shot down three of the aircraft²⁸ and that evening the Israeli air force attacked Syrian military airfields, destroying much of its air force on the ground.²⁹ Syrian shelling continued throughout the war and, on 9 June, the night of the fifth day, Israeli airplanes and ground forces advanced against Syrian positions on the Golan Heights.³⁰ The Syrian positions fell through combat often conducted hand to hand. Although Syria had declared a ceasefire hours before the Israeli counterattack, hostilities had not been suspended and the Israeli assault on the Golan Heights was clearly a defensive response.³¹ A Soviet sponsored vote in the Security Council condemning Israeli aggression failed to achieve the necessary majority.³²

ings/a-new-horizon-in-us-israel-relations-from-an-american-embassy-in-jerusalem-to> ('Gold'). See also BBC News, *Golan Heights profile* (online, 25 March 2019). <<https://www.bbc.com/news/world-middle-east-14724842>>.

²² Benny Morris, *1948: a History of the First Arab-Israeli War* (Yale University Press, 2008) ch 5 fn 329.

²³ Michael Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East* (Oxford University Press, 2002) 46 ('Oren').

²⁴ This activity intensified in the first half of 1967; *Ibid.*, 42-6. For a map of northern Israel and the Golan Heights showing Israeli agricultural settlements and Syrian artillery ranges and firing 1949-1967. See Gilbert *Atlas* (n 14) 63-4.

²⁵ Hal Kosut, *Israel and the Arabs: The June 1967 War* (Facts on File, 1968) 89.

²⁶ Oren (n 23) 186.

²⁷ *Ibid.* 195.

²⁸ *Ibid.*; David W Lesch, 'Syria: playing with fire' in Wm Roger Louis and Avi Shlaim (eds), *The 1967 Arab-Israeli War: origins and consequences* (Cambridge University Press, 2012) 79, 92.

²⁹ Oren (n 23) 195. Valuable intelligence concerning Syrian airfields and military positions was provided by an Israeli spy, Eli Cohen, who infiltrated high levels of the Syrian military establishment, see Martin Gilbert, *In Ishmael's House - A History of Jews in Muslim Lands* (Yale University Press, 2010) 283. A website is dedicated to this history at <<http://www.elicohen.org.il/>>.

³⁰ Oren (n 23) 280; Britain Israel Communications and Research Centre, *Causes and consequences of the Six-Day War* (Briefing paper, March 2017) <<http://www.bicom.org.uk/analysis/bicom-briefing-causes-consequences-six-day-war-1967/>>.

³¹ Some authors characterise the attack as aggression constructed through conspiracy; see: John Quigley, *The Six-Day War and Israeli Self Defence: Questioning the Legal Basis for Preventive War* (Cambridge University Press, 2013) 115 ('Quigley'). However, the historical record demonstrates that this characterisation lacks credibility (compare similar allegations made by Syria six years later in the 1973 Day of Atonement War; see Lester Sobel (ed), *Israel and the Arabs: The October 1973 War* (Facts on File, 1974) 92.)

³² Quigley (n 31) 98.

The 1973 October War was launched by Syria and Egypt after several threats and feints that forced mobilisations and demobilisations of Israeli military reserves and caused Israeli strategic confusion.³³ Crafting the advantage of surprise, Syrian and Egypt launched the war on the Jewish Day of Atonement. Syria retook the Golan Heights and Syrian artillery advanced almost down to the plains of the Galilee but, after the initial surprise advance, Syrian artillery and infantry hesitated and were forced back, at the cost of heavy casualties among Israeli troops. Ultimately, in 1973, Israel gained further territory in the north eastern Golan Heights than in 1967, but drew back from those advance positions, and also from the area around Quneitra occupied in 1967, in favour of the establishment there of a demilitarized zone under United Nations supervision.³⁴ The line of Israeli control is colloquially called the 'purple line' on the western border of the demilitarized zone.³⁵

Since 2018, the Iranian Revolutionary Guard Corps ('IRGC') and its proxy militia Hezbollah (Shiite Party of God, considered the most capable Islamist militia and a global terrorist group)³⁶ have established bases in the eastern Golan Heights region under Syrian control.³⁷ Their presence, directed to Iran's purpose of 'erasing Israel from the map'³⁸ currently involves military build-up and occasional rocket strikes on Israel, and Israeli bombing of their munitions bases.³⁹ Increasing numbers of explosive rocket and unmanned aerial vehicle attacks launched from under Syrian jurisdiction and extensive Israeli strikes upon launch and ammunition facilities⁴⁰ make apparent that Syrian control of the eastern Golan Heights would catalyse more violence and that these mountains have ongoing strategic importance in current times.

IV REGIONAL LEGAL ARRANGEMENTS

The 1949 *General Armistice Agreement* emphasized, in accordance with Syrian demands, that:

... the following arrangements for the Armistice Demarcation Line between Israeli and Syrian armed forces are not to be interpreted as having any relation whatsoever

³³ Israelis considered the many casualties of the 1973 Day of Atonement War a debacle, so a national commission of enquiry was established to investigate its failures, producing the *Agranat Commission Report* (1974); see Pnina Lahav, *Judgement in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (University of California Press, 1997) 227; Sobel (n 31) 93, 130-132.

³⁴ The 'UNDOF zone', see subheading 'Regional Legal Arrangements' below; SC Res 2428, UN SCOR, UN Doc S/RES/2428 (29 June 2018); Sobel (n 31) 161-165.

³⁵ Zvi Hauser and Isaac Zarfati, 'Recognition of Israel's Sovereignty over the Golan Heights' (Policy Paper, Coalition for the Israeli Golan, January 2018) 23, <https://www.golancoalition.org/wp-content/uploads/2018/06/Recognition_of_Israels_Sovereignty_Over_the_Golan_Heights_EN_Polypaper.pdf>.

³⁶ An extensive description and analysis of Hezbollah can be found in Matthew Levitt, *Hezbollah: The Global Footprint of Lebanon's Party of God* (Georgetown University Press, 2013) 357.

³⁷ Jonathan Spyer, 'A New Order Emerges in South Syria' on Jonathan Spyer, *Middle East Analysis and Reportage* (1 December 2018) <<https://jonathanspyer.com/2018/12/01/a-new-order-emerges-in-southern-syria/>>; Jonathan Spyer, 'Is southern Syria heading for 'Lebanonization?'' on Jonathan Spyer, *Middle East Analysis and Reportage* (online, 13 July 2018) <<https://jonathanspyer.com/2018/07/13/is-southern-syria-heading-for-lebanonization/>>.

³⁸ Jeffrey Goldberg, 'The Iranian Regime on Israel's Right to Exist', *The Atlantic* (online, 9 March 2015) <<https://www.theatlantic.com/international/archive/2015/03/Iranian-View-of-Israel/387085/>>.

³⁹ Shmuel Even, *The Campaign against Iran in Syria: Are Israel's Statements Helpful?* (INSS Insight No 113, 6 February 2019) <<https://www.inss.org.il/publication/campaign-iran-syria-israels-statements-helpful/?offset=14&posts=286&subject=256>>.

⁴⁰ Asaf Orion, 'You Cannot Step into the Same River Twice': *The Disengagement of Forces Agreement on the Golan of 1974 and UNDOF of 2018* (INSS Insight No 1076, 22 July 2018) <<https://www.inss.org.il/publication/cannot-step-river-twice-disengagement-forces-agreement-golan-1974-undof-2018/>>.

to ultimate territorial arrangements affecting the two Parties to this Agreement.⁴¹

The demarcation line was abrogated by Syrian resumption of hostilities in 1967 and 1973. In any event, there is no agreed Israel-Syria border.

Despite their defeat in the 1967 war, the 22 members of the Arab League collectively maintained in its aftermath that there would be no negotiations, no recognition of and no peace with Israel.⁴² Syria still demands the full return to Syria of the Golan Heights as a precondition to any discussion of recognition of Israel.⁴³ Despite application of its national laws to the Golan Heights since 1981 (see below), Israeli refreshed overtures for peace negotiations with Syria in 1992, 1995, 2000 and 2008 which were unsuccessful.⁴⁴ In contrast, peace treaties were agreed with Israel by Egypt in 1979 and by Jordan in 1994.⁴⁵

There is limited regular contact between the two countries. Syria does not recognize Israeli passports or allow travel by Syrian passport holders to Israel. Golan Druze apples are allowed into Syria and Syria supplies 10% of the water for the Druze cross-border town of Majdal Shams.⁴⁶ Movement is permitted in both directions for United Nations peacekeepers, and at the Quneitra crossing for Druze pilgrims, students and brides.⁴⁷ Syria has refused to repatriate for burial the remains of fallen Israeli soldiers missing in action.⁴⁸

The United Nations Disengagement Observer Force ('UNDOF') is a multinational peace keeping force that was deployed on the Golan Heights under United Nations Security Council ('UNSC') Resolution 350 on 31 May 1974, on the same day as the signing of the *Israel-Syria Agreement on Disengagement*.⁴⁹ It became a new part of the existing United Nations

⁴¹ *Israeli-Syrian General Armistice Agreement*, 42 UNTS 327 (signed and entered into force 20 July 1949) art V.

⁴² League of Arab States, 4th Summit, *Resolution 1*, 1 September 1967 (Khartoum, Sudan): Khartoum Resolution, [3] adopted the 'The 3 No's', discussed in Yoram Meital 'The Khartoum Conference and Egyptian Policy after the 1967 War: A Reexamination' (2000) 54 *Middle East Journal* 64.

⁴³ Syria also demands the transfer to its control of the pocket of territory of the British Mandate area at the base of the Golan Heights along the lower south-east coast of the Sea of Galilee that it occupied during the 1948 war. See Dennis Ross, *The Missing Peace – The inside story of the fight for Middle East peace* (Farrar Straus and Giroux, 2005) 583.

⁴⁴ Ibid, 107-114 (1992 negotiations), 238-245 (1995), 509-590 (2000); regarding 2008 negotiations, see Milad Alodet Allah 'An account of the 2008 Israeli-Syrian negotiations in Turkey' (2016) 9 *Contemporary Arab Affairs* 100-114. See also Israel Ministry of Foreign Affairs 'Israel-Syria Negotiations - The Bilateral Negotiations' (online, 21 May 2008) <<https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-syria%20negotiations.aspx>>; Isabel Kershner, 'Secret Israel-Syria Peace Talks Involved Golan Heights Exit', *The New York Times* (online, 12 October 2012) <<https://www.nytimes.com/2012/10/13/world/middleeast/secret-israel-syria-peace-talks-involved-golan-heights-exit.html>>; 'Timeline: Israel, Syria and the Golan Heights', *The Guardian* (online, 21 May 2008) <<https://www.theguardian.com/world/2008/may/21/golan.background>>.

⁴⁵ *Peace Treaty Between the State of Israel and the Arab Republic of Egypt*, signed 26 March 1979, UNTS 17813 (entered into force 1 January 1980); *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan*, signed 26 October 1994, 2042 UNTS 393 (entered into force 26 October 1994). However, both Arab countries decline economic, political and cultural relations with Israel.

⁴⁶ 'Israeli Druze Minister: Syria Should Give Water to Golan Towns', (Online, 14 February 2010) <<https://www.haaretz.com/1.5030124>>; Majdal Shams, 'A would-be happy link with Syria', *The Economist* (Middle East and Africa) 19 February 2009.

⁴⁷ The unique situation of Israeli Golan Heights Druze brides leaving to marry grooms in Syria but unable to return has been dramatized in film and analysed in feminist theory: Rose Brister, 'Replacing Women's Bodies in Eran Riklis's *The Syrian Bride*' (2014) 39(4) *Signs: Journal of Women in Culture and Society* 927, 927-948.

⁴⁸ Syrian implacability is exemplified by the refusal to return remains of Israeli soldiers missing in action against Syrian forces in Lebanon in June 1982 and then hidden in Syria, see Michael Zubovskiy, 'How Russia Views the Return of Israel MIA Zachariah Baumel's Body', *Jerusalem Center for Public Affairs* (online, 7 April 2019) <<http://jcpa.org/russias-hand-in-returning-an-israeli-mia-soldiers-body/>>.

⁴⁹ *Agreement on Disengagement*, Israel-Syria, signed 31 March 1974, S/11302/Add.1, annexes I and II (30 May 1974); reproduced in (1974) 13(4) *International Legal Materials* 880.

Truce Supervision Organization ('UNTSO') established in 1949 to monitor disengagement commitments under armistices agreed with Israel by surrounding Arab countries (Egypt, Lebanon, Syria and TransJordan) following their 1948 - 9 war against it.⁵⁰ The UNDOF mandate is renewed biannually by the UNSC.⁵¹

The UNDOF mandate is to monitor the disengagement of Syrian and Israeli armed forces in the Golan Heights and, in particular, to ensure the absence of their armed forces in the Area of Separation, which is a demilitarized zone located primarily on the Syrian side of the 'purple line' and the limitation of forces and equipment on either side.⁵² It also engages in demining activities in Syrian minefields.⁵³ The UNDOF comprises about 1,000 personnel, with command headquarters in Damascus and a budget decided annually by the United Nations General Assembly ('UNGA'), which was about US\$60 million in 2018.⁵⁴ The UNDOF peacekeepers come primarily from Fiji, India, Ireland, Nepal, the Netherlands and Philippines. Their capability reputation suffered significant setbacks at the hands of Islamist rebels during the Syrian civil war: 21 Filipino peacekeepers were taken hostage in March 2013⁵⁵ and another four in May 2013 by the Yarmouk Martyrs Brigade⁵⁶ and, later, another 40 were besieged for seven hours before fleeing when 45 Fijian peacekeepers were taken hostage in August 2014 by the *Al Nusra Front*.⁵⁷

Israel has not formally annexed the western Golan Heights to be under its sovereign territory but in 1981 passed a law tantamount to annexation. The *Golan Heights Law* applies Israeli law, jurisdiction and administration to the Golan Heights. The 1981 legislation came about after 15 years of application by Israel of the international law of military occupation. In contrast, Israeli domestic laws do not apply to the Arab population in the disputed/occupied West Bank/Judaea and Samaria, where Israel administers law principally under international rules for military occupation.⁵⁸ The *Golan Heights Law* is the legal framework transitioning the area to a future under Israeli sovereignty. There is some debate and uncertainty as to

⁵⁰ SC Res 350, UN Doc S/RES/350 (31 May 1974).

⁵¹ Security Council Report *Monthly Forecast* 'June 2019' (online, 31 May 2019) <<https://www.securitycouncilreport.org/monthly-forecast/2019-06/undof-golan-heights-3.php>>.

⁵² United Nations Peacekeeping, UNDOF Fact Sheet <<https://peacekeeping.un.org/en/mission/undof>>; SC Res 350, UN Doc S/RES/350 (31 May 1974).

⁵³ See generally Landmine Monitor Core Group, *Landmine Monitor Report 2002: Toward a Mine-free World* (Human Rights Watch, report presented to the Fourth Meeting of States Parties to the Mine Ban Treaty in Geneva in September 2002); *Budget for the United Nations Disengagement Observer Force for the period from 1 July 2011 to 30 June 2012: Report of the Secretary-General*, 65th sess, Agenda Item 156(a), UN Doc A/65/710 (2 February 2011).

⁵⁴ 'The UN General Assembly approved a budget of \$60,295,100 from July 2018 through June 2019: *Approved resources for peacekeeping operations for the period from 1 July 2018 to 30 June 2019: Note by the Secretary-General*, 5th Comm, 72nd sess, Agenda Item 149, UN Doc A/C.5/72/25 (online, 2019) <<https://undocs.org/A/C.5/72/25>>.

⁵⁵ 'Freed UN hostages in Jordan after Syria release', *BBC News* (online, 9 March 2013) <<https://www.bbc.com/news/world-middle-east-21725991>>; Louis Charbonneau and Manuel Mogato, 'How U.N. troops defied orders, opened fire and escaped Syrian rebels', *Reuters* (online, 13 September 2014) <<https://www.reuters.com/article/us-syria-crisis-peacekeepers-un-insight/how-u-n-troops-defied-orders-opened-fire-and-escaped-syrian-rebels-idUSKBN0H724T20140912>>.

⁵⁶ Ilan Ben Zion and AP, 'Syrian rebels grab UN peacekeepers near Golan', *The Times of Israel* (online, 7 May 2013) <<https://www.timesofisrael.com/syrian-rebels-detain-un-peacekeepers-near-golan/>>.

⁵⁷ The Guardian, 'Golan Heights peacekeeper crisis: Filipinos escape, Fijians taken hostage', *The Guardian* (online, 1 September 2014) <<https://www.theguardian.com/world/2014/aug/31/syria-fiji-filipinos-peacekeepers-golan-heights-al-nusra>>.

⁵⁸ These are principally Jordanian civil laws, applied together with Israeli military laws. See Sharon Weill, 'The judicial arm of the occupation: the Israeli military courts in the occupied territories' (2007) 89(866) *International Review of the Red Cross* 395, 406 (online, 2007) <https://www.icrc.org/en/doc/assets/files/other/irrc_866_weill.pdf>.

whether the *Golan Heights Law* amounts to *de jure* annexation under Israeli law.⁵⁹ It makes no mention of annexation or sovereignty but, as it brings the area under domestic law, it has that effect *de facto*.

In summary, armistice lines set out the Golan Heights international borders of control. The armistice conditions are overseen on the Syrian side by a UN observer force that is largely ineffective. Israeli administration of the eastern Golan Heights shifted in 1981 from military to civilian authorities, suggesting Israeli intentions to maintain permanent control there. The international legal consequences of the *Golan Heights Law* are discussed below.

V INTERNATIONAL LAW AND UNITED NATIONS RESOLUTIONS

Israel is a party to the *Fourth Geneva Convention on Protection of Civilians* 1949. It provides that 'penal laws of the occupied territory shall remain in force'.⁶⁰ In addition, the *Hague Convention IV* 1907 respecting the laws and customs of war on land is considered customary international law and binding on Israel. It provides, in the *Regulations Annex*, section 3, in relation to military authority over the territory of the hostile State, that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁶¹

Thus, Israel is legally bound to maintain and enforce Syrian penal and civil law in the Golan Heights, until such time as it ceases to occupy the area, or formally annexes it.

In response to the Israeli *Golan Heights Law*, passed on 14 December 1981, the UNSC promptly met on 17 December 1981 and unanimously adopted Resolution 497. That resolution seems to have been adopted under Chapter VI of the UN Charter, as the resolution makes no explicit reference to Chapter VII as is usual practice under that chapter, and the issue was raised under Chapter VI.⁶² A follow-up resolution under Chapter VII was voted down.⁶³ Resolution 497 'decides' that:

... the Israeli decision to impose its laws, jurisdiction, and administration in the occupied Syrian Golan Heights is null and void and without international legal effect.⁶⁴

⁵⁹ Asher Maoz, 'Application of Israeli Law to the Golan Heights Is Annexation' (1994) 20 *Brooklyn Journal of International Law* 355, 355-396. For an opposing opinion, see Leon Shelef 'Application of Israeli Law to the: Heights Is Not Annexation' (1994) 20 *Brooklyn Journal of International Law* 333.

⁶⁰ Geneva Convention (IV) *Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 64.

⁶¹ Convention (IV) *Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910) art 43.

⁶² UNSC *Repertoire*, 'Chapter X - Consideration of the Provisions of Chapter VI of the Charter' (Questions submitted to the Security Council in 1981 at Tabulation item 9(a) 'Situation in the occupied Arab territories') concerns the *Golan Heights Law*, implying that the issue was raised for a resolution under Chapter VI; <<https://www.un.org/securitycouncil/content/repertoire/actions#rel6>>. For a discussion of UNSC practice under Chapter VII, see text below accompanying n 80.

⁶³ See below n 66.

⁶⁴ SC Res 497, UN Doc S/Res/397 (17 December 1981).

As the Israeli law was not meanwhile rescinded (a deadline of two weeks had been set), the Security Council reconvened four weeks later, on 20 January 1982, to consider sanctions action under Chapter VII of the United Nations ('UN') Charter, which empowers coercive measures. A draft resolution cast the Israeli law as 'an act of aggression under article 39 of the Charter of the United Nations'. It called upon Member States to:

... consider applying concrete and effective measures in order to nullify the Israeli annexation of the Golan Heights and to refrain from providing any assistance or aid to and cooperation with Israel in all fields in order to deter Israel and its policies and practices of annexation.⁶⁵

The USA vetoed the proposed Security Council sanctions.⁶⁶ It considered the Golan Heights Law a breach of the *Fourth Geneva Convention* but also considered that the Golan Heights themselves had not been *de jure* annexed.⁶⁷

In response, on 29 January 1982, the General Assembly opened an emergency special session and adopted Resolution 37/123A, which used the language of UNSC Resolution 497 labelling the Golan Heights Law as 'null and void', having 'no legal validity and/or effect whatsoever'.⁶⁸ It deplored the United States veto in the Security Council and called upon all States and international agencies to boycott Israel in its totality:

13. ... (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
 - (b) To refrain from acquiring any weapons or military equipment from Israel;
 - (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
 - (d) To sever diplomatic, trade and cultural relations with Israel;
14. Reiterates its call to all Member States to cease forthwith, individually and collectively, all dealings with Israel in order totally to isolate it in all fields ...⁶⁹

Two earlier relevant resolutions of fundamental importance were adopted by the UNSC. In the wake of the June 1967 war, Resolution 242 of 22 November 1967 emphasises in its preamble 'the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace'. Its first operational paragraph then:

⁶⁵ Draft resolution – Jordan: revised draft resolution, UN Doc S/14832/Rev.1 (20 January 1982). The UNSC *Repertoire* on Chapter VII explain that a draft resolution S/14832/Rev.1 was not adopted. As the draft was for an explicit Chapter VII decision, in contrast to Res 497, its voting down reinforces a conclusion that Res 497 itself was not adopted under Chapter VII. For further discussion, see text below accompanying n 80.

⁶⁶ *Draft Resolution – Mideast situation/Golan*, UN Doc S/14831/Rev.1 (19 January 1982); 9 votes in favour, 5 abstentions, 1 veto. This was a period during the Cold War of Soviet predominance in the UN, in which the USSR used Israel as a wedge issue to isolate the USA. See, for example, Theodore Friedgut, 'Soviet anti-Zionism and Antisemitism—Another Cycle' (1984) 14(1) *Soviet Jewish Affairs* 3.

⁶⁷ As reported by Syrian delegate, *UNSC Official Records: SC 2329th Meeting, 37th Official Records S/PV.239*, 20 January 1982, [207]-[209] < <https://unispal.un.org/DPA/DPR/unispal.nsf/0/906E017E71607D778525737E-004F33AA> >.

⁶⁸ Yehuda Z Blum and Luke W Finlay, 'The Seventh Emergency Special Session of the UN General Assembly: An Exercise in Procedural Abuse' (1986) 80 *American Journal of International Law* 587.

⁶⁹ *The Situation in the Middle East*, GA Res 37/123A, UN Doc A/RES/37.123A (16 December 1982). This was adopted 86 for, 21 against, 34 abstentions.

1. *Affirms* that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force ...⁷⁰

Resolution 242 does not specify under which chapter of the UN Charter it is adopted. Neither does UNSC Resolution 338, adopted towards the end of the 1973 war. The latter 'calls for' a ceasefire and for the parties to implement Resolution 242. It also 'decides that' they should commence negotiations under 'appropriate auspices aimed at establishing a just and durable peace in the Middle East'.⁷¹

It is evident that the UN Security Council considered the *Golan Heights Law* illegal under international law and that it catalysed a General Assembly recommendation to isolate Israel totally. It did not presume Israel's military occupation of the eastern Golan Heights, pending peace negotiations, as unlawful.

VI EVALUATION OF LEGAL IMPLICATIONS

Legal implications follow from the above summary of Israeli law, international law and the UN resolutions. They indicate that the Golan Heights have been annexed *de facto* but not *de jure*, meaning that they are under ongoing and possibly permanent Israeli legal control, and that the United Nations have declared annexation illegal. Nevertheless, although Israel has not asserted sovereignty, it has legal grounds to do so and practical conditions in the area would support *de jure* assertion of its sovereignty.

- (1) It is uncertain that the Israeli Golan Heights were annexed *de jure* and therefore they technically and formally remain militarily occupied;
- (2) Continuing Israeli military occupation of the Golan Heights is legitimate under laws of armed conflict;
- (3) The Israeli 1981 *Golan Heights Law* was in breach the international laws of military occupation;
- (4) UNSC Resolution 497 negating the *Golan Heights Law* is a recommendation without coercive effect;
- (5) Relevant UNSC resolutions do not explicitly require a transfer of the Golan Heights to Syria;
- (6) UNGA resolutions on the Golan Heights are recommendations without coercive effect;
- (7) UNGA resolutions on the Golan Heights are without extrinsic binding legal effects;
- (8) In 1967, international law did not reward wars of aggression, such as Syria's against Israel, with restoration of an aggressor's lost territory;

⁷⁰ SC Res 242, UN Doc S/RES/242 (22 November 1967).

⁷¹ SC Res 338, UN Doc S/RES/338 (22 October 1973).

- (9) International law permits departure from its rules precluding wrongfulness in situations of necessity, such as for the Golan Heights, (supposing that a rule prohibiting defensive conquest had emerged in recent times); and
- (10) *De facto* annexation of the Golan Heights by Israel is occurring incrementally;
- (11) It would be lawful within international law at the present time for Israel formally to annex the Golan Heights *de jure*.

A. Golan Heights not formally annexed

At the time of the *Golan Heights Law* in 1981, the Israeli government maintained that the *Golan Heights Law* was not an annexation, although the then Israeli coalition government policy was not to give up the Golan Heights.⁷² Neither national law nor government policy set out any formal Israeli legal claim to the Golan Heights or specified annexation. Israel, in practice also, supported the notion that the Golan Heights were not annexed to it; indeed, despite the 1981 policy, later governments initiated negotiations to hand the Golan Heights to Syria in consideration of a possible peace treaty and security guarantees in 1992, 1996, 2000 and 2008.⁷³ However, in early 2016, the Israeli government declared, once again informally, in light of the Syrian civil war and history of hostility, that the Golan Heights will remain part of Israel.⁷⁴ Annexation by formal act of State has not occurred and there has been no declaration of *de jure* sovereignty. Thus, the legal situation remains ambiguous as the failure to annex is inconsistent with informal governmental policy to hold the land indefinitely. The default legal position is that the area remains under military occupation.

B. Israeli military occupation of the Golan Heights is lawful

While war is still technically ongoing, with no permanent peace or borders agreed but with major active hostilities suspended by ongoing armistices, and no clear *de jure* annexation, the international laws of armed conflict continue to apply in the Golan Heights.⁷⁵ The Israeli military occupation of the Golan Heights was a measure of self-defence in response to wars initiated by Syria.⁷⁶ It continues to remain legitimate in the absence of peace and is supported by the UN regional arrangements.

C. The 1981 Golan Heights Law was in breach of Fourth Geneva Convention

Article 64 of the *Fourth Geneva Convention on Protection of Civilians* and section 3 of the *Hague Convention IV 1907 Regulations Annex*, require that the penal laws of the occupied territory shall remain in force during occupation. The Israeli 1981 *Golan Heights Law*

⁷² Israel (Begin Second Coalition Government) *Agreement on Fundamental Policy Guidelines* (5 August 1981), in Laqueur and Rubin (n 8) 234.

⁷³ See above n 45.

⁷⁴ William Booth, 'Netanyahu vows that Israel will never give up the Golan Heights', *Washington Post* (online, 16 April 2017) <https://www.washingtonpost.com/world/middle_east/netanyahu-vows-that-israel-will-never-give-up-golan-heights/2016/04/17/c7639e16-04a7-11e6-bfed-ef65dff5970d_story.html?noredirect=on>.

⁷⁵ For in-depth discussion of the law of occupation, see: Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2nd ed, 2012).

⁷⁶ Quigley summarises legal analysis for and against Israel's right of self-defence as exercised in June 1967: Quigley (n 31) 120-127, 132-137. He concludes that the weight of authority is in favour of the right of anticipatory self-defence and of Israel's legitimate exercise of it in 1967, although he himself is not of the same view: 149. However, his analysis focuses on the Egyptian front and not the law as applied to the Golan Heights, where Syrian unilaterally launched attacks days before the Israeli ground forces counterattack. For a detailed account of the Six Day War, see Oren (n 23) 186, 260, 280.

imposes Israel's domestic laws on the area, including criminal laws. This is a breach of the international laws of occupation.

The type of breach is not one considered a grave breach under international laws of armed conflict; ie it is not specified in the *Fourth Geneva Convention on Protection of Civilians* as one to which sanctions apply.⁷⁷ Furthermore, no deprivation of benefits to the local population was occasioned by change of institutions or government.⁷⁸ Thus, the response of the General Assembly pursuant to Resolution 37/123A, calling for extraordinary total isolation of Israel, might have been intended to ensure Syrian sovereignty and constrain Israel, rather than to protect civilians.

D. UNSC Resolution 497 on Golan Heights Law is a recommendation

The relevant UNSC resolutions are in the form of recommendations without inherent coercive effect. Security Council resolutions 242, 338 and 497 do not follow the common Security Council practice of stating explicitly that the resolutions are adopted under Chapter VII, nor indeed are they made under that Chapter. Security Council resolutions adopted under Chapter VI of the UN Charter are recommendations for action that carry no coercive or judicial authority even when expressed as mandatory decisions or judgements. The language used in Chapters VI and VII is distinct, separating 'recommendations' in Chapter VI⁷⁹ from 'decisions' in Chapter VII.⁸⁰ There is a fundamental difference between the legal status of resolutions under Chapters VI and VII. Leading academic commentators affirm the distinction as between binding and non-binding UNSC resolutions.⁸¹ For example, de Wet observes that 'Allowing the UNSC to adopt binding measures under Chapter VI would undermine the structural division of competences foreseen by Chapters VI and VII, respectively. The whole aim of separating these chapters is to distinguish between voluntary and binding measures.'⁸²

A Chapter VII resolution usually says explicitly that the situation constitutes a threat to international peace and security under article 39, and that its operative paragraphs are actions by the Security Council under Chapter VII.⁸³ Furthermore, Resolution 497 is omitted from

⁷⁷ *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 147.

⁷⁸ An occupying power may not deprive protected civilians of the benefits of Geneva Convention IV caused by change in the governing institutions, nor by annexation; *ibid* art 47.

⁷⁹ Chapter VI provides that 'The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, *recommend* appropriate procedures or methods of adjustment' - article 33(1) (emphasis added).

⁸⁰ Chapter VII provides that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' - article 39 (emphasis added). Further, 'The Security Council may *decide* what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures' - article 41 (emphasis added).

⁸¹ Eg Michael C Wood 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73, 77-8; MN Shaw, *International Law* (Grotius Publications Limited, 2nd ed, 1986) 557.

⁸² Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 39.

⁸³ Eg UNSC Resolution 706 (Iraq-Kuwait) (15 August 1991), see Patrik Johansson, *Equivocal Resolve?: Toward a Definition of Chapter VII Resolutions* 2008, Umea University, Department of Political Science; <<http://umu.diva-portal.org/smash/record.jsf?pid=diva2%3A141827&dsid=4604>>. The UNSC adopts an average of 50% of its resolutions explicitly under Chapter VII; see: *Repertoire of the Practice of the Security Council 20th Supplement 2016-17*, <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/part_vii_final_for_webposting.pdf>.

the *Repertoire* concerning UNSC practice under Chapter VII.⁸⁴ An interpretation drawn merely from the word 'decides' used in Resolution 497 - to imply that it was adopted under Chapter VII - cannot stand against opposing implications from other UNSC practice using explicit language referring to Chapter VII and art 39, inclusion of the issue under *Repertoire* on Chapter VI, the omission of Resolution 497 from the *Repertoire* on Chapter VII, and the voting down under Chapter VII of a draft resolution on the same issue.

In recent decades, the UNSC has exerted its political authority through quasi-legal judgments but its purported absorption of judicial functions is legally dubious. The UNSC is not an overarching international Constitutional Court that can nullify laws by recommendation, as it purported to do in Resolution 497.⁸⁵ It can of course make assessments concerning peace and security that cite existing law and find that it has been breached. Further, the UNSC may make findings of fact as necessary premises for Chapter VII resolutions. According to the *Namibia Advisory Opinion*, a legal consequence might flow from a declaration of illegality if the resolution was binding, which was not the case for Resolution 497. Nevertheless, the UNSC mandate concerning international peace and security does not extend to quasi-judicial determinations of borders or competing territorial claims.

A question remains as to possible extrinsic legal effects of the UNSC declaration in Resolution 497 as contributing to evidence of customary international law. Security Council membership at any time comprises less than 8% of UN Member States, so its recommendations cannot represent globally uniform State opinion, *a fortiori* when resolutions are merely recommendation or not adopted unanimously (eg by vote or by abstention).⁸⁶ Thus, Chapter VI resolutions cannot bind indirectly by forming customary international law. They have less persuasive power in forming *opinio juris* than do UNGA resolutions. (For discussion concerning effects on customary international law of UNGA resolutions, see sub-section G, below.) Moreover, rules of customary international law are rules of general application and are not made exclusively for a specific country situation.

E. UNSC resolutions do not specify transfer of the Golan Heights to Syria

None of the relevant Security Council resolutions explicitly requires a return of the Golan Heights to Syria. The language used in UNSC Resolution 242 does not mandate this. Ongoing legal debate over interpretation of Resolution 242 has already endured for half a century.⁸⁷ The resolution states that 'establishment of a just and lasting peace in the Middle East should include the application of both the following principles ... [territorial withdrawal and secure

⁸⁴ UNSC *Repertoire*, 'Chapter XI - Consideration of the Provisions of Chapter VII of the Charter'; see above n 62.

⁸⁵ 'The Security Council is not a judicial organ, nor in any real sense does it exercise quasi-judicial functions, though, like the General Assembly it does have the power, in certain circumstances and in connection with particular situations or disputes, to establish judicial or quasi-judicial organs, such as the Yugoslav and Rwanda International Criminal Tribunals and the Iraq-Kuwait Boundary Demarcation Commission' - Wood (n 81) 78.

⁸⁶ The UNSC members comprise 15 of the 193 UN member States.

⁸⁷ Compare the views of Eugene Rostow, 'Legal Aspects of the search for peace in the Middle East' (1970) 64(5) *American Journal of International Law* 64; with Henry Cattan, 'Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict' (1975) 3(1) *International Journal of Legal Information* 110, <<https://www.cambridge.org/core/journals/international-journal-of-law-libraries/article/palestine-and-international-law-the-legal-aspects-of-the-arab-israeli-conflict-by-henry-cattan-with-a-foreword-by-dr-w-t-mallison-jr-london-longman-1973-pp-xiv-242-documentary-appendices-index/0F123D280D63E453F18058EA080D721E>>.

borders]'.⁸⁸ Israel interprets the reference to 'withdrawal of Israel armed forces from territories occupied ...' rather than '*the* territories' – which was language used in an earlier draft – as signifying that not all the territories that it occupied during 1967 must be surrendered. This interpretation is in accordance with the drafting history and recollections of the key English language Security Council representatives who were its drafters⁸⁹ but was contested by other representatives.⁹⁰ The immediately following affirmation of the principle of the 'right to live in peace within *secure* and recognized boundaries free from threats' supports that interpretation, whereby Israel argues that it is necessary for security to retain the Golan Heights.⁹¹ The resolution's preamble is not an operational paragraph and it must be read as applying to use of force in wars of aggression (as discussed in point I below). Unsurprisingly, UNSC Resolution 242, a product of compromise language between Cold War and other political adversaries, is constructed ambiguously to accommodate conflicting meanings.⁹² One can say with certainty that it is premised on the notion of negotiation of territories for peace. In UNSC Resolution 338, two of the three paragraphs do not use mandatory language (ie they merely 'call for' actions) but the third paragraph does say that the UNSC 'decides' that the parties are to engage in negotiations.⁹³

F. UNGA resolutions are recommendations without coercive effect

All UNGA resolutions on matters of international peace and security are recommendatory.⁹⁴ Any resolution on a particular situation, such as on the Golan Heights, addresses international peace and security and is, therefore, necessarily a recommendation. General Assembly recommendations lack power under the Charter to create obligations that are legally binding for Member States.⁹⁵

⁸⁸ SC Res 242, UN Doc S/RES/242 (22 November 1967) para 1(i) and (ii).

⁸⁹ Lord Caradon, United Kingdom representative – see Sydney D Bailey, *The Making of Resolution 242* (Martijnus Nijhoff, 1985), 153; and Justice Goldberg, US representative – see Bailey; and Arthur J Goldberg, 'Resolution 242 after 20 years', in National Committee on American Foreign Policy, *The Middle East: Islamic Law and Peace – U.N. Resolution 242: Origin Meaning and Significance* (online, April 2002) <https://web.archive.org/web/20150203052019/http://www.mefacts.com/cached.asp?x_id=10789>.

⁹⁰ Bailey (n 89). Advocates for Syrian sovereign control of the Golan assert that the 'inadmissibility of the acquisition of territory by war' as broadly stated in the preamble should be read in innovative fashion to extend even to wars in self-defence, discussed at point J below.

⁹¹ SC Res 242, UN Doc S/RES/242 (22 November 1967) para 1(ii) (emphasis added). See discussion concerning the rule of necessity at point H below.

⁹² Eugene Kontorovich 'Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal' (2015) 16(1) *Chicago Journal of International Law* 127, (hereinafter 'Kontorovich Resolution 242') 141.

⁹³ Although the argument has been made that this paragraph in UNSC Resolution 338 strengthens a call for negotiations under UNSC Resolution 242 in the previous paragraph, which in turn strengthens the Resolution 242 so as to give that resolution implicit Chapter 7 status, the argument is unpersuasive. It distorts the clear meaning of the words in UNSC Resolution 338. It also lays postulations upon each other, building an even weaker structure than any of the individual resolutions have by themselves.

⁹⁴ UN Charter article 18(2): 'Decisions of the General Assembly on important question shall be made by a two thirds majority of the members present and voting. These questions shall include recommendations with respect to the maintenance of international peace and security...'

⁹⁵ Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 6 *European Journal of International Law* 883. UNGA binding decision-making powers relate only to internal aspects of the functioning of the UN, on matters such as budget, procedure, membership, and trusteeship; e.g. budgetary powers at UN Charter at Art. 17. Member States were considered bound only to consider General Assembly resolutions in the case on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa (Advisory Opinion)* [1955] ICJ Rep 67, Separate Opinion of Judge Klaes-tad, at 88; Separate Opinion of Judge Lauterpacht, at 119. See also *South West Africa Cases (Ethiopia v South Africa;*

G. UNGA resolutions on the Golan Heights are without extrinsic binding legal effects

The relevant resolutions of the General Assembly do not have extrinsic effects by forming customary international law solely by themselves. In the 1979 *Libya v Texaco* arbitration, the ‘legal value’ of a General Assembly resolution as customary international law was considered and found unable by itself to create new law.⁹⁶ That position has been confirmed by the International Law Commission.⁹⁷ The resolutions might contribute to the creation of international customary law when they express general principles (concerning matters such as friendly relations, self-determination and sustainable development) and reflect a shared *opinio juris* of the Member States.⁹⁸ Even then, objections, explanations of vote, interpretations and public statements expressed by Member States must be considered in order to contextualize and qualify consensus or majority vote decisions. However, to form international law, *opinio juris* evidenced in resolutions must be accompanied by relevant State practice that is widespread and virtually uniform.⁹⁹

The next difficulty facing the assertion that General Assembly resolutions formulate a special *opinio juris* concerning the Golan Heights is that principles of law are by nature of general application. There can be no principle of customary international law that is particular to Israel or exclusive to the Golan Heights. To assert otherwise is inimical to equality before the law, negating a fundamental principle of rule of law. No regional customary practice has developed and, even if it had, Israel would be construed as a persistent objector.¹⁰⁰

Liberia v South Africa (Judgment) [1966] ICJ Rep 98.

⁹⁶ *Texaco Overseas Petroleum Company v Government of the Libyan Arab Republic*, 1979 *Yearbook of Commercial Arbitration* 177; reproduced in 1978 *International Legal Materials* 1; 1979 *Int. L. Rep.* 389. The case considered a UN General Assembly Resolution on permanent sovereignty over natural resources with a view to determining whether it formed customary international law. It found that ‘In fact, while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions...’ [85], and ‘... the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolutions must be accepted by the members of the United Nations in order to be legally binding’ [86], and that various circumstances must be looked to to identify whether it has been accepted as a declaration of *opinio juris*. The arbitrator in this case, Prof. René Jean Dupuy, was appointed by the International Court of Justice. See also Stephen M Schwebel, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’ (1979) 73 *American Society of International Law Proceedings* 301.

⁹⁷ International Law Commission, ‘Conclusion 12.1: A resolution of or at an intergovernmental conference cannot, of itself, create a rule of customary international law’, *Draft conclusions on identification of customary international law* and accompanying commentaries adopted in 2018 by the International Law Commission, (UN, 2018) UN Doc A/73/10, [66] (hereinafter ‘ILC CIL’); <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf>.

⁹⁸ ILC CIL Conclusion 12 notes that such a resolution may provide ‘evidence for determining the existence and content of a rule (12.2), and that it ‘may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as a law (opinion juris)’ (12.3); *ibid*. The International Court of Justice articulated this view in its earlier *Nuclear Weapons advisory opinion*: ‘[I]t is necessary to look at its content and the conditions of ... [a General Assembly Resolutions] adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule’, *Legality of the Use or Threat of Nuclear Weapons* [1996] ICJ Rep, 254–255, [70]. See also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14, 99–100 [188], and Schwebel (n 96).

⁹⁹ ILC CIL, Conclusion 10, *Draft conclusions on identification of customary international law* and accompanying commentaries adopted in 2018 by the International Law Commission, (n 98). It concludes that ‘Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: ... conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference’. See also *North Sea Continental Shelf Cases (Germany v Denmark) (Judgement)* [1969] ICJ Rep 3, 43.

¹⁰⁰ A particular regional or local customary international law can apply in circumstances where there is a general practice

Even the merely moral authority of UNGA resolutions is diminished in the area of the Arab-Israel conflict by the prevalence of widely acknowledged inbuilt politicisation within UN institutions. Economic and political pressure is exerted by the Organization of Islamic Cooperation (OIC) members that comprise almost a third of the UN membership,¹⁰¹ and influence other UN Member States with convergent interests, such as their neighbouring States¹⁰² and allies,¹⁰³ and oil-dependent trading partners.¹⁰⁴ Yet further countries simply acquiesce to this bias to remain 'within the consensus'.¹⁰⁵ Thus, condemnation of Israel is a widely recognised price for doing business in UN negotiations. The broader political bias of UN members against the Jewish State has been noted in formal statements made by the UN's highest level officials, including consecutive Secretaries-General¹⁰⁶ who condemned the recognised bias.¹⁰⁷

H. International law did not reward an aggressor with restoration of lost territory

It is bad policy to reward perpetrators of wars of aggression. International law has not done so in the past. Indeed, State practice demonstrates that aggression leads to forfeiture of the aggressor's territory. States that failed in their war of aggression in World War I suffered territorial losses, illustrated by break ups of the Ottoman Empire and of the Austro-Hungarian Empire,¹⁰⁸ and loss of German home territories¹⁰⁹ and of German colonial territories to other trustees.¹¹⁰ In World War II, defeated Axis countries lost territory to Allied Forces: Japan lost

among the States concerned and is accepted as binding by them among themselves; see ILC CIL Conclusion 16 (n 98). However, there is no such regional custom applicable for the Golan Heights and the ILC CIL maintain that a persistent objector to a supposed rule is not subject to that rule (Conclusion 15.1).

- ¹⁰¹ The Organization of Islamic Cooperation comprises 56 of the 193 member States of the UN. See United Nations, *Member States* (online, 2011) <<https://www.un.org/en/member-states/>>.
- ¹⁰² Neighbouring States of members of the Organization of Islamic Cooperation are primarily the 54 members of the Africa regional bloc (28% of UN members) and the 53 members of the Asia bloc (27.5% of UN members).
- ¹⁰³ The Arab League forms a market of 320 million people with considerable purchasing power as well as wealth. For example, British-Arab trade and investment excels in education, training, armaments, management, banking services, oil, etc - <<https://www.abcc.org.uk/>>; see also French economic, cultural and strategic engagement in Africa - <<https://www.lorientlejour.com/article/1121294/la-france-puissance-musulmane-.html>>.
- ¹⁰⁴ China, India, Japan and South Korea collectively are the world's gross largest importers of oil and all East and South Asian industrial economies are heavily dependent upon oil for energy fuel imported from the Persian Gulf (where the littoral States are primarily Arab League members).
- ¹⁰⁵ Eg New Zealand's sponsorship of SC resolution 2334, UN Doc S/RES/2334 (23 December 2016), demonstrated an instance of a country without substantial material or religious interests in the status of Jerusalem seeking a leadership profile safely located within this UN consensus.
- ¹⁰⁶ The three most recent UN Secretaries-General - Antonio Guterres, Ban Ki Moon and Kofi Anan, - have critiqued organs of the UN for anti-Israel bias: Toi Staff and AFP, 'UN chief vows to stand up against anti-Israel bias, anti-Semitism', *Times of Israel* (online, 24 April 2017) <<https://www.timesofisrael.com/un-chief-vows-to-stand-up-against-anti-israel-bias-anti-semitism/>>; United Nations, 'Secretary-General Urges Human Rights Activists to 'Fill Leadership Vacuum', Hold World Leaders to Account, in Address to International Day Event' (Press Release, SG/SM/10788-HR/4909-OBV/601, online, 8 December 2006) <<https://www.un.org/press/en/2006/sgsm10788.doc.htm>>; United Nations, 'Secretary-General urges Human Rights Council to Take Responsibilities Seriously, Stresses Importance of Considering all Violations Equally' (Press Release, SG/SM/11053-HRC/8, online, 20 June 2007) <<https://www.un.org/press/en/2007/sgsm11053.doc.htm>>.
- ¹⁰⁷ US permanent representatives to the UN have also critiqued UN bias against Israel, eg Allen Cone, 'Nikki Haley in farewell talk: UN hopelessly biased against Israel', *UPI* (online, 19 December 2018) <https://www.upi.com/Top_News/World-News/2018/12/19/Nikki-Haley-in-farewell-talk-UN-hopelessly-biased-against-Israel/8191545193039/>.
- ¹⁰⁸ The Austro-Hungarian Empire collapsed and the Ottomans made territorial concessions under Treaty of Lausanne; see Norman Davies, *Europe: A History* (Pimlico, 1997) 932, 937.
- ¹⁰⁹ Eg Imperial Germany ceded Alsace to France, and Schleswig to Denmark; see *ibid* 909, 931.
- ¹¹⁰ Eg South West (Namibia) to South Africa and East Africa to Britain and Papua New Guinea to Australia.

Pacific islands (South Sakalin and the Kuriles to the Soviet Union, and other Pacific islands to the USA) and colonial Manchukuo to China,¹¹¹ while Germany lost more sovereign land in Europe (Danzig to Poland and Konigsburg to the Soviet Union). Similarly, the Netherlands, Greece and Yugoslavia acquired border territory from Germany and Italy.¹¹²

Scholars asserting that international law prohibits the acquisition of territory in an armed conflict altogether, even if conducted in self-defence tend to ignore the distinction between use of force in aggression or in self-defence. Kohen, in an encyclopedia entry on conquest, provides a sentence asserting that ‘no exception to the prohibition in the case of self-defence can be validly invoked as a justification of conquest, since its aim is limited to expelling the aggressor, and does not extend to the enlargement of one’s territory’. This simplistic rationale ignores factors such as repeated aggression, strategic defences and geoformation.¹¹³ Jennings provided more extensive treatment of acquisition of territory by lawful use of force.¹¹⁴ He noted the authority of the 8th edition of Oppenheim supported the proposition and he could cite no legal authorities against it.¹¹⁵ However, Jennings regarded the proposition that acquisition in self-defence is lawful with ‘suspicion’ and formulated legal policy reasons against it.¹¹⁶ His formulations do not contemplate situations such the ongoing threat posed from the Syrian Golan Heights and are irrelevant to it.

The temporal commencement of the proposed comprehensive prohibition on acquisition of territory by means of lawful self-defence also requires careful examination. It seems to have gathered support in the 1970s. Kohen notes that transfers of German territory conquered by the Soviet Union in self-defence were legally acceptable at the end of the Second World War and were formalised into treaty law in 1970.¹¹⁷ The International Law Commission in 1950 endorsed the legality of conquest of territory, unless by aggression or in violation of the UN Charter.¹¹⁸ At the time, in a defensive war, South Korea acquired control of territory north of its prior border at the 38th parallel with North Korea. The eighth edition of Oppenheim in 1955 opined that such acquisitions were lawful. Jennings in 1963 had no legal authority against them. By 1970, the UNGA resolved on the illegality of a ‘threat or use of force against the territorial integrity or political independence of any State ...’¹¹⁹ but its formulation strongly implies exclusion of lawful self-defence from the ‘use of force’ as its formulation is in a context of explicit references to threats against another State’s territorial

¹¹¹ Jonathan Fenby, *Modern China - the Fall and Rise of a Great Power, 1850 to the Present* (HarperCollins, 2008) 327.

¹¹² Mor observes that ‘[i]n 1947, peace treaties were concluded that took away land from Finland, Hungary, Romania, and Bulgaria while, in the same year, Italy made concessions to France on the Alps and transferred islands previously in its possession to Albania and Greece. In 1954, Italy was forced to accept the partition of Istria with Yugoslavia precipitating an exodus of nearly a quarter million ethnic Italians from the ceded territory. These changes were only finalized in a treaty in 1975, and the much more dramatic territorial changes in Germany were only finally ratified in treaties in 1990’ - Shany Mor, ‘The Golan Heights and the Depths of Hypocrisy’, *Tablet* (online, 3 April 2019) <<https://www.tabletmag.com/sections/israel-middle-east/articles/golan-hypocrisy-international-norms>>.

¹¹³ Marcelo G Kohen, ‘Conquest’ in *Max Planck Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2015) [12].

¹¹⁴ Robert Y Jennings, *The Acquisition of Territory International Law* (Manchester University Press, 1963).

¹¹⁵ *Ibid* 54, citing H Lauterpacht, *Oppenheim’s International Law* (Longmans, 8th ed, 1955) vol 1, 574-5.

¹¹⁶ Jennings (n 114) 55-56.

¹¹⁷ Kohen (n 113) [16].

¹¹⁸ International Law Commission, ‘Preparation of a Draft Code of Offences against the Peace and Security of Mankind’ (1951) *Yearbook of International Law Commission* 136, UN Doc A/CN.4/SER.A/1950; Kontorovich ‘Resolution 242’, (n 92) 141-3.

¹¹⁹ UNGA Res 2625 (XXV), ‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States’, principle 1; <<http://www.un-documents.net/a25r2625.htm>>.

integrity and to aggression. Korman suggests that, by 1982, the United States position also indicated the illegality of acquisition of territory by defensive force.¹²⁰

As pointed out by Kontorovich, however, assertions that international law now prohibits acquisition of sovereignty in the Golan Heights through defensive war typically neglect intertemporal considerations and do not identify exactly when the proposed prohibition became international law.¹²¹ In 1967, when Israel conquered the Golan Heights in a defensive war, there was no prohibition on consequential acquisition of territory.¹²² An infeasible Syrian right to the Golan Heights under international law, despite three aggressive wars and repeated lesser assaults on Israel, grants an aggressor rewards for illegal acts and is implausible because it is plainly wrong – politically and morally.¹²³ Legally, the purported right did not exist. Its framing to exclude self-defence, in a circumstance exclusively applicable to war against Israel (there being no similar cases), and its crafting soon after 1967 to apply (retrospectively) to those territories lost by Arab aggressor States at that time, demonstrate that the assertion is dubious.

I. International law permits exceptions in situations of necessity

A lawful ‘situation of necessity’ legitimates actions that might otherwise, *in arguendo*, be considered unlawful. Necessity is codified by the International Law Commission and endorsed by the International Court of Justice as a circumstance precluding wrongfulness. The International Law Commission recognised a ‘situation of necessity’ as applying where the prima facie unlawful action is ‘(a) ... the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole’.¹²⁴

¹²⁰ Sharon Korman, *The Right of Conquest the Acquisition of Territory by Force in the 21st Century* (Clarendon Press, 1996) 243, 262-3. Korman’s analysis was based on her interpretation of the US attitude to the Golan Heights, which has now been officially negated.

¹²¹ See, for example, the lack of temporal consideration in analysis by Eliav Lieblich, ‘The Golan Heights and the Perils of “Defensive Annexation”’, *Just Security* (online, 4 April 2019) <<https://www.justsecurity.org/63491/the-golan-heights-and-the-perils-of-defensive-annexation/>>.

¹²² Kontorovich observes that, where international law has not set a restraining rule, the principle of *non liquet* applies, meaning that ‘States remain free to act’; citing S.S. Lotus (France v Turkey) Judgement (1927) PCIJ Series A no. 10, ICGJ 248 (PCIJ 1927) 7 September 1927 - Eugene Kontorovich, ‘International Law and the Recognition of Israeli Sovereignty in the Golan Heights’ Prepared Written Testimony before the United States House of Representatives Committee on Oversight, Subcommittee on National Security 17 July 2018, in House of Representatives Subcommittee on National Security of the Committee on Oversight and Government Reform, *A New Horizon in U.S.-Israel Relations: From An American Embassy In Jerusalem To Potential Recognition Of Israeli Sovereignty Over The Golan Heights*, Hearing Before the 115th Congress, Second Session, 17 July 2018, Serial Number 115-97, 32, 33 <<https://oversight.house.gov/legislation/hearings/a-new-horizon-in-us-israel-relations-from-an-american-embassy-in-jerusalem-to>>.

¹²³ This is an application of the legal principle *ex injuria non-oritur*, ie no legal right emerges for benefit of a wrong; see Stephen M Schwebel, ‘What Weight to Conquest?’ in Stephen M Schwebel, *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel* (Cambridge University Press, 1994) 523 (originally published as an editorial comment, see Stephen M Schwebel, ‘What Weight to Conquest?’ (1970) 64 *American Journal of International Law* 344, 346-7).

¹²⁴ International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ [2001] 2(2) *Yearbook of the International Law Commission*, article 25(1), <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>; see also Roman Boed, ‘State of necessity as a justification for internationally wrongful conduct’ (2000) 3 *Yale Human Rights and Development Law Journal* 1; Attila Tanzi ‘Necessity, State of’ *Max Planck Encyclopaedia of Public International Law* (February 2013). Although necessity cannot be invoked to preclude the wrongfulness of violations of peremptory norms (see article 26 of the Draft Articles), the analysis in section H above

The authenticity in customary international law of the defence ‘on an exceptional basis’ of a situation of necessity was recognised by the International Court of Justice in the *Gabcikovo-Nagymaros Case*.¹²⁵ In that case, the International Court of Justice considered that the act, otherwise in breach of international law must (1) protect an ‘essential interest’ of the State which is the author of the act, be the ‘only means’ of safeguarding that interest; and must not ‘seriously impair an essential interest’ of the State towards which the obligation existed; and that (2) the essential interest of the State in breach of must have been threatened by a ‘grave and imminent peril’, which it did not contribute to the occurrence of.¹²⁶ These criteria would preclude wrongfulness of Israeli annexation of the Golan Heights, supposing that annexation were otherwise unlawful.

In effect, Israeli control of the Golan Heights is a military necessity for the long-term future. The ongoing hostility from Syria, and the vulnerability of Israel’s heartland to attacks from the Heights establish a clear military case of the necessity for Israeli control of the Golan Heights. It is difficult to make a practical argument against Israel continuing to hold at the very least the slopes and ridges that overlook Israeli communities below them.

J. De facto annexation occurring incrementally

Although the Golan Heights are not formally annexed by Israel, the application of Israeli domestic law since 1981 under the *Golan Heights Law* has legal effects that require examination. The law’s assumption of implicit legal authority under Israeli domestic law and its cumulative legal effects across four decades suggest *de facto* annexation. There was in the past considerable Israeli domestic opposition to the 1981 *Golan Heights Law*, due to its possible obstruction of peace negotiations with Syria. However, over the past half-century, retention of the Golan Heights has gained widespread and bipartisan support in Israel.¹²⁷ Israeli control of the Golan Heights will likely continue indefinitely, given the enduring hostility and volatility of Syria. Druze residents of the Golan Heights increasingly take up citizenship and see benefits of Israeli administration as preferable to Syrian administration. In effect, practical conditions on the ground within the Golan Heights that promote Israel’s assertion of its international legal claims in the area are developing over time, as the local populace accommodates itself to Israeli domestic law and administration. Thus, annexation is occurring *de facto*, in an incremental informal manner.

K. Israel may lawfully annex the Golan Heights

In conclusion, based on the cumulative circumstances described above, an Israeli *de jure* annexation of the Golan Heights would be lawful. It would cure the illegality under the laws of military occupation of the *Golan Heights Law* as the military occupation would formally terminate upon annexation transferring sovereignty over the Golan Heights to civil government in Israel.

indicates absence of a peremptory norm prohibiting defensive acquisition of territory.

¹²⁵ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

¹²⁶ *Ibid* 63-67.

¹²⁷ William Cubbison, ‘What do Israelis think about the Golan Heights?’, *Israel Democracy Institute* (online, 31 March 2019) <<https://en.idi.org.il/articles/26456>>.

VII UNITED STATES RECOGNITION OF ISRAELI SOVEREIGNTY AND THE RESPONSES

The White House formally recognised the Golan as under Israeli sovereign territory when President Donald Trump issued an Executive Declaration on 25 March 2019¹²⁸ but presaged that with a Twitter announcement *@realDonaldTrump*, four days earlier.¹²⁹ Another curious aspect of this recognition is that Israel itself had denied that it has formally annexed the Golan Heights and has not claimed sovereignty.

Foreign policy drives the making of decisions to recognize the legitimacy of a foreign State, a foreign government or a foreign territory. Recognition is a foreign policy instrument with legal impacts that include formalising international legal status and legitimating exercises of foreign governmental authority.¹³⁰ As the executive arm of government conducts foreign relations, so recognition is an instrument exercised usually by the executive arm. The White House recognition of Israeli sovereignty thus implemented its foreign policy in the Middle East.

The proclamation of recognition of Israeli sovereignty was consistent with existing United States policy for almost a half century. The policy of the Gerald Ford administration, as expressed in a letter to Israeli Prime Minister Yitzhak Rabin on 1 September 1975 was that 'a peace agreement must assure Israel's security from attack from the Golan Heights' and that the USA 'will give great weight to Israel's position that any peace agreement with Syria must be predicated on Israel remaining on the Golan Heights'.¹³¹ Another letter of assurance was written during the HW Bush administration, by Secretary of State James Baker to Israeli Prime Minister Yitzhak Shamir in the lead up to the 1991 Madrid peace conference. It confirmed the commitment made in the Ford letter concerning the Golan Heights.¹³² In 1996 also, during the Bill Clinton administration, the Ford letter was reconfirmed by letter from Secretary of State Warren Christopher to Prime Minister Benjamin Netanyahu on 19

¹²⁸ Above n 1.

¹²⁹ *@realDonaldTrump* (Donald J Trump) (Twitter, 21 March 2019, 9:50am AEST) <<https://twitter.com/realdonaldtrump/status/1108772952814899200?lang=en>>. 'After 52 years it is time for the United States to fully recognize Israel's Sovereignty over the Golan Heights, which is of critical strategic and security importance to the State of Israel and Regional Stability!'

¹³⁰ Recognition of a State as such is usually considered either a declaratory or constitutive factor in its status as a State; see James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 26. Recognition of an area as part of a State's territory legitimates its exercise of jurisdiction in that area, with implications under trade agreements for tariffs and rules of origin for products of that territory. See Guy Harpaz, 'The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law' (2004) 38(6) *Journal of World Trade* 1049, 1049-1058. A recent Canadian Federal Court decision (under appeal at this time of writing) has found that wines produced in the Golan Heights are not products of Israel, see *Kattenburg v Canada (Attorney-General)* 2019 FC 1003 (29 July 2019) <<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/419068/index.do>>.

¹³¹ '... The U.S. will support the position that an overall settlement with Syria in the framework of a peace agreement must assure Israel's security from attack from the Golan Heights. The U.S. further supports the position that a just and lasting peace, which remains our objective, must be acceptable to both sides. The U.S. has not developed a final position on the borders. Should it do so it will give great weight to Israel's position that any peace agreement with Syria must be predicated on Israel remaining on the Golan Heights. My view in this regard was stated in our conversation of September 13, 1974 ...' - Gerald Ford letter to Yitzhak Rabin (1 September 1975) <<https://www.jewishvirtuallibrary.org/president-ford-letter-to-israeli-prime-minister-rabin-september-1975>>.

¹³² '... as you express a special concern about the Golan Heights. In this context the United States continues to stand behind the assurances given by Pres Ford to Prime Minister Rabin on September 1, 1975'; see 'U.S. letter of assurance to Israel, 1991' quoted in Terje Rod Larson, Nur Laiq and Fabrice Aidan (eds), *The Search for Peace in the Arab-Israeli Conflict a Compilation of Documents and Analysis* (Oxford University Press, 2014) 438-40.

September 1996.¹³³ As noted by Dore Gold, these letters were a standing statement of United States policy.¹³⁴

VIII WIDER RECOGNITION OF ISRAELI SOVEREIGNTY OVER THE GOLAN HEIGHTS

Should other countries follow the USA to recognise Israel's *de jure* sovereignty over the Golan Heights? Principles of international law set out notionally universal rules applicable to all countries. Legal debates about them occur due to their frequent indeterminacy. The legal analysis above concludes that recognition is a legally sound course through this international thicket and that the case for the legitimacy of Israeli annexation of the Golan Heights is persuasive. It is a legal conclusion that is applicable generally for all countries.

The formal recognition by the White House of Israeli sovereignty in the Golan Heights was condemned by European Union countries, the Arab League, Russia, Iran and Syria.¹³⁵ The objections of the European Union member countries appear driven by foreign policy doctrine.¹³⁶ Russia and Iran are heavily engaged Syrian military allies in the Syrian civil war and have clear Syrian interests. Although Arab leaders condemned the declaration of recognition,¹³⁷ there were no condemnatory resolutions against the move passed in the UNGA. This quietude stands in contrast to fierce condemnation in December 2017 of the White House recognition of Jerusalem as the capital of Israel.¹³⁸ We might conclude from this contrast that recognition of Israeli sovereignty over the Golan Heights was regarded as less objectionable by the Arab League, and therefore in the UNGA. Syria is currently suspended from the Arab League because it is aligned with Iran, which is Persian and Shiite, and both act against their Sunni Arab residents or neighbouring countries.

Although the General Assembly annually adopts a list of condemnations of actions of Israel, including its administration in the Golan Heights,¹³⁹ yet individual countries' actions are not typically in harmony with that majority bloc chorus and the security and ethical considerations for every country can vary in their relations with Israel according to the unique situation of each. Security and ethical factors for or against recognition of Israeli sovereignty

¹³³ Gold (n 21).

¹³⁴ Ibid.

¹³⁵ United Nations, 'Security Council Members Regret Decision by United States to Recognize Israel's Sovereignty over Occupied Syrian Golan' (Media Release, SC/1373, online, 27 March 2019) <<https://www.un.org/press/en/2019/sc13753.doc.htm>>.

¹³⁶ 'The position of the European Union as regards the status of the Golan Heights has not changed. In line with the international law and UN Security Council resolutions 242 and 497, the European Union does not recognize Israeli sovereignty over the occupied Golan Heights' - Council of the European Union, 'Declaration by the High Representative on behalf of the EU on the Golan Heights' (Press Release, online, 27 March 2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/03/27/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-golan-heights/>>; Tova Lazarov and Omri Nahmias 'All 28 EU states reject Israeli sovereignty over the Golan Heights', *The Jerusalem Post* (online, 31 March 2019) <<https://www.jpost.com/Breaking-News/EU-We-do-not-recognize-Israelis-sovereignty-over-the-Golan-Heights-584859>>.

¹³⁷ Reuters, 'Arab League: Trump's recognition of Golan Heights as Israeli doesn't change its status' (online, 25 March 2019) < <https://www.reuters.com/article/us-usa-golanheights-arabs/Arab-league-trumps-recognition-of-golan-heights-as-israeli-doesnt-change-its-status-idUSKCN1R627B> >

¹³⁸ The UNGA condemned recognition by the USA of Jerusalem as the capital of Israel. See *Status of Jerusalem*, GA Res ES-10/L.22, UN Doc A/RES/ES-10/L.22 (21 December 2017).

¹³⁹ The UN Information System on Palestine administered by the UN's bespoke Division on Palestinian Rights records all UN decisions on Palestine, including the Golan Heights although the area was previously a part of Syria; Golan Heights Archives - Question of Palestine, <sun.org>.

in the Golan Heights are argued here to be mostly determined by common factors shared by all countries, however. This is the case because Israeli sovereignty over the Golan Heights would promote security stability more broadly in the Middle East, as suggested below.

Considering security, we might ask whether continuing Israeli control of the Golan Heights will increase or decrease the likelihood of war with Syria, and whether such war would be more severe or less than in the past? The history shows that Syria initiated war with Israel three times during the 21 years it controlled the Golan Heights and is since embroiled in a decade of civil war, and that there has been no war there during the 52 years that Israel has controlled it. Presumably, there is less likelihood of war with the Golan Heights continuing under Israeli control. If Syria now controlled the Golan Heights, the volatility of its civil war would greatly increase the likelihood of its violence having spilled over into war with Israel. Further, if Syria were to control the Golan and initiate a war against Israel, the mutually destructive impact of military technology would likely be far greater today, especially given the likely involvement of Hezbollah, the Iranian Revolutionary Guard Corps, and other entrenched Iranian-controlled militias regionally. Their opposition to the existence of Israel increases the probability of a war that would engulf also Lebanon, Iraq and Iran. Thus, global security is very clearly protected by continuation of Israeli control.

On evaluation of ethics in international relations, Syria has a weak case. It launched aggressive wars, allegedly commits massive war crimes against its own citizens, is a politically unstable military dictatorship, propped up by foreign hegemony (Iran and Russia), and dominated internally by extremist militias. Syria resists negotiations to make peace with Israel and has facilitated the entrenchment of foreign militias for future assaults on Israel. Transfer of the military vantage and water resources of the Golan Heights to Syria can be argued only within a framework that maintains as its imperative the destruction of Israel.

Furthermore, the ethical notion of supersession of injustice suggests that, when considering redress for an historic injustice to a local indigenous population, changing circumstances on the ground effect a shift in applicable ethical factors.¹⁴⁰ In the case of the Golan Heights, the local Druze population of 27,000 does not claim an independent sovereignty competing with Israeli or Syrian sovereignty. A decade of Syrian civil war is a factor that inclines some of the Druze population against transfer to Syria of control over the Golan Heights. In addition, the interests of the 22,000 Jews now living in the Golan Heights carries weight in ethical considerations of the region's future. They also are disinclined to be transferred to Syrian control, due to Syrian internal strife, persecution of Jews and the insecurity of any potential peace. The 50,000 Arab Syrian refugees who fled in 1967 from the Golan Heights have resettled in Syria and, of 20,000 Jews who fled Syria, 4,500 of them resettled in Israel.¹⁴¹ The historical Jewish presence in the Golan Heights and the superseding circumstances of Jewish population there today and the benign nature of the current administration form a powerful ethical case for ongoing Israeli control.

The political considerations for and against recognition of Israeli sovereignty over the Golan Heights are for each country's foreign minister to decide in accordance with geopolitical alliances and relationships particular to each country. However, some general observations are universally relevant. In relation to political considerations, a minister

¹⁴⁰ Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4, 4-28; Jeremy Waldron, 'Settlement, Return and the Supersession Thesis' (2004) 5(2) *Theoretical Enquiries in Law* 236.

¹⁴¹ See above n 14.

of foreign affairs would likely weigh the risks of political retaliation for departure from the country's voting record in the UN if the country has usually voted with anti-Israel resolutions. The lack of significant Arab protest against the recognition of Israeli sovereignty by the Trump White House suggests that the risk is currently not high. Nevertheless, the counterargument can be made that discreet inaction by the minister of foreign affairs on the question of recognition would maintain the ambiguous status quo in the short term, which has its political attractions: it forestalls regional war, maintains Israeli control, shelters within the 'safe space' of UN consensus and avoids potential political protest. Nevertheless, the 50 years of ongoing ambiguity around the legality of Israeli control contributes to instability in the longer term and is impossible to maintain indefinitely. A far-sighted political analysis suggests that inaction is increasingly dangerous in the current volatile Syrian situation and that the moment is right to stabilise and concretise Israeli control.

In relation to economic and trade considerations, recognition of Israeli sovereignty might carry risks of boycotts. The relative size and importance of national trade with Syria as compared to trade with Israel would need to be evaluated.¹⁴² Syria is a minor economy and its current Iranian and Russian allies provide little foreign development aid. Wider retaliatory trade actions by Syrian-allied circles of predominantly Arab, Muslim or European countries might also be a concern for smaller countries recognising Israeli sovereignty over the Golan Heights. The gravity of this risk depends upon the size of the national economy and the relative severity of exposure to possible retaliatory action,¹⁴³ although some small and disengaged economies might not be impacted.¹⁴⁴ Nevertheless, it seems unlikely that retaliation would be imposed by Arab League member countries in light of Syria's current suspension from the Arab League.¹⁴⁵ Trade with and aid from the European Union is unlikely to be affected because recognition of Israeli territorial sovereignty over the Golan Heights is not a direct or central concern in European bilateral relationships. In contrast, global trade destabilisation and energy price inflation (especially impacting East Asian and European oil importing countries) would inevitably be triggered by intense regional wars that would

¹⁴² Syria's annual GDP (by purchasing power parity) is declining and was estimated in 2015 to have been USD \$50.28 billion. See Central Intelligence Agency, *The World Factbook: Syria* (online, 7 October 2019) <<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>>. In contrast, Israel's annual GDP in 2015 was 6-fold higher and is growing: USD \$295.3 billion, see Central Intelligence Agency, *The World Fact Book: Israel* (online, 7 October 2019) <<https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>>.

¹⁴³ For example, Australia was threatened with cancellation of a free trade deal with Indonesia when it recognised West Jerusalem as Israel's capital. See James Massolla and Kaaruni Rompies, 'Australia-Indonesia free trade deal safe and now but Malaysian criticism swift', *The Sydney Morning Herald* (online, 17 October 2018) <<https://www.smh.com.au/world/asia/australia-indonesia-free-trade-deal-safe-for-now-20181017-p50a6z.html>>. Brazil's stated intention in 2019 to recognize Jerusalem as the capital of Israel came under effective Arab economic pressure to abort recognition: see Dan Williams, 'Brazil opens trade mission in Jerusalem, short of full embassy move', *Reuters* (online, 31 March 2019) <<https://www.reuters.com/article/us-israel-brazil/brazil-opens-israel-trade-mission-in-jerusalem-short-of-full-embassy-move-idUSKCN1RC097>>.

¹⁴⁴ Eg Pacific small island countries vote against the consensus in the UN General Assembly, and Nauru has recently recognised Jerusalem as the capital of Israel. 'Palestinians condemn Honduras, Nauru moves on Jerusalem status', *Al Jazeera* (online, 30 August 2019) <<https://www.aljazeera.com/news/2019/08/palestinians-condemn-honduras-nauru-moves-jerusalem-status-190829161042058.html>>.

¹⁴⁵ Syrian membership in the Arab League has been suspended since 2011, see Ben Hubbard, 'The Golan Heights Was Once an Arab Rallying Cry. Not Anymore.', *The New York Times* (online, 22 March 2019) <<https://www.nytimes.com/2019/03/22/world/middleeast/golan-heights-israel-syria.html>>; Seth Frantzman, 'Does the Middle East care about Trump's Golan announcement?', *The Jerusalem Post* (online, 21 March 2019) <<https://www.jpost.com/Israel-News/Does-the-Middle-East-care-about-Trumps-Golan-announcement-584223>>.

follow from renewed Syrian control over the Golan Heights and armed attacks on Israel from there.

It is historically unique that defensively captured territory remains in a legal impasse, more than half a century after the aggressor lost three wars, even more remarkably, in circumstances where the three wars were launched from that very strategically important territory. As acknowledged above, this legal impasse maintains Israeli control, which is conducive to peace. Nevertheless, regional instability and Syrian hostility are exacerbated by the ongoing legal ambiguity. Current ethical, trade and economic considerations, which are common to most countries vis-à-vis Syria, suggest that this is an opportune moment for wider recognition of Israeli sovereignty.

IX CONCLUSION

The Golan Heights supply a reliable portion of regionally shared water and are of great military significance. In a region torn by violent strife, they offer either a defence bastion or an attack vantage. During the half-century under Israeli control, they have remained relatively peaceful. In contrast, Syria instigated three wars and intermittently shelled Israel in the 20th century and its civil war is spilling into cross-border hostilities in the 21st century.

Under the international law of armed conflict, continuing Israeli occupation of the Golan Heights is lawful. Nevertheless, the Israeli 1981 *Golan Heights Law* replacing Syrian law is not. It is part of a process of Israeli *de facto* annexation of the Golan Heights that is occurring by gradual steps. To resolve the current legal status of the western Golan Heights under the international law of armed conflict, formal annexation of the Golan Heights could end the illegality of the *Golan Heights Law*, transitioning to *de jure* Israeli sovereign title.

The legal case for recognising the legality of Israeli annexation of the Golan Heights is strong. The relevant United Nations resolutions do not explicitly require transfer of the Golan Heights to Syria and are recommendatory. Their extrinsic legal effects do not in themselves establish new binding international laws peculiar to the Golan Heights. More fundamentally, the Golan Heights were occupied in defensive wars and principles of international law do not penalise self-defence. Indeed, the legal ceding of territory by defeated aggressors remained the norm after Syria's defeat in 1967. Furthermore, Israeli control occurs in a situation of ongoing legal necessity that promotes regional security. Nor do most western Golan Heights inhabitants aspire to live under Syrian sovereignty. Facts on the ground have changed over the past half century. Simply put, Syrian sovereignty there has effectively been superseded.

In deciding whether to recognise Israeli *de jure* sovereignty over the Golan Heights, the global security and ethical and legal considerations are essentially common for all countries. Economic or political retaliation risks are particular to each country's situation, but the points of vulnerability and risks are negligible. Thus, wider legal recognition of Israeli sovereignty in the Golan Heights would be consistent with international law and would promote regional peace.