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Mending the "Fence": How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense

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

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"The problem [of Palestine] is mainly one of human relationship and political rights. Few countries have been the subject of so many general or detailed enquires . . . ."[1]

I. INTRODUCTION

While the United States has not been wholly immune from terrorism in recent decades,[2] the tragedy of September 11, 2001 awakened the American conscience to the harsh reality that a new war between the

1. UNITED NATIONS, SPECIAL COMM. ON PALESTINE, REPORT ON PALESTINE V (1947).

2. *See, e.g.*, JOSEPH M. SIRACUSA & DAVID G. COLEMAN, DEPRESSION TO COLD WAR: A HISTORY OF AMERICA FROM HERBERT HOOVER TO RONALD REAGAN 240-43 (2002); George Wilson, *So We've Bloodied Qaddafi's Nose: Now What's Their Move?*, WASH. POST, Mar. 30, 1986, at D1.

forces of democracy and fundamentalism had spread to American soil.[3] September 11 was an attack against Americans not unlike the Palestinian suicide bombings of Israeli civilians.[4] The United States response to terrorism has, in many ways, emulated Israel's attempts to protect its citizens from acts of violence.[5] The overwhelming response to Israel's efforts, however, remains highly critical.[6] Perhaps the most significant repudiation of Israel's right to defend itself against Palestinian terror was articulated by the International Court of Justice at the Hague (Hague Court) on July 9, 2004.[7]

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3. September 11 was a "nightmare scenario . . . [that] even the experts had not imagined." Dan Balz, *Bush Confronts a Nightmare Scenario: Crisis Looms as Defining Test of President's Leadership*, WASH. POST, Sept. 12, 2001, at A2. Congress and the White House, "[s]tunned by the magnitude of [the] terrorist attacks[,] . . . reassess[ed] an approach to fighting terrorism that until this week has favored the tools of law enforcement over those of war." John Lancaster & Susan Schmidt, *U.S. Rethinks Strategy for Coping With Terrorists: Policy Shift Would Favor Military Action, Tribunal over Pursuing Suspects Through American Courts*, WASH. POST, Sept. 14, 2001, at A9.

4. On September 12, one journalist wrote, "Do you get it now? . . . [Y]ou can't avoid the question when . . . you have seen the human wreckage [in Israel] caused by the suicide bombs that go off with sickening frequency. You ask it because Jerusalem offers a glimpse of what New York may become." Clyde Haberman, *When the Unimaginable Happens, and It's Right Outside Your Window*, N.Y. TIMES, Sept. 12, 2001, at A10. Haberman added, "[F]ear . . . grips Israelis . . . as the ambulances keep coming, they reach for cell phones . . . to make sure that loved ones are all right. Often, they cannot get through because so many people are phoning at the same time. . . . All of that happened in New York yesterday." *Id.*

5. The Israeli Supreme Court stated that Palestinian terrorism "embod[ies] all the characteristics of armed conflict." H.C. 2056/04, Beit Sourik Vill. Council v. Gov't of Israel, at *3, *available at* http://62.90.71.124/eng/verdict/framesetSrch.html. President George W. Bush declared that the September 11 attack and previous attacks "created a state of armed conflict." Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).

6. Despite condemnation of Israel's attempts to ensure its security, "[t]he world was quick to welcome [American] strikes on Afghanistan . . . . [T]here were few dissenting voices . . . ." *How the World Sees It; Global Support as the War on Terror Begins*, DAILY REC. (Scotland), Oct. 8, 2001, at 12. The U.N. General Assembly "[*u*]*rgently call*[*ed*] for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September 2001." U.N. GAOR, 56th Sess., Agenda Item 8, at 1, U.N. Doc. A/56/L.1 (2001). The Security Council expressed its "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism." S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368(2001) (2001); *see also* John D. Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 DENV. J. INT'L L. & POL'Y 583, 583 (2004) (noting "tacit support" for American use of force based upon the customary international law of self-defense and Article 51 in the U.N. Charter). Israel's justification of self-defense under Article 51 of the U.N. Charter, however, was rejected by the International Court of Justice (Hague Court). *See infra* Part V.D.

7. *See infra* Parts IV.D, V, VI. The day the Hague Court issued its advisory opinion has been described as "a dark day in the history of international law." 150 CONG. REC. H5465 (daily ed. July 9, 2004) (statement of Rep. Pence).

This Note assesses the legality of Israel's construction of a security structure as part of its counterterrorism initiative.[8] To discuss the Israeli security structure in context, Part II provides a history of the *Intifada* and Israel's recent campaign to defend itself from acts of terror against its citizens. Part III traces the history of the Israeli-Palestinian conflict beginning in the early twentieth century, the development of the two-state solution in Palestine, and the Arab-Israeli wars that reflected and defined the region's volatile dynamic.[9] Part IV explores the relationship between Israel and the United Nations (U.N.). Part V evaluates the Hague Court's interpretation of international law principles relative to both the Israeli-Palestinian conflict and Israel's counterterrorism initiative. Lastly, Part VI assesses the ramifications of the Hague Court's advisory opinion with respect to the law of self-defense and the corpus of international law.

II. PALESTINIAN TERRORISM IN ISRAEL AND ISRAEL'S COUNTERTERRORISM INITIATIVE[10]

Prior to 1988, both Palestinians and Israelis engaged in armed struggle[11] that often resulted in "open warfare."[12] The National Covenant proclaiming the founding of the Palestine Liberation Organization (PLO)[13] denounced Zionism[14] as colonialism and advocated the destruction of Israel.[15] At the conclusion of the 1967 Six-Day War,[16] the PLO emerged

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8. *See infra* note 48 and accompanying text.

9. The conflict has produced a rich oeuvre of scholarship and literature advancing both perspectives. "Approaches to the Palestine question have varied in accordance with the beliefs and ideologies of [those who] have sought to engage in and resolve it." ABD AL-FATTAH MUHAMMAD EL-AWAISI, THE MUSLIM BROTHERS AND THE PALESTINE QUESTION 1928-1947 1 (1998). This Note does not attempt to advance one particular historical interpretation.

10. One scholar noted that "students of international law approach the question of a Palestinian State from the standpoints of terrorism, self-determination and human rights. . . . [S]uch an approach is altogether reasonable." Louis René Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229, 229-30 (1999) (footnote call numbers omitted).

11. Thomas L. Friedman wrote that the Palestine Liberation Organization (PLO) "want[s] to use the 'armed struggle' to utterly destroy the peace process." Thomas L. Friedman, *Hijackers in Custody: A Special Satisfaction for Israel and U.S.*, N.Y. TIMES, Oct. 12, 1985, § 1, at 10.

12. ANDREW S. BUCHANAN, PEACE WITH JUSTICE: A HISTORY OF THE ISRAELI-PALESTINIAN DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS § 1.2, at 3 (2000). The author characterized the nature of the conflict as "inter-ethnic" and "existential": "The Israeli-Palestinian conflict, until 1988, . . . failed to attain . . . the destruction of the other side's claim to legitimacy and to exist as a sovereign entity in the land of Israel/Palestine." *Id.*

13. On May 22, 1964, Egyptian leader Gamal Abdul Nasser founded the PLO as a "political umbrella organisation" controlling several groups that conducted raids into Israel. EDGAR O'BALLANCE, THE PALESTINIAN INTIFADA 4 (1998).

14. *See infra* notes 75-76 and accompanying text.

15. First Arab Palestine Cong., *The Palestinian National Covenant* (1964), *in* 1 PALESTINE:

as the leader of an independent Palestinian liberation movement.[17] When Palestinians mounted protests against Israel beginning in 1987, the PLO "hurried to take charge . . . and turn it into a PLO-directed civil resistance movement."[18]

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

While previous declarations recognized the Palestinian people,[19] Palestinian national identity[20] was defined in the Palestinian National Charter of 1968.[21] Following the Charter's adoption, "the number of Palestinian resistance groups mushroomed."[22] The primary objective of these groups was to engage in acts of international terrorism against Israelis[23] in order to "publicise their cause."[24] As many of these groups

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DOCUMENTS 204, 205 (Mahdi F. Abdul Hadi ed., 1997). The Covenant states, "[T]he establishment of Israel [was] illegal and false . . . . [T]he Palestine Liberation Organization carries out its complete role to liberate Palestine." *Id.*

16. *See infra* Part III.D.

17. REUVEN KAMINER, THE POLITICS OF PROTEST: THE ISRAELI PEACE MOVEMENT AND THE PALESTINIAN INTIFADA 25 (1996). For a discussion of the PLO's history and development, see generally JILLIAN BECKER, THE PLO (1984), HELENA COBBAN, THE PALESTINIAN LIBERATION ORGANIZATION (1984), and ABDALLAH FRANGI, THE PLO AND PALESTINE (Paul Knight trans., 1983).

18. O'BALLANCE, *supra* note 13, at 25.

19. *See, e.g.*, G.A. Res. 302, U.N. GAOR, 4th Sess., U.N. Doc. A/RES/302(IV) (1949) (providing assistance to "Palestine refugees" after the 1948-1949 Arab-Israeli war); *accord* G.A. Res. 212, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/212(III) (1948).

20. For a historical discussion of Palestinian national identity, see 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, 33-41 (1997).

21. Palestine Nat'l Council, *The Palestinian National Charter* (1968), *in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 213, 213. The Charter recognized that the Palestinian people possessed "the legal right to their homeland." *Id.* It added that "Palestinian identity is a genuine, essential, and inherent characteristic" unaffected by "[t]he Zionist occupation." *Id.* The Charter further recognized that "there is a Palestinian community . . . [with a] material, spiritual, and historical connection with Palestine." *Id.* The Charter noted that "Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians." *Id. But see* Chaim Herzog, Address General Assembly (Nov. 10, 1975), *in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 237, 239 (quoting PLO Chairman Yassir Arafat's opening address at a symposium in Libya: "'There will be no presence in the region other than the Arab presence . . . .' In other words, in the Middle East from the Atlantic Ocean to the Persian Gulf only one presence is allowed, and that is Arab presence.").

22. O'BALLANCE, *supra* note 13, at 5.

23. *See, e.g.*, Terence Smith, *Mrs. Meir Speaks: A Hushed Parliament Hears Her Assail 'Lunatic Acts,'* N.Y. TIMES, Sept. 6, 1972, at 1 (noting that Palestinian guerillas targeted Israeli citizens traveling abroad).

24. O'BALLANCE, *supra* note 13, at 8.

began to decline in the 1980s, several factors facilitated an atmosphere ripe for Palestinians to develop a united protest movement against Israel.[25]

1. The First Palestinian *Intifada*

On December 8, 1987, several Palestinians were injured and killed in a traffic accident with an Israeli vehicle near the Jebaliya refugee camp in Gaza.[26] The incident served as a catalyst for the first *Intifada*[27] against Israel's presence in both Gaza and the West Bank.[28] The movement "galvanized the Palestinian people, impressed international public opinion, and, most importantly, convinced a sizeable number of Israelis that they could not indefinitely maintain [a presence in] the West Bank and Gaza strip."[29] Over the course of approximately six years, Palestinians staged mass demonstrations and engaged in acts of noncooperation against Israel.[30] In 1988, as the first *Intifada* gained momentum, the PLO declared

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25. For a discussion of factors that scholars suggest facilitated a decline in the importance of the PLO and its satellite networks between 1982 and 1987, see UZI AMIT-KOHN ET AL., ISRAEL, THE "INTIFADA" AND THE RULE OF LAW 28-29 (1993). For a discussion of factors that contributed to an atmosphere of unified Palestinian protest, 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).

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

27. O'BALLANCE, *supra* note 13, at 26. This "Intifada," or uprising, represented the first significant and unified Palestinian attempt to protest Israel's presence in both Gaza and the West Bank. *See* ANDREW RIGBY, LIVING THE INTIFADA 1 (1991). "Intifada" is derived from the Arabic "*Nafada*," which means "the action of 'shaking off' or 'shaking out.'" *Id.* at 2.

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

29. RASHID KHALIDI, PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS 201 (1997). The *Intifada* "constituted a . . . new form of interethnic crisis between Israel and the Palestinians." HEMDA BEN-YEHUDA & SHMUEL SANDLER, THE ARAB-ISRAELI CONFLICT TRANSFORMED: FIFTY YEARS OF INTERSTATE AND ETHNIC CRISES 141 (2002).

30. Palestinian resistance included rock throwing, demonstrations, and the construction of illegal roadblocks. AMIT-KOHN ET AL., *supra* note 25, at 27. Although both Israelis and Palestinians incurred casualties, the first *Intifada* has nonetheless been characterized as an "*unarmed* form of resistance, insofar as the tools of confrontation used by the Palestinians have not been *lethal*." RIGBY, *supra* note 27, at 1. As a political and social movement, the first *Intifada* was "an unprecedented, full-scale civilian uprising . . . and the main weapon . . . was an unprecedented level of mass participation in every conceivable act of resistance . . . . The emerging Intifada was basically non-violent . . . . An unarmed civilian population . . . confront[ed] an army . . . and create[ed] . . . an alternative source of power." KAMINER, *supra* note 17, at 42. As a result, the first *Intifada* has been referred to as "the war of stones." Nationmaster.com, *Encyclopedia: First Intifada*, *at* http://www.nationmaster.com/encyclopedia/First-Intifada (last visited May 9, 2005).

Palestinian independence.[31] When the first *Intifada* formally concluded in 1993,[32] an era of peaceful co-existence and an end to decades of violence between Palestinians and Israelis seemed forthcoming.[33]

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

As the 1990s progressed, the peace process that seemed within reach[34] rapidly began to unravel.[35] In April 1994, the first in a series of suicide bombings that continued throughout the 1990s[36] and into the new millennium erupted within the West Bank and Israel. Assassinations of

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31. *See* Louis René Beres, *The Oslo Agreements in International Law, Natural Law, and World Politics*, 14 ARIZ. J. INT'L & COMP. L. 715, 736 n.85 (1997). The PLO "was called upon to put aside" its declaration of statehood as a prerequisite to peace negotiations. Camille Mansour, *The Palestinian-Israeli Peace Negotiations: An Overview and Assessment*, J. PALESTINE STUD., Spring 1993, at 5, 6.

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

33. Israel and the PLO signed the Declaration of Principles on Interim Self-Government Authority (Oslo Accords) in 1993. *See* U.S. President Bill Clinton, Statement at the Signing of the Israel-PLO Accord (Sept. 13, 1993), *in* 2 PALESTINE: DOCUMENTS, *supra* note 15, at 150, 150-51 ("[T]here is a great yearning for [peace].").

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

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

36. *See* O'BALLANCE, *supra* note 13, at 171-79; Bob Hepburn, *Israel Seals off West Bank, Gaza Arab Militants Vow More Attacks*, TORONTO STAR, Apr. 8, 1994, at A1; Bill Hutman & Alon Pinkas, *Terrorist Was Wanted Hamas Member*, JERUSALEM POST, Apr. 7, 1994, at 1. Following an October 1994 suicide bombing, a terrorism expert stated: "For this atrocity to happen in the heart of Tel Aviv means that the arm of terrorism is long" and that Hamas "appears to be willing to take greater risks . . . to weaken the peace process." David Rudge, *Newsline with Prof. Yonah Alexander*, JERUSALEM POST, Oct. 20, 1994, at 2. For further descriptions of numerous suicide bombings in Israel between 1994 and 1998, see Israel Foreign Ministry, *Suicide Bombings*, *available at* http://www.aish.com/Israel/articles/Suicide_Bombings_p.asp (last visited May 9, 2005).

both Palestinian[37] and Israeli[38] leaders, discontent among Palestinians with their own leadership,[39] and a breakdown in negotiations between Israeli and Palestinian officials[40] contributed to an atmosphere of uncertainty that weakened any prospect for peace.[41]

3. The Second Palestinian *Intifada*

The causes of the second *Intifada*[42] remain in dispute.[43] Although the second *Intifada* mirrored its predecessor by featuring "thousands of Arabs hurling rocks, burning tires, and blocking highways," it became increasingly violent.[44] The second *Intifada* incorporated the use of suicide bombings[45] designed to inflict casualties among Israeli civilians.[46] In 2002,

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37. Israelis assassinated leaders of the Fatah Black Hawks, Islamic Jihad, and Hamas militant groups in 1995 and 1996. O'BALLANCE, *supra* note 13, at 194, 198, 201.

38. Prime Minister Rabin was assassinated by an Israeli while he attended a peace rally in November 1995. *Id.* at 199; *see* Serge Schmemann, *The Israeli Vote: The Overview: Netanyahu, Set to Lead Israel, to Seek 'Peace with Security,'* N.Y. TIMES, May 31, 1996, at A1. Palestinian responses to Rabin's death were mixed. *See* Youssef M. Ibrahim, *Assassination in Israel: The Palestinians: In the West Bank and Gaza, Mixed Feelings*, N.Y. TIMES, Nov. 6, 1995, at A11. Despite the prospects of concluding a permanent peace after the 1993 Oslo Accords, "hope died with Rabin in 1995." Ofer Zur, *Time for a Wall*, TIKKUN, May/June 2002, at 20, 20.

39. *See, e.g.*, Ethan Bronner, *Gaza Deaths Spur Unrest: Israeli Troops Kill Three*, BOSTON GLOBE, Nov. 20, 1994, § National/Foreign, at 1 (reporting clashes between Palestinian police and stone-throwing Palestinian youths outside a Gaza mosque); Charles W. Holmes, *Can Arafat Make Peace Work? Palestinians Have New Enemy-Each Other-as PLO Chief Fights Militants*, ATLANTA J. & CONST., Nov. 20, 1994, at A13.

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

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

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

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

44. DANIEL DOR, INTIFADA HITS THE HEADLINES 18 (2004).

45. The Israel Defense Forces (IDF) cited a total of 22,406 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/

the Israeli Supreme Court described the all-encompassing reach of the attacks: "These suicide bombers reach every place where Israelis are to be found."[47]

B. *Israel's Counterterrorism Initiative*[48]

The notion of "physically separating the Israeli and Palestinian peoples is an old one."[49] Israel responded to the second Palestinian *Intifada* and the accompanying terrorist attacks[50] by erecting a security structure separating Israel from the West Bank and Gaza beginning in 2000.[51] According to the

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9/21829.doc (last updated July 24, 2004). For a list of terrorist and suicide attacks in Israel from 1994 through 2002, see HA'ARETZ, *Chronology of Suicide Bombings in Israel, available at* http://www.haaretz.co.il/hasen/pages/ShArt.jhtml?itemNo=209646&contrassID=2&subContrassID=1&sbSubContrassID=0&listSrc=Y (last visited May 9, 2005).

46. At least four thousand Palestinians have sacrificed themselves as part of the ongoing struggle. Steven Stalinsky, *The Intifada, 5 Years Later*, N.Y. SUN, Oct. 6, 2004, at 9. A 2004 poll of Palestinians revealed that seventy percent of those surveyed supported continuing the conflict against Israel, forty-six percent sought to eliminate Israel and replace it with Palestine, and sixty-two percent supported the use of suicide bombings to further Palestinian objectives. Caroline B. Glick, *Supreme Injustice*, JERUSALEM POST, July 2, 2004, at 1. Palestinian leaders have endorsed suicide attacks "as a legitimate weapon of resistance." Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297, 312 (2003).

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

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

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

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

51. *See infra* note 62 and accompanying text.

Israeli Supreme Court, the "separation fence is a project of utmost national importance."[52]

1. Recognizing the Need for a Security Structure

Prime Minister Rabin, in response to a suicide bombing in 1994, asserted, "'There has to be a separation, not just a technical closure . . . . We have to decide on separation as a philosophy.'"[53] Israel subsequently erected an electronic fence around the Gaza Strip pursuant to military deployment requirements set forth under the Oslo Accords, but it was demolished when the second *Intifada* erupted in 2000.[54] In July 2000, prior to the start of the second *Intifada*, Israeli Prime Minister Ehud Barak emphasized that a physical separation between Israel and the Palestinians would mutually benefit both nations.[55] Shortly thereafter, the Israel Defense Forces (IDF) adopted a philosophy of "separation between the two entities together with . . . cooperation"[56] while simultaneously constructing "'a border that breathes"[57] in order to recognize Palestinian concerns and needs.[58]

Although current Prime Minister Ariel Sharon originally opposed constructing a security structure, he succumbed to growing public sentiments demanding protection against suicide bombings.[59] A poll of Israelis found that eighty-four percent of those surveyed supported the construction of a security structure.[60] Most Israelis were united in their confidence that such an initiative would significantly reduce the number of terrorist attacks and violence perpetrated against them.[61]

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52. *Beit Sourik Vill. Council*, at *8.

53. David Makovsky, *Rabin: We Need Border with Palestinians*, JERUSALEM POST, Oct. 20, 1994, at 1 (quoting Israeli Prime Minister Yitzhak Rabin). In 1995, Rabin declared "This path must lead to a separation . . . . We do not want . . . residents of the State of Israel . . . subject[ed] to terrorism." *Rabin: Peace "Must Lead to a Separation" Between Israelis and Palestinians*, MIDEAST MIRROR (London), Jan. 24, 1995, LEXIS, World News, Middle East/Africa Sources. Rabin was assassinated ten months later. *See supra* note 38 and accompanying text.

54. ALMOG, *supra* note 48, at xi; *see also* MAKOVSKY, *supra* note 41, at 7.

55. Before Barak departed for the Camp David Summit in 2000, he stated, "[S]eparation . . . will promote a healthier relationship as well as economic and multi-disciplinary collaboration . . . . Israel's welfare is linked to the prosperity of the Palestinian people." Prime Minister Ehud Barak, Address to the "Peace and Security Council, *Peace as My Paramount Objective*, MIDEAST MIRROR, June 28, 2000, LEXIS, World News, Middle East/Africa Sources.

56. *Israel Plans to Build Fence Along Border with Palestinians*, XINHUA NEWS AGENCY, June 21, 2000, LEXIS, World News, Political.

57. Hanan Sher, *Separate But Unequal*, JERUSALEM REP., Nov. 20, 2000, at 80.

58. *See infra* note 63 and accompanying text.

59. *See* MAKOVSKY, *supra* note 41, at 7.

60. Ephraim Yaar & Tamar Hermann, *Peace Index: February 2004*, *at* http://spirit.tau.ac.il/socant/peace/peaceindex/2004/files/feb2004e.pdf (last visited May 9, 2005).

61. *Id.*

2. Elements of the Israeli Security Structure

On April 14, 2002, the Ministers' Committee for National Security authorized the IDF to commence construction of the structure.[62] The Israeli Supreme Court noted that careful consideration was given to Palestinian interests when the Israeli Government determined the location and composition of the security structure.[63] The structure included an elaborate network of electronic fences, a bulldozed security buffer zone, high-tech sensors equipped with interception capabilities, electronically enhanced observation posts, patrol roads, a "trace" road composed of sand to detect footprints, barbed wire, and secured gates designed to ensure safe passage.[64] While no security measure could be entirely impenetrable,[65] recent evidence suggests that this elaborate security network has been

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62. The Minister's Committee sought to "strengthen operational capability in the framework of fighting terror, and to prevent the penetration of terrorists . . . into Israel." H.C. 2056/04, Beit Sourik Vill. Council v. Gov't of Israel, at *3, *available at* http://62.90.71.124/eng/verdict/frameset Srch.html. The structure was designed as "a temporary solution" to "help contend with the threat of Palestinian terror." *Id.* at *3, *16; *see also* Ministry of Defence, *Israel's Security Fence: Purpose*, *at* http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm (last updated July 1, 2004) (last visited May 14, 2005).

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

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

65. MAKOVSKY, *supra* note 41, at 17 (stating that although "terrorists may still find ways to circumvent the West Bank fence . . . even a less-than-perfect success rate would still save many lives").

effective.[66] As of July 2004, Israel reported a ninety percent decrease in terrorist attacks and a seventy percent decrease in terrorist-related deaths.[67]

III. HISTORICAL DEVELOPMENTS DEFINING THE ARAB-ISRAELI CONFLICT

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

A. *Zionist Aspirations and Mandatory Palestine*

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

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

67. Editorial, *The UN's Blinkers*, GLOBE & MAIL (Toronto), July 22, 2004, at A14.

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

69. Jill Allison Weiner, Comment, *Israel, Palestine, and the Oslo Accords*, 23 FORDHAM INT'L L.J. 230, 230 (1999).

70. *See* HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME 163-64 (1979).

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

72. MAKOVSKY, *supra* note 41, at 3.

73. Barry A. Feinstein & Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 3 (2000).

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

75. Zionism "is an international political movement which aspires to link all Jews . . . into a . . . political and cultural centre [in] the state of Israel." SAMI HADAWI, BITTER HARVEST:

Palestinian Arabs simultaneously began forging a national identity separate and distinct from other Arabs in the region.[77] An increased presence of Jewish settlers in Palestine,[78] the British Government's political promises to Zionist leaders,[79] and the creation of Transjordan in 1923[80] heightened tensions between Jews and Palestinian Arabs.[81]

B. *The Derivation of a Two-State Solution*

The modern history of the Middle East can be described as one of a series of divisions. The first occurred when Britain and France[82] implemented the Sykes-Picot Agreement[83] after World War I. The Balfour

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PALESTINE BETWEEN 1914-1979, at 30 (Caravan Books 1983) (1967). "'Zionism strives to create for the Jewish people a Home in Palestine secured by public law.'" UNITED NATIONS SPECIAL COMM. ON PALESTINE, *supra* note 1, at 103 n.103 (quoting an English translation of the Bagle Program of 1897).

76. MARTIN GILBERT, ISRAEL: A HISTORY 3, 16 (1998). For a discussion of political Zionism, see MARK TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT 7-68 (1994). Zionism inspired Jewish immigrants to arrive steadily in Palestine throughout the early part of the twentieth century. *See* George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 476-502 (1994) (recounting a history of Jewish land acquisition in Palestine prior to 1948 and suggesting that "'the conquest of land' was one of the pillars of the Zionist effort"). *But see* JOAN PETERS, FROM TIME IMMEMORIAL: THE ORIGINS OF THE ARAB-JEWISH CONFLICT OVER PALESTINE 101 (1984) (arguing that the conception that Jews expelled Arabs from their lands was a "myth" because "Arabs were immigrating to Israel, as much as the Jews").

77. Palestinian nationalism developed separately from a larger Arab nationalist movement. *See* MUHAMMAD Y. MUSLIH, THE ORIGINS OF PALESTINIAN NATIONALISM, at x (1988).

78. *See supra* note 76 and accompanying text.

79. The Balfour Declaration committed Britain to "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 15, at 22, 22. For a discussion of the legal ramifications of the Balfour Declaration, see JEWISH AGENCY FOR PALESTINE, THE JEWISH PLAN FOR PALESTINE: MEMORANDA AND STATEMENTS 70-82 (1947) [hereinafter THE JEWISH PLAN FOR PALESTINE]. For a Palestinian perspective on the Balfour Declaration, see HADAWI, *supra* note 75, at 13-15.

80. The Allies' partition of the Ottoman Empire facilitated the creation of the Palestine Mandate. *See* Sykes-Picot Agreement of 1916, *in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 20, 20; SACHAR, *supra* note 70, at 95 (depicting a map of the region under the Sykes-Picot Agreement). In 1923, the British Government reorganized Transjordan and, as a result, "Transjordan and Palestine . . . evolved in very different ways. The latter became the scene of increasingly bitter confrontations between Jews and Arabs." TESSLER, *supra* note 76, at 164-65. For a critique of the legal validity of the Palestine Mandate, see HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 65-68 (2d ed. 1976).

81. For a discussion of violence during the Palestine Mandate, see generally J. BOWYER BELL, TERROR OUT OF ZION (1977).

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

83. *See supra* note 80 and accompanying text. Despite assurances by Britain that it would support Arab independence from the Ottoman Empire, the "secret" agreement between France and

Declaration facilitated a second division.[84] On two separate occasions, preceding and following World War II, European governments attempted to divide Palestine into independent Arab and Jewish states. Ultimately, these efforts led to the outbreak of a series of hostilities that began in 1948 and continue today.

1. The Peel Commission Partition Plan of 1937[85]

The modern dilemma in Palestine "started with the adoption by the United Nations [in 1947] of the Palestine partition plan which provided for the establishment of a 'Jewish state,' an 'Arab state,' and an 'International Zone of Jerusalem.'"[86] The two-state solution had been first articulated ten years prior in the Peel Commission Partition Plan of 1937.[87] The Peel Commission Plan was ultimately set aside due to British concerns over implementation[88] and the practical need to gain both Jewish and Arab support for the Allies against the Axis Powers.[89]

2. The United Nations Partition Resolution of 1947[90]

Resistance against British Mandatory rule in Palestine escalated between 1945 and 1947,[91] as did clashes between Palestinian Jews and Arabs.[92] In 1947, the British Government recognized the "unworkable"

Britain "conflicted with Arab aspirations" in the region. HADAWI, *supra* note 75, at 15.

84. *See supra* note 79 and accompanying text. Palestinians viewed the Balfour Declaration as the "signing away to the Jews Arab rights in Palestine." HADAWI, *supra* note 75, at 15.

85. For a map depicting land designations and borders under the Peel Commission Partition Plan, see GILBERT, *supra* note 76, at 626.

86. PALESTINE PARTITIONED 1947-1958 (EXCERPTS & DOCUMENTS) 2 (Sami Hadawi ed., 1959); *see infra* Part III.B.2.

87. The Commission acknowledged that the British Mandate presented "no possibility of solving the Palestine problem." Report of the Palestine Royal Commission (Peel Commission) (July 7, 1937), *excerpted in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 99, 99. The Commission recommended the establishment of a new mandate over Jerusalem and Bethlehem, an independent Jewish state comprising part of Palestine, and an independent Arab state comprising part of Palestine and Transjordan. *Id.*

88. SACHAR, *supra* note 70, at 217-19. The Woodhead Commission was established by the British Government in 1938 to assess the viability of partitioning Palestine. *Id.* at 217. The Commission concluded "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." Palestine Partition Commission: British Policy Statement Against Partition, *excerpted in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 104, 104-05.

89. *See* SACHAR, *supra* note 70, at 227-29; NAT'L STUDIES ON INT'L ORG., ISRAEL AND THE UNITED NATIONS 21-22 (1956).

90. For a map depicting the U.N. Partition Plan, see GILBERT, *supra* note 76, at 629.

91. *See* BELL, *supra* note 81, at 140-252.

92. *Id.* at 254-313. Pre-1948 violence has been referred to as the "unofficial" war. AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD 28 (2000).

nature of the mandate and referred the matter to the U.N.[93] The U.N. formed the Special Committee on Palestine (UNSCOP) to seek a viable resolution to the conflict.[94] UNSCOP's initial recommendations included the termination of the Palestine Mandate[95] and the grant of Palestinian independence[96] "at the earliest practicable date,"[97] the establishment of a "transitional period preceding the grant of independence in Palestine" under U.N. auspices,[98] the preservation of democratic principles and protection of minorities,[99] and the cessation of violence in the region.[100] On November 29, 1947, the U.N. General Assembly adopted Resolution 181, which provided for the end of the mandate and partition of Palestine into independent Jewish and Arab states alongside a special international regime for Jerusalem.[101]

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

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

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

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

95. *Id.* at 140.

96. *Id.* at 142.

97. *Id.* at 140, 142.

98. *Id.* at 143-44.

99. *Id.* at 148-49.

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

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

102. Arabs rejected the resolution on the grounds that it violated the U.N. Charter and established a Jewish state with a Jewish government presiding over Arab ownership of approximately ninety percent of the state's land. HADAWI, *supra* note 75, at 73; *see* PALESTINE PARTITIONED 1947-1958 (EXCERPTS & DOCUMENTS), *supra* note 86, at 2. *But see* MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 34-35 (2002) (stating that an Arab majority existed throughout Palestine and that over seventy percent of the land that became Israel in 1948 belonged to the Mandate government, not Arab landowners). In response to the resolution, the British government refused to cooperate in order "to avoid provoking the Arab world . . . when Britain's foothold in the Middle East was already precarious." SACHAR, *supra* note 70, at 296.

for partition.[103] Violence immediately escalated between Palestinian Jews and Arabs,[104] and the British Mandatory Government contemplated advancing the timeline for its withdrawal of forces from the region.[105] The U.N. Security Council established a Truce Commission[106] and adopted several resolutions calling for a restoration of order.[107] On May 14, 1948, one day prior to the anticipated termination of the British Mandate over Palestine, Jewish leaders proclaimed the establishment of the State of Israel[108] within territories designated for a Jewish state under the U.N. Partition Plan.[109]

The War of 1948[110] engaged regular military forces from Egypt, Transjordan, Syria, Lebanon, Iraq, "irregular" Palestinian forces, the Arab Liberation Army sponsored by the Arab League, and the IDF.[111] Between May and December 1948 the U.N. Security Council issued nine resolutions urging cease-fires and diplomatic solutions to the conflict.[112]

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

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

105. JONES, *supra* note 100, at 320.

106. S.C. Res. 48, U.N. SCOR, 3d Sess., 287th mtg., U.N. Doc. S/RES/48(1948) (1948).

107. *See* S.C. Res. 46, U.N. SCOR, 2d Sess., 283d mtg., U.N. Doc. S/RES/46(1948) (1948); S.C. Res. 43, U.N. SCOR, 2d Sess., 277th mtg., U.N. Doc. S/RES/43(1948) (1948); S.C. Res. 42, U.N. SCOR, 2d sess., 263d mtg., U.N. Doc. S/RES/42(1948) (1948).

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

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

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

111. SHLAIM, *supra* note 92, at 34.

112. S.C. Res. 66, U.N. SCOR, 3d Sess., 396th mtg., U.N. Doc. S/RES/66(1948) (1948); S.C. Res. 62, U.N. SCOR, 3d Sess., 381st mtg., U.N. Doc. S/RES/62(1948) (1948); S.C. Res. 61, U.N. SCOR, 3d Sess., 377th mtg., U.N. Doc. S/RES/61(1948) (1948); S.C. Res. 59, U.N. SCOR, 3d Sess., 367th mtg., U.N. Doc. S/RES/59(1948) (1948); S.C. Res. 56, U.N. SCOR, 3d Sess., 354th mtg., U.N. Doc. S/RES/56(1948) (1948); S.C. Res. 54, U.N. SCOR, 3d Sess., 338th mtg., U.N. Doc. S/RES/54(1948) (1948); S.C. Res. 53, U.N. SCOR, 3d Sess., 331st mtg., U.N. Doc. S/RES/53(1948) (1948); S.C. Res. 50, U.N. SCOR, 3d Sess., 310th mtg., U.N. Doc. S/RES/50(1948) (1948); S.C. Res. 49, U.N. SCOR, 3d Sess., 302d mtg., U.N. Doc. S/RES/49(1948) (1948).

When armistice agreements were concluded in 1949,[113] Israel had increased its territory by approximately twenty percent over those lands designated for a Jewish state under the Partition Plan.[114] Territories of Palestine that did not become part of Israel "fell under the control of neighboring Arab states."[115] The border between Israel and Jordan, as contained in the General Armistice Agreement concluded between the two nations on April 3, 1949,[116] has been commonly referred to as the "Green Line," which separated Israel from the West Bank between 1949 and 1967.[117] Notwithstanding an undeclared war of attrition during the 1950s and 1960s, as well as a brief war between Israel and Egypt over access to

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113. The armistice agreements were intended "as *temporary* measures rapidly to be replaced by *permanent* peace treaties." GERVASI, *supra* note 93, at 99. The "nonbinding nature of the armistice agreements left them devoid of legal or practical force." Ball, *supra* note 93, at 995. The Arab states' refusal to recognize and directly negotiate with Israel contributed to the failure of concluding permanent peace treaties. *See* GERVASI, *supra* note 93, at 101. Consequently, no peace ensued: "The 1949 armistice agreements . . . . were signed 'in order to facilitate the transition from the present truce to permanent peace' . . . . [but] the state of war continued." MORDECHAI NISAN, ISRAEL AND THE TERRITORIES: A STUDY IN CONTROL 1967-1977, at 11-12 (1978) (quoting the armstice agreements); *see generally* David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801 (1996) (discussing the legal significance of U.N. armistice agreements). A Palestinian perspective on the 1949 armistice agreements is contained in HADAWI, *supra* note 75, at 92-119.

114. SACHAR, *supra* note 70, at 350. No legal distinction had been made between territory designated for the Jewish state under the Partition Plan and territory Israel incorporated into its borders following the 1948 war. TESSLER, *supra* note 76, at 273. The attack against Israel during the war "did justify Israeli defensive measures, both within and as necessary, without the boundaries allotted her by the partition plan." Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 346 (1970). Palestinians cited a loss of seventy-eight percent of Palestinian territory under the Partition Plan after "ultimate defeat" in the 1948 war. Written Statement Submitted by Palestine, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *42, *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_08_Palestine.pdf (last visited May 9, 2005).

115. TESSLER, *supra* note 76, at 275. At the conclusion of the conflict, Egypt occupied Gaza but never claimed sovereignty over the territory. *See* John Quigley, *Judicial Autonomy in Palestine: Problems and Prospects*, 21 U. DAYTON L. REV. 697, 704 (1996). Egypt never applied its own law in Gaza and deemed itself a belligerent occupant. Carol Farhi, *On the Legal Status of the Gaza Strip*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980, at 61, 74-76 (1982). Transjordan assumed control over East Jerusalem and annexed the West Bank, a measure that was condemned by the Arab League as a violation of international law. R. R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 942 (8th ed. 1995); Ball, *supra* note 93, at 996; *see infra* notes 235-37 and accompanying text.

116. General Armistice Agreement, Apr. 3, 1949, Jordan-Isr., 42 U.N.T.S. 304.

117. Written Statement of the Government of Israel on Jurisdiction and Propriety (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *38, *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_17_Israel.pdf (last visited May 9, 2005); *see also* BARD, *supra* note 102, at 284.

the Suez Canal in 1956,[118] no territorial changes occurred in the Middle East until 1967.

D. *The Six-Day Arab-Israeli War of 1967*[119]

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

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118. After Egypt nationalized the Suez Canal, the Security Council called for "free and open transit through the Canal without discrimination." S.C. Res. 118, U.N. SCOR, 11th Sess., 743d mtg., U.N. Doc. S/RES/118(1956) (1956). Israeli troops crossed into the Sinai Peninsula but later withdrew. *See* BARD, *supra* note 102, at 49-50; SHLAIM, *supra* note 92, at 178-85.

119. The Six-Day War had "the most wide-ranging political transformation in the Middle East since 1948." Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 79 (2003).

120. *See supra* notes 113, 116 and accompanying text.

121. *See supra* note 118 and accompanying text.

122. CATTAN, *supra* note 80, at 25; *see* GILBERT, *supra* note 76, at 361-68.

123. In 1960, Egyptian leader Gamal abdel-Nasser addressed the General Assembly: "'The only solution to Palestine is . . . the annulment of Israel's existence.'" SACHAR, *supra* note 70, at 615 (quoting Gamal abdel-Nasser, Address Before the U.N. General Assembly (Sept. 1960)); *see also* Uri Shoham, Note, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245, 247-48 (1996) (quoting statements by Nasser and other Arab leaders calling for the destruction of Israel). One week before the outbreak of war in 1967, the Jordanian representative to the Security Council noted that the 1949 armistice agreement "fixed the demarcation line" but "did not fix boundaries." NISAN, *supra* note 113, at 12; *see supra* notes 113, 116, and accompanying text.

124. *See* SACHAR, *supra* note 70, at 615-20. Egypt permitted U.N. Emergency Forces (UNEF) within its territory after the 1956 war but expelled them in May 1967. GILBERT, *supra* note 76, at 366; *see also* OCCASIONAL PAPERS: ARAB POSITIONS CONCERNING THE FRONTIERS OF ISRAEL 15 (Ruth Kedar trans., Alouph Hareven ed., 1977); MICHAEL B. OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST 33-126 (2002) (providing an in-depth discussion of events that led to the outbreak of the war).

125. Military forces from Egypt, Iraq, Saudi Arabia, Syria, and Jordan fought against the IDF. Weiner, *supra* note 69, at 235.

126. *See id.*; Schwebel, *supra* note 114, at 346 (arguing that the facts demonstrate that Israel waged a defensive war). *But see* John Quigley, *Identifying the Origins of Anti-American Terrorism*, 56 FLA. L. REV. 1003, 1007 (2004) (suggesting that Israel attacked first). The Security Council issued four separate resolutions demanding immediate cease-fires during the course of the short-lived conflict. S.C. Res. 236, U.N. SCOR, 22d Sess., 1357th mtg., U.N. Doc. S/RES/236(1967) (1967); S.C. Res. 235, U.N. SCOR, 22d Sess., 1352d mtg., U.N. Doc. S/RES/235(1967) (1967); S.C. Res. 234, U.N. SCOR, 22d Sess., 1350th mtg., U.N. Doc. S/RES/234(1967) (1967); S.C. Res. 233, U.N. SCOR, 22d Sess., 1348th mtg., U.N. Doc. S/RES/233(1967) (1967).

When the war concluded on June 10, 1967, Israel had removed Egypt from the entire Sinai Peninsula and Gaza, Jordan from the West Bank and East Jerusalem, and Syria from the Golan Heights.[127] Two days later, the U.N. Security Council passed Resolution 237, which called upon Israel to "ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place."[128] Having had neither an interest in conducting a war nor a desire to expand territorially,[129] Israel offered to return all acquired territories in exchange for full peace accords with its Arab neighbors.[130] The proposal was rejected by Arab countries.[131] As a result, the 1967 Six-Day War was "the first war in history which . . . ended with the victors suing for peace and the vanquished calling for unconditional surrender."[132]

E. *United Nations Security Council Resolution 242*

Immediately following the Six-Day War, the U.N. Security Council adopted Resolution 242,[133] which has been described as "[t]he most

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127. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 58-59 (1990). The territories Israel gained during the course of the war were three times larger than its prewar borders. Shoham, *supra* note 123, at 248-49. Maps depicting Israeli territorial acquisitions are contained in GILBERT, *supra* note 76, at 645-49.

128. S.C. Res. 237, U.N. SCOR, 22d Sess., 1361st mtg., U.N. Doc. S/RES/237(1967) (1967). The Resolution did not call for a return of territories. *See id.*

129. Israel's primary military objective during the war was "the removal of the threat to the State of Israel." DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 5 (2002); *see also* NISAN, *supra* note 113, at 5 ("[N]ationalism was not a force for expansion in 1967. Israel . . . sought Arab recognition, not of her power, but of her existence.").

130. Shoham, *supra* note 123, at 249. Israel refused, however, to relinquish East Jerusalem to Jordan. *Id.*

131. *Id.*; *see* BARRY RUBIN, REVOLUTION UNTIL VICTORY?: THE POLITICS AND HISTORY OF THE PLO 13 (1994). The Arab League remained "unite[d] . . . to ensure the withdrawal of . . . Israeli forces from the Arab lands which ha[d] been occupied . . . . This w[ould] be done within the framework of . . . no peace with Israel, no recognition of Israel, [and] no negotiations with it . . . ." Arab League Summit Conference Resolution (Sept. 1, 1967), *in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 209, 209.

132. ABBA EBAN, AN AUTOBIOGRAPHY 446 (1977).

133. S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg., at 8, U.N. Doc. S/RES/242(1967) (1967). Resolution 242 required

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

significant international pronouncement on the Arab-Israeli dispute."[134] Although the Resolution essentially provided for Arab state recognition of Israel's legitimacy and secured borders in exchange[135] for Israel's withdrawal from territories acquired[136] during the 1967 war,[137] it was nonetheless a "masterpiece of deliberate . . . ambiguity."[138] The Resolution referred to neither Israel[139] nor the Palestinians[140] by name. Additionally, the Resolution's deliberate omission[141] of the word "the"[142] from the English translation[143] of the phrase "from territories occupied in the recent

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Id.

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

135. *See* AMNON SELLA & YAEL YISHAI, ISRAEL THE PEACEFUL BELLIGERENT 1967-79, at 9 (1986) (stating that Israel's victory during the 1967 war "gave Israel a bargaining position"). Resolution 242 served as the original source of the "formula 'land for peace.'" GILBERT, *supra* note 76, at 398-99.

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

137. *See* S.C. Res. 242, *supra* note 133; HEMDA BEN-YEHUDA & SHMUEL SANDLER, THE ARAB-ISRAELI CONFLICT TRANSFORMED 108 (2002).

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

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

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

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

142. The Soviet delegate sought to include the phrase "all the" in reference to the territories from which Israel's armed forces would be required to withdraw. BARD, *supra* note 102, at 67.

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

conflict"[144] has been the focus of much debate[145] and conflicting interpretations of the status of territories Israel acquired during the war.[146] Supporters of the Resolution believed that it "seem[ed] to provide for a satisfactory solution of the Middle East controversy."[147]

The Israeli-Palestinian conflict continued to produce significant numbers of casualties. During the 1970s and 1980s, Israel engaged in a war of attrition with Egypt, a fourth regional armed conflict with its Arab neighbors in 1973, and a protracted campaign against the PLO in Southern Lebanon that spanned nearly twenty years.[148] Resolution 242, viewed as a paradigm of the U.N.'s treatment of the Middle East conflict,[149]

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144. S.C. Res. 242, *supra* note 133.

145. The Resolution has several inconsistencies:

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

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

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

Id.

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

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

147. Quincy Wright, *The Middle East Problem*, 64 AM. J. INT'L L. 270, 270 (1970). *But see* CATTAN, *supra* note 80, at 208 ("Resolution 242 falls short of providing . . . for a just and lasting peace.").

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

149. The Resolution has been described as completely "misrepresented." DISPUTED TERRITORIES: FORGOTTEN FACTS ABOUT THE WEST BANK AND GAZA STRIP 14-16 (2003)

demonstrates a pattern of U.N. involvement that exacerbated, rather than resolved, the contentious Israeli-Palestinian dynamic.[150]

IV. ISRAEL AND THE UNITED NATIONS

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

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

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[hereinafter DISPUTED TERRITORIES].

150. *See supra* note 146 and accompanying text.

151. Wright, *supra* note 147, at 273.

152. *The UN's Blinkers*, *supra* note 67; *see also* Michael J. Jordan, *UN's 'Two Standards' Under Fire: Critics Ask Why Some Nations Are Held to UN Resolutions and Others Are Not*, CHRISTIAN SCI. MONITOR, Sept. 27, 2002, at 1 (noting that "the UN has painted the Jewish State as the world's great pariah"). The U.N. "'is the tool of those who would make Israel the archetypal human rights violator . . . . [I]t is a breeding ground for anti-Semitism.'" Morris B. Abram, *Anti-Semitism in the United Nations* (1998) (quoting Professor Anne Bayefsky of York University), *at* http://www.jewishvirtuallibrary.org/jsource/UN/unantisem.html (last visited May 9, 2005).

153. The General Assembly conducted a "severe investigation" during which the Israeli representative "was subjected to a searching cross-examination concerning his government's views on a number of outstanding topics." NAT'L STUDIES ON INT'L ORG., *supra* note 89, at 58.

154. *Id.* Israel's initial request for admission was denied. *Id.* at 59. *But see supra* note 101 and accompanying text.

155. G.A. Res. 273, U.N. GAOR, 3d Sess., 207th plen. mtg., U.N. Doc. A/RES/273(III) (1949).

156. *The Treatment of Israel by the United Nations: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. 4 (1999) [hereinafter *Treatment of Israel Hearing*] (statement of Rep. Ros-Lehtinen).

157. Arnold Beichman, *U.N. Bias Against Israel*, WASH. TIMES, June 27, 1999, at B3 (quoting Secretary-General Annan: "[T]he United Nations is regarded by many as biased against the state of Israel. I know that Israelis see hypocrisy and double standards in the intense scrutiny given to some of its actions, while other situations fail to elicit the world's outrage.").

obsession with the State of Israel" since Israel joined the U.N.[158] Attempts by the General Assembly to internationalize Jerusalem[159] nine months after Israel's admission to the organization highlighted the beginning of Israel's ongoing struggle to receive fair treatment within the organization.[160]

A. *Isolation of Israel Within the United Nations*

Israel has been described as having received "second-class status" within the U.N.[161] Israel has consistently been excluded from receiving the same benefits accorded to other nations,[162] whether in terms of financial aid[163] or membership in a regional group. For a member nation to serve within the U.N. Security Council or other U.N. committees, it first must belong to a regional group.[164] Although Israel geographically belongs in the Asian Group, it has been barred from membership primarily by Arab states.[165] As late as 1999, non-Arab states such as France have also

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

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

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

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

161. *Developments in the Middle East: Hearing Before the House Comm. on Int'l Relations*, 105th Cong. 23 (1998) (statement of Rep. Rothman).

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

163. In 1974 the U.N. Educational, Scientific and Cultural Organization (UNESCO) denied Israel membership and barred it from receiving UNESCO aid. *UNESCO Vote on Israel Scored*, N.Y. TIMES, Nov. 26, 1974, at 46.

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

165. BARD, *supra* note 102, at 118; *Mauritania, Israel Forge Diplomatic Ties: African Nation Becomes 3rd Arab Country with Full Relations with Jewish State*, BALT. SUN, Oct. 29, 1999, at 12A. "Israel is the only longstanding member . . . to be denied acceptance into any of the United Nations regional blocs. . . ." H.R. 3236, § 2(a)(1). Attempts to deprive Israel of its rights to fully participate in the U.N. "have not enhanced Israeli respect for the Organization." Roberts, *supra* note

expressed opposition to Israel's admission into a regional group.[166] In 1998, both Houses of Congress introduced bills urging equitable treatment of Israel in the U.N.[167] In 2000, Israel, as the only U.N. member not belonging to a group,[168] gained temporary membership[169] to the Western Europe and Others Group (WEOG).[170]

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

While providing an atmosphere in which member nations succeeded in restricting Israel's full participation within the organization, the U.N. has also served as a forum for "open and emphatic displays of anti-Semitism."[171] Although the U.N. has condemned nearly all manifestations of racism, it has continually ignored, and in some instances encouraged, anti-Semitic expressions.[172] Syrian representatives invoked the "blood libel"[173] accusation against Jews during a session of the U.N. Commission

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127, at 75.

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

167. The House bill urged the U.S. Ambassador to the U.N. to "take all steps necessary to ensure Israel's acceptance" into the WEOG. H.R. 3236, § 2(a)(2). The Senate bill mirrored the language of its House counterpart. *See* S. 2092, 105th Cong. § 2 (1998).

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

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

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

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

172. BARD, *supra* note 102, at 119. Resolution 623 mentioned the term "anti-Semitism" for the first time in the organization's history. G.A. Res. 623, U.N. GAOR, 53rd Sess., Agenda Item 108, at 16, U.N. Doc. A/53/623 (1998); BARD, *supra* note 102, at 119.

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

on Human Rights in 1991.[174] The Commission accepted the PLO representative's accusation that Israel deliberately infected several hundred Palestinian children with the human immunodeficiency virus (HIV).[175] In its infamous Resolution 3379,[176] the General Assembly noted an "unholy" alliance between South African apartheid and Zionism with its determination that Zionism was "a form of racism and racial discrimination."[177] In October 2000, the Deputy Permanent Representative of the Libyan Arab Jamahiriya likened the IDF to Nazis,[178]

Permanent Representative of Israel, to the Secretary-General, United Nations (May 18, 2001), U.N. Doc. A/56/79, at 2. Only recently has the Commission on Human Rights acknowledged the "blood libel" as one form of anti-Semitism. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. ESCOR, 60th Sess., Provisional Agenda Items 6, 9, 17, at 3, U.N. Doc. E/CN.4/2004/NGO/5 (2004).

174. *Treatment of Israel Hearing*, *supra* note 156, at 2 (opening statement of Chairman Gilman); David Littman, *Syria's Blood Libel Revival at the UN: 1991-2000*, MIDSTREAM, Feb./Mar. 2000, at 2, 3.

175. The Palestinian observer stated in 1997 that Israeli authorities intentionally injected Palestinian children with the virus, spurning an "AIDS libel." David Littman, Press Release HR/CN/819 18 March 1998, *at* http://www.un.org/News/Press/docs/1998/19980318.HRCN819.html (last visited May 9, 2005). Israel has been the only nation subjected to such an accusation. Beichman, *supra* note 157.

176. G.A. Res. 3379, U.N. GAOR, 30th Sess., 2400th plen. mtg., U.N. Doc. A/RES/3379(XXX) (1975).

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

Chaim Herzog, Israeli Ambassador to the U.N., admonished the General Assembly for adopting Resolution 3379: "[It] is part of a dangerous anti-Semitic idiom which is being insinuated . . . to block the current move towards . . . peace in the Middle East." Chaim Herzog, Address Before the U.N. General Assembly (Nov. 10, 1975), *in* 1 PALESTINE: DOCUMENTS, *supra* note 15, at 236, 239. Although Resolution 3379 was repealed in December 1991, *see* G.A. Res. 86, U.N. GAOR, 46th Sess., 74th plen. mtg., U.N. Doc. A/RES/46/86 (1991), the General Assembly passed four separate anti-Israel resolutions that month. *See* G.A. Res. 82, U.N. GAOR, 46th Sess., 73d plen. mtg., U.N. Doc. A/RES/46/82 (1991) (condemning Israel's "occupation" of Palestinian territory"); G.A. Res. 76, U.N. GAOR, 46th Sess., 69th plen. mtg., U.N. Doc. A/RES/46/76 (1991) (expressing "profound shock" at Israel's response to the first Palestinian *Intifada*); G.A. Res. 75, U.N. GAOR, 46th Sess., 69th plen. mtg., U.N. Doc. A/RES/46/75 (1991) (inviting the PLO to participate in the Internatonal Peace Conference on the Middle East); G.A. Res. 47, U.N. GAOR, 46th Sess., 66th plen. mtg., U.N. Doc. A/RES/46/47 (1991) (condemning Israel's treatment of Palestinians, including its "torture of children").

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

an accusation that re-emerged a year and a half later.[179]

C. *Imbalanced Treatment of the Israeli-Palestinian Conflict by the United Nations*

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

Israel has been denounced for extreme violations of Palestinians' human rights,[184] and the Palestinian plight has been a central, if not

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was a common rhetorical device employed by Arab countries. PETERS, *supra* note 76, at 175. In 1982, an Egyptian magazine stated that "'what Hitler did in 12 years cannot be compared to what Israel has done in twelve days.'" *Id.* at 175 & n.10 (quoting Anis Mansour, *What If the PLO Leaves Lebanon?*, OCTOBER, Aug. 8, 1982).

179. In April 2002, the Palestinian observer Nasser al-Kidwa reiterated that "[w]hat the Israeli army was doing was no different from what the Nazi forces did in many European cities." Press Release, Security Council, United Nations, Council Hears Renewed Calls for Implementation of Its Resolutions, Dispatch of International Monitoring Force to Middle East (Apr. 9, 2002), U.N. Doc. SC/7359.

180. AM. JEWISH COMM., *supra* note 158, at iv. *But see* Written Statement of the United States of America, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *8-15, *23-30, *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_19_UnitedStatesofAmerica.pdf (last visited May 9, 2005); *supra* note 146 and accompanying text.

181. Press Release, Economic and Social Council, United Nations, ECOSOC Adopts Resolutions and Decisions on Regional Cooperation in Economic, Social and Related Fields (July 18, 2003), U.N. Doc. ECOSOC/6083, *available at* http://www.un.org/News/Press/docs/2003/ecosoc6083.doc.htm (last visited May 9, 2005).

182. AM. JEWISH COMM., *supra* note 158, at iv.

183. *Treatment of Israel Hearing*, *supra* note 156, at 1 (opening statement of Chairman Gilman). Chairman Gilman noted that "these condemnations, couched in virulently anti-Israel language, give legitimacy to those who still wish to spread hatred." *Id.* at 2. The General Assembly has passed over 400 resolutions against Israel since 1964. Tom Feeney, *Affirm Israel's Right to Protect Itself*, ORLANDO SENTINEL TRIB., Feb. 10, 2004, at A11.

184. As early as 1969, the method by which the General Assembly investigated alleged Israeli human rights violations suggested the organization's attitude toward Israel: "A . . . problem was created by the makeup of the group appointed . . . to investigate human rights in the Israeli-occupied territories . . . . None of [the] states maintained diplomatic relations with Israel." Thomas M. Franck & H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308, 314 (1980). Although "an allegation of bias need not be accepted at face value when made by an accused . . . the credibility of the process would have benefited from the selection of fact finders against whom no plausible charge could have been made." *Id.* Resolution 124 ignored attacks against Israeli civilians and instead "[d]eplore[d] those policies and practices of Israel that violate the human rights of the Palestinian people." G.A. Res.

disproportionate, concern of the U.N.[185] Although the U.N. High Commissioner for Refugees typically dispenses welfare and relief to refugee groups, a separate organization, the U.N. Relief and Works Agency for Palestinian Refugees (UNRWA), "has been an anomaly in the UN system, operating as the only UN organization devoted entirely to the plight of one group of refugees."[186] The General Assembly has never explicitly endorsed Palestinian violence against Israel,[187] but it has nevertheless reaffirmed its "support to the Palestinian people . . . in [their] struggle to regain [their] right to self-determination and independence."[188] The Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People portrayed Israel as the sole source of the Palestinian plight while simultaneously remaining silent on Palestinian terror.[189] Along with the skewed presentation[190] of human and economic losses resulting from the second *Intifada*, the General Assembly praised the Committee for promoting Palestinian rights and supporting the Middle East peace process.[191]

124, U.N. GAOR, 57th Sess., 73d plen. mtg., A/RES/57/124 U.N. Doc. (2002); *see also* ESTHER ROSALIND COHEN, INTERNATIONAL CRITICISM OF ISRAELI SECURITY MEASURES IN THE OCCUPIED TERRITORIES 7-27 (Jerusalem Papers on Peace Problems, No. 37, 1984) (discussing irregularities and bias against Israel in U.N. committee reports).

185. The organization has been silent to the plight of Arabs, Muslims, and non-Palestinians in other regions of the world. *See* AM. JEWISH COMM., *supra* note 158, at i. A former U.N. Ambassador of Finland noted that "[m]ore meetings have been held . . . more resolutions passed . . . on Palestinian refugees than on any other single cause." *Id.*

186. *Id.* at iv.

187. The Commission on Human Rights adopted a resolution affirming the "legitimate right of the Palestinian people to resist the Israeli occupation by all available means in order to free its land and be able to exercise its right of self-determination." *Questions of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. Commission on Human Rights, 58th Sess., Agenda Item 8, at 3, U.N. Doc. E/CN.4/2002/L.16 (2002). The Commission was criticized for its "thinly veiled endorsement of Palestinian terror attacks" against Israel. Press Release, The American Jewish Committee, Six European States Vote for Palestinian Terrorism (Apr. 15, 2002) [hereinafter Vote for Palestinian Terrorism], *at* http://www.ajc.org/InTheMedia/PressReleases.asp?did=499 (last visited May 9, 2005).

188. G.A. Res. 43, U.N. GAOR, 37th Sess., 90th plen. mtg., para. 23, U.N. Doc. A/RES/37/43 (1982). Resolution 43 affirmed "the legitimacy of the struggle of peoples for independence . . . by all available means, including armed struggle." *Id.* at para. 2. The phrase "by all available means" is "recognized UN code language for the legitimization of terrorism." Vote for Palestinian Terrorism, *supra* note 187; *see* AM. JEWISH COMM., *supra* note 158, at iv.

189. *See Report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People*, U.N. GAOR, 57th Sess., Supp. No. 35, at 6, 8, U.N. Doc. A/57/35(SUPP) (2002). *But see supra* Part II.A.

190. The United States has vetoed several resolutions based upon their failure to "condemn Palestinian groups for enacting suicide bombings against Israelis." Edith M. Lederer, *PA Slams UN Resolution on Israeli Children*, JERUSALEM POST, Nov. 12, 2003, at 6.

191. G.A. Res. 107, U.N. GAOR, 57th Sess., 66th plen. mtg., U.N. Doc. A/RES/57/107 (2003). The Committee "carr[ies] out a public relations campaign on behalf of the Palestinians."

During its fifty-eighth Session, the General Assembly adopted a resolution entitled "Situation of and Assistance to Palestinian Children," which condemned Israeli conduct as psychologically destructive to Palestinian youth.[192] Although the resolution referenced "the safety and well-being of all children in the whole Middle East region,"[193] Israel submitted a separate resolution.[194] Calling upon the General Assembly to similarly condemn Palestinian suicide bombings that killed Israeli children,[195] Israel's resolution encountered significant opposition[196] and modification.[197] The resolution was eventually withdrawn.[198]

D. *Setting Forth the Case Against Israel at the Hague*

Israel's counterterrorism initiative garnered the attention of the U.N. in 2003 and was characterized as a "racist wall which devours Palestinian territories."[199] Approximately one and a half years after Israel began construction of its security structure,[200] four nations[201] within the Security Council introduced a resolution condemning Israel.[202] The United States vetoed its adoption.[203] Following the defeat of the Security Council's draft

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AM. JEWISH COMM., *supra* note 158, at 2. No counterpart U.N. organ exists to investigate and expose terrorist atrocities against Israelis, and the U.N. "has never investigated the Palestinian terror campaign against Israel." Feeney, *supra* note 183.

192. G.A. Res. 155, U.N. GAOR, 58th Sess., 77th plen. mtg., U.N. Doc. A/RES/58/155 (2004).

193. *Id.*

194. Israeli representatives introduced a separate resolution because the General Assembly resolution "pretends that one side . . . has a monopoly on the status of victim." Herb Keinon, *Israel Sees Win in UN Loss*, JERUSALEM POST, Nov. 9, 2003, at 2. The General Assembly resolution "was overtly biased against Israel, completely ignoring the fate of scores of Israeli children wounded or killed by Palestinian terrorists." David Goldberg, *Edging Toward Irrelevancy: Canada's Vote at the 57th UN General Assembly*, CANADIAN JEWISH NEWS, Jan. 16, 2003, at 9.

195. *See Sharon Feels the Heat*, MIDDLE E. ECON. DIG., Nov. 7, 2003, at 3.

196. Palestinians claimed that Israel's resolution was "an anti-Palestinian resolution." Lederer, *supra* note 190 (quoting Palestinian observer Nasser Al-Kidwa). Israel believed that the resolution's failure would clearly demonstrate the U.N.'s bias against Israel. *Id.*

197. Members sympathetic to the Palestinian cause submitted amendments to the Israeli resolution that significantly altered its language and meaning. AM. JEWISH COMM., *supra* note 158, at iii.

198. AM. JEWISH COMM., *supra* note 158, at iii.

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

200. *See supra* note 62 and accompanying text.

201. Guinea, Pakistan, the Syrian Arab Republic, and Malaysia introduced the resolution. *Guinea, Malaysia, Pakistan and Syrian Arab Republic: Draft Resolution*, U.N. SCOR, 58th Sess., U.N. Doc. S/2003/980 (2003).

202. The proposed resolution stated that "the construction by Israel, the occupying Power, of a wall in the Occupied Territories . . . is illegal under relevant provisions of international law." *Id.*

203. The proposed resolution "was unbalanced and did not . . . address . . . the devastating

resolution, the General Assembly adopted a new resolution containing language nearly identical to its predecessor.[204] The General Assembly subsequently adopted a second resolution expressing its belief that Israel's actions violated international law.[205] The resolution called upon the Hague Court[206] 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?[207]

The United States[208] reiterated its objection[209] and maintained that the General Assembly "misstate[d] the applicable international law" and

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suicide attacks that Israelis have had to endure." U.N. SCOR, 58th Sess., 4842d mtg. at 2, U.N. Doc. S/PV.4842 (2003).

204. The General Assembly convened an emergency session and adopted a resolution that "[d]emands that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory . . . which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law." G.A. Res. ES-10/13, U.N. GAOR., 10th Emer. Spec. Sess., 22d plen. mtg. at 2, U.N. Doc. A/RES/ES-10/13 (2003) (emphasis omitted).

205. *See* G.A. Res. ES-10/14, U.N. GOAR, 10th Emer. Spec. Sess., 23d plen. mtg., U.N. Doc. A/RES/ES-10/14 (2003).

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

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

208. The American delegate emphasized that the resolution was "one-sided and completely unbalanced. . . . It doesn't even mention the word 'terrorism.'" U.N. GOAR, 10th Emer. Spec. Sess., 23d mtg. at 19, U.N. Doc. A/ES-10/PV.23 (2003); *see also* H.R. Con. Res. 390, 108th Cong. (2004) (condemning the "inappropriate use" of the Hague Court "for narrow political purposes that only do harm to the credibility of the General Assembly and the Court").

209. The Israeli delegate observed that "the countries that voted for [the resolution are] . . . mostly tyrannical dictatorships." U.N. GOAR, 10th Emer. Spec. Sess., 23d mtg. at 24, U.N. Doc. A/ES-10/PV.23 (2003).

cloaked a "political proceeding . . . in legal garb."[210] Immediately following the Hague Court's acceptance of the case,[211] controversy engulfed the entire proceeding.

V. ISRAEL AND THE HAGUE COURT: A RE-ASSESSMENT OF THE APPLICABLE LAWS TO THE ISRAELI-PALESTINIAN CONFLICT[212]

The Hague Court's decision to issue an advisory opinion represented "a hostile act . . . against the Jewish state and not . . . a simple response to a simple request."[213] Israel, together with several nations, challenged the court's jurisdictional authority to issue an advisory opinion[214] and boycotted the proceedings.[215] Israel further objected to the court's decision that enabled Palestine to participate in the proceedings.[216] Additionally,

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210. H.R. Con. Res. 371, 108th Cong. (2004). Congress condemned the General Assembly's "manipulation" of the Hague Court into a "political forum for denunciation of Israel and its legitimate actions in self-defense." H.R. Con. Res. 390, 108th Cong. (2004). Hague Court Judge Kooijmans wrote that "it would have been better if the Court had . . . left issues . . . to th[e] political process." *Legal Consequences*, *supra* note 63, at 1071 (separate opinion of Judge Kooijmans).

211. *Legal Consequences*, *supra* note 63 (Order of Dec. 19, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20031219.PDF (last visited May 9, 2005).

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

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

214. Israel argued that "the advisory opinion request is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly." Written Statement of the Government of Israel on Jurisdiction and Propriety, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *4, *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_17_Israel.pdf (last visited May 16, 2005); *see also* U.N. GOAR, 10th Emer. Spec. Sess., 23d plen. mtg., U.N. Doc. A/ES-10/PV.23 (2003) (discussing opposition to the advisory opinion by other nations); *supra* note 208. In a separate opinion, Judge Buergenthal stated that "the Court should have exercised its discretion and declined to render the requested advisory opinion." *Legal Consequences*, *supra* note 63, at 1078 (declaration of Judge Buergenthal).

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

216. *See Legal Consequences*, *supra* note 63 (Order of Dec. 19, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20031219.pdf (last visited May 16, 2005). Israel maintained that "[t]he presence of 'Palestine' before the Court signals clearly the contentious nature of the proceedings." Written Statement of the Government of Israel on Jurisdiction and Propriety, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *13, *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpstatements/iWrittenStatement_17_Israel.pdf (last visited May 16, 2005). Palestinian participation "reinforce[d] Israel's wider concerns about the fairness of the process . . . and the Order itself is already being viewed as an additional substantive factor in the political debate about Palestinian statehood." *Id.* at 14. The court, however,

Israel questioned the court's ability to render an objective and impartial opinion by arguing that its statute[217] required that Judge Nabil Elarby recuse himself from the case.[218] The court rejected each of Israel's positions.[219]

A. *Occupation Versus Administration: Conflicting Interpretations of the Fourth Hague Convention*[220]

The legal question submitted to the Hague Court by the General Assembly[221] presupposed that, based upon the Fourth Hague Convention of 1907,[222] Israel "occupied"[223] the territories it acquired during the 1967

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permitted Palestine's participation because the U.N. accorded it a "special status of observer" within the General Assembly and it cosponsored the draft resolution requesting the advisory opinion. *Legal Consequences*, *supra* note 63 (Order of Dec. 19, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20031219.pdf (last visited May 16, 2005).

217. Article 17(2) states, "No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity." STATUTE OF THE INT'L COURT OF JUSTICE art. 17(2).

218. Israel maintained that Judge Elaraby's prior service as an Egyptian diplomat "demonstrated that he was actively engaged in opposition to Israel . . . on matters directly related to the advisory opinion." *ICJ Advisory Opinion on Israeli Security Fence*, 98 AM. J. INT'L L. 361, 362 (2004). The court denied Israel's motion to preclude Judge Elaraby from the proceedings because the judge "'expressed no opinion on the question put in the present case,' and . . . 'could not be regarded as having "previously taken part" in the case.'" *Id.* (quoting *Legal Consequences*, *supra* note 63 (Order of Dec. 19, 2003)).

Judge Buergenthal criticized the court's "most formalistic and narrow" reading of Article 17(2) and reminded the majority that the provision "refers to what would generally be considered to be the most egregious violations of judicial ethics." *Legal Consequences*, *supra* note 63 (dissenting opinion, Order of Jan. 30, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20040130_DissOpinionJudgeBuergenthal.pdf (last visited May 16, 2005). The statutory provision "reflect[ed] much broader conceptions of justice and fairness that must be observed by courts of law," since "[j]udicial ethics are not matters strictly of hard and fast rules." *Id.* Judge Buergenthal ultimately concluded that Judge Elaraby's participation in the case "creates an appearance of bias" that warranted his preclusion. *Id.*

219. *See Legal Consequences*, *supra* note 63 (Order of Jan. 30, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20040130.pdf (last visited May 16, 2005).

220. Although the question submitted by the General Assembly to the Hague Court explicitly referenced the Fourth Geneva Convention, *see supra* note 207 and accompanying text, the court engaged in an assessment of the applicability of the Fourth Hague Convention. *See infra* notes 225-31 and accompanying text.

221. *See supra* note 207 and accompanying text.

222. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 36 Stat. 2277, 1 Bevans 631 [hereinafter Fourth Hague Convention]. Article 42 states, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." *Id.*

223. Dore Gold wrote that the term "'occupation' has allowed Palestinian spokesmen to

Six-Day War.[224] The court concluded, without analysis, that Israel had and "has continued to have the status of occupying Power" over the territories.[225] The Israeli Government rejected the term "occupied"[226] and instead considered the territories as either "disputed"[227] or "administered."[228] The use of and distinction between these terms dramatically reshapes the legal nature of the conflict.[229] The court's findings, however, concealed the inherent complexity[230] that calls into

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obfuscate" the history of the 1967 Six-Day War, particularly since Israel fought a defensive war. Dore Gold, *From "Occupied Territories" to "Disputed Territories,"* JERUSALEM LETTER/VIEWPOINT, Jan. 16, 2002, *at* http://www.jcpa.org/jl/vp470.htm (last visited May 9, 2005); *see supra* note 126 and accompanying text. *But see Legal Consequences*, *supra* note 63, at 1030 (describing the 1967 war as simply an "armed conflict" and ignoring Arab states' aggression against Israel).

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

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

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

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

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

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

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

The Israeli Government voluntarily engaged in "all the measures . . . [necessary] to . . . ensure . . . public order and safety" in the territories immediately after the 1967 war. *See* Fourth Hague Convention, *supra* note 222, at art. 43; *infra* note 240. Thus, Israel has balanced

question whether Israel is an occupying power under, and is therefore bound by, the Hague Convention.[231]

The laws of belligerent occupation[232] operate only when two conditions are satisfied: (1) territory is "actually placed under the authority" of an army; and (2) that army is "hostile."[233] Although Israel established a military government to administer the territories following the 1967 war,[234] Israel questioned whether it was a "hostile" army that entered former Palestine Mandate territories to which Jordan and Egypt did not have legal title between 1948 and 1967.[235] The Israeli Government has adopted the

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contradictory positions by voluntarily applying the Convention while simultaneously rejecting the principle of belligerent occupation. *See* DISPUTED TERRITORIES, *supra* note 149, at 5 ("[T]he West Bank and Gaza . . . should not be considered occupied territories."); Falk & Weston, *supra* note 25, at 137 (stating that Israel has "announced its intention to adhere voluntarily to humanitarian legal standards" contained within the Hague Convention). The court never explained the duality of Israel's position and instead stated that the Hague Convention was "part of customary law . . . recognized by all the participants in the proceedings before the Court." *Legal Consequences*, *supra* note 63, at 1035. *But see* Written Statement of the Government of Israel on Jurisdiction and Propriety, 43 I.L.M. 1009, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwstatements/iWrittenStatement_17_Israel.pdf (last visited May 16, 2005) (containing no reference to the Israeli Government's recognition of the Hague Convention's application in the proceeding before the court).

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

232. "[T]he character of belligerent occupation always has been somewhat problematic. It has been complicated in the present instance by the confused and overlapping claims to sovereign identity that have attached . . . prior to and since the 1967 Six Day War." Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 125, 133 (Emma Playfair ed., 1992). "There [exists] no single authoritative exegesis of the various purposes served by that part of the laws of war relating to . . . the 'law on occupations.'" Roberts, *supra* note 127, at 45. For a general history of the development of the laws of belligerent occupation, see DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914, at 13-69 (1949).

233. Fourth Hague Convention, *supra* note 222, at art. 42; *see* RIDDER, *supra* note 228, at 37.

234. Because "there is no recognized 'state' government exerting sovereignty over a territory, Israel's questioning the applicability of the law of belligerent occupancy may not be unfounded." Ball, *supra* note 93, at 1001. An IDF proclamation issued immediately after the war stated that Israel "assumed responsibility for security and maintenance of public order." Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, *in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980, at 13, 13 (Meir Shamgar ed., 1982). Portions of the proclamation "based on the assumption that under international law any territory outside the existing boundaries . . . would be regarded as occupied territory," were revoked soon after the war. KRETZMER, *supra* note 129, at 32-33.

235. *See supra* note 115; *infra* notes 236-37, 254 and accompanying text. Israel contends that "[o]ccupied territories are territories captured in war from an established and recognized sovereign." DISPUTED TERRITORIES, *supra* note 149, at 5. Since neither the West Bank nor Gaza

"Missing Reversioner" theory, which emphasizes that neither Egypt nor Jordan were "legitimate sovereign[s]" over Gaza and the West Bank,[236] respectively, thereby defeating any of their potential reversionary rights to the territories.[237] Thus, Israel's government maintains that belligerent

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were "under the legitimate and recognized sovereignty of any state prior to the Six Day War, they should not be considered occupied territories." *Id.* Israel's rejection of occupation supports the theory that *de facto* belligerent occupation is a legal fiction because an occupant "is under no legal obligation to institute a Hague occupation." RIDDER, *supra* note 228, at 45-46. Therefore, the Israeli Government adheres to a position that "'no single part of the Land of Israel is occupied or conquered territory.'" W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM: IN INTERNATIONAL LAW AND WORLD ORDER 273 (1986) (quoting Menachem Begin, Address the Knesset (July 27, 1967)). *But see* H.C. 2056/04, Beit Sourik Vill. Council v. Gov't of Israel, at *2, *available at* http://62.90.71.124/eng/verdict/framesetSrch.html ("Since 1967, Israel has been holding the areas of Judea and Samaria . . . in belligerent occupation."); *supra* note 231 and accompanying text.

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

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

237. By acquiring the territories from Egypt and Jordan, Israel "lawfully [assumed] control of territory in respect of which no other States can show a better title." Blum, *supra* note 236, at

occupation occurs only when the occupying power displaces the "legitimate sovereign." Based upon these principles, Israel fervently objected to the General Assembly's use of the term "occupied Palestinian territories"[238] in the legal question presented to the Hague Court.[239] Regardless of whether the laws of belligerent occupation apply to the conflict,[240] they "are violated on a regular basis [by both sides] rendering them inapplicable in fact, if not in law."[241]

B. *Applicability of the Fourth Geneva Convention*[242]

Although Israel's arguments supporting the inapplicability of the Fourth Hague Convention to the conflict may appear tenuous, Israel has advanced a formidable objection to the *de jure* application of the Fourth Geneva Convention.[243] Israel's objection to application of the Convention

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294. *But see* MALLISON & MALLISON, *supra* note 235, at 254 ("Dr. Blum and the Government of Israel use an obscure method of treaty interpretation which is not known in international law."); Carol Bisharat, *Palestine and Humanitarian Law: Israeli Practice in the West Bank and Gaza*, 12 HASTINGS INT'L & COMP. L. REV. 325, 339 (1989) (citing the Mallisons' study and rejecting Blum's assessment because his theory "defies reality").

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

239. *See supra* note 207 and accompanying text.

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

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

242. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The Fourth Geneva Convention "had so far been applied sparsely, if at all . . . since 1949." Shamgar, *supra* note 234, at 37.

243. *See Legal Consequences*, *supra* note 63, at 1035-36; *infra* note 248 and accompanying

relies upon a "highly formalistic semantic" interpretation[244] of the treaty's language in Article 2.[245] Despite evidence that strongly suggests that the Convention does not apply to Israel's administration of the territories,[246] the Hague Court determined otherwise[247] and concluded that the Convention rendered Israel's construction of its security structure illegal.[248]

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text.

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

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

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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

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

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

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

1. The Formalistic Approach

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

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249. Ball, *supra* note 93, at 1008.

250. *Legal Consequences*, *supra* note 63, at 1035-36. If both conditions are satisfied, "the Convention applies . . . in any territory occupied in the course of the conflict by one of the contracting parties." *Id.* at 1036.

251. *Id.* at 1035. Some commentators suggest that Israel is bound by the Convention "via its relationship with Jordan." Ball, *supra* note 93, at 1012; *see* Bisharat, *supra* note 237, at 339.

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

253. *See supra* Part III.E.

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

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

> the one and only conclusion . . . that the Convention applies merely to the occupation of *the territory of a High Contracting Party* and not generally to territories held under military occupation. . . . [A]s a *prima facie* corollary, . . . not each and every occupation of territory turns it into territory to which the Convention applies.

Critics have maintained that Israel's interpretation ignores language contained in the first paragraph of Article 2.[255] The Hague Court wholeheartedly adopted the position that paragraph two supplements paragraph one[256] despite contradictions in the Article's sentence structure. The plain language of the two paragraphs substantiates Israel's interpretation that each paragraph is "indeed independent"[257] and renders the Convention inapplicable to the conflict.[258]

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

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

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

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

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

258. Ball, *supra* note 93, at 1028. "Article 2(2) operates independently of Article 2(1) . . . . [T]he use of 'High Contracting Party' and 'the territory of a High Contracting Party' . . . establish the state-centric focus of the Convention that renders it inapplicable to the sui generis situation presented by the Middle East conflict." *Id.*

2. The Antiformalistic Approach

Although the antiformalistic approach avoids consideration of the plain language of the Convention's provisions,[259] its application effects no alternative conclusion. The Hague Court noted that its conclusion that the Convention applied to the conflict was "confirmed by the Convention's *travaux préparatoires*."[260] Reliance upon the positions advanced by the International Committee of the Red Cross (ICRC) during the drafting of the Convention and since 1967,[261] however, is highly anachronistic[262] and problematic.[263] Article 31 of the Vienna Convention on the Law of Treaties[264] requires that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty."[265] Since the ordinary reading of Article 2 of the Convention suggests that it is inapplicable to the conflict,[266] the use of "supplementary

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

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

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

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

263. As the Israeli Supreme Court has recognized, "the correct interpretation of a given provision in the law stems not only . . . from the language . . . but also from the purpose of the law." H.C. 785/87, Abd Al Nasser Al Aziz v. Commander of IDF Forces, 42(2) P.D. 1, at *10, *available at* http://62.90.71.124/eng/verdict/framesetSrch.html (last visited Apr. 2, 2005) (quoting C.A. 31/63, Feldberg v. Dir. for the Purposes of the Land Appreciation Tax Law, 17 P.D. 1231, 1235).

264. Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

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

266. *See supra* Part V.B.1.; *see also* Ball, *supra* note 93, at 1003 ("The inapplicability of the Fourth Geneva Convention . . . derives from an 'ordinary' reading of the Convention text taken from its context, object, and purpose."); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 100, 108 ("[I]ntentions of the drafters cannot be granted more importance than the actual text of the Article.").

means of interpretation" only confirm that the court's findings are erroneous.[267]

C. *Conflicting Views of Palestine's Legal Status*

The Hague Court recognized that the "existence of a 'Palestinian people' [wa]s no longer in issue."[268] While the Palestinian people may not be a legal fiction,[269] Palestine itself "does not fit easily into defined categories of international status."[270] The court accentuated this inherent ambiguity by simultaneously constructing different classifications for Palestine. The court accorded Palestine benefits resembling statehood[271] when it permitted the Palestinian delegation to submit a written statement to the court without substantial justification.[272] By doing so, the court ignored a significant corpus of legislation and statutory provisions suggesting that Palestine did not qualify for participation in the proceedings.[273] Although it afforded Palestine full rights to participate in

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267. Ball, *supra* note 93, at 1003.

268. *Legal Consequences*, *supra* note 63, at 1041.

269. The court noted that President Arafat and Prime Minister Rabin's 1995 interim agreement expressed Palestine's "legitimate rights." *Id.* at 1041-42; *see supra* notes 32-33 and accompanying text. *But see infra* notes 271-73 and accompanying text.

270. Dajani, *supra* note 20, at 89-90. This ambiguity arises, in part, because Palestine is recognized as a separate and distinct entity that simultaneously lacks sovereignty. *Id.*

271. "[A] fascinating debate over Palestine's existence as a subject of international law" began after the PLO signed the 1993 Oslo Accords. Ball, *supra* note 93, at 1004-05. Nevertheless, "it is an incontrovertible fact that the Occupied Palestinian Territory does not qualify as a sovereign state." *Id.* at 1005.

272. *See supra* note 216 and accompanying text. Approximately sixty states have granted the PLO "full diplomatic status." Math Noortmann, *Non-State Actors in International Law*, *in* NON-STATE ACTORS IN INTERNATIONAL RELATIONS 59, 68 (Bas Arts et al. eds., 2001). Although the General Assembly acknowledged the PLO's "legal status under international law," Palestine has remained a non-State actor under international law. Dajani, *supra* note 20, at 89 ("In order for an entity's statehood to be 'constituted' by recognition, it must first be recognized [as] a State. . . . [N]o State or international body has recognized [Palestine] as an independent State."); Noortmann, *supra*, at 68; *see also* McCarthy, *supra* note 225, at 18 ("[The PLO's] metamorphosis into the Palestinian Authority (PA) in 1993 did not vest in the territories the legal standing of a sovereign.").

273. *See Legal Consequences*, *supra* note 63 (Order of Dec. 19, 2003) ("[T]he United Nations and its Member States are considered . . . to be able to furnish information."), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwporder/imwp_iorder_20031219.pdf (last visited Apr. 2, 2005). The PA "lacks the independence necessary to consolidate Palestine's legal status as a State." Dajani, *supra* note 20, at 89. "Palestine," which superceded the PLO's designation in 1988, "should be used . . . without prejudice to the observer status and functions of the [PLO] within the United Nations system." G.A. Res. 177, U.N. GAOR, 43d Sess., 82d plen. mtg., U.N. Doc. A/RES/43/177 (1988).

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 (1998) (providing that Palestine would be seated in the U.N. "immediately after non-member States

a manner similar to U.N. member states,[274] the court nonetheless recognized that Palestinian terrorist attacks against Israelis were not "imputable to a foreign State."[275]

D. *Applicability of Article 51 of the United Nations Charter*

The Hague Court's contradictory treatment of Palestine was poignantly reflected in its determination that Israel could not invoke Article 51[276] of the U.N. Charter to justify its construction of the security structure.[277] The court stated that Article 51 "recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."[278] Judge Kooijmans concluded that Israel could not invoke the U.N. Charter's self-defense provision because Article 51 "is a rule of international law and thus relates to international phenomena."[279] Although the court referenced U.N. Security Council Resolutions 1368 and 1373, both of which were adopted immediately after the September 11 terrorist

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and before the other observers"). Such a designation of Palestine's seat after nonmember states supports the conclusion that Palestine does not rise to the level of a state. *See supra* note 272 and accompanying text. Moreover, "conditions under which the Court shall be open to other *states* shall . . . be laid down by the *Security Council*." STATUTE OF THE INT'L COURT OF JUSTICE art. 35(2) (emphasis added). No provisions substantiate the court's tenuous justification that enabled Palestine to participate and derive the same benefits accorded to states in the proceedings.

274. STATUTE OF THE INT'L COURT OF JUSTICE art. 35(1) ("The Court shall be open to the states parties to the present Statute."); *supra* note 216 and accompanying text. The court also permitted the Arab League and the Organization of the Islamic Conference, "explicitly anti-Semitic organizations," to present oral arguments. Glick, *supra* note 213. The court's decision to involve these two groups was entirely discretionary and reflected "a clear indication of the court's lack of objectivity towards the Jewish state." *Id.*; *see* STATUTE OF THE INT'L COURT OF JUSTICE art. 34(2).

275. *Legal Consequences*, *supra* note 63, at 1050.

276. 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. One scholar recognized that "since the founding of the League of Nations, lawyers, statesmen and diplomats have been arguing the question of defining 'aggression.'" NATHAN FEINBERG, STUDIES IN INTERNATIONAL LAW 55 (1979). For a discussion of different interpretations of the term "armed attack," which appears only in Article 51 of the U.N. Charter, see *id.* at 55-73.

277. *Legal Consequences*, *supra* note 63, at 1049-50.

278. *Id.* at 1050. Such an interpretation supports the argument that Palestine is not a state. *See supra* Part V.C.; *see also Legal Consequences*, *supra* note 63, at 1079 (declaration of Judge Buergenthal) ("[T]he United Nations Charter . . . does not make its exercise dependent upon an armed attack by another State, leaving aside . . . the question whether Palestine . . . should not be and is not in fact being assimilated . . . to a State.").

279. *Legal Consequences*, *supra* note 63, at 1072 (separate opinion of Judge Kooijmans). *But see infra* notes 280, 282, 330-31.

attacks,[280] the court characterized Israel's security needs as "different from that contemplated" by the Security Council Resolutions.[281]

Judge Buergenthal, however, declared that the court's interpretation was a "legally dubious conclusion,"[282] particularly because it never examined the terrorism to which Israel responded with its construction of the security structure.[283] Judge Higgins similarly noted that Article 51 contained no express language suggesting that armed attacks must originate from another state.[284] Regardless of the point of origin for acts of

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

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

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

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

284. *Legal Consequences*, *supra* note 63, at 1063 (separate opinion of Judge Higgins). Judge Higgins stated, "I do not agree with all that the Court has to say on the question of the law of self-defence." *Id.* (separate opinion of Judge Higgins). Judge Higgins noted, however, that the court's

terrorism,[285] Judge Buergenthal reiterated that Israel maintained its right to self-defense against any attack "provided the measures it takes are otherwise consistent with the legitimate exercise of that right."[286]

The court further rejected the argument that a "state of necessity" justified Israel's construction of its security structure.[287] Citing an earlier decision in which it determined that necessity could only be invoked "on an exceptional basis,"[288] the court concluded that it was "not convinced" that Israel considered alternative measures that would "safeguard the interests of Israel against the peril."[289] Rather than assessing the relevant facts that precipitated construction of Israel's counterterrorism initiative,[290] the court relied exclusively on information provided by the U.N.[291] The

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determination was derived from a 1986 opinion and not from any explicit language in Article 51. *Id.* (separate opinion of Judge Higgins).

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

285. *See supra* notes 280-81 and accompanying text.

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

287. *Legal Consequences*, *supra* note 63, at 1050.

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

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

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

291. *Legal Consequences*, *supra* note 63, at 1064-65 (separate opinion of Judge Higgins). "The Court has based itself largely on the . . . Written Statement of the United Nations. It is not clear whether it has availed itself of other data . . . ." *Id.* (citation omitted). Moreover, "the Court barely address[ed] the summaries of Israel's position . . . which contradict or cast doubt on the material the Court claims to rely on." *Id.* at 1080 (separate opinion of Judge Buergenthal); *see* Anne Bayefsky, *Had Enough?: The U.N. Handicaps Israel, Along with the Rest of Us*, NAT'L. REV. ONLINE, July 17, 2004 ("Rather than . . . examin[ing] the facts for themselves, the Court relied heavily on prior biased U.N. reporting."), *at* http://www.nationalreview.com/comment/bayefsky200407171024.asp (last visited May 9, 2005).

Israel objected to the court's adoption of the term "wall" because it "reflect[ed] a calculated media campaign to raise pejorative connotations . . . of great concrete constructions of separation such as the Berlin Wall." Written Statement of the Government of Israel on Jurisdiction and Propriety, 43 I.L.M. 1009, (*Legal Consequences*, *supra* note 63) (Jan. 30, 2004), at *10-11, *available at* www.icj-cij.org/icjwww/idocket/imwp/imwp statements/iwrittenstatement_17_Israel.pdf (last visited Apr. 2, 2005). Israel added that "[g]iven the intentionally pejorative use of the term 'wall', and the ready availability of the neutral term 'barrier' used in the Secretary-General's report,

court's conclusion that Israel could not act in self-defense was "an embarrassment for logic and common sense" and defied any sense of rationality.[292]

VI. RAMIFICATIONS OF THE HAGUE COURT ADVISORY OPINION

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

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

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

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

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

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

295. S. Res. 408, 108th Cong. (2004). The bill acknowledged that "all countries possess an inherent right to self-defense." *Id.* One Congressman who expressed outrage over the court's decision to hear the case, *see supra* note 7, remarked that "the court simply did a cut and paste of [the General Assembly's submission to the Court] . . . completely failing . . . [to mention] years of brutal terrorism at the hands of Palestinian extremists." 150 CONG. REC. H5465 (daily ed. July 9, 2004) (statement of Rep. Pence).

296. G.A. Res. ES-10/15, U.N. GAOR, 10th Emer. Spec. Sess., 27th plen mtg., U.N. Doc. A/RES/ES-10/15 (2004).

comply with the court's advisory opinion,[297] but has implemented changes to the structure based upon a recent ruling by the Israeli Supreme Court.[298] Although the Hague Court's opinion focused specifically on the legality of Israel's security structure, the implications of its ruling extend beyond the Israeli-Palestinian conflict, particularly with respect to self-defense in a post-September 11 world.

A. *A Flexible Approach to International Humanitarian Law*

The Hague Court employed a flexible application of the Fourth Hague and Geneva Conventions to conclude that Israel was bound by both conventions and precluded from erecting its security structure.[299] The Hague Convention, codified during a period of relative peace in Europe, contemplated a "classic case" of belligerent occupation.[300] The Israeli-Palestinian conflict, however, "has contained many special features" that distinguish it from the classic situation contemplated by the Convention.[301]

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297. The court recognized that its opinion "'has no binding force.'" *Legal Consequences*, *supra* note 63, at 1025 (quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 71 (Mar. 30)). Israel "already announced that it will ignore the Court's decision." Jeremy Rabkin, *'Lawfare,'* WALL ST. J., July 13, 2004, at A14; *see* David Warren, *Seeing the World Through an Airbrush*, OTTAWA CITIZEN, July 16, 2004, at A13 ("[T]he ICJ decision would 'find its place in the garbage can of history.'") (quoting a spokesperson from the Israeli prime minister's office).

298. *See supra* note 63 and accompanying text. U.S. Congressional Representative Mike Pence stated that "the Israeli Supreme Court['s] . . . rulings on the . . . [f]ence ha[ve] struck a fair balance between the rights of Israelis to live free from suicide bombings and the right of Palestinians to their economic well-being, and there is no legal basis for the court in the Hague to usurp its authority." 150 CONG. REC. H5465 (daily ed. July 9, 2004) (statement of Rep. Pence). Israel joins Morocco, France, Iceland, and the United States as nations rejecting the Hague Court's nonbinding advisory opinions. *See* James S. Tisch, *Who's Defying the World Court?*, JEWISH WK., July 23, 2004, *at* http://www.thejewishweek.com/top/editletcontent.php3?artid=3570 (last visited May 9, 2005).

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

300. The Hague Convention represented "a late codification of a body of law adopted in an atmosphere of nineteenth century liberalism . . . drafted for the conditions of a nineteenth century world, so different . . . from the twentieth century and its total wars." GRABER, *supra* note 232, at 35. One scholar noted that belligerent occupation was "largely regulated" by the Fourth Hague Convention. F. Llewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 TRANSACTIONS OF THE GROTIUS SOC'Y 149, 160 (1924). *But see supra* Part V.A.

301. Roberts, *supra* note 127, at 61 (enumerating at least five elements rendering the conflict unique).

By finding that Israel violated the Hague Convention,[302] the court apparently believed that the Convention was "not considered outdated and superseded by newer developments in international law."[303] Humanitarian law, the court implied, "has a sizeable 'place-holder'" for various types of conflicts, regardless of the participation of state or nonstate actors.[304] By imposing upon Israel obligations under both the Hague and Geneva Conventions, the court ensured that, regardless of Israel's voluntary consideration of Palestinian humanitarian rights, "basic principles of humanitarian law" applied to Israel *de jure*.[305]

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

Unlike the flexible approach it utilized to apply international humanitarian law to the conflict, the Hague Court's interpretation of Article 51 of the U.N. Charter represents a restrictive approach that establishes dangerous precedent in an era of global terrorism. In order to condemn Israel's construction of its security structure, the court engaged in the "splitting of a legal hair"[306] that defies legal reasoning, invalidates a state's right to defend itself against terrorism, and enables terrorists to manipulate and operate outside of the international legal system.[307] The court's opinion established that "new rules" apply to and limit a state's right of self-defense: (1) self-defense only applies to terrorist attacks that reach a certain level of devastation and destruction; (2) the U.N. Charter does not permit a state to engage in self-defense against an "armed attack" by terrorists who are not state actors; and (3) self-defense does not include

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302. *See Legal Consequences*, *supra* note 63, at 1046-47.

303. *See* GRABER, *supra* note 232, at 35; Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 ISR. DEF. FORCES L. REV. 19, 23 (2003) ("The advent of the twentieth century . . . turned the duty imposed on the occupant into a broad grant of authority to prescribe and create changes in the life of the occupied economy and society.").

304. Ratner, *supra* note 299, at 8. This was not the position the court adopted regarding a state's right of self-defense. *See infra* Part VI.B.

305. Ratner, *supra* note 299, at 9; *see Legal Consequences*, *supra* note 63, at 1035-38. *But see supra* Part V.A.-B. The court's analysis focused solely upon the hardships imposed upon Palestinians. *See* Editorial, *A Disgraceful Ruling*, WASH. TIMES, July 19, 2004, at A18. One critic noted the court's hypocrisy: "[D]enial of Israel's right to defend itself because doing so might violate 'humanitarian' rights was read in open court by the chief judge representing China, whose government massacred hundreds of its own citizens . . . ." Krauthammer, *supra* note 283.

306. Warren, *supra* note 297.

307. McCarthy, *supra* note 225, at 17. The court's advisory opinion "dealt a serious blow to the credibility of international law" because it demonstrated "the way in which those who practice terrorism have been allowed to manipulate the international legal system." Andrew Apostolou, *A Court in the Service of Terrorism: Playing Arafat's Propaganda Game*, NAT'L REV. ONLINE, *at* http://www.nationalreview.com/comment/apostolou200407190844.asp (last visited May 9, 2005).

nonviolent actions.[308] Against the backdrop of September 11, these conclusions are highly problematic.[309]

1. Calculating the Gravity of an Attack

The Hague Court's declaration that Article 51 "has no relevance" to the case against Israel[310] suggests that it predicates a state's "inherent right" to self-defense[311] upon the gravity of the attack waged against it.[312] While the court implicitly recognized the September 11 terrorist attacks against the United States,[313] it refused to acknowledge that Palestinian suicide bombings against Israelis constituted terrorist acts.[314] In doing so, the court endorses a subjective standard as to what acts of terror rise to the level of an "armed attack."[315] The court had no difficultly concluding that the

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308. Bayefsky, *supra* note 291.

309. *Legal Consequences*, *supra* note 63, at 1078 (declaration of Judge Buergenthal); *see also id.* at 1062-63 (separate opinion of Judge Higgins) (stating that "[i]t seems quite detached from reality . . . that it is the wall that presents a 'serious impediment'" to Israeli self-defense and Palestinian self-determination).

310. *Id.* at 1050.

311. U.N. CHARTER art. 51.

312. Requiring that "an attack reach a certain level of gravity before triggering a right of self-defense would make the use of force more rather than less likely." William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 300 (2004).

313. The court cited Resolutions 1368 and 1373 adopted after the September 11 attacks but discussed neither their substance nor purpose. *See Legal Consequences*, *supra* note 63, at 1049-50.

314. The court merely stated that "Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population." *Id.* at 1050. Judge Koroma justified such attacks: "[I]t is understandable that a prolonged occupation would engender resistance." *Id.* at 1057 (separate opinion of Judge Koroma). Judge Elaraby added that "occupation has always been met with armed resistance." *Id.* at 1088 (separate opinion of Judge Elaraby). Judge Owada went further by describing the violence as "so-called terrorist attacks by Palestinian suicide bombers against the Israeli civilian population." *Id.* at 1098 (separate opinion of Judge Owada). *But see supra* Part II.A.2.-3.

315. The court implied that a certain "scale and effect" was required in order for an action to constitute an "armed attack." Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 23 (2003); *see* Matthew Scott King, Note & Comment, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457, 463 (2003) ("[F]actors such as the terrorist threat to a state's safety . . . may be considered when trying to determine whether an attack constitutes an 'armed attack.'"). Thus, a single hostile act or a series of isolated attacks, such as a suicide bombing, may or may not constitute an armed attack depending upon "'its magnitude or severity.'" Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 L. & INEQUALITY 195, 202 (2004) (quoting U.S. DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION 3 (2003)). A terrorist attack should be considered part of a larger scale of actions when determining whether such an attack rises to the level of an "armed attack." *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 29 (2004)

September 11 attacks created a "situation [that] is . . . different" from the violence in Israel.[316] By distinguishing between acts of terrorism, the court endorsed a highly subjective standard that trivialized loss of life and arbitrarily placed a higher value upon those lives it deemed worthy of protection.[317] According separate standards of protection for Israelis and Palestinians "will only serve to further stoke the long-running . . . conflict and do nothing to bring it to an end."[318]

2. Imputing an "Armed Attack" to a State Actor

The court's limited interpretation of the language of Article 51 is based solely upon the assumption that the drafters of the U.N. Charter did not envision that an entity other than a state could engage in an armed attack.[319] Although the U.N. Charter did not define an "armed attack,"[320] the court determined that Article 51 permits self-defense only in "the case of armed attack by one State against another State."[321] While this approach may have rendered illegal Israel's security structure, it severely limits any state's right to defend itself against attack.[322] Thus, the court's conclusion

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("[V]iolence inflicted by international terrorism can quickly reach the level of an armed attack as contemplated in Article 51 of the United Nations Charter.").

316. *Legal Consequences*, *supra* note 63, at 1050. This conclusion suggests that Palestinian suicide bombings against Israelis constitute isolated instances of violence separate from a broader atmosphere of terror, *see supra* note 314 and accompanying text, and ignores "an on-going pattern of behavior involving terrorist activity" existing prior to September 11 and throughout the Second *Intifada*. *See* King, *supra* note 315, at 463. The court, however, found no similarity between September 11 and Palestinian suicide bombings. *See Legal Consequences*, *supra* note 63, at 1049-50. *But see supra* note 4 and accompanying text.

317. The court's opinion suggested that Palestinian humanitarian concerns trumped Israel's right to protect its citizens from terrorism: "[T]wo Israelis . . . died in suicide attacks [with the security structure], compared with 166 killed in the same time frame at the height of the terrorism. But what are 164 dead Jews to this court?" Krauthammer, *supra* note 283.

318. Apostolou, *supra* note 307; *see supra* note 305 and accompanying text.

319. *See* Guruli, *supra* note 266, at 108. One scholar observed, "For the first time . . . states are now forced to reevaluate the long-standing notion that only a state has the capacity to commit an armed attack against another state . . . ." Brown, *supra* note 315, at 24.

320. Brown, *supra* note 315, at 21. "[T]he court's opinion is almost entirely bereft of any discussion of the actual practice of states . . . ." *A Disgraceful Ruling*, *supra* note 305; *see also* Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire-The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 137-39 (2004) (discussing whether the U.N. Charter contemplated armed attacks by nonstate actors).

321. *Legal Consequences*, *supra* note 63, at 1050. The court added that "Israel does not claim that the attacks against it are imputable to a foreign State." *Id. But see supra* Part V.C.

322. *See A Disgraceful Ruling*, *supra* note 305 ("[T]he 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"). Thus, the court permits Palestinian suicide bombings against Israelis based upon a narrow interpretation of the language

suggests that the United States could not have invoked its right of self-defense against al Qaeda absent specific authorization from the Security Council.[323] This interpretation suggests that a state must seek U.N. authorization *before* engaging in an act of self-defense after a terrorist attack.[324] Ultimately, the court distinguished between the American and Israeli attacks without elaboration[325] and thereby applied a separate legal standard for Israel's reliance upon self-defense.[326]

The court's limitation upon Israel's "inherent right"[327] to self-defense contemplated that Palestinian violence could not be imputed to a Palestinian state.[328] Since Palestinian violence "originates within, and not outside" Israel,[329] the court suggested that the location of a terrorist attack determines whether a state can act in self-defense.[330] Notwithstanding

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of Article 51. *See id.*

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

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

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

326. *See supra* note 213 and accompanying text.

327. U.N. CHARTER art. 51. Use of the term "inherent" suggests its importance. *See* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 31-32 (1987).

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

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

330. *See id.* at 1050; *see supra* note 281 and accompanying text. This conclusion ignores the circumstances of September 11 when nineteen foreign nationals boarded four American civilian airliners at American airports. *See* Lippman, *supra* note 46, at 297; *infra* note 332. It also runs contrary to the language of the Security Council Resolutions 1373 and 1368. *See* S.C. Res. 1373, *supra* note 280; S.C. Res. 1368, *supra* note 280.

international law principles that govern interactions between states, a requirement that perpetrators of violence possess an "international personality" is not required.[331]

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

3. Nonviolent Actions and Self-Defense

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

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

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

333. *See supra* note 6 and accompanying text.

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

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

336. *See generally* Brown, *supra* note 315 (arguing that the September 11 attacks established a new paradigm relating to the international law principles governing a state's use of force).

permitted."[337] Whereas the United States exercises force in its campaign to eradicate terror, Israel's counterterrorism initiative represents a "non-forcible" measure.[338] The court never addressed the nonviolent character of the structure itself.[339] Judge Higgins determined that Article 51 did not contemplate the use of a nonforcible measure, such as a barrier, fence, or wall, as an exercise of self-defense.[340] As a result, the court implicitly favored the exercise of force over endorsement of a state's implementation of nonviolent measures designed to enhance its citizens' safety and security.[341]

VII. CONCLUSION

For the first time in the history of the Israeli-Palestinian conflict, the General Assembly invoked its authority to call upon the Hague Court to determine the legality of Israel's construction of its security structure.[342] The court's advisory opinion reflected the extent to which anti-Israel sentiment has clouded judicial reasoning[343] as the U.N. practice of "blam[ing] Israel first"[344] manifested itself through a proceeding during which the court "bound" itself to "censure" Israel and dismantle its efforts to combat terrorism.[345] Although Israel represents one of approximately

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

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

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

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

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

342. *See supra* note 206 and accompanying text.

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

344. Glick, *supra* note 213.

345. McCarthy, *supra* note 225, at 24.

190 nations within the U.N., it has been isolated,[346] defamed,[347] and rebuked[348] by the organization and its highest court.[349] Israel's counterterrorism initiative serves solely as a prophylactic measure designed to isolate Palestinian suicide bombers and insulate Israeli citizens from violence.[350] While its counterterrorism initiative imposes hardships upon both Israelis and Palestinians,[351] Israel's primary objective has been to preserve lives on both sides of the conflict.[352] The court, however, determined that Israel's security structure violated the rights of Palestinians.[353]

The court's advisory opinion, which relied exclusively upon material provided by the U.N.,[354] failed to engage in an impartial assessment of the conflict. Instead, the Court engaged in revisionist history,[355] advanced flawed legal reasoning,[356] and succumbed to the same elements of bias and anti-Israel sentiment expressed within the General Assembly.[357] Presented with a legally conclusive question framed to produce a predetermined answer,[358] the court advanced an interpretation of legal principles that achieved the result sought by the General Assembly: Israel's attempts to shield itself from terror violated international law.[359]

In an advisory opinion designed to substantiate the illegality of Israel's security structure, the Hague Court manipulated principles of international law in order to undermine Israel's inherent right to defend itself against acts of terror.[360] The unanticipated ramification of the court's newly

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346. *See supra* Part IV.A.

347. *See supra* Part IV.B.

348. *See supra* Part IV.D.

349. "[T]he Court's decision w[as] crafted to apply to a party of one." Bayefsky, *supra* note 291.

350. *See supra* Part II.B.

351. Palestinians "need freedom of movement . . . . Israeli Jews and . . . Arabs have a human right not to be blown to pieces by suicide bombers." Wedgwood, *supra* note 63.

352. "[S]aving lives is more important than preserving the quality of life," which "is always amenable to improvement. Death is permanent." Netanyahu, *supra* note 283. *But see supra* notes 340-41 and accompanying text.

353. *See Legal Consequences*, *supra* note 63, at 1054-55.

354. *See supra* note 295 and accompanying text.

355. The court noted that Palestinian Arabs rejected the 1947 U.N. Partition Resolution because "it was unbalanced." *Legal Consequences*, *supra* note 63, at 1030. *But see supra* note 102 and accompanying text.

356. The decision was described as one emanating from a "kangaroo court." Krauthammer, *supra* note 283; *see also* Editorial, *Europe and the ICJ*, JERUSALEM POST, July 12, 2004, at 13.

357. The court's opinion "joins the parade of anti-Semitic infamy." Saul Singer, *ICJ to Israel: Drop Dead*, JERUSALEM POST, July 16, 2004, at 20.

358. *See supra* note 207 and accompanying text. The General Assembly "simply want[ed] to know 'the legal consequences' of Israel's original sin." Wedgwood, *supra* note 63.

359. *See Legal Consequences*, *supra* note 63, at 1054-55.

360. The court's decision "raises still broader questions about the U.N.'s capacity to contribute

established precedent may preclude a nation targeted by terror from responding to and preventing security threats against its citizens.[361] Thus, while the General Assembly may have sought to censure Israel by seeking an advisory opinion from the court, it effectively undermined all U.N. member nations' rights to self-defense.[362]

to any serious international effort against terrorism." Rabkin, *supra* note 297.

361. *See supra* Part VI.B.

362. Bayefsky, *supra* note 291.