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Rules of "Disengagement": Relating the Establishment of Palestinian Gaza to Israel's Right to Exercise Self-Defense as Interpreted by the International Court of Justice at the Hague

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ESSAY

RULES OF "DISENGAGEMENT": RELATING THE ESTABLISHMENT OF PALESTINIAN GAZA TO ISRAEL'S RIGHT TO EXERCISE SELF-DEFENSE AS INTERPRETED BY THE INTERNATIONAL COURT OF JUSTICE AT THE HAGUE

*Robert A. Caplen**

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“Gaza—we hope—will serve as a model of how the Palestinian Authority is able to govern, and to bring real economic progress, calm, order, and hope, to its people.”¹

I. INTRODUCTION

One historian presciently observed in 1907 that “the fate of nations [i]s mirrored” in Gaza² “as long as the center of history remain[s] in the Mediterranean world.”³ Given Israel’s recent Disengagement⁴ from the Gaza Strip,⁵ which has single-handedly “changed the political landscape

1. Silvan Shalom, Israeli Foreign Minister, Address at the Washington Institute for Near East Policy (Sept. 13, 2005) (transcript available on Lexis Nexus).

2. This Essay uses the term Gaza to describe territories in existence prior to the first Arab-Israeli War of 1948. For a discussion of the 1948 war, see *infra* Part II.B.

3. MARTIN A. MEYER, HISTORY OF THE CITY OF GAZA FROM THE EARLIEST TIMES TO THE PRESENT DAY 4 (1907).

4. “Disengagement” refers to Israel’s conclusion that “there is currently no reliable Palestinian partner with which it can make progress in a bilateral peace process. Accordingly, it has developed a plan of unilateral disengagement.” ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE DISENGAGEMENT PLAN: GENERAL OUTLINE [hereinafter DISENGAGEMENT PLAN], available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> (last visited May 8, 2006). Use of the term ‘unilateral’ from ‘unilateral Disengagement’ “had been dropped silently and without fanfare.” Peter Berkowitz, *Rules of Disengagement; Ariel Sharon Sticks to the Road Map*, DAILY STANDARD, Dec. 17, 2004. Disengagement involves, among various other commitments, the complete evacuation by Israel from the Gaza Strip. DISENGAGEMENT PLAN, *supra*.

5. Although former Israeli Prime Ministers Yitzhak Rabin and Shimon Peres developed a policy centering around “the basic premise that Israel would disengage from most of the territories occupied in 1967,” Uri Savir, *All Praise to Sharon (and Peres)*, JERUSALEM POST, Aug. 24, 2005, at 15, this Essay focuses solely upon Disengagement as it relates to the Gaza Strip. The term “Gaza

in Israel and the Palestinian territories,"⁶ such an assessment of Gaza's importance could not be more applicable nearly one hundred years later. Disengagement has not only been cited as essential to Israel's strategic security interests⁷ but it "has [also] been designed to benefit the Palestinian people."⁸ The U.S. Department of State forecasted that Disengagement will "revitalize the Palestinian economy . . . help the Palestinian security forces restore law and order and, overall . . . advance the . . . vision of two states living side by side."⁹ Moreover, a feeling of cautious optimism for peace has reemerged¹⁰ since Disengagement has the potential "to end Palestinian terrorism . . . [by] end[ing] Israel's presence in the territories."¹¹

Despite prospects for facilitating a peaceful resolution to the volatile Israeli-Palestinian dynamic, Disengagement has "far from reduce[ed] the terrorists' bloodlust" against Israelis.¹² Less than two weeks after the completion of Disengagement in September 2005, Palestinian extremists, in "the largest explosion of violence since Israel withdrew its settlers and forces from the Gaza Strip," launched a series of rockets into Israeli residential neighborhoods.¹³ The attack, along with any further violence originating from within the Gaza Strip, stokes the embers of an unsettled debate over the law of self-defense¹⁴ as it pertains to Israel's efforts to protect its citizens from Palestinian terrorism,¹⁵ particularly in light of

Strip" is used throughout this Essay to designate territorial boundaries in existence from 1948 through September 2005. *See infra* text accompanying note 284.

6. Alon Ben-Meir, *Post-Withdrawal Stress*, available at <http://www.globes.co.il/serveen/globes/docview.asp?did=1000014525&fid=980> (last visited May 8, 2006).

7. Berkowitz, *supra* note 4.

8. *Id.*

9. Adam Erel, Deputy Spokesman, *State Department Briefings*, Sept. 12, 2005 (available at Lexis Nexus).

10. *See Israeli Troops Leave Evacuated West Bank Settlements*, VOICE OF AM. NEWS, Sept. 21, 2005 ("Israel's disengagement sparked widespread hope for a return to full negotiations via the internationally-backed Roadmap Peace Plan. Both Israel and the Palestinians have welcomed a return to the plan.").

11. Jeff Jacoby, *Gaza's Final Evacuees*, BOSTON GLOBE, Sept. 1, 2005, at A19.

12. *Id.*

13. Conal Urquhart, *World: Israel Fires on Militants After Gaza Attacks*, OBSERVER, Sept. 25, 2005, at 20; *see also* Scott Wilson, *Israeli Missiles Kill 2 Hamas Members in Gaza*, WASH. POST, Sept. 25, 2005, at A29 (stating that "Israel now has double the responsibility to protect its people from Gaza attacks . . . the Palestinian Authority appears to have no inclination whatsoever of stopping them").

14. *See infra* Parts IV.B & V.A-C.

15. *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 I.L.M. 1009 (I.C.J. 2004) [hereinafter Legal Consequences]; *see also* Robert A. Caplen, Note, *Mending the "Fence": How Treatment of the Israeli-Palestinian Conflict*

recent pronouncements by the International Court of Justice (Hague Court).¹⁶

This Essay addresses the “puzzle of Gaza’s new legal status”¹⁷ by assessing the ramifications of Israel’s Disengagement from the Gaza Strip as it relates to Israel’s right of exercising self-defense. To discuss Disengagement in context, Part II provides a history of the Gaza Strip during the course of the ongoing Israeli-Palestinian conflict. Part III builds upon the historical dimension by exploring each Palestinian *Intifada*, Israel’s construction of a counterterrorism initiative,¹⁸ and the genesis of Disengagement. Part IV analyzes how the 2004 advisory opinion issued by the Hague Court presents conflicting applications of the law of self-defense since it simultaneously and inconsistently accorded Palestine both state and non-state status. Lastly, Part V evaluates Palestine’s status as a non-state actor for purposes of Israel’s right to exercise self-defense following its Disengagement from the Gaza Strip.

II. THE JUXTAPOSITION OF ISRAEL AND THE GAZA STRIP

Neither Israelis nor Palestinians “can be understood properly . . . through the prism of the present-day struggle in the Middle East.”¹⁹ Despite the general viewpoint that “deep-seated hatred between

by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense, 57 FLA. L. REV. 717, 746-69 (2005).

16. The U.N. General Assembly adopted Resolution ES-10/13 calling upon the International Court of Justice (ICJ) to issue an advisory opinion on the following legal question:

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

G.A. Res. S-10/14, U.N. GAOR, 10th Emer. Spec. Sess., 23d plen. Mtg., U.N. Doc. A/RES/ES-10/14 (2003).

17. *Now Who Takes The Blame?; The Status of Gaza*, ECONOMIST, Aug. 27, 2005.

18. In an effort to maintain objectivity, this Essay avoids use of the terms “fence,” “wall,” or “barrier” and instead uses the terms “counterterrorism initiative” and “security structure” interchangeably. For a discussion on the distinction between the terms “fence,” “wall,” and “barrier” used to describe Israel’s counterterrorism initiative, see Caplen, *supra* note 15, at 725 n.48.

19. MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 1 (1994).

Israelis and the Palestinians has been going on ad nauseam,²⁰ the current Israeli-Palestinian conflict is not derived from "or driven forward by primordial antagonisms."²¹ Rather, the conflict stems from two individual Jewish and Arab nationalism movements²² in British Mandatory Palestine following World War One that "were pursuing parallel paths."²³ Although a thorough historical assessment of the elements comprising the conflict is beyond the scope of this Essay,²⁴ an historical discussion tracing the events preceding Israel's administration²⁵ and Disengagement from the Gaza Strip provides a necessary backdrop.

A. Gaza During the British Mandate Over Palestine

Gaza, the most southern region of Palestine, "has enjoyed from the earliest times a unique position in the history" of the Middle East.²⁶ Nonetheless, it has also been described as "the forgotten man of the Middle East."²⁷ The Woodhead Commission²⁸ noted that Gaza "stretches

20. J. Gibson, *Never-Ending Hatred*, TAMPA TRIB., June 23, 2003, at 10; see also Ron Ferguson, *Listening to the Pain of Others' Tales*, HERALD (Glasgow), Jan. 31, 2002, at 18 ("Palestinians and Israelis, after almost 100 years of mutual conflict, suspicion, and hatred, have come to hold deep-seated stereotypes about one another."). *But see infra* text accompanying note 21.

21. TESSLER, *supra* note 19, at 1. It is a "common misconception that the current struggle in Palestine is an extension of an ancient blood feud, fueled by ethnic or religious antagonisms dating back hundreds of years." *Id.*; see also Caplen, *supra* note 15, at 728 ("Arabs and Jews coexisted in a state of mutual cooperation under Ottoman rule during the close of the nineteenth century.").

22. A Palestinian national movement has been traced to the late nineteenth century when a consolidation of Arab consciousness was accompanied by the development of a separate and distinct Palestinian Arab national identity. See CHERLY A. RUBENBERG, *THE PALESTINIANS: IN SEARCH OF A JUST PEACE* 3 (2003).

23. MARTIN GILBERT, *ISRAEL: A HISTORY* 67 (1998).

24. "Thousands of books have been written on various aspects and periods of the conflict." BENNY MORRIS, *RIGHTEOUS VICTIMS* xiii (1999).

25. Despite the fact that territories Israel acquired following the 1967 Six-Day War are commonly referred to and have been accepted in regular usage as the "occupied territories," see RUBENBERG, *supra* note 22, at 19 ("[T]he West Bank, Gaza, and East Jerusalem . . . [s]ince 1967, . . . collectively have been known as the Occupied Territories"), their status remains in dispute. This Essay, therefore, avoids usage of the common term "occupied territory" when referencing the Gaza Strip. For a discussion of occupation versus administration in the context of the Israeli-Palestinian conflict, see Caplen, *supra* note 15, at 746-56.

26. MEYER, *supra* note 3, at 3. Gaza "occupied a strategic position on the important trade route between Egypt and Syria," was conquered by Napoleon, and was the third largest port in Palestine. Sara Roy, *The Gaza Strip: Critical Effects of the Occupation, in OCCUPATION: ISRAEL OVER PALESTINE* 253-54 (Naseer H. Aruri ed., 1989) [hereinafter OCCUPATION].

27. SARA M. ROY, *THE GAZA STRIP: A DEMOGRAPHIC, ECONOMIC, SOCIAL AND LEGAL SURVEY* 1 (1986). In 1913, the Palestine Royal Commission noted that "[t]he road leading from Gaza . . . was only a summer track suitable for transport by camels and carts . . . villages in this area

along the Mediterranean coast from the Ramleh sub-district in the north to the Sinai border in the south-west, and extends on the east to the borders of the Hebron and Beersheba sub-districts.”²⁹ Known today as the Gaza Strip,³⁰ the territory derives its name from the fact that it is one hundred and forty square miles in size but only approximately five miles wide.³¹ One of the most densely populated regions of the world,³² the Gaza Strip was always envisioned as part of a separate Arab state in Palestine.³³

During World War One, Great Britain and France planned the post-war division of the Ottoman Empire and proposed the creation of a British Mandate over Palestine.³⁴ Following the war, the British Government committed itself to advancing both an Arab desire for self-government³⁵ as well as the establishment of a Jewish homeland in Palestine.³⁶ Mounting hostilities and violent confrontations between Jewish immigrants and indigenous Arab residents in Palestine, however, required Great Britain to

were few and thinly populated . . . many villages were deserted by their inhabitants.” Palestine Royal Commission Report, *quoted in* MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 11 (2002).

28. *See infra* text accompanying notes 51 & 52.

29. SIR JOHN WOODHEAD, PALESTINE PARTITION COMMISSION REPORT 70 (1938).

30. “Gaza City, together with one other town, eight farming villages and a few Bedouin encampments, was incorporated into an entity known as the Gaza Strip.” Roy, *supra* note 26, at 254.

31. ROY, *supra* note 27, at 1. Other sources suggest that the Gaza Strip is a four-mile wide area. *See* BAYLIS THOMAS, HOW ISRAEL WAS WON: A CONCISE HISTORY OF THE ARAB-ISRAELI CONFLICT 107 (1999); *see also* Palestinian Academic Society for the Study of International Affairs (PASSIA), at http://www.passia.org/palestine_facts/pdf/pdf2004/3-Geography.pdf (last visited May 8, 2006).

32. ROY, *supra* note 27, at 1. Approximately 60,000 Palestinians resided in Gaza prior to the 1948 Arab-Israeli War, and an additional 250,000 entered the region following the conflict. THOMAS, *supra* note 31, at 107. A 1986 survey estimated that nearly 510,000 people resided in the Gaza Strip. ROY, *supra* note 27, at 1. The Central Intelligence Agency estimated that the 2005 population of the Gaza Strip exceeded 1.3 million. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, *available at* <http://www.cia.gov/cia/publications/factbook/geos/gz.html> (last visited May 8, 2006).

33. *See infra* Parts II.A.1-2.

34. *See* Sykes-Picot Agreement of 1916, in 1 PALESTINE DOCUMENTS 20, 20 (Mahdi F. Abdul Hadi ed., 1997); *see also* ITZHAK GALNOOR, THE PARTITION OF PALESTINE 36-37 (1995). For a map depicting territorial divisions of the Ottoman Empire under the agreement, *see* HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 95 (1979).

35. *See* SAMI HADAWI, BITTER HARVEST: PALESTINE BETWEEN 1914-1979, at 9-13, 18-19 (Caravan Books 1983) (1967).

36. The Balfour Declaration expressed that “His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people.” Letter from Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), in 1 PALESTINE: DOCUMENTS, *supra* note 34, at 22.

reexamine its Mandatory policies.³⁷ The newly-established Peel Commission was assigned the responsibility to "ascertain the underlying causes of the disturbances . . . [and] to make recommendations . . . for the prevention of their recurrence."³⁸

1. The Peel Commission Plan of 1937

Noting that the conflict between Palestinian Arabs and Jews "was inherent in the situation from the outset"³⁹ and forecasting that "intensification . . . will continue,"⁴⁰ the Peel Commission determined that the British government's dual "obligations" to both the Arab and Jewish communities⁴¹ were "irreconcilable."⁴² Ultimately concluding that "[p]artition seems to offer . . . a chance of ultimate peace,"⁴³ the Peel Commission recommended frontiers for separate Jewish and Arab states, the latter of which would include "the Sub-Districts of Nablus, Ramallah, Jericho, Hebron, Gaza and Beersheba. . . ."⁴⁴ Including Gaza in the proposed Arab state provided access to the Mediterranean Sea and promoted "the interests of Arab trade and industry."⁴⁵

The Peel Commission's "revolutionary"⁴⁶ recommendation for the partition of Palestine sparked intense debate.⁴⁷ Within the Arab world, "attacks on the Peel Report increased in frequency and vehemence."⁴⁸ Most of the criticism was lodged at the proposed borders delineating

37. The Peel Commission Report summarized the situation as follows: "An irrepressible conflict has arisen between two national communities within the narrow bounds of one small country. About 1,000,000 Arabs are in strife, open or latent, with some 400,000 Jews." THE ROYAL COMMISSION REPORT 1937, reprinted in THE RISE OF ISRAEL 390 (Howard M. Sachar et al. eds., Garland Publishing 1987) (1937).

38. WOODHEAD, *supra* note 29, at 15.

39. THE ROYAL COMMISSION REPORT 1937, *supra* note 37, at 391.

40. *Id.*

41. See *supra* notes 34 & 35 and accompanying text.

42. THE ROYAL COMMISSION REPORT 1937, *supra* note 37, at 394. The Woodhead Commission, headed by Sir John Woodhead and established by the British Government in 1938, concluded that "careful study . . . [and] further examination has shown that the political, administrative and financial difficulties involved in the proposal to create independent Arab and Jewish States inside Palestine are so great that this solution of the problem is impracticable." 1 PALESTINE: DOCUMENTS, *supra* note 34, at 104-05 (quoting excerpts from the Palestine Partition Commission "Woodhead Commission").

43. THE RISE OF ISRAEL, *supra* note 37, at 396.

44. *Id.* at 404.

45. *Id.* at 405; see *infra* text accompanying note 88.

46. SACHAR, *supra* note 34, at 205.

47. See AMOS PERLMUTTER, ISRAEL: THE PARTITIONED STATE 60-73 (1985).

48. SACHAR, *supra* note 34, at 209.

separate Arab and Jewish states, which were deemed “unacceptable.”⁴⁹ One member of the British House of Lords remarked that the Commission’s borders were “entwined in an inimical embrace like two fighting serpents.”⁵⁰ The Woodhead Commission, established in 1938 “to visit Palestine and to submit proposals for a detailed scheme of partition,”⁵¹ detailed “why we find it necessary to reject the Royal Commission’s plan in its original form.”⁵² Its most viable alternative, dubbed Plan C, contemplated the Gaza sub-district as entirely within the proposed Arab state.⁵³ A separate partition proposal, introduced by Zionist leader David Ben-Gurion, contemplated that the Gaza district, “with practically no Jews, would be autonomous under British supervision for a transitional period.”⁵⁴

While each proposed partition plan model shared the common element of designating Gaza to the Arab state, no consensus as to which plan was acceptable could be reached.⁵⁵ By the start of 1939, “it was doubtful if the British government was seriously interested in any version of partition.”⁵⁶ Ultimately, the question of partition was set aside due, in part, to the practical need to secure both Jewish and Arab support against the Axis powers during World War Two.⁵⁷ Any discussion of partition was therefore delayed until after the war.⁵⁸

49. The Twentieth Zionist Congress, which convened in Zurich in 1937, accepted partition since it facilitated “the establishment of a Jewish State” but opposed the designated boundaries of the territories. GILBERT, *supra* note 23, at 88.

50. SACHAR, *supra* note 34, at 205.

51. WOODHEAD, *supra* note 29, at 19.

52. *Id.* at 99.

53. *See* maps accompanying *id.*

54. GALNOOR, *supra* note 34, at 63. The Jewish Agency further proposed “the voluntary transfer of [approximately] 100,000 Arab farmers to . . . Gaza” in order to alleviate concerns about Arab and Jewish populations remaining isolated in the proposed Jewish and Arab states, respectively. *Id.* at 179; *see also* TESSLER, *supra* note 19, at 242 (discussing the possibility of population transfer).

55. TESSLER, *supra* note 19, at 244. Arabs rejected territorial partition “totally and unequivocally.” *Id.* Jews initially viewed the partition plan as a “grave setback.” SACHAR, *supra* note 34, at 204. For further discussion of the Arab and Jewish response to the Peel Commission, *see id.* at 204–10.

56. SACHAR, *supra* note 34, at 218.

57. THE HEBREW UNIVERSITY OF JERUSALEM, NAT’L STUDIES ON INT’L ORG., ISRAEL AND THE UNITED NATIONS 21–22 (1956).

58. *See* GALNOOR, *supra* note 34, at 273.

2. The U.N. Partition Plan of 1947

The intervening years between 1945 and 1948 were "characterized by the twists and turns of British policy toward Palestine . . . and increasing involvement of the United States and later of the United Nations."⁵⁹ In 1947, Great Britain requested that the question of Palestine be addressed by the U.N. General Assembly.⁶⁰ A Special Committee on Palestine (UNSCOP) was established "to seek a viable resolution to the conflict."⁶¹ UNSCOP recommended the termination of the Palestine Mandate, the establishment of Palestinian independence "at the earliest practicable date,"⁶² and the implementation of a "transitional period preceding the grant of independence in Palestine" under U.N. auspices.⁶³

Based upon UNSCOP's recommendations,⁶⁴ the General Assembly adopted Resolution 181, which set forth the terms of the U.N.'s partition of Palestine into separate Jewish and Arab states.⁶⁵ The resolution "detailed boundaries of separate Arab and Jewish states as well as territory surrounding Jerusalem that [would be] administered by the U.N."⁶⁶ The proposed Arab state included, *inter alia*, territories comprising "northern and western boundaries of Mukhezim to the Gaza District boundary and thence runs across the village lands . . . to the southern point of intersection."⁶⁷ Two modifications to the plan contemplated additional allocations of land to the Arab state, neither of which affected the designation for Gaza.⁶⁸ Ultimately, "the eastern part of the Gaza sub-

59. *Id.* at 278.

60. HADAWI, *supra* note 35, at 59. The British government "decided, in effect, to wash its hands of Palestine and dump the problem in the lap of the United Nations." MORRIS, *supra* note 24, at 180.

61. Caplen, *supra* note 15, at 731.

62. UNITED NATIONS, SPECIAL COMM. ON PALESTINE, REPORT ON PALESTINE 140, 142 (1947).

63. *Id.* at 143-44.

64. UNSCOP's report containing eleven recommendations was approved unanimously. HADAWI, *supra* note 35, at 61.

65. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 322-43, U.N. Doc. A/RES/181(II) (Nov. 29, 1947). "The [proposed] Jewish state would contain 'approximately' 498,000 Jews and 407,000 Arabs[;] the Arab state would [include] 725,000 Arabs and 10,000 Jews." GILBERT, *supra* note 23, at 149.

66. Caplen, *supra* note 15, at 731 n.101.

67. *Id.* See Palestinian Academic Society for the Study of International Affairs (PASSIA), at http://www.passia.org/palestine_facts/MAPS/1947-un-partition-plan-reso.html (last visited May 8, 2006) (for maps depicting the U.N. Partition Plan).

68. SACHAR, *supra* note 34, at 292.

district,” an area not part of the present-day Gaza Strip, was included under the proposed Jewish state.⁶⁹

Scholars critical of the U.N. partition resolution maintain that it “was no more than a recommendation [that] did not have the force of a decision and . . . could not be binding.”⁷⁰ Nonetheless, Jewish leaders embraced it and considered it binding authority because doing so “offered the first international recognition of the legitimacy of a Jewish state in Palestine.”⁷¹ As the foregoing suggests, each proposed partition plan of Palestine—from the Peel and Woodhead Commissions to U.N. Resolution 181 and variants thereof—contemplated the incorporation of Gaza in the Arab Palestinian state.⁷² Although Israel has been portrayed as “the base of imperialism,”⁷³ no evidence suggests that Jewish leaders intended to incorporate the Gaza region into an independent Jewish state before 1948.⁷⁴

B. *The First Arab-Israeli War of 1948*

The U.N. partition resolution passed on November 29, 1947,⁷⁵ and hostilities⁷⁶ that ultimately culminated in the first Arab-Israeli war⁷⁷ commenced the following day.⁷⁸ Arab military forces⁷⁹ “entered Israel

69. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, at 322-43, U.N. Doc. A/RES/181(II) (Nov. 29, 1947).

70. HADAWI, *supra* note 35, at 73 (emphasis omitted). Arabs rejected the resolution because “[t]hey believed the entire land belonged to them, and could not see any justification for sharing it with a usurper from abroad.” YOSSE MELMAN & DAN RAVIV, *BEHIND THE UPRISING* xv (1989).

71. THOMAS, *supra* note 31, at 50 (emphasis omitted).

72. *See supra* Parts II.A.1-2.

73. YEHOSEFAT HARKABI, *ARAB ATTITUDES TO ISRAEL* 158 (1972); *see infra* text accompanying note 88-90.

74. *See* THOMAS, *supra* note 31, at 65 (noting Jewish military proposals to acquire territory in the Galilee and the designated international zone under the U.N. partition plan).

75. Thirty-three nations voted for partition, thirteen voted against, and ten abstained. TESSLER, *supra* note 19, at 261. “Partition had passed, but not very comfortably (had three of the ayes voted nay, the resolution would have failed).” MORRIS, *supra* note 24, at 186.

76. “Arabs rejected the resolution on the grounds that it violated the U.N. Charter.” Caplen, *supra* note 15, at 731 n.102. Jews, however, viewed partition as a way for them and their Arab neighbors to “be liberated from . . . fear of domination by the other” and accepted the U.N. Resolution. Letter from Dr. Chaim Weizmann to the Chairman of UNSCOP (July 14, 1947); THE JEWISH AGENCY FOR PALESTINE, *THE JEWISH PLAN FOR PALESTINE: MEMORANDA AND STATEMENTS* 558-59 (The Jewish Agency for Palestine 1947).

77. Israelis refer to the conflict as their War of Independence, whereas Arabs describe it as “al-Nakba,” or “the disaster.” AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 28 (2000); TESSLER, *supra* note 19, at 273.

78. JOSEPH HELLER, *THE BIRTH OF ISRAEL, 1945-1949: BEN-GURION AND HIS CRITICS* 93 (2000); *see also* DAVID BEN-GURION, *ISRAEL: A PERSONAL HISTORY* 65-70 (1971). Within weeks

[and] the Egyptian army moved through Gaza."⁸⁰ Israel's primary objective was "to secure all the areas allotted to the Jewish state under the UN partition resolution."⁸¹ Nonetheless, by the time armistice agreements were concluded in 1949, Israel "had increased its territory by approximately twenty percent over those lands designated for a Jewish state under the Partition Plan."⁸²

Territorial expansion was not, however, Israel's military objective. Given the opportunity to launch a campaign designed to remove Egyptian forces from the Gaza Strip,⁸³ Israeli officials were "ready and willing" to negotiate "[i]f the Egyptians want[ed] to talk."⁸⁴ The subsequent Egyptian-Israeli armistice agreement ending the war was "a tremendous achievement [that would] open a new era in . . . the development of [Israel's] foreign relations with its surroundings."⁸⁵ Under its terms, Egypt retained control of the Gaza Strip.⁸⁶

Officially, Israel was "not favorably disposed to the *annexation* of the Gaza area by Egypt . . . the future of Gaza should not be decided upon until there is some decision on the future of the Arab section of Palestine."⁸⁷ Although some Israeli officials harbored reservations about the Gaza Strip remaining in Egyptian hands,⁸⁸ others privately recognized the necessity of ensuring that it remained *separate* from Israel:

of the passage of the resolution, "the country was plunged in what soon became a full-scale civil war." NUR MASALHA, *EXPULSION OF THE PALESTINIANS* 176 (1992).

79. "[R]egular military forces from Egypt, Transjordan, Syria, Lebanon, Iraq, 'irregular' Palestinian forces, [and] the Arab Liberation Army sponsored by the Arab League" fought against the Israel Defense Force (IDF) during the course of the war. Caplen, *supra* note 15, at 732.

80. Edward T. Canuel, Note, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, 20 B.C. INT'L & COMP. L. REV. 85, 99 (1997).

81. RUBENBERG, *supra* note 22, at 11.

82. Caplen, *supra* note 15, at 733. *But see* HENRY CATTAN, *PALESTINE AND INTERNATIONAL LAW* 24 (1976) (arguing that Israel's official boundaries had expanded to include eighty-percent of the former Mandatory Palestine).

83. For a discussion of an Israeli operation designed at removing Egyptian forces from the Gaza Strip, see GILBERT, *supra* note 23, at 242-44.

84. BEN-GURION, *supra* note 78, at 295.

85. Armistice Agreement Between Israel and Egypt, *quoted in* HELLER, *supra* note 78, at 104.

86. GILBERT, *supra* note 23, at 246. *But see* Canuel, *supra* note 80, at 99 (stating that Egypt "occup[ied] the Gaza Strip"); *accord Israel's Gaza Presence*, WASH. TIMES, May 23, 2004, at B2.

87. BEN-GURION, *supra* note 78, at 296 (emphasis added).

88. Israeli Prime Minister David Ben-Gurion, for example, opposed Egypt's possession of the Gaza Strip, believing that it enabled Egypt to expand territorially into Israel. *Id.* at 294.

It is therefore doubtful whether we gain anything by refusing to agree to Egyptian control of Gaza. . . . [T]he status of the [Gaza] strip according to the November [U.N. Partition] resolution . . . was supposed to be in the Arab state. . . . We must demand that they agree to borders based on the November resolution. . . . We regard Gaza as the port that will serve Arab Palestine. . . . If the Arabs of Palestine do not have Gaza, they will . . . be denied access to the sea.⁸⁹

Israel's further unwillingness to gain control over the Gaza Strip was reflected during the 1956 Suez conflict with Egypt when Israeli Defense Forces (IDF) removed Egyptian armies from the Gaza Strip but "immediately handed [Gaza] back to Egyptian administration and military control" after the conflict concluded.⁹⁰ Israel called upon the United Nations to administer the Gaza Strip "until there is a peace settlement, to be sought as rapidly as possible, or a definitive agreement on the future of the Gaza Strip."⁹¹

C. *The Arab-Israeli Six-Day War of 1967*

The 1956 Suez conflict foreshadowed the fierce military engagements that followed a decade later. Tensions mounted during the 1960s due, in part, to Egyptian leader Gamal Abdel-Nasser's view of Israel as an impediment to his ascent to greatness⁹² as a leader in the Arab world.⁹³ Throughout the waning months of 1966 and the spring 1967, numerous Palestinian groups began penetrating Israel's borders with Jordan, Syria,

89. *Id.* at 294-95.

90. GILBERT, *supra* note 23, at 327. As Gilbert recounted: "Israeli understanding had been that Egypt would not return to the Gaza Strip, since this was not considered Egyptian territory: it had been conquered and occupied by Egypt in 1948, having previously been part of Mandate Palestine." *Id.* Moreover, Prime Minister Ben-Gurion acknowledged that "it will be embarrassing for us" to take possession of the Gaza Strip. BEN-GURION, *supra* note 78, at 505; *see generally* MORRIS, *supra* note 24 (discussing the 1956 Suez Conflict).

91. BEN-GURION, *supra* note 78, at 531.

92. Nasser advocated "Pan-Arabism," a vision for a single Arab national outlook led by Egypt. GILBERT, *supra* note 23, at 362.

93. ROBERT MCNAMARA, BRITAIN, NASSER, AND THE BALANCE OF POWER IN THE MIDDLE EAST 1952-1967, at 244 (2003). In fact, Nasser proclaimed that "we shall not rest until we restore the Arab nation to Palestine and Palestine to the Arab nation." Address before the U.N. General Assembly, Sept. 1960, *quoted in* SACHAR, *supra* note 34, at 615; *see also* Uri Shoham, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245, 247 (1996) (quoting Nasser and other Arab leaders calling upon the destruction of Israel and restoration of Palestine to the Arab people).

Lebanon, and the Gaza Strip and engaging the IDF in combat.⁹⁴ In the Spring 1967, Egypt instructed the United Nations Emergency Forces (UNEF) stationed in the Sinai peninsula to withdraw,⁹⁵ a strategy that, "for the first time in a decade, [forced] Egyptian and Israeli forces [to] confront[] each other directly."⁹⁶ Nasser proclaimed: "[W]e are restoring things to what they were in 1956 . . . if we are able to restore conditions to what they were before 1956 God will surely help us and urge us to restore the situation to what it was in 1948."⁹⁷ The Six-Day War commenced on June 5, 1967 when Israel "would take the military initiative against those who were threatening her annihilation."⁹⁸

Israel conducted the war with "no objectives of conquest. [Their] goal [was] to frustrate the attempt of the Arab armies to conquer [their] country."⁹⁹ Focusing primarily upon its military campaign to defeat the Egyptian military in the Sinai Peninsula,¹⁰⁰ Israel effectively "cut off the Gaza Strip from all contact with Egypt."¹⁰¹ Although isolated from Egypt, Gaza was not contemplated as an important military objective and "would be left for a later stage" in the war.¹⁰² Ultimately, when a cease-fire was concluded, the IDF had secured the entire Gaza Strip.¹⁰³

The Six-Day War has been described as "the first war in history which . . . ended with the victors suing for peace and the vanquished

94. GILBERT, *supra* note 23, at 362.

95. Following the 1956 Sinai Conflict, Egypt permitted a U.N. presence within its territory. OCCASIONAL PAPERS, ARAB POSITIONS CONCERNING THE FRONTIERS OF ISRAEL 15 (Alouph Hareven ed., 1977). Approximately 3400 troops were stationed in the Gaza Strip and southern region of the Sinai Peninsula. GILBERT, *supra* note 23, at 366. U.N. Secretary General U Thant acquiesced to the demand despite dissatisfaction from several member nations. *See* BEN-GURION, *supra* note 78, at 758. The withdrawal of U.N. Emergency Forces (UNEF) "remov[ed] the buffer that had separated Egypt and Israel since 1956." TESSLER, *supra* note 19, at 388.

96. MCNAMARA, *supra* note 93, at 245. Israeli leaders forecasted the "presumably inevitable clash with our neighbors." TESSLER, *supra* note 19, at 387.

97. Reminiscent of the 1956 Suez crisis, Nasser refused to "allow the Israeli flag to pass through the Gulf of Aqaba." Laura James, *Nasser and his Enemies: Foreign Policy Decision Making in Egypt on the Eve of the Six Day War*, 9 MIDDLE EAST REV. INT'L AFF. 10 (2005), available at <http://meria.idc.ac.il/journal/2005/issue2/jv9no2a2.html> (last visited May 25, 2006).

98. GILBERT, *supra* note 23, at 383. *But see* Caplen, *supra* note 15, at 734 (stating that Arab armies initiated the attack against Israel). For an in-depth discussion of events that led to the outbreak of the war, see MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 33-126 (2002).

99. MORRIS, *supra* note 24, at 313; *see also* HADAWI, *supra* note 35, at 227 (quoting then-Israeli Prime Minister Levi Eshkol and Minister of Defense Moshe Dayan).

100. *See* SACHAR, *supra* note 34, at 638-42.

101. GILBERT, *supra* note 23, at 387.

102. MORRIS, *supra* note 24, at 319.

103. *Id.* at 329.

calling for unconditional surrender.”¹⁰⁴ Israel maintained that the Six-Day War did not effectuate a preconceived campaign to expand its border.¹⁰⁵ Rather, its objective was “the removal of the threat to the State of Israel.”¹⁰⁶ At the conclusion of the conflict, Israel offered to relinquish all acquired territories in exchange for full peace accords with its Arab neighbors.¹⁰⁷ The proposal, however, was not accepted by Arab countries.¹⁰⁸ Surveying the territory over which it now had control, Israel now possessed all Jewish settlements that had been abandoned during the 1948 war¹⁰⁹ and territories in which “more than one million Palestinians” resided.¹¹⁰

III. ISRAEL’S ENGAGEMENT OF AND DISENGAGEMENT FROM THE GAZA STRIP

The aftermath of the Six-Day War—and Israel’s possession of territories it was willing to return¹¹¹—sparked a debate within Israel “that was to continue for the next three decades: how to rule, and for how long to rule, the Palestinian Arabs.”¹¹² Some Israeli political parties, noting that Israel had “liberated” the Gaza Strip, advanced a platform for its “formal annexation.”¹¹³ Israeli Minister of Defense Moshe Dayan advocated that “[w]e certainly don’t want Egypt to go back to the Gaza Strip . . . I don’t think that we should in any way give back the Gaza Strip to Egypt.”¹¹⁴

104. ABBA EBAN, *AN AUTOBIOGRAPHY* 446 (1977).

105. See TESSLER, *supra* note 19, at 466; Caplen, *supra* note 15, at 735 n.129 (“[N]ationalism was not a force for expansion in 1967. Israel . . . sought Arab recognition, not of her power, but of her existence.”).

106. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 5 (2002).

107. Shoham, *supra* note 93, at 249. Israel offered to “give up Sinai and the Golan in exchange for peace [but] did not mention the Gaza Strip.” MORRIS, *supra* note 24, at 330.

108. See BARRY RUBIN, *REVOLUTION UNTIL VICTORY?: THE POLITICS AND HISTORY OF THE PLO* 13 (1994).

109. GILBERT, *supra* note 23, at 401.

110. MORRIS, *supra* note 24, at 329.

111. See *supra* text accompanying notes 106-07. Egypt “wanted all the territories, including the Gaza Strip . . . restored . . . but without giving Israel full peace in exchange.” MORRIS, *supra* note 24, at 348.

112. GILBERT, *supra* note 23, at 396.

113. TESSLER, *supra* note 19, at 411.

114. HADAWI, *supra* note 35, at 229. Dayan “at times enigmatically hint[ed] at a preference for annexation, at other times suggest[ed] that it would be disastrous.” MORRIS, *supra* note 24, at 330.

Regardless, Israel's acquisition of Gaza placed "hundreds of thousands" of Palestinians under the administration of the Israeli military.¹¹⁵

A. *The Israeli Settlement Program*

Unlike the Sinai Peninsula and West Bank areas, the Gaza Strip suffered from "neglect of the Egyptian military administration by which it was governed between 1948 and 1967, le[aving] the region without a viable economic base. Poverty and related social ills were widespread, with most residents being heavily dependent on support from the United Nations."¹¹⁶ Constructing Jewish settlements in the Gaza Strip was one method through which Israel could bolster the Gaza economy¹¹⁷ while simultaneously promoting its security interests.¹¹⁸ Beginning shortly after the Six-Day War, Israel encouraged settlement in both the Gaza Strip¹¹⁹ and West Bank for the purposes of establishing permanent defensive perimeters.¹²⁰ The architect of one proposed settlement program, designed to supplement a "major offensive against terror in Gaza," was Israeli General Ariel Sharon.¹²¹

1. Israeli Settlements Before 1977

Initially, Israeli settlement activities in the Gaza Strip were limited given a larger plan for permanent peace that contemplated territorial compromises.¹²² Sentiment, however, began to shift toward a consensus

115. TESSLER, *supra* note 19, at 402. The population of the Gaza Strip approximated 356,000. BEN-GURION, *supra* note 78, at 837.

116. TESSLER, *supra* note 19, at 401. The Egyptian military "controlled the local governmental, judicial, and educational system" in Gaza and "limited entrance and exit from the Strip through dispensation of *laissez-passers* (travel passes)." Ann M. Lesch, *Palestine: Land and People*, in OCCUPATION, *supra* note 26, at 69.

117. See GILBERT, *supra* note 23, at 402-03 (noting the "unexpected economic effect" of Israel's presence in the Gaza Strip by the presence of Gaza's Palestinian residents driving into Israel to find work and earn livings); see also MORRIS, *supra* note 24, at 338 (noting that the Gaza economy was rapidly fused with Israel's economy). Between 1968 and 1982, the gross national product of the Gaza Strip "experienced a substantial increase." Roy, *supra* note 26, at 265.

118. See John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 10 PACE INT'L L. REV. 1, 6 (1998).

119. *Id.* at 5.

120. See TESSLER, *supra* note 19, at 466; Justus R. Weiner, *The Hebron Protocol: The End of the Beginning or the Beginning of the End of the Israel-Palestinian Peace Process?*, 15 B.U. INT'L L.J. 373, 426 n.331 (1997). The Gaza Strip was conceived as a "buffer against invasion from Egypt." Leslie Susser, *Gaza: The Doomed Experiment*, JERUSALEM REP., Sept. 19, 2005, at 11.

121. Susser, *supra* note 120.

122. GILBERT, *supra* note 23, at 406.

favoring settlement in the Gaza Strip: "In post-Six-Day War Israel's mainstream, [the idea of settlement] was virtually axiomatic. Even some dovish politicians supported settlement in Gaza. 'The matter of establishing security settlements in the Gaza Strip is not open to question.'"¹²³ Beginning in 1968, Israel's Knesset approved the establishment of settlements in the Gaza Strip, "[a]lmost all [of which] were in areas without large Arab concentrations."¹²⁴

Beginning in the 1970s, settlement construction increased amid a focus upon securing a "permanent retention" of the Gaza Strip.¹²⁵ Settlements became the mechanism through which to "extend[] Israel's future borders and fight[] terror."¹²⁶ Following the 1973 Yom Kippur War, in which Syrian and Egyptian armies¹²⁷ simultaneously "launched an offensive against Israel"¹²⁸ from the north and south, respectively, a major settlement campaign was implemented to "beef up the buffer against Egypt."¹²⁹ Prior to 1977, approximately seventeen settlements were established in order to provide a buffer between Egypt and the Gaza strip.¹³⁰

2. Israeli Settlements After 1977

In 1977, Menachem Begin, "in an unexpected turnaround,"¹³¹ became Israel's Prime Minister and, together with Egyptian President Anwar el-Sadat, entered into the Camp David peace accords in 1979.¹³² As stipulated

123. Susser, *supra* note 120.

124. MORRIS, *supra* note 24, at 333. The "fundamental rationale" of settlements was "to ensure the safety of the state." PERLMUTTER, *supra* note 47, at 206.

125. TESSLER, *supra* note 19, at 505. Israeli officials nonetheless recognized that permanent retention of the Gaza Strip "would threaten Israel's existence as a Jewish state . . . since it would add a million or more non-Jews to the country's population." *Id.* at 469.

126. Susser, *supra* note 120. *But see* Lesch, *Palestine: Land and People, in OCCUPATION, supra* note 26, at 72 (stating that as early as 1955, Israeli leaders recognized that "occupation of the Gaza Strip will not resolve any security problem").

127. "At least nine Arab states, including four non-Middle Eastern nations, actively aided the Egyptian-Syrian war effort." BARD, *supra* note 27, at 76.

128. SACHAR, *supra* note 34, at 763.

129. Susser, *supra* note 120. Prior to the 1973 conflict, only four isolated settlements existed in the Gaza Strip. *Id.*

130. ANTI-DEFAMATION LEAGUE, ISRAEL SETTLEMENTS: A GUIDE 5 (1995).

131. MORRIS, *supra* note 24, at 445.

132. TESSLER, *supra* note 19, at 512-13. For a discussion of the Israeli-Egyptian peace process between 1977 and 1979, see MORRIS, *supra* note 24, at 444-93. Arabs in both the West Bank and Gaza Strip rejected the Camp David Accords. See HADAWI, *supra* note 35, at 282-83. "[A] rally was held in [the] Gaza [Strip] to denounce the Accords." Roy, *supra* note 26, at 261; *see also* Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1, 1 (2005).

under the peace treaty, Israel withdrew from the Sinai peninsula.¹³³ Begin, however, "had no intention of ceding . . . the Gaza Strip,"¹³⁴ and withdrawal from the Sinai "added momentum" to constructing additional strategic settlements in the Gaza Strip.¹³⁵ During Begin's tenure as Prime Minister, the number of settlements in all of Israel's acquired territories from the 1967 Six-Day war doubled.¹³⁶ Under Ariel Sharon's leadership as Minister of Agriculture, additional land was secured for civilian settlement projects.¹³⁷ Several settlements established by the IDF subsequently were "turned into civilian settlements" under the Begin administration,¹³⁸ leading critics to accuse Israel of forgetting "why [it] had gone to Gaza in the first place" since a shift from security purposes to civilian settlement had begun to manifest itself.¹³⁹

Beginning in 1992, however, Israeli Prime Minister Yitzhak Rabin "set out . . . to radically alter the government's settlement policy."¹⁴⁰ Most of the settlements "added nothing to security, and even were a burden on the army."¹⁴¹ Israel's settlements "have been the major obstacle to peace between the Palestinians and Israelis,"¹⁴² and the 1993 Oslo Accords

133. TESSLER, *supra* note 19, at 513; MORRIS, *supra* note 24, at 486.

134. GILBERT, *supra* note 23, at 482. The Camp David accords "deliberately left the final status of . . . Gaza unresolved." TESSLER, *supra* note 19, at 529.

135. Susser, *supra* note 120.

136. TESSLER, *supra* note 19, at 520. Begin did not, however, necessarily envision Israel's annexation of the Gaza Strip. IBRAHIM MATAR, *JEWISH SETTLEMENTS, PALESTINIAN RIGHTS, AND PEACE* 4 (1996). Begin's plan emphasized that "[s]ettlement throughout the entire land of Israel is for security and by right." ANTI-DEFAMATION LEAGUE, *supra* note 130, at 9.

137. TESSLER, *supra* note 19, at 523.

138. ANTI-DEFAMATION LEAGUE, *supra* note 130, at 5.

139. Susser, *supra* note 120. For a discussion of other Israeli policies aimed at "deepen[ing] its presence in . . . Gaza . . . , some of which were even more important than its immediate settlement activities," see TESSLER, *supra* note 19, at 521-23. Israel's High Court of Justice approved settlement programs based upon security concerns. See ISRAEL INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *ISRAELI SETTLEMENT IN THE OCCUPIED TERRITORIES AS A VIOLATION OF HUMAN RIGHTS: LEGAL AND CONCEPTUAL ASPECTS* 23-29 (1997) [hereinafter ISRAEL INFORMATION CENTER FOR HUMAN RIGHTS]. A map of the Gaza Strip indicating Israeli settlements may be found at PASSIA, at www.passia.org/palestine_facts/MAPS/gaza-2000.html.

140. ANTI-DEFAMATION LEAGUE, *supra* note 130, at 12. *But see* MATAR, *supra* note 136, at 9 (noting that twenty new settlements were established in the Gaza Strip at the end of 1994 alone).

141. ISRAEL INFORMATION CENTER FOR HUMAN RIGHTS, *supra* note 139, at 28.

142. MATAR, *supra* note 136, at 14.

signed between Israel and the Palestine Liberation Organization (PLO)¹⁴³ “perpetuated the special status of the settlements, at least until the parties reach a final agreement.”¹⁴⁴ Ultimately, the Oslo Accords contemplated the withdrawal of Israel’s military from the Gaza Strip¹⁴⁵ but the continued presence of Israeli settlers in the territory.¹⁴⁶ The shift in Israeli policy concerning settlements and willingness to begin withdrawal from the Gaza Strip stemmed from the first of two Palestinian resistance movements known as the *Intifada*.¹⁴⁷

B. Palestinian Resistance and the Intifada Movements¹⁴⁸

Israel’s presence in the Gaza Strip—both militarily and with settlement construction—facilitated the rise of a unified Palestinian protest movement that “exploded”¹⁴⁹ in 1987.¹⁵⁰ Following the deaths of six Palestinians¹⁵¹ during a traffic accident with an Israeli vehicle within the Gaza Strip,¹⁵² rumors circulated that the accident was “deliberate . . . in revenge for the murder of an Israeli two days before.”¹⁵³ The ensuing protest movement, characterized as an “unarmed form of resistance, insofar as the tools of confrontation used by the Palestinians have not been lethal,”¹⁵⁴ facilitated

143. The Palestine Liberation Organization (PLO) and Israel exchanged letters of mutual recognition en route to the signing of the Declaration of Principles on Interim Self-Government Authority. See *Declaration of Principles on Interim Self-Government Authority*, in 2 PALESTINE: DOCUMENTS 142-51 (Mahdi F. Abdul Hadi ed., 1997).

144. ISRAEL INFORMATION CENTER FOR HUMAN RIGHTS, *supra* note 139, at 28.

145. RUBENBERG, *supra* note 22, at 58.

146. See MATAR, *supra* note 136, at 14-15.

147. *Intifada* refers to the “uprising of Palestinian Arabs.” ECHOES OF THE INTIFADA: REGIONAL REPERCUSSIONS OF THE PALESTINIAN-ISRAELI COURT 241 (Rex Brynen ed., 1991) [hereinafter ECHOES OF THE INTIFADA]; see also Caplen, *supra* note 15, at 722 n.27.

148. This Essay discusses the *Intifada* in terms of human casualties inflicted upon both sides. The *Intifada* movements also had significant economic repercussions for both Israelis and Palestinians, which are discussed further in MELMAN & RAVIV, *supra* note 70, at 199-200.

149. See *id.* at 1.

150. For a discussion of factors that contributed to an atmosphere conducive to unified Palestinian protest against Israel’s presence in the Gaza Strip, see Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT’L L.J. 129, 132 (1991).

151. MORRIS, *supra* note 24, at 573.

152. See *Israeli Troops Kill 2 in Clashes with Arabs*, CHI. TRIB., Dec. 10, 1987, at C13.

153. MORRIS, *supra* note 24, at 573.

154. ANDREW RIGBY, *LIVING THE INTIFADA 1* (1991). Typical actions in which Palestinians engaged included rock throwing, impassioned demonstrations, and the construction of illegal roadblocks. UZI AMIT-KOHN ET AL., *ISRAEL, THE “INTIFADA” AND THE RULE OF LAW* 27 (1993).

a rapid change in the Palestinians' sociopolitical structure.¹⁵⁵ More importantly, the first *Intifada* "convinced a sizeable number of Israelis that they could not indefinitely maintain [a presence in the] Gaza strip."¹⁵⁶ Twelve consecutive days of rioting¹⁵⁷ effectuated a "new form of interethnic crisis between Israel and the Palestinians"¹⁵⁸ that required Israel to secure peace with its neighbors:

We cannot afford to waste any opportunities to reach understandings with any of our neighbors . . . if they accept Israel's existence and do not support terrorism. . . . We have a formal peace treaty with Egypt, which eases our security concerns on that front. Now we must redouble our efforts for an agreement, to include an acceptable status for . . . Gaza.¹⁵⁹

The first *Intifada* formally concluded in 1993 when the PLO, an organization that traced its "birth" to Gaza in the 1960s,¹⁶⁰ entered into the Oslo Accords with Israel.¹⁶¹

In 2000, the second *Intifada*¹⁶² commenced amidst a breakdown in the Israeli-Palestinian peace process¹⁶³ and an escalation of suicide

155. ECHOES OF THE INTIFADA, *supra* note 147, at 7. The first *Intifada* "galvanized the Palestinian people, impressed international public opinion." Caplen, *supra* note 15, at 722. The Islamic movement during the *Intifada* sought to preserve the "movement's popular base so that it can strongly support the continuation of the *jihād* . . . as the way to liberate Palestine." SHAUL MISHAL & AVRAHAM SELA, *THE PALESTINIAN HAMAS* 126 (2000).

156. RASHID KHALIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* 201 (1997).

157. MORRIS, *supra* note 24, at 574.

158. HEMDA BEN-YEHUDA & SHMUEL SANDLER, *THE ARAB-ISRAELI CONFLICT TRANSFORMED: FIFTY YEARS OF INTERSTATE AND ETHNIC CRISES* 141 (2002).

159. MELMAN & RAVIV, *supra* note 70, at 7.

160. Roy, *supra* note 26, at 257.

161. *See Declaration of Principles on Interim Self-Government Authority, in 2 PALESTINE: DOCUMENTS, supra* note 143. Palestinians characterized the unilateral cancellation of the *Intifada* and the Palestine Liberation Organization's (PLO) recognition of Israel as a "series of renunciations, of the PLO Charter, of violence and [of] terrorism." ANDREW S. BUCHANAN, *PEACE WITH JUSTICE: A HISTORY OF THE ISRAELI-PALESTINIAN DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS* 215 (2000).

162. The second *Intifada*, known as the al-Aqsa *Intifada*, derives its name "because Palestinians traced its origin to the date on which current Israeli Prime Minister Ariel Sharon entered the Al-Aqsa mosque in Jerusalem, which Muslims regard as the third most holy site in Islam." Caplen, *supra* note 15, at 724 n.42.

163. *See, e.g.,* Dore Gold, *Closing the Deal*, *JERUSALEM POST*, Dec. 22, 2000, at 3B (noting Israel's willingness to make concessions during the 2000 Camp David Summit and Palestinian refusal to accept an agreement). Any resolution to the conflict "seem[ed] out of reach for the

bombings¹⁶⁴ against Israeli citizens.¹⁶⁵ More violent than its predecessor,¹⁶⁶ the second *Intifada*, referred to as a “cult of death,”¹⁶⁷ “incorporated the use of suicide bombings designed to inflict casualties among Israeli civilians.”¹⁶⁸ Suicide bombings became “almost a weekly event”¹⁶⁹ as terrorists typically targeted restaurants in populous metropolitan areas and public transportation buses.¹⁷⁰ One attack targeted a religious service in which “the highest death toll of any attack against Israelis during the conflict” occurred.¹⁷¹ Considered martyrs,¹⁷² at least four thousand Palestinians sacrificed themselves as part of the ongoing struggle.¹⁷³

foreseeable future” due to an “upsurge in Palestinian violence.” DAVID MAKOVSKY, *A DEFENSIBLE FENCE: FIGHTING TERROR AND ENABLING A TWO-STATE SOLUTION*, at xv (2004).

164. The first in a series of Palestinian suicide bombings began in 1994 and continued throughout the 1990s. See EDGAR O’BALLANCE, *THE PALESTINIAN INTIFADA 171-79* (1998); Bob Hepburn, *Israel Seals of West Bank, Gaza Arab Militants Vow More Attacks*, TORONTO STAR, Apr. 8, 1994; Bill Hutman & Alon Pinkas, *Terrorist Was Wanted Jamas Member*, JERUSALEM POST, Apr. 7, 1994, at 1. The frequency and intensity of suicide bombings increased throughout the 1990s. For descriptions of numerous suicide bombings in Israel between 1994 and 1998, see Israel Foreign Ministry, *Suicide Bombings*, available at http://www.aish.com/Israel/articles/suicide_bombings_p.asp (last visited May 8, 2006).

165. The militant group Hamas assumed responsibility for attacks that resulted in at least eighteen Israeli deaths within the first three months of the Oslo Accords. See David Hoffman, *Palestinian Militants’ Exile in Lebanon Ends: Rabin’s Move Failed to Break Hamas*, WASH. POST, Dec. 16, 1993, at A35. For a discussion of Hamas, see generally MISHAL & SELA, *supra* note 155.

166. The IDF cited over 22,400 Palestinian terrorist attacks since the second *Intifada* began. Israel Defense Forces, *Total of Attacks in the West Bank, Gaza Strip and Home Front Since September 2000*, available at http://www1.idf.il/SIP_STORAGE/DOVER/files/9/21829.doc (last visited May 8, 2006). Israel also recounted numerous suicide terrorist attacks between 2001 and 2003 in its written statements to the Hague Court. Written Statement of the Government of Israel on Jurisdiction and Propriety, at 5, 7, 49-50, Legal Consequences, *supra* note 15, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited May 8, 2006).

167. Steven Erlanger, *Hoping Democracy Can Replace an Icon*, N.Y. TIMES, Nov. 14, 2004, § 4, at 1.

168. Caplen, *supra* note 15, at 724 (footnote omitted). Suicide bombings became a “common tactic.” Steven Erlanger, *Israelis Battle Over Gaza Plan; Sharon’s Initiative Caught in Quagmire*, INT’L HERALD TRIB., Sept. 9, 2004, at 4.

169. Anne Saker, *Legacies of 9/11; 3rd Anniversary of Terrorist Attacks Finds Vigilance, Quiet Commemorations*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 11, 2004, at A1.

170. Gil Troy, *What Pro-Palestinian Forces Can Do to Help*, CANADIAN J. NEWS, Jan. 6, 2005, at 10.

171. Molly Moore, *Leavening the Pain; A Support Group Helps Israeli Survivors of Attacks Venture Back Into the World*, WASH. POST, Apr. 8, 2004, at C01.

172. Jane Lampman, *Fenced In, Frustrated Arafat Speaks Out*, CHRISTIAN SCI. MONITOR, Apr. 22, 2004, at 7.

173. Steven Stalinsky, *The Intifada, 5 Years Later*, N.Y. SUN, Oct. 6, 2004, at 9.

C. Israel's Counterterrorism Initiative

Israel responded to the rise in suicide bombings during the second *Intifada* by implementing and constructing a security structure¹⁷⁴ separating it from both the West Bank and Gaza Strip.¹⁷⁵ Designed as a "temporary solution" to "contend with the threat of Palestinian terror,"¹⁷⁶ critics charged that it would nonetheless "constitute a de-facto border."¹⁷⁷ Israel, however, maintained that the structure, which spans a total of approximately four hundred miles, was not a political border.¹⁷⁸

The security structure, costing at least \$1.3 billion to construct, has been described as an "engineering tour de force."¹⁷⁹ It featured an "elaborate network of electronic fences, a bulldozed security buffer zone, high-tech sensors equipped with interception capabilities, electronically enhanced observation posts, patrol roads, a 'trace' road composed of sand to detect footprints, barbed wire, and secured gates designed to ensure safe passage."¹⁸⁰ Although both opponents¹⁸¹ and supporters¹⁸² of the security structure acknowledged that it was not entirely impenetrable,¹⁸³ Israel reported substantial reductions in terrorist-related activities since construction commenced.¹⁸⁴ The security structure, together with a final

174. See *supra* text accompanying note 18.

175. The purpose of the security structure, as recounted by Israel's Supreme Court, was to "strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists . . . into Israel." H.C. 2067/04, Beit Sourik Vill. Council v. Gov't of Israel, at *3, available at http://62.90.71.124/eng/verdict/frameset_Srch.html.

176. *Id.* at *3, *16.

177. Gerald M. Steinberg, *Concrete Separation, Not Road Maps*, JERUSALEM POST, May 16, 2003, at 9A.

178. Greg Myre, *U.N. Estimates Israeli Barrier Will Disrupt Lives of 600,000*, N.Y. TIMES, Nov. 11, 2005, at A6.

179. Michael Woods, *Controversial Israeli Security Fence Is 'Engineering Tour de Force'*, PITTSBURGH POST-GAZETTE, Mar. 1, 2004.

180. Caplen, *supra* note 15, at 727.

181. Palestinians charged that it "will not prevent Palestinian fighters from harming . . . Israel." Cliff Churgin, *Four Die in Suicide Bombing at Bus Stop Outside Tel Aviv; Attack Comes After Israel Gunship Kills Militant*, MILWAUKEE J. SENTINEL, Sept. 26, 2003, at 03A.

182. "[T]errorists may still find ways to circumvent the . . . fence . . . even a less-than-perfect success rate would still save many lives." MAKOVSKY, *supra* note 163, at 17.

183. Caplen, *supra* note 15, at 727. Nonetheless, the structure was designed to be "the most impenetrable security barrier ever constructed in Israel." Andrew R. Malone, Comment, *Water Now: The Impact of Israel's Security Fence on Palestinian Water Rights and Agriculture in the West Bank*, 37 CASE W. RES. J. INT'L L. 639, 647 (2005).

184. Editorial, *The UN's Blinkers*, GLOBE & MAIL (Toronto), July 22, 2004, at A14; see also Malone, *supra* note 183, at 646-47 ("The Fence is a highly effective . . . way of eliminating attacks by Palestinian militants.").

disposition over the status of the Gaza Strip, constituted Israel's largest campaign to diffuse Palestinian suicide bombings and reinvigorate the peace process.¹⁸⁵

D. *The Implementation of Disengagement*¹⁸⁶

On December 18, 2003, Israeli Prime Minister Ariel Sharon announced Israel's decision to unilaterally "disengage" from the Gaza Strip.¹⁸⁷ The decision to physically separate Israel from the Gaza Strip represented the culmination of a twelve-year debate over unilateral withdrawal as a potential solution to the "problem of Gaza,"¹⁸⁸ particularly in the midst of the two *Intifada* movements.¹⁸⁹ It also reversed several decades of a "grandiose geopolitical"¹⁹⁰ vision of Israel's long-term security.¹⁹¹

Despite numerous Israeli protests¹⁹² against the Disengagement policy¹⁹³ and "wrenching scenes of Jewish soldiers expelling defiant

185. The security structure and Disengagement together would "provide new opportunities" for peace in the Middle East. Steven R. Weisman, *A Day When the White House Reversed Stand on the Killing*, N.Y. TIMES, Mar. 23, 2004, at A10. One Israeli official noted that Disengagement would place Israel into a "more comfortable parking position" as it awaited a return to peace negotiations with the Palestinian Authority. David Gollust, *Israeli Envoy Explains Gaza Settlement Removal Plans*, VOICE OF AM. NEWS, Feb. 5, 2004.

186. Like the *Intifada* movements, see *supra* Part III.B. Disengagement has had substantial economic effects on both Israelis and Palestinians. See Zeev Klein, *CPI Up 0.2% in August*, ISRAEL BUS. ARENA, Sept. 15, 2005.

187. See Justin C. Danilewitz, *The Ties That Bind: U.S. Foreign Policy Commitments and the Constitutionality of Entrenching Executive Agreements*, 14 J. TRANSNAT'L L. & POL'Y 87, 93 (2004); see also Harvey Morris, *Sharon's Ultimatum to Palestinians: Negotiate or Be Cut Off by the Wall*, FIN. TIMES (London), Dec. 19, 2003, at 13.

188. *Israel asks: What to do with Gaza?*, ST. PETERSBURG TIMES, Mar. 7, 1993, at 20A. Many Israelis viewed the Gaza Strip as an "albatross that should have been shucked off years ago." Sheldon Kirshner, *Israel Faces Uncertainty After Evacuation*, CANADIAN J. NEWS, Sept. 1, 2005, at 11.

189. See *supra* Part III.B.; see also *Will They Sink or Swim?—Palestinians in Gaza; To Come*, ECONOMIST, Sept. 24, 2005 (noting that 84% of Palestinians believe the *Intifada* movements prompted Israel's Disengagement from the Gaza Strip).

190. Leon Wieseltier, *Dry Your Eyes, Keep Your Heads*, NEW REPUBLIC, Sept. 5, 2005, at 12.

191. See *supra* Part III.A.1-2.

192. The "most serious confrontation" included approximately one hundred protestors who "barricaded themselves . . . and clashed with the security forces for several hours." Greg Myre, *Israeli Troops and Police Clear All But 5 Gaza Settlements*, N.Y. TIMES, Aug. 20, 2005, at A3.

193. See, e.g., Greg Myre, *Thousands Rally Against the Planned Withdrawal From Gaza*, N.Y. TIMES, Aug. 3, 2005, at A5 (noting that at least 25,000 protestors attended one anti-Disengagement rally). Unlike settlers, who generally opposed the policy, Disengagement enjoyed broad support from the Israeli public. Korobkin & Zasloff, *supra* note 132, at 70.

Jewish settlers from their homes and farms in the Gaza Strip,"¹⁹⁴ the process constituted a "bloodless evacuation"¹⁹⁵ of nearly nine thousand Israeli settlers.¹⁹⁶ "[P]roceed[ing] far more quickly and with less turmoil than almost anyone had predicted,"¹⁹⁷ the entire process was completed in less than a week.¹⁹⁸ After midnight on August 15, 2005, Disengagement, considered "an act of historical wisdom,"¹⁹⁹ permanently established that "no Israeli could enter the [Gaza] Strip other than security forces."²⁰⁰ By August 22, the "curtain came down" on Israel's presence in the Gaza Strip.²⁰¹

Although Israelis distinguish between a physical separation and a "political division"²⁰² from the Palestinians, the two notions are inseparable.²⁰³ While Disengagement was designed to effect the intended physical separation from the Palestinians, two competing political strategies for post-Disengagement have emerged. Under one plan, Israel would fully complete construction of its security structure while waiting for "a real Palestinian partner" to broker a final peace agreement.²⁰⁴ A second plan envisions another unilateral Disengagement from the West Bank as a means of "keep[ing] the two-state dynamic going."²⁰⁵

For Palestinians, Disengagement served as a testament to the success of the *Intifada* movements.²⁰⁶ The Palestinian Authority (PA), which celebrated the "great victory"²⁰⁷ by distributing banners encouraging

194. Joseph Berger & Robin Shulman, *American Jews Sharing Pain of Gaza Pullout*, N.Y. TIMES, Aug. 14, 2005, § 1, at 29; see also *The Middle East Peace Process and U.S. Strategic Priorities Post-Disengagement: Hearing of the Middle East and Central Asia Subcommittee of the House Int'l Relations Comm.*, 109th Cong. (2005) [hereinafter *Middle East Peace Process Hearing*] (statement of Rep. Ros-Lehtinen) ("The sadness and the anguish exhibited by Israelis who had to abandon their homes and by Israeli soldiers obliged to enforce the disengagement process, brings into context the extent of the sacrifices endured by the Israeli people throughout the years for the sake of peace . . .").

195. Kirshner, *supra* note 188.

196. Myre, *supra* note 192.

197. *Id.*

198. *Now Who Takes the Blame?*, *supra* note 17.

199. Wieseltier, *supra* note 190.

200. Matti Friedman et al., *Disengagement*, JERUSALEM REP., Sept. 5, 2005, at 7.

201. Susser, *supra* note 120.

202. Steinberg, *supra* note 177.

203. See Leslie Susser, *Sharon's Choices*, JERUSALEM REPORT, Sept. 5, 2005, at 12.

204. *Id.*

205. *Id.*

206. See Steven Erlanger, *Gazans Revel as They Sift Through Ex-Settlements*, N.Y. TIMES, Sept. 13, 2005, at A1; *supra* text accompanying note 192.

207. Daniel Williams, *Purported al Qaeda Newscast Debuts on Internet; Masked Anchorman Lauds Gaza Pullout, Iraq Attacks, Hurricane Katrina*, WASH. POST, Sept. 27, 2005, at A16.

Palestinians to continue placing pressure on Israel's presence in the West Bank,²⁰⁸ deployed a force numbering fifty-five thousand to ensure control over the Gaza Strip.²⁰⁹ Control over Gaza, however, "presents the Palestinians with an opportunity and a problem"²¹⁰ since Disengagement will either facilitate an era of Palestinian state-building "or spell the unraveling of a coherent Palestinian national home before one has even been born."²¹¹

IV. THE HAGUE COURT'S ADVISORY OPINION ON THE LEGALITY OF ISRAEL'S COUNTERTERRORISM INITIATIVE

The Palestinians' ability to establish a viable infrastructure in the Gaza Strip depends, in part, upon the legal principles that are implicated post-Disengagement.²¹² When the U.N. General Assembly characterized Israel's counterterrorism initiative as a "racist wall which devours Palestinian

208. The banners read "Gaza today; the West Bank and Jerusalem tomorrow." *United Nations Reform: Hearing Before the House Comm. on Int'l Relations*, 109th Cong. (2005) (statement of Rep. Ros-Lehtinen).

209. Friedman et al., *supra* note 200, at 7. "[L]awlessness within the Gaza Strip and continued attacks against Israel has characterized the Palestinian response to disengagement." *Middle East Peace Process Hearing*, *supra* note 194 (statement of Rep. Ros-Lehtinen). In response, Israel's military "upgraded its technology" to ensure that the security structure remained impenetrable. *Now Who Takes the Blame?*, *supra* note 17.

210. Dennis Ross, *Finding the Lost Peace*, NAT'L INTEREST, Fall 2005, at 34. Ross noted that Disengagement

creates the possibility of re-establishing the core bargain of peace-making—namely, security for freedom. Israelis get their security, Palestinians their freedom. Over the last four years, both sides lost their faith in this bargain: Israelis because they became convinced that Palestinians rejected Israel as a Jewish state and used terror as their instrument of rejection, and Palestinians because they saw the Israeli response to the intifada as proof that Israelis would never surrender control over them. But with disengagement, Palestinians will see that Israelis actually will surrender control over them . . . and Israelis will see that Palestinians will actually fulfill their obligations.

Id. at 37.

211. Isabel Kershner, *The Gaza Model*, JERUSALEM REPORTER, Aug. 22, 2005, at 24.

212. The Hague Court ruling in 2004 represented "a historic development pertaining to the question of Palestine, as well as a unique opportunity for emphasizing the rule of international law in the efforts to resolve the Israeli-Palestinian problem." Pieter H.F. Bekker, *The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective*, 38 CORNELL INT'L L.J. 553, 555-56 (2005).

territories,"²¹³ it called upon the Hague Court²¹⁴ to issue an advisory opinion determining the legal consequences of the security structure.²¹⁵ Having never previously consulted the Hague Court on any matter pertaining to the Israeli-Palestinian conflict,²¹⁶ the General Assembly Resolution²¹⁷ "signaled the first time that an international judicial organ has ruled . . . on a prominent aspect of the [Israeli-Palestinian] problem by applying rules of international law."²¹⁸ The Hague Court's decision to issue an advisory opinion represented "a hostile act"²¹⁹ that created "two sets of rules in international law . . . one set which is valid for the entire world and [one where] there is an international law applicable only to Israel."²²⁰ The apparent double standard is best exemplified by the Hague Court's conflicting treatment of Palestine's legal status²²¹ and how that treatment affects the applicability of Israel's right to self-defense.²²²

A. Procedural Treatment of Palestine as a State for Purposes of Participation

Palestine "does not fit easily into defined categories of international status" because it is recognized as a distinct entity that nonetheless lacks sovereignty.²²³ A "fascinating debate over Palestine's existence as a subject of international law"²²⁴ developed after the PLO and Israel signed

213. G.A. Res. 1/30-PAL, 57th Sess., Annex 3, at 33, 35, U.N. Doc. A/57/824-S/2003/619 (June 6, 2003).

214. Under Article 96 of the U.N. Charter, the General Assembly "may request the International Court of Justice to give an advisory opinion on any legal question." U.N. CHARTER art. 96, pt. 1.

215. See *supra* note 16 and accompanying text. The Hague Court, pursuant to Article 65 of the Statute of the International Court of Justice, "may give an advisory opinion on any legal question." STATUTE OF THE INT'L COURT OF JUSTICE art. 65(1).

216. See Caplen, *supra* note 15, at 745 n.207; see also Bekker, *supra* note 212, at 556 ("In the past, only the General Assembly and the Security Council . . . had dealt with the Israeli-Palestinian problem.").

217. See *supra* notes 16 & 213 and accompanying text.

218. Bekker, *supra* note 212, at 556.

219. Caroline B. Glick, *Supreme Injustice*, Jerusalem Post, July 2, 2004, at 1.

220. *Exclusive Interview with Meir Rosenne* (IsraCast.com broadcast, Jan. 17, 2004), available at http://www.isracast.com/Transcripts/Rosenne_transcripts.htm (last visited May 8, 2006).

221. See *infra* Part IV.A.

222. See *infra* Part IV.B.

223. Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y, 27, 89-90 (1997).

224. David John Ball, *Toss the Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment*, 79 N.Y.U. L. REV. 990, 1004-05 (2004).

the Oslo Accords in 1993.²²⁵ As the Hague Court stated, Israel's recognition of the PLO in 1993 as the "representative of the Palestinian people" explicitly accorded "legitimate rights," including the right of self-determination, to the Palestinian people.²²⁶

Regardless of whether Palestine possessed legitimate rights, the United Nations has never accorded Palestine state status.²²⁷ Since 1974, the PLO held the status of observer within the United Nations.²²⁸ Beginning in 1988, "Palestine" replaced the PLO designation and "should be used . . . without prejudice to the observer status and functions of the [PLO] within the United Nations system, in conformity with relevant United Nations resolutions and practices."²²⁹ Under Resolution 250, the General Assembly granted Palestine additional—albeit limited—rights and privileges as a "super observer,"²³⁰ including rights to participate in debate and co-sponsor draft resolutions provided that "[s]uch draft resolutions and decisions . . . be put to a vote only upon request from a Member State."²³¹ The resolution further provided that Palestine's seat within the General Assembly "shall be arranged immediately *after non-member* States and before the other observers."²³² Such a designation of Palestine's seating, together with Palestine's inability to independently offer resolutions and decisions for a vote, "supports the conclusion that Palestine does not rise to the level of a state."²³³

Although the General Assembly acknowledged the PLO's "legal status under international law" by granting it super observer status,²³⁴ Palestine has remained a non-state actor under principles of international law.²³⁵ In

225. See Caplen, *supra* note 15, at 723 nn.32-33.

226. Legal Consequences, *supra* note 15, at 1041-42.

227. No state has recognized Palestine as an independent state. See *infra* text accompanying notes 236 & 238.

228. Andrew C. McCarthy, *The End of the Right of Self-Defense? Israel, the World Court, and the War on Terror*, COMMENTARY, Nov. 1, 2004, at 20; see also *U.N. Votes For New Palestinian Status*, BALTIMORE SUN, July 8, 1998, at 1A.

229. G.A. Res. 177, U.N. GAOR, 43d Plen. mtg., U.N. Doc. A/Res/43/177 (Dec. 15, 1988).

230. See Barbara Crossette, *Palestinians' U.N. Role Widened; A U.S. 'No' Vote Is Overwhelmed*, N.Y. Times, July 8, 1998, at A1.

231. G.A. Res. 250, U.N. GAOR, 52d Plen. mtg., U.N. Doc. A/RES/52/250 (July 13, 1998); see also Crossette, *supra* note 230 ("The Palestinians will not have the right to vote in the General Assembly, however. And nothing in today's actions affects the work of the Security Council.")

232. G.A. Res. 250, U.N. GAOR, 52d Plen. mtg., U.N. Doc. A/RES/52/250 (July 13, 1998) (emphasis added).

233. Caplen, *supra* note 15, at 756 n.273.

234. See *supra* text accompanying notes 229-33.

235. Math Noortmann, *Non-State Actors in International Law*, in NON-STATE ACTORS IN INTERNATIONAL RELATIONS 68 (Bas Arts et al. ed., 2001).

order for an entity's statehood "to be 'constituted' by recognition, it must first be recognized [as] a State."²³⁶ Although over one hundred states have recognized the PLO and approximately sixty have granted it "full diplomatic status,"²³⁷ the PLO's "metamorphosis into the Palestinian Authority (PA) in 1993 did not vest in the territories the legal standing of a sovereign."²³⁸ Moreover, "while the . . . General Assembly . . . expressed . . . hope that the . . . peace process will culminate in the establishment of a State of Palestine, no State or international body has recognized [Palestine] as an *independent State*."²³⁹

Despite the general conclusion that the PA "lacks the independence necessary to consolidate Palestine's legal status as a State,"²⁴⁰ the Hague Court's "authoritative statements on the applicable international law . . . change[s] the parameters for any negotiated solution" by "authoriz[ing] what it called 'Palestine' to participate."²⁴¹ Although it is "an incontrovertible fact that the Occupied Palestinian Territory does not qualify as a sovereign state,"²⁴² the Hague Court nonetheless "afforded Palestine full rights . . . in a manner similar to U.N. member states" by enabling it to participate in the proceedings.²⁴³ "[T]he United Nations and its Member States are considered . . . to be able to furnish information on all aspects raised by the question submitted to the Court for its advisory opinion."²⁴⁴ Under Article 35(2) of the Statute of the International Court of Justice, the Security Council determines "conditions under which the Court shall be open to other *states*" not parties to a case.²⁴⁵ In the absence of any affirmative declaration by the Security Council,²⁴⁶ the Hague Court blatantly "ignored a significant corpus of legislation and statutory provisions suggesting that Palestine did not qualify for participation in the

236. Dajani, *supra* note 223, at 89.

237. Noortmann, *supra* note 235, at 68.

238. McCarthy, *supra* note 228, at 18.

239. Dajani, *supra* note 223, at 89 (emphasis added); *see supra* text accompanying note 236.

240. *Id.*

241. Bekker, *supra* note 212, at 556.

242. Ball, *supra* note 224, at 1004-05.

243. Caplen, *supra* note 15, at 756-57.

244. Order of Dec. 19, 2003, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder20031219.pdf.

245. STATUTE OF THE INT'L COURT OF JUSTICE art. 35(2) (emphasis added).

246. The General Assembly never accorded Palestine statehood status. *See supra* text accompanying notes 227-33.

proceedings.”²⁴⁷ Thus, the Hague Court procedurally accorded Palestine the benefits of statehood available to U.N. Member States.²⁴⁸

B. *Substantive Treatment of Palestine as a Non-State Actor for Purposes of the Doctrine of Self-Defense*

The Hague Court ultimately concluded that Israel’s construction of its security structure violated international law.²⁴⁹ The Court further determined that it was “not convinced”²⁵⁰ that a “state of necessity”²⁵¹ existed that required Israel to “safeguard [its] interests” against Palestinian suicide bombers.²⁵² Rendering Article 51 of the U.N. Charter²⁵³ inapplicable to the situation because it “is a rule of international law and thus relates to international phenomena,”²⁵⁴ the Court treated Palestinian terrorists as non-state actors operating within Israeli territory for purposes of denying Israel’s right to exercise self-defense.²⁵⁵

By narrowly construing Article 51 to contemplate only international phenomena, the Hague Court concluded that “the threat which [Israel] regards as justifying the construction of the wall originates within, and not

247. Caplen, *supra* note 15, at 756. General Assembly Resolution 250 never extended Palestine’s rights to any proceeding involving the Hague Court. See G.A. Res. 250, U.N. GAOR, 52d Sess., Annex, Agenda Item 36, U.N. Doc. A/RES/52/250 (July 13, 1998).

248. Under Article 34(2) of the Statute of the International Court of Justice, the Hague Court “may request of *public international organizations* information relevant to cases before it.” STATUTE OF THE INT’L COURT OF JUSTICE art. 34(2) (emphasis added). Accordingly, the Hague Court permitted the Arab League and the Organization of the Islamic Conference, two organizations recognized as U.N. observers, see *Permanent Missions to the United Nations—New York*, at <http://www.un.org/Overview/missions.htm#nperm> (last visited May 8, 2006) (presenting oral arguments); Glick, *supra* note 219. Palestine, however, was allowed full participation, thereby further substantiating that the Hague Court accorded it a separate status rising to the level of statehood for the purposes of submitting briefs and arguing before the Court. See *Permanent Missions to the United Nations—New York, supra*.

249. Legal Consequences, *supra* note 15, at 1054. The decision was described as “embarrassment for logic and common sense.” Samuel Herman, *The International Court of Injustice*, J. NEWS (Westchester County, N.Y.), July 27, 2004, at 4B.

250. Legal Consequences, *supra* note 15, at 1050. Judge Buergenthal, however, emphasized that that court “says it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.” *Id.* at 1080 (declaration of Judge Buergenthal).

251. *Id.* (declaration of Judge Buergenthal) (“[T]he Court fails to address any facts or evidence specifically rebutting Israel’s claim of military exigencies or requirements of national security.”).

252. *Id.* at 1050.

253. Article 51 states, in pertinent part, that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.” U.N. Charter art. 51.

254. Legal Consequences, *supra* note 15, at 1072 (separate opinion of Judge Kooijmans).

255. See *infra* text accompanying note 256.

outside, that territory."²⁵⁶ Although Article 51 does not define an "armed attack,"²⁵⁷ the Court reasoned, based solely upon the assumption that the drafters of the U.N. Charter did not envision that an entity other than a state could engage in an "armed attack,"²⁵⁸ that Article 51 authorizes self-defense only in "the case of armed attack by one State against another State."²⁵⁹ Acknowledging that Israel "does not claim that the attacks against it are imputable to a foreign State,"²⁶⁰ the Court substantially limited Israel's right to exercise self-defense under Article 51 because "Palestinian violence could not be imputed to a Palestinian state."²⁶¹ In a separate opinion, Judge Kooijmans recognized but dismissed a significant inconsistency in the Hague Court's reasoning:

The Security Council called actions of international terrorism, without any further qualification, a threat to international peace and security . . . without ascribing these acts of terrorism to a particular State. This is the completely new element in [R]esolutions [1368 and 1373]. . . . This new element is not excluded by . . . Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State. . . . The Court has regrettably by-passed this new element.²⁶²

Judge Higgins agreed, adding that she "fail[ed] to understand the Court's view that [Israel] loses the right to defend [itself] . . . if the attacks emanate from the occupied territory."²⁶³

Having rendered Article 51 inapplicable to Israel's construction of its security structure, the Court further concluded that Israel could not rely

256. Legal Consequences, *supra* note 15, at 1050.

257. Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 21 (2003).

258. Caplen, *supra* note 15, at 764.

259. Legal Consequences, *supra* note 15, at 1050.

260. *Id.*

261. *Id.* But see Bekker, *supra* note 212, at 567 (arguing that "[n]obody questions Israel's right to protect its citizens against violent attacks . . . and deadly acts of violence against its civilian population").

262. Legal Consequences, *supra* note 15, at 1072 (separate opinion of Judge Kooijmans).

263. *Id.* at 1063 (separate opinion of Judge Higgins). Judge Higgins noted that "I do not agree with all that the Court has to say on the question of the law of self-defense." *Id.*

upon Security Council Resolutions 1368²⁶⁴ and 1373,²⁶⁵ both of which were passed in the aftermath of the September 11, 2001 terrorist attacks.²⁶⁶ The Court reasoned that both resolutions “refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts.”²⁶⁷ The Court stated that Israel’s efforts at combating Palestinian terror presented a “situation [that] is thus different” than the circumstances contemplated under Resolutions 1368 and 1373.²⁶⁸

The Hague Court’s pronouncements concerning Israel’s inability to rely upon Resolutions 1368 and 1373 have substantial implications beyond the Israeli-Palestinian context.²⁶⁹ In effect, the Court suggests that the United States could not have exercised its right to self-defense against al Qaeda, also a non-state actor, absent specific authorization from the Security Council.²⁷⁰ The Court therefore implies that each state must seek U.N. authorization prior to exercising any act in self-defense after a terrorist attack.²⁷¹ Since Israel never sought permission from the Security Council prior to its construction of its security structure, which is a nonviolent act of anticipatory self-defense,²⁷² its right to self-defense was constrained. Consequently, the Court’s interpretation of the purpose of Resolutions 1368 and 1373 as both relate to the timing of a state’s exercise

264. Resolution 1368 recognizes “the inherent right of individual or collective self-defense” without distinguishing between acts of terror instigated by state or non-state actors. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (Sept. 12, 2001).

265. Resolution 1373 authorized member nations to “combat by all means . . . threats to international peace and security caused by terrorist attacks” without regard to state sponsorship. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

266. The terrorist attacks in New York, Washington, and Pennsylvania were a “nightmare scenario of . . . post-Cold War era terrorism at home aimed at innocent civilians [that] hit with a terrible swiftness and frightening power . . . even experts had not imagine[d].” Dan Balz, *Bush Confronts a Nightmare Scenario; Crisis Looms as Defining Test of President’s Leadership*, WASH. POST, Sept. 12, 2001, at A2. Over three thousand innocent people from over eighty nations perished on September 11. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 23, (2002).

267. *Legal Consequences*, *supra* note 15, at 1072 (separate opinion of Judge Kooijmans).

268. *Id.* at 1050 (separate opinion of Judge Kooijmans). Judge Kooijmans added that the Court “rightly conclude[d] that the [Israeli-Palestinian] situation is different from that contemplated by resolutions 1368 and 1373.” *Id.* at 1072.

269. “At a time when . . . terrorists scout high-profile targets,” the Court’s interpretation “is suicidal.” McCarthy, *supra* note 228, at 24.

270. *See Legal Consequences*, *supra* note 15, at 1049-50.

271. This interpretation directly conflicts with the plain language of Article 51, which provides that “[m]easures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council. . . .” U.N. Charter art. 51 (emphasis added).

272. *See Caplen*, *supra* note 15, at 766-67.

of self-defense runs contrary to the drafters' intent when incorporating Article 51 into the U.N. Charter at the San Francisco Conference in 1945.²⁷³

V. THE POST-DISENGAGEMENT STATUS OF THE GAZA STRIP

The Hague Court's focus upon the location of a terrorist attack as a decisive factor determining whether a state can exercise self-defense²⁷⁴ necessarily requires reexamination in the aftermath of Disengagement.²⁷⁵ On September 15, 2005, Israeli Prime Minister Ariel Sharon addressed the U.N. General Assembly endeavoring to write a new, peaceful chapter to the Israeli-Palestinian dynamic:

I . . . reach[] out today to our Palestinian neighbors in a call for reconciliation and compromise to end the bloody conflict. . . . This week, the last Israeli soldier left the Gaza Strip. . . . [We are] ready to . . . resolve the conflict with the Palestinians. The decision to disengage was very difficult. . . . Now it is the Palestinians' turn to prove their desire for peace.²⁷⁶

While Israel envisions that Disengagement "is only a first step in a wider historical process" replete with "another major disengagement in the West Bank,"²⁷⁷ Israel currently has "no responsibility whatsoever over anything that happens in Gaza under international law."²⁷⁸ Nonetheless, Disengagement has resulted in both Israelis and Palestinians "putting forth

273. DAVID M. ACKERMAN, SELF-DEFENSE UNDER ARTICLE 51 OF THE UNITED NATIONS CHARTER: THE ORIGINAL UNDERSTANDING, CRS REPORT FOR CONGRESS 4 (1994) ("Article 51 force may also be used in self-defense before the machinery of the Organization can be brought into action, since self-defense against aggression would be consistent with the purposes of the Organization.").

274. See *Legal Consequences*, *supra* note 15, at 1050.

275. How "the world views Gaza [after Disengagement] will influence the way the larger conflict plays out in coming years." Greg Myre, *Israel Will Still Control Gaza, Palestinians Say*, INT'L HERALD TRIB., Sept. 12, 2005, at 5.

276. Prime Minister's Office, PM Sharon's Speech at the United Nations Assembly, <http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speech150905.htm> (last visited May 8, 2006); see also JANE CORBIN, GAZA FIRST 10 (1994) ("[A] peace agreement [between Israel and the Palestine Liberation Organization was] built on the notion of first returning Gaza to Palestinian control.").

277. Susser, *supra* note 120.

278. *Now Who Takes the Blame?*, *supra* note 17.

legal arguments about Gaza's status,"²⁷⁹ particularly since "international law never imagined anywhere like this—a place neither fully occupied nor completely sovereign."²⁸⁰

A. *Palestinian Gaza as an Independent Entity*²⁸¹

"An interesting Israeli-Palestinian tug of war is already taking place . . . over Gaza's legal status."²⁸² On September 21, 2005, Israel declared the Gaza Strip "'foreign' territory" in an effort to restore the pre-1948 international boundaries²⁸³ as provided under the U.N. Partition Resolution.²⁸⁴ Disengagement, according to Israel, has placed the Gaza Strip completely under Palestinian jurisdiction.²⁸⁵ Palestinians argue that the Gaza Strip's "legal status . . . would not change" after Disengagement²⁸⁶ since Israel would retain control of land, sea, and air frontiers.²⁸⁷ Nonetheless, it is recognized that some "type of Palestinian sovereignty" over the Gaza Strip has been established.²⁸⁸

Israel's transfer of authority to the Palestinians in Palestinian Gaza²⁸⁹ obligates the Palestinian governing authority "to rule, to enforce law and order, and to prevent terrorism."²⁹⁰ Now "accountable for the responsibilities" of maintaining order and establishing an infrastructure,²⁹¹ democracy under the PA government will be contingent upon how

279. Myre, *supra* note 275.

280. *Now Who Takes the Blame?*, *supra* note 17. One commentator asked: "Will [Gaza] be a Palestinian state with provisional borders? Half a Palestinian state? Half a provisional Palestinian state? A Palestinian autonomous region?" Herb Keinon, *Sharon's Search for Freedom of Action After Disengagement*, *Jerusalem Post*, Aug. 7, 2005, at 1.

281. This Essay utilizes the term "Palestinian Gaza" to identify the Gaza Strip's status after Israel's Disengagement and as dependent upon "evolving facts on the ground." *Now Who Takes the Blame?*, *supra* note 17.

282. Keinon, *supra* note 280.

283. *Israel Declares Gaza Strip 'Foreign' Territory*, INDO-ASIANNEWSERV., Sept. 21, 2005, Indo_Asian News Home Page, <http://www.ians.in>.

284. *See supra* Part II.A.2.

285. Joshua Mitnick, *Israel Lowers Its Flag Over Gaza; Palestinians Celebrate 'Liberation'*, WASH. TIMES, Sept. 12, 2005, at A01.

286. Khaled Abu Toarreh, *Gaza Withdrawal Is A Defeat For Israel, Says PA Foreign Minister*, JERUSALEM POST, Aug. 21, 2005, at 3.

287. Mitnick, *supra* note 285. Palestinians will advance "the case that the withdrawals must continue [because] Israeli occupation lives on." Keinon, *supra* note 280.

288. *End of Gaza Occupation Poses Questions*, UPINNEWSERV., Aug. 16, 2005, United Press International Home Page, <http://www.upi.com>.

289. *See Now Who Takes the Blame?*, *supra* text accompanying note 17.

290. Mitnick, *supra* note 285.

291. *Now Who Takes the Blame?*, *supra* note 17.

successful it can curb armed organizations: "[i]f the official organizations of the state or whatever its legal status will be will be terrorist organizations this will be a terrorist state."²⁹² Although Disengagement may have created a nebulous "type of Palestinian sovereignty"²⁹³ over Palestinian Gaza, it has nonetheless created a de facto autonomous entity that leaves Palestinians "without any pretext to continue carrying out [terrorist] attacks."²⁹⁴

B. Violence Originating Within Palestinian Gaza

Israeli officials impressed upon the PA that "it is time for the Palestinians to take dramatic action to support the peace process."²⁹⁵ Since Israel's Disengagement, however, the PA has struggled to establish order²⁹⁶ and has instead "had a taste . . . for anarchy."²⁹⁷ Internally, Palestinian Gaza has witnessed the "most violent" clashes²⁹⁸ between PA security forces and militant groups such as Hamas.²⁹⁹ Palestinian police forces "charged onto the grounds of the Palestinian parliament"³⁰⁰ demanding greater protection³⁰¹ in the aftermath of Hamas's "violations and disregard for law and order."³⁰² In one recent act of violence, twenty-one Palestinians died during a Hamas rally when self-manufactured

292. David Horovitz, *You Can't Fool Around With Terrorist Groups*, JERUSALEM POST, July 12, 2005, at 6.

293. See *End of Gaza Occupation Poses Questions*, *supra* note 288 and accompanying text.

294. Keinon, *supra* note 280.

295. *Sharon, Abbas To Meet Next Week; Palestinians Seek Looser Restrictions In Territories*, WASH. POST, Oct. 7, 2005, at A14.

296. Greg Myre, *Israeli and Palestinians To Discuss Steps To Peace*, N.Y. TIMES, Oct. 6, 2005, at A7.

297. Kershner, *supra* note 211.

298. *Hamas Hurt; Palestine*, ECONOMIST, Oct. 8, 2005, at 58.

299. See Dan Efron, *Tensions on Rise Over Hamas's Election Role Israel, US Push to Keep Group Out of Jan. Vote*, BOSTON GLOBE, Oct. 5, 2005, at A10. Israel has maintained that the peace process cannot proceed "until Palestinian leaders crack down on Hamas and other armed factions." Myre, *supra* note 296.

300. *Cops Demand More Help Against Hamas*, CHI. TRIB., Oct. 4, 2005, at C6.

301. "The Palestinian Authority's 30,000 police and soldiers in the Gaza Strip say they lack the capacity to disarm" Palestinian militants. Matt Rees, *Gaza's New Strongmen; Now That Israel is Gone, the Palestinian Authority Faces a New Foe: Armed Militias that Want to Clean House and Take Their Piece of the Pie. Meet the Sopranos of the Middle East*, TIME, Oct. 17, 2005, at 48.

302. *Hamas-Fatah Rivalry Grows Violent*, N.Y. TIMES, Oct. 8, 2005, at A10. In an act of defiance, Hamas militants attacked a Palestinian police station causing several deaths and numerous injuries. *Committee Condemns Hamas for Gaza Attacks*, UPI NEWS SERV., Oct. 6, 2005.

rockets intended for use against Israel were detonated.³⁰³ Palestinians fear that “a bloody struggle” between the PA and “the myriad armed groups proliferating” in Palestinian Gaza will engulf the territory.³⁰⁴ With internal divisions posing “an even greater threat” to achieving stability,³⁰⁵ only recently have at least eight militant Palestinian groups embarked upon serious efforts to end factional rivalries.³⁰⁶

The “chaos”³⁰⁷ that has recently plagued Palestinian Gaza “only serves those who contend Palestinians cannot be trusted to run a state of their own.”³⁰⁸ Disengagement has effectively “refocused attention on the internal Palestinian strife” within Palestinian Gaza.³⁰⁹ Israel’s complete withdrawal precludes Palestinians from “be[ing] able to justify their attacks to the world.”³¹⁰ Israel terms the Palestinians’ ability to disarm a “true test” since it “won’t tolerate terror acts.”³¹¹ As a result, Disengagement has even greater implications for Israel’s ability to defend itself. By establishing Palestinian sovereignty in Palestinian Gaza,³¹² Disengagement effectively internationalizes any incident that might involve the territory:

If . . . [Palestinian terrorist] attacks continue then Israel could legitimately employ its right of self-defense and . . . respond with a degree of force it has refrained from using in the past. . . . [T]he occupation of Gaza has ended and will give Israel a free hand to respond to attacks from there as legitimate acts of self-defense.³¹³

303. Philip Klein, *Fredo Abbas*, AM. SPECTATOR, Oct. 5, 2005, online at <http://www.spectator.org>.

304. Rees, *supra* note 301.

305. Korobkin & Zasloff, *supra* note 132, at 66.

306. *The World; Palestinian Militant Groups Call for End to Rivalries; Factions Hold a News Conference to Denounce Violence Against Each Other’s Members*, L.A. TIMES, Oct. 9, 2005, at A17. Various Palestinian militant groups have vowed to halt “spreading chaos or internal strife.” *Id.*

307. “Gaza is in security chaos.” Rees, *supra* note 301.

308. Editorial, *Gaza’s Deadly Turmoil*, TORONTO STAR, Oct. 5, 2005, at A22.

309. *Cops Demand More Help Against Hamas*, *supra* note 300.

310. Keinon, *supra* note 280.

311. Mitnick, *supra* note 285; *see also* Kershner, *supra* note 211 (noting that “[y]ou can’t ‘crack down’ on Hamas . . . [t]hey represent probably 35 percent of the society”).

312. *See End of Gaza Occupation Poses Questions*, *supra* note 288 and accompanying text.

313. Keinon, *supra* note 280.

In effect, Israel's Disengagement establishes Palestinian Gaza as an entity with "the trappings of statehood."³¹⁴

C. Applying the Hague Court's Pronouncements to Palestinian Gaza

Although Palestinian statehood has yet to be "constituted,"³¹⁵ autonomy within Palestinian Gaza makes it "look like a state [that] can be held responsible for its actions like all independent states."³¹⁶ While the Hague Court's advisory opinion concerning the illegality of Israel's security structure "dealt a serious blow to the credibility of international law"³¹⁷ and seemingly established "new rules" limiting a state's right to self-defense,³¹⁸ Disengagement establishes parameters through which Israel can respond to terrorism without reservation or condemnation by the Court.³¹⁹ No longer can Palestinian Gaza be considered territory "within, and not outside" Israel.³²⁰ Thus, the Court's conclusions that Security Council Resolutions 1368 and 1373 cannot be invoked to justify Israel's actions are now inoperative.³²¹ Disengagement therefore presents a situation in which terrorism originating from Palestinian Gaza, as a matter of law, constitutes "acts of *international* terrorism . . . constituting a threat to *international* peace and security."³²²

Furthermore, in the absence of Resolutions 1368 and 1373, Disengagement affords Israel the right to exercise self-defense against Palestinian Gaza under Article 51, which the Hague Court suggested contemplates only "the case of armed attack by one State against another

314. *Id.*

315. See *supra* text accompanying note 236.

316. Keinon, *supra* note 280.

317. Andrew Apostolou, *A Court in the Service of Terrorism: Playing Arafat's Propaganda Game*, NAT'L REV. ONLINE, at <http://www.nationalreview.com/comment/apostolou/200407190844.asp>.

318. See Caplen, *supra* note 15, at 762-67.

319. See Editorial, *A Disgraceful Ruling*, WASH. TIMES, July 19, 2004, at A18 ("[The ICJ's] worst folly was its assertion that the inherent right of self-defense . . . is not available to Israel . . . because it is not being attacked by a sovereign state. . . . [T]his view [is] not based on the language of the U.N. Charter" and "it flies in the face of post-September 11 Security Council resolutions."). See *supra* text accompanying notes 263-73.

320. Legal Consequences, *supra* note 15, at 1050. *But see* Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 125, 138 (Emma Playfair ed., 1992) ("Until recently . . . most of the violence directed against Israel has been planned and perpetrated . . . by exiled liberation forces *outside Israel-controlled territory*." (emphasis added)).

321. See *supra* text accompanying notes 263-73.

322. Legal Consequences, *supra* note 15, at 1072 (separate opinion of Judge Kooijmans).

State.”³²³ Although the Court interpreted Article 51 to “relate[] to international phenomena,”³²⁴ the provision does not require a specific point of origin for acts of terrorism.³²⁵ In fact, the framers of the U.N. Charter specifically drafted provisions such that “[t]here is nothing whatever in the Charter which impairs a nation’s right of self-defense. . . . Among the purposes of the Charter is security.”³²⁶ Moreover, “terrorist actions are violations of the laws and customs of war [that] amount to crimes against humanity . . . in violation of the central principles of the Charter of the United Nations.”³²⁷ Assuming *arguendo* that the Court’s pronouncements on Article 51 are valid despite the fact that it is “implausible to require that only a state actor may engage in an armed attack before the targeted state can invoke Article 51,”³²⁸ Palestinian Gaza’s state-like attributes³²⁹ place it squarely within the Court’s interpretation of when a state may exercise self-defensive measures.³³⁰ Thus, Disengagement refutes any contention that Israel cannot utilize either forcible or non-forcible³³¹ measures to combat Palestinian terrorist activities under Article 51.³³²

VI. CONCLUSION

Although Israel was not bound by the Hague Court’s advisory opinion,³³³ and announced it would ignore the Court’s decision,³³⁴ Disengagement is nonetheless Israel’s response to the Court’s decision that

323. *Id.* at 1050; *see supra* text accompanying notes 311-14.

324. *Legal Consequences, supra* note 15, at 1072 (separate opinion of Judge Kooijmans).

325. *See supra* text accompanying notes 262-63.

326. ACKERMAN, *supra* note 273, at 5-6.

327. Written Statement of the Government of Israel on Jurisdiction and Propriety, at 51, *Legal Consequences, supra* note 15, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited May 8, 2006) (emphasis added).

328. It is “implausible to require that only a state actor may engage in an armed attack before the targeted state can invoke Article 51.” Caplen, *supra* note 15, at 766 n.334.

329. *See supra* text accompanying note 316.

330. *See Legal Consequences, supra* note 15, at 1050.

331. Judge Higgins nonetheless argued that “I remain unconvinced that non-forcible measures . . . fall within self-defence under Article 51. . . . [E]ven if it were an act of self-defence . . . it would need to be justified as necessary and proportionate.” *Id.* at 1063 (separate opinion of Judge Higgins).

332. *See supra* text accompanying notes 316 & 327.

333. *See Legal Consequences, supra* note 15, at 1025 (noting that its opinion “has no binding force”) (quoting Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, 1950 I.C.J. 65, 71 (Mar.30)).

334. Jeremy Rabkin, ‘Lawfare,’ WALL ST. J., July 13, 2004, at A13.

made "a mockery of Israel's right to defend itself."³³⁵ In a post-September 11 era in which "states [have been] forced to reevaluate the long-standing notion that only a state has the capacity to commit an armed attack against another state,"³³⁶ the Court's interpretation of the law of self-defense as it applied to Israel has been described as "suicidal."³³⁷ In a broader context, the Court's "newly established precedent" undermined "all U.N. member nations' rights to self-defense."³³⁸

Disengagement from the Gaza Strip produced several consequences that substantially affect the Israel-Palestinian dynamic. Firstly, Disengagement represents a deliberate effort to reinvigorate a flailing peace process.³³⁹ Secondly, it ascribes an international character to Palestinian Gaza³⁴⁰ and enables the Palestinian people to work toward establishing full sovereignty over a Palestinian state.³⁴¹ Thirdly, it effectively eliminates accusations that Israel maintains control over Palestinian Gaza³⁴² and instead places the obligations of maintaining security and internal stability squarely within the purview of the PA.³⁴³ Lastly, Disengagement renders the Hague Court's decision inapplicable to the Israeli-Palestinian conflict by eliminating any question concerning Israel's ability to defend itself against terrorist activities originating from Palestinian Gaza.³⁴⁴

Ultimately, Disengagement has reinvigorated peace negotiations between Israel and the Palestinians.³⁴⁵ For Palestinians, Disengagement provides a first and significant step toward solidifying statehood in Palestinian Gaza.³⁴⁶ Palestinian Gaza represents an opportunity for the PA to create and maintain a viable political, social, and economic

335. Benjamin Netanyahu, *Why Israel Needs a Fence*, N.Y. TIMES, July 13, 2004, at A19; see also Charles Krauthammer, *Travesty at the Hague*, WASH. POST, July 16, 2004, at A21.

336. Brown, *supra* note 257, at 24.

337. McCarthy, *supra* note 228, at 24.

338. Caplen, *supra* note 15, at 768-69.

339. See Myre, *supra* note 192; Berkowitz, *supra* note 4.

340. See *supra* Parts V.A-C.

341. See Shalom, *supra* note 1 and accompanying text.

342. See *supra* text accompanying notes 283-85. But see *supra* text accompanying notes 286-87.

343. See *supra* text accompanying notes 289-92.

344. See *supra* Part V.C.

345. See Joshua Mitnick, *Sharon, Abbas to Meet Next Week; Palestinians Seek Looser Restrictions in Territories*, WASH. POST, Oct. 7, 2005, at A14; Greg Myre, *Peace Talks in Mideast To Resume*, INT'L HERALD TRIB., Oct. 7, 2005, at 4.

346. See *End of Gaza Occupation Poses Question*, *supra* note 288 and accompanying text.

infrastructure without interference.³⁴⁷ For Israel, Disengagement concludes decades of administration over the Gaza Strip, a territory over which it never sought control,³⁴⁸ and reaffirms its inherent right to defend itself against acts of Palestinian terror.³⁴⁹ Disengagement provides not only for Israeli security, but ensures Palestinian Gaza much-desired autonomy as well as control over its own security needs.³⁵⁰ As Israel plans a second potential Disengagement from the West Bank,³⁵¹ the establishment of Palestinian Gaza represents an affirmative act of nation-building³⁵² that once again, places Gaza on the frontier of defining “the fate of nations.”³⁵³

347. *See Peril and Promise; Yassar Arafat's Death Could Spark Internecine Struggle, But it Offers Both Sides a Second Chance*, HOUSTON CHRON., Nov. 12, 2004, at B8 (noting that Palestinians would have had “an independent state years ago. Had Arafat been able to say yes to a reasonable agreement, he could have presided over an independent Gaza” in 2000).

348. *See supra* Part II.

349. *See supra* Part V.

350. The PA must “create an effective government in Gaza [to] ensure that Hamas and Islamic Jihad do not carry out indefensible attacks against Israeli civilians.” Tim King & Doug Woodward, *Gaza's Success Must Become a Global Priority*, INDIANAPOLIS STAR (Indiana), Sept. 25, 2005, at 3E.

351. *See* Susser, *supra* note 120; Gershon Baskin, *The Price of Peace*, JERUSALEM POST, May 31, 2005, at 16; *supra* text accompanying notes 205 & 277.

352. *See Palestinian Security Official Rejects Israeli Call to Disarm Militants*, BBC MONITORING INT'L REP., Aug. 24, 2005 (“If the Israelis fully withdraw from the Gaza Strip and if this withdrawal is complete, [it will] lead[] to full independence of the Gaza Strip.”).

353. MEYER, *supra* note 3, at 4.