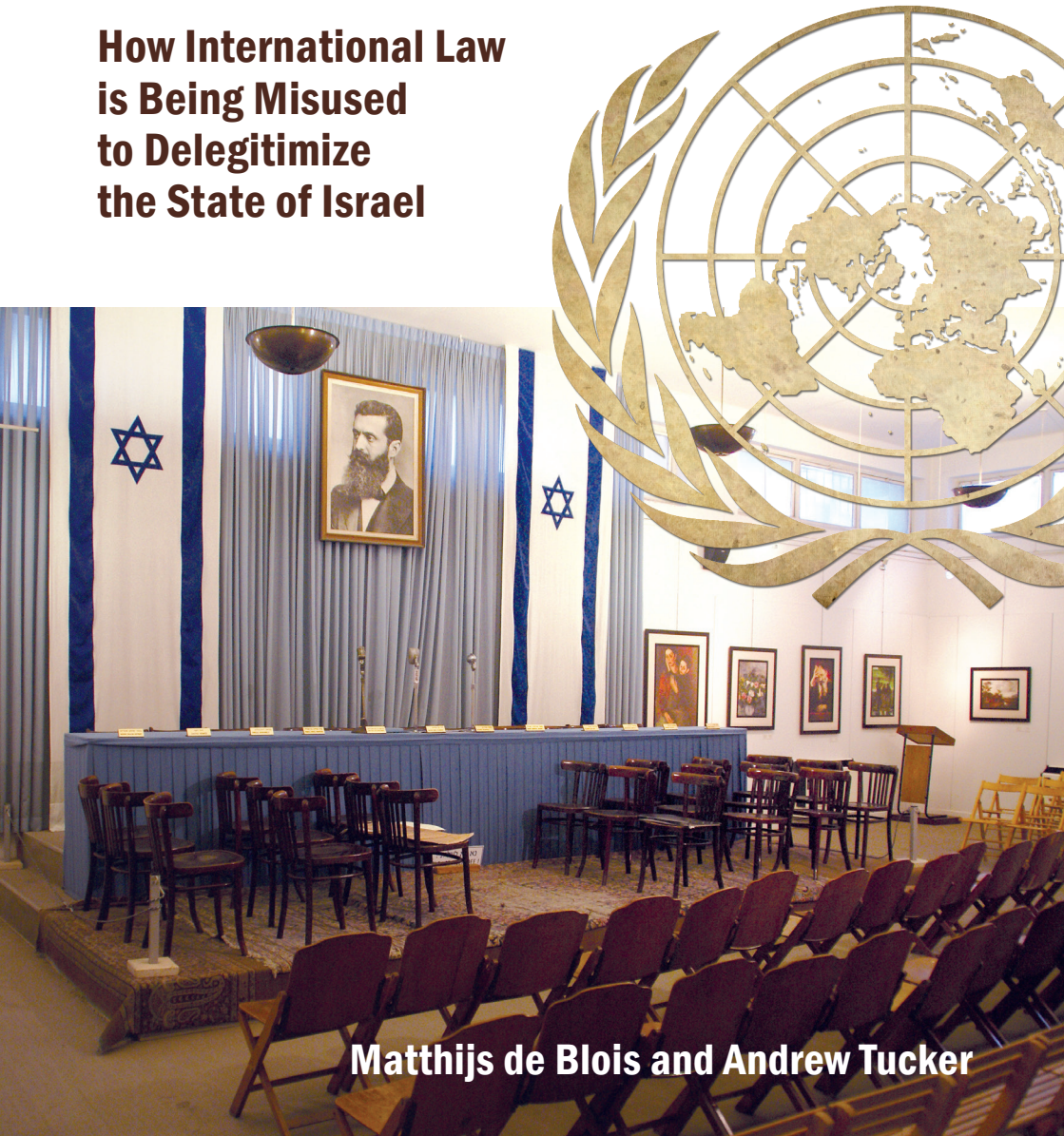
The Hague Initiative for International Cooperation

Israel on Trial

Executive Summary and Conclusions

How International Law is Being Misused to Delegitimize the State of Israel



Matthijs de Blois and Andrew Tucker

www.thinc.info

In 2018, the State of Israel turned 70, but it has never been fully accepted as a member of the international community. Notwithstanding peace agreements with Egypt and Jordan, conflict between Israel and some of its neighbors in the region is looming. And peace between Israel and the Palestinians seems as far away as ever. Why?

Since the 1970's, the idea has developed that international law requires resolution of the Arab/Israeli conflict by creating a State of Palestine with East Jerusalem as its capital, and borders based on the "1967 lines"—the so-called "two-state solution". Israeli "settlements" are regarded by many as illegal and an impediment to this solution.

This book reviews international law regarding self-determination, statehood, territorial sovereignty, human rights and the right to self-defense. It argues that the two-state solution as defined by the UN is not required by international law.

The authors examine how international law has been used and misused over the last century with regard to the Arab/Israeli conflict. They argue that the historical context of the creation of the State of Israel, especially the Mandate for Palestine, is too often ignored.

The Arab states, the Palestinian leadership and the European Union have all played a role in enabling the UN to become a platform for "lawfare" against Israel: policies and resolutions that use the language of international law but, in fact, undermine the existence of the Jewish State and have disputable basis in international law.

It is time to revisit the prevailing legal paradigm to resolve the conflict. This book aims to provide a legal framework for the exploration of alternative policy solutions that balance the rights of the Jewish State of Israel to territorial integrity, security and political independence with the rights of Palestinian Arabs to political autonomy and economic and social advancement.

……..

This booklet contains the executive summary and conclusions of the book. The book (500 pp) can be ordered at: www.thinc.info.

Executive Summary and Conclusions

1. Israel on Trial

1.1 This study has been carried out in response to the controversial United Nations (UN) Security Council Resolution 2334 (23 December 2016). It is an attempt to critically assess the interpretation and application of international law in that resolution. As the resolution relies on the Advisory Opinion of the International Court of Justice (ICJ) in the *Wall* case (2004), this book is also a critique of that Opinion. Consequently, it is critical of numerous other resolutions of UN organs in respect of the Israeli/Palestinian conflict that are based a similar approach. Our primary contention is that the ICJ, the UN Security Council and UN General Assembly, and as a result many other institutions, have failed to properly frame the issues requiring solution, and have adopted biased, and in some respects, incorrect interpretations of international law.

1.2 Resolution 2334 and the 2004 ICJ Advisory Opinion advance what we call the "current legal paradigm." This paradigm has four main elements:

a. International peace and security requires the creation of a Palestinian state;

b. This state should be based on the "4 June 1967 borders" as the only possible solution to these competing claims. The UN has jurisdiction to require compliance with these borders;

c. Any action taken by Israel that threatens that outcome is seen as an infringement of international law, and Israel is obliged to cooperate with the creation of the State of Palestine based on the 4 June 1967 lines; and

d. All other states are responsible to ensure that Israel meets these obligations.

1.3 The current legal paradigm relies on a particular interpretation of five inter-related ideas on aspects of international law: statehood, territorial sovereignty, self-determination, human rights and humanitarian law. The understanding of how international law in these fields applies to the case of Israel/Palestine is challenging. One has to take into account a changing world and changing perceptions of international law, combined with the extremely complex historical, political and legal background of these territories and the peoples involved. In our view, the UN Security Council and the ICJ failed to take adequate account of this complex background, and gave insufficient attention to the rights of the Jewish people to self-determination and the status of Israel as a sovereign state enjoying the right to sovereign equality.

1.4 We argue that:

a. Israel has the right to exist as a sovereign state enjoying peace and security as all other states;

b. Israel is under no obligation to withdraw from the "occupied territories" or remove Israeli settlements;

c. the creation of a State of Palestine is not required under international law;

d. even if it were, the UN and its Member States have no jurisdiction to determine the borders between that state and the State of Israel; in any event, the borders mandated in Resolution 2334 (the "4 June 1967 lines") infringe on Israel's rights under international law; and

e. third states are under no obligation to enforce the "two-state solution" or facilitate the creation of the State of Palestine; on the contrary, to do so in the terms of Resolution 2334 constitutes a fundamental infringement of Israel's rights.

1.5 A fundamental review of the current legal paradigm is urgent and important for two main reasons:

a. The discriminatory interpretation and application of international law to the Israel/Palestine conflict is not only unfair to Israel, it is producing perverse results and impeding a negotiated solution; and

b. The "instrumental" use of international law to achieve political or military goals conflicts with the idea of an international legal order based on fairness and objectivity. International law will only retain

its credibility and usefulness as a set of international norms in the pursuit of peace if it is applied fairly, objectively, reasonably and with full regard to both context and historic realities.

2. Israel and International Law

2.1 Binding principles or rules of international law operate as a limitation of state sovereignty, which remains the core principle of international law. For that reason, the body of international law is relatively limited. According to Article 38 of the Statute of the ICJ, there are only four sources of international law: obligations contained in treaties; international custom (evidence of general practice accepted as law); general principles recognized by civilized nations; and judicial decisions and writings of highly qualified publicists. In addition to these, nowadays decisions of international organizations are recognized as source of international law.

2.2 Statements of law must be distinguished from statements of policy or morality. The former are binding as a matter of law, while the latter are not. A treaty, for example, may contain provisions that are intended to be binding by their terms ("hard law"). Many of the resolutions and declarations referred to in Resolution 2334 and the 2004 Wall Advisory Opinion are only statements of intention or policy ("soft law").

2.3 The principle of the sovereign equality of states is the bedrock of the Westphalian system of international law. This principle means that: (a) all states are equal under the law—there should be no discrimination in the way law is interpreted or applied to states; (b) all states enjoy the rights inherent in full sovereignty; (c) all states have the right to political independence and territorial integrity; and (d) all states are under the same duty to comply with international law. Israel is a state, and as such enjoys all of these rights and duties in the same way and to the same extent as other states.

2.4 Israel is a UN Member State, and thus bound by the terms of the UN Charter, in the same way that all other UN Member States

are bound by it. It is, however, not bound by the numerous, generally condemnatory, UN resolutions adopted by UN institutions in respect of Israel. Under the UN Charter, the General Assembly and its subsidiary organ, the UN Human Rights Council, have no power to adopt binding resolutions with external effect. The same is true for Security Council resolutions, unless they are made under Chapter VII of the UN Charter. Statements of law contained in UN General Assembly or UN Security Council resolutions may, in some cases, be evidence of *opinion juris*, but they do not—in and of themselves—constitute definitive statements of law. Accordingly, neither UN institutions nor UN Member States are entitled to treat such resolutions as definitive or binding. On the contrary, they are obliged to form an independent view on the relevant legal issues and their application to the factual situation under consideration.

2.5 The ICJ has the jurisdiction (power) to give a binding judgment in a contentious case only when the states concerned consent to it doing so. The ICJ may also issue an advisory opinion on a legal matter when asked to do so by another UN institution. By their nature, such opinions may contain important statements, but they are advisory only—not binding by their terms. The 2004 Wall Advisory Opinion is therefore not binding on the State of Israel, nor is it binding on other states.

2.6 Since the early 1970's, especially after the Yom Kippur War (October 1973), the UN system has been "used" by certain blocks of states to isolate and delegitimize the State of Israel. The notion that "Zionism is Racism" once expressed in a UN General Assembly resolution, epitomizes their approach. There are a number of reasons for this. One of them is the influence of the Organization of Islamic Cooperation (OIC) and the League of Arab States (the Arab League), which, as a matter of policy, deny the legitimacy of the Jewish State of Israel, and promote the creation of an independent Arab/Islamic State of Palestine. Another is the role of the European nations, which in the early 1970's, adopted a policy to support the creation of a state of Palestine. This is a policy that has subsequently become known and received recognition as "the two-state solution." The UN

system has also been increasingly influenced by non-governmental organizations (NGOs), many of which have an "anti-Israel" agenda. In addition, the UN has created several institutions dealing with "Palestinian" issues that are consistently condemning Israel for breaches of international law. No other state has been subjected, and continues to be subjected, so intensively and consistently to such scrutiny and condemnation.

2.7 The discriminatory activities of other states to isolate Israel disproportionally constitutes a fundamental infringement of Israel's right to sovereign equality. These outcomes are often made possible by the voting behavior of numerous countries, often themselves human rights violators, that form voting blocs that protect and support each other and simultaneously condemn the State of Israel for violations of international law. Human rights law in particular is used instrumentally by UN Member States as a weapon that results in "the rule of some groups over others by and through the law, rather than a community united under the rule of law."

2.8 There are many procedural and substantive problems with the 2004 Wall Advisory Opinion of the ICJ, which undermine its authoritativeness. In particular:

- The ICJ was, in fact, purporting to determine a conflict—which it had no jurisdiction to do, as Israel did not consent to the court's jurisdiction;
- By relying on very limited information, the ICJ failed to take adequate account of the historical, political and military/strategic complexities of the Israel/Palestine conflict;
- Because the court only received arguments put forth by certain parties, most of which are hostile towards Israel, its Advisory Opinion is in many respects poorly reasoned and fails to take adequate account of the legal significance of the relevant instruments and events prior to 1948, such as the Mandate for Palestine, resulting in unbalanced findings on the status of the disputed territories and of the Jewish settlements therein;
- The ICJ virtually denied Israel's right to self-defense against terrorist attacks originating from the disputed territories.

2.9 This instrumental and discriminatory use of international law and the UN system in order to achieve a political outcome (namely undermining the validity of the Jewish State of Israel and promoting the creation of a "state of Palestine" based on certain boundaries that have no legal significance as borders) is called *lawfare*. *Lawfare* is problematic for several reasons: It ignores the rights and interests of the State of Israel under international law; it does not take satisfactory account of the status of the relevant territories pursuant to the law applicable to territorial sovereignty, and it conflicts with the purposes and principles of the UN Charter. In particular:

- The discriminatory application of international law to Israel breaches the principle of the sovereign equality of states;
- The continual support for the Palestinian cause without, when necessary, condemning the use of terror against Israeli citizens, and in many cases supporting the use of terror, breaches the principle that all UN Member States must respect and protect the territorial integrity of other UN Member States;
- Imposing conditions on Israel for the resolution of its dispute with its neighbors, that are not imposed on other states, conflicts with the object of establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained";
- Failing to condemn the use of terror against innocent citizens breaches the object of "[practicing] tolerance and [living] together in peace with one another as good neighbors"; and "[ensuring] by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest."

2.10 Finally, *lawfare* devalues and undermines the international legal order itself, by selectively using the terms of certain instruments while ignoring other obligations and sources of international law. When the law is no longer strictly followed and applied but instead instrumentally used to achieve political ends, the stability, certainty and predictability of the legal system are threatened.

3. The State of Israel

3.1 In terms of modern international law, the State of Israel can be seen as an expression of the self-determination of the Jewish people. The very long history of this people sharing a common religion, culture and language, as well as its continuing relationship to the territory in the Middle East, which as a result of the Roman occupation became known as Palestine, is substantiated by an overwhelming body of evidence. In addition, it has become clear that the ambition to establish an independent Jewish political entity in the territory was clearly expressed by the Zionist movement as from the end of the 19th century. This ambition was recognized by the British government in the Balfour Declaration of 1917 and confirmed by the agreement of the Allied Powers, who had the obligation (and power) to decide on the future of the territories of the Ottoman Empire after World War I, in the San Remo Resolution of 1920. Finally, it was recognized in the Mandate for Palestine, adopted by the Council of the League of Nations in 1922. This instrument explicitly recognized the historical connection between the Jewish people and Palestine and the grounds for reconstituting their national home there.

3.2 The Mandate for Palestine is unique in comparison to all the other mandates created by the League of Nations in that its primary beneficiaries were not only the Jewish inhabitants at that time living in Palestine, but the Jewish people as a whole, the majority of which was still living outside the territory. The mandatory power (Great Britain) had the obligation to secure for them the establishment of a Jewish national home (Article 2). Therefore, the Mandate for Palestine also included the duty to facilitate the immigration of Jews and their "close settlement" in the Mandate territory (Article 6). In addition to the duty to implement the political rights of the Jewish people, the Mandate for Palestine included an obligation to safeguard the civil and religious rights of all its inhabitants (including Arabs). We have shown that—unfortunately—the Mandatory Power did not live up to its obligations. More and more, Britain ignored the unique character of the Mandate for Palestine, restricting Jewish immigration and settlement. Eventually, Britain decided to resign its commission and withdraw from Palestine. It withdrew from Palestine on 15 May

1948. Already two years earlier, the League of Nations was dissolved. Notwithstanding all these facts, the Mandate for Palestine still has legal relevance; based on Article 80 of the UN Charter, the rights of all peoples under the Mandate system should be respected.

3.3 This history has implications for the legal relationship of Israel to the whole territory subject to the former Mandate. The Gaza Strip and Judea/Samaria (the West Bank including East Jerusalem) are not ordinary occupied territories, while the Jewish settlers in those areas are, in principle, entitled to be there having regard to Article 6 of the Mandate.

3.4 The day before Britain left Palestine, 14 May 1948, the State of Israel was proclaimed in Tel Aviv. The State of Israel immediately came into being because, at that moment, it fulfilled all of the criteria for statehood under international law. Israel became a full member of the UN in August 1949. Israel has all the rights of UN Member States, which all other Member States are obliged to respect. In particular:

a. Israel is entitled to be treated equally under international law; and,
b. Israel has the same rights to territorial integrity, political independence and security as all other states.

3.5 In the Declaration on the Establishment of the State of Israel we find the contours of Israel as a Jewish and democratic state. It is Jewish, because the majority of its population is Jewish. Its Jewishness is expressed in its official symbols, national anthem and official holidays. Its legal system is, to a large extent, secular, but Jewish law plays a role. The Law of Return enables Jews to become Israeli nationals. Against those who qualify the Jewish character of the state as "racist" or consider Israel to be an "apartheid" state, we have underlined that under international law the right to self-determination includes the right to opt for a specific cultural identity, including the right to offer citizenship to Jews from all over the world.

3.6 The fact that Israel qualifies itself as a Jewish state does not mean that it is not democratic. In fact, it has a clearly democratic

character, with a parliamentary democracy that respects the rule of law. It is in that respect the exception in the Middle East.

4. Territorial Sovereignty and Boundaries

4.1 The State of Israel emerged out of, and came into being as a result of, the San Remo resolution of the Principal Allied Powers (1920) and the Mandate for Palestine (1922), which implemented the Balfour Declaration (1917). The core purpose of the Balfour Declaration, the San Remo Resolution and the Mandate for Palestine was the creation of a "Jewish national home" in Palestine. That homeland was to be created by means of enabling the immigration of Jews into Palestine from the diaspora, and their "close settlement" of the land. The Jewish homeland was to ensure the protection of the civil and religious rights of non-Jews in Palestine.

4.2 It is arguable that the San Remo Resolution was effective in transferring to the Jewish people sovereign title to the territory known as Palestine, and that the State of Israel (as an expression of the right of the Jewish people to self-determination) inherited those rights upon its creation in May 1948.

4.3 The whole of the territory that is today considered part of "Israel proper," as well as the so-called "Occupied Palestinian Territories" (East Jerusalem, the West Bank, and Gaza) were all an integral and inseparable part of the Mandate for Palestine, which was created pursuant to the decisions of the Principle Allied Powers after WWI, and subsequently implemented by the League of Nations (in 1922).

4.4 The Mandate for Palestine was equivalent to a treaty that was (and arguably remains) binding on all the states that were members of the League of Nations.

4.5 The area of Transjordan, which subsequently became the Hashemite Kingdom of Transjordan in 1946, was part of the Mandate for Palestine as was determined by the League of Nations. On the unilateral determination by Great Britain, with the approval of the

League, administration of Transjordan was subsequently (in 1921) separated from administration of the western part of the Mandate territory in order to accommodate the interests of the Arab Palestinians. In a very real sense, therefore, Jordan was intended to be, and in fact became, an Arab Palestinian state.

4.6 There are strong arguments to support the view that the borders of the State of Israel are determined by the principle of *uti possidetis juris*. This general principle of international law essentially means that the administrative borders of the relevant Mandate at the time the state emerges, become the borders of that state. The principle of *uti possidetis juris* has been applied to all other states emerging from Mandates, such as Syria and Iraq. Pursuant to the sovereign equality of states, the same principle should be applied to Israel. Application of the principle of *uti possidetis juris* to Israel means that the administrative boundaries of the Mandate for Palestine, as they were applied on 14 May 1948, became the borders of the new State of Israel when it came into existence on that date. This included all of "modern Israel" as well as the Gaza Strip and the West Bank (including East Jerusalem).

4.7 It is important to note that the so-called "Partition Plan" adopted by the UN General Assembly in November 1947 never came into effect and therefore has no legal relevance. Given the fact that it was Arab rejection of the Partition Plan that prevented it from coming into effect, it is disingenuous, inappropriate and misleading for Arab states and the Palestine Liberation Organization (PLO) to refer to this resolution as having any legal relevance whatsoever.

4.8 Resolution 2334 of the Security Council and many other UN resolutions assert that the so-called "1967 lines" should be treated as *de jur*e border of the State of Israel. The UN and its Member States have no jurisdiction to determine the borders between the State of Israel and its neighbors. In any event, the 1949 Armistice Lines (often referred to as the "the 1967 lines," "the 1967 borders," "the 4 June lines," or "the Green Line") have never acquired the status of international borders under international law. They therefore should

not be, directly or indirectly, referred to as the borders of the State of Israel or any prospective State of Palestine. Nothing since 1948 has altered or affected the legal status of these territories or the borders of Israel as at 14 May 1948.

4.9 The right of the State of Israel to territorial integrity means that the State of Israel is entitled to claim and protect governance of the territories belonging properly to the State of Israel upon its creation. It also means that the State of Israel has the right to defend itself against acts of aggression against that territory, or citizens located in that territory.

4.10 UN Security Council Resolutions 242 and 338 are non-binding resolutions. However, they do refer to important principles of international law that are binding on Israel and other states.

4.10.1 One of those principles is the principle of "the inadmissibility of the acquisition of territory by war"—a foundational principle of international law which prohibits the acquisition of territory by acts of aggression. That principle is often (explicitly or implicitly) used to criticize Israel's control of East Jerusalem and the West Bank. In fact, Israel has never undertaken acts of aggression in order to, or with the result of, acquire or acquiring territory. The Six-Day War was, from Israel's perspective, a defensive war. Application of the principle of "the inadmissibility of the acquisition of territory by war" means that territorial gains of Egypt (Gaza) and Jordan (West Bank) in 1947-1949, which resulted in the 1949 Armistice Lines, were illegal. The principle of *ex iniuria ius non oritur* (or the "clean hands" principle) means that unjust acts cannot create law. The application of that principle to the nations that attacked Israel in 1948-1949 (Jordan, Syria, Lebanon, Egypt, and Iraq) means that they are not now entitled to claim any benefit from those acts of aggression. The leadership of the Arab Palestinians, under Grand Mufti Husseini, also publicly supported and actively participated in those acts of aggression. To the extent the PLO is the heir of that leadership, it too is prohibited from benefitting from those acts of aggression. This principle defeats their claims to territorial sovereignty over East Jerusalem and the West Bank.

4.10.2 The second principle referred to in UN Security Council resolution 242 is "the withdrawal of Israeli armed forces from territories occupied in the recent conflict." This formulation was purposefully and carefully drafted to ensure that it did not imply that Israel was required to withdraw all of its armed forces from all of the relevant territories. It therefore supports the view, as stated above, that, because of Israel's legitimate claims of territorial sovereignty, Israel was entitled to retain military control over the territories of which it gained control in the Six-Day War until such time as a peace treaty is reached.

4.10.3 In any event, it is strongly arguable that Israel has complied with the recommendation of the Security Council in Resolutions 242 and 338 to withdraw its forces from territories. Israel handed over the Sinai to Egypt in 1979 and withdrew from Gaza in 2005. Further, it has withdrawn its armed forces from Areas A and B in the West Bank.

4.11 The law of belligerent occupation is often used to imply that Israel is illegally controlling or possessing East Jerusalem and the West Bank. Much confusion has arisen over this issue, in part perhaps because Israel itself has not clearly asserted its sovereign rights and has elected (voluntarily) to apply the law of occupation to these territories (*de facto*, but not *de jure*) to the West Bank. This is implicit in the term "Occupied Palestinian Territories" that is now common parlance in UN literature.

4.11.1 In our view, it is strongly arguable that this body of law does not apply to these territories at all, as Israel did not assume control of them (in 1967) from a prior sovereign state (Jordan having illegally occupied the West Bank between 1949 and 1967).

4.11.2 In any event, the law of belligerent occupation does not apply to Gaza and, arguably, also does not apply to Areas A and B in the West Bank, as Israel does not exercise actual authority on the ground in those territories.

4.11.3 Even if the law of belligerent occupation applies to these territories (which we doubt), that body of law does not affect the sovereign status of the territories. The law of belligerent

occupation governs the conduct of states that gain control over territory previously controlled or governed by a neighboring state, until the parties have reached an agreement terminating their conflict. It is designed to both protect the citizens of the occupied territory, and preserve the interested of the "ousted sovereign." It does not render the occupation itself illegal, nor does it affect the question of whether the territory belongs to one or the other party.

4.12 It is often and repeatedly claimed (as in Resolution 2334) that Israel's "settlements policies since 1967" infringe on international law. That claim rests solely on article 49(6) of the Fourth Geneva Convention, which prohibits an occupying power from transferring or deporting its own population into the "occupied territories." In our view, Article 49(6) was intended to apply to large-scale forced transfers or deportations of population groups. It only applies where it can be proven that a citizen of Israel has been forcibly moved into the "occupied territories" (i.e., the West Bank including East Jerusalem) as a direct result of a policy or program of the government of the State of Israel. For many reasons explained in this book, most Israelis living in these territories have not been forced to but are doing so of their own volition. In any event, article 49(6) of the Fourth Geneva Convention only applies to states. It does not render the conduct of individual citizens of Israel illegal.

4.13 Israel and the PLO have chosen to negotiate the terms of Palestinian self-determination under the terms and conditions set out in the Oslo Agreements. Those agreements remain in force, and therefore provide the agreed framework within which the self-determination of the Palestinian people is to be determined. "Jerusalem" and "settlements" are amongst the issues which Israel and the PLO have agreed will be resolved in permanent status negotiations. Seeking "unilateral" recognition of Palestinian statehood arguably breaches the terms of the Oslo Agreements.

4.14 Israel has reunified the city of Jerusalem and administers the city (both "East" and "West" Jerusalem) as a single, unified city. It

has also declared Jerusalem to be the undivided capital of the State of Israel. The "international community" refuses to accept either the effective annexation of Jerusalem since June 1967, or its claimed status as capital of the State of Israel. This position is unfounded. Jerusalem undeniably constituted part of the Mandate for Palestine, which did not make any separate provision for the city. Under the principle of *uti possidetis juris*, Jerusalem became an integral part of the State of Israel in 1948. As set out previously, the plans in the "Partition Plan" to make Jerusalem an international city never came into effect. By declaring undivided Jerusalem to be its capital, and by applying Israeli law and jurisdiction to the whole municipality of Jerusalem, Israel has clearly asserted its sovereign rights with respect to this territory. Accordingly, Israel, in our view, has every right to possess and control the whole of the city of Jerusalem.

5. Israel and Human Rights

5.1 Much of the criticism of Israel concerns its alleged infringement of human rights in general, and—more specifically—the rights of Palestinians.

5.2 Israel accepts the highest standards in this field, both in its national law and by the ratification of the major international human rights conventions. The enforcement of human rights within the national legal order in Israel is strengthened by the powers of judicial review of the Supreme Court of Israel, which is reputed for its high profile and critical attitude towards the executive branch of government.

5.3 A point of real concern is the human rights situation in the disputed territories. According to the ICJ, Israel is bound to comply with both the rules of international humanitarian law, as well as the rules of international human rights law. The Israeli government contends that both categories of law cannot be applied simultaneously but they are prepared to apply international humanitarian law *de facto* in the disputed territories. The Israel Supreme Court, on the other hand, is willing to apply international human rights law in respect of these territories. We acknowledge the intention to protect the rights and

interests of all civilians, whether in times of peace or war. However, we find it difficult to understand how both categories of law can apply in their entirety simultaneously. In our submission, priority should be given to international humanitarian law as a *lex specialis* of human rights law.

Further, because of the fact that under the Interim Agreement certain powers are transferred to Palestinian authorities, Israel cannot be held liable for breaches of international humanitarian law in respect of powers exercised by those authorities in Areas A and B. However, the situation in which Israeli citizens living in the West Bank are given different treatment compared with non-Israeli civilians living there, should not continue indefinitely. A fair solution urgently needs to be found for the long term, in which all civilians living in the West Bank will have full civil, political, religious, economic, social and cultural rights, while allowing Israel to preserve its character as a Jewish State.

The situation in East Jerusalem is different. In East Jerusalem, Israel applies Israeli law and administration, and has offered all non-Israeli civilian residents the opportunity to become Israeli citizens. Israel cannot be held responsible for the fact that many of them have chosen not to accept this offer (and the consequent disadvantages that come with it).

5.4 Israel's respect for human rights is a prominent concern of UN monitoring mechanisms and organs. It has been submitted that Israel has been confronted over the years with an extraordinary and, at many times, extra-proportional criticism of its human rights record. While of course this record is—just as the record of other states—not always blameless, it can safely be assumed that within these mechanisms there has been, and still is, a strong bias against Israel. In that connection, we have pointed at the disproportionate number of resolutions on purported violations of human rights by Israel, as compared to the number of resolutions adopted against other states. In addition, it has been shown that the successive Special Rapporteurs on the question of the human rights in occupied Palestinian territory sometimes very explicitly displayed their anti-Israel bias. It has finally been noted that this question has been made by the UN Human Rights Council a fixed agenda item, a "privilege" granted only to Israel.

5.5 In the discussion of the substantive claims against Israel, we examined three common claims of breach of human rights:

5.5.1 First, the issue of discrimination. The malicious allegation that Zionism is to be equated to racism, and the related popular idea that Israel is an "apartheid state," have no basis in international law. These claims ignore the protections embedded in the Israeli legal system and overlook the significance of the Jewish right to self-determination. Israeli citizens of different backgrounds—Jews, Muslims and Christians—have equal civil and political rights. The allegations are arguably part of a campaign to delegitimize Israel as a Jewish state. The situation in the West Bank, while not a desirable situation in the long term, also cannot be considered racist. The decision of the State of Israel not to apply Israeli law to non-Israeli citizens in this territory is a legitimate decision. Nevertheless, we accept that the human rights of Palestinian Arabs in the West Bank demands changes to enable them to have full rights ensuring their fundamental freedoms and civil rights. International law does not, however, prescribe the way in which such improvement is to be achieved.

5.5.2 Secondly, the issue of the religious freedom in Israel was discussed, in light of the claim that Israel infringes on this freedom, in respect of its policies concerning the Temple Mount and other Islamic and Christian holy places. Under Israeli law, the religious freedom and the right to worship is guaranteed to all believers. Israel is, in that respect, the positive exception in the Middle East. In cases where, in practice, problems do arise, they can be and are addressed within the Israeli judicial system.

5.5.3 Finally, we elaborated on the claim that the measures taken by Israel to combat terrorism have infringed on Palestinian human rights. In this connection, it has been underlined that under international law Israel is obliged to combat terrorism. The aim of the fight against terrorism is, in itself, the protection of the most fundamental rights to life, personal integrity and health. It was observed that the international supervisory bodies have shown little or no understanding of Israel's need (and right) to balance the protection of human rights with its obligation to protect its own citizens.

6. "Palestine"

6.1 It is held by many that the "Palestinian people" is a people having a right to self-determination under international law. It is doubtful that this right did exist in the sense of the objective criterion of having a distinct historical, cultural, religious and linguistic identity in 1922, as Palestine was populated by groups representing various different peoples. In the succeeding decades, however, the non-Jewish Palestinian population increasingly developed a more or less coherent historical, cultural, religious and linguistic identity. It seems clear that from the 1960's onwards there has been a group of persons who identify themselves as Palestinian Arab people, and who have the political will to become an independent nation. This means that, on the basis of at least the subjective tests, it is arguable that there is today indeed a Palestinian people having a right to self-determination.

6.2 The territorial scope of the Palestinian-Arab claims to self-determination remains ambiguous. It would seem that the PLO and Arab states deliberately leave open the possibility of claims to territorial sovereignty over all of Palestine, including the pre-1967 territories. The Palestinian National Charter simply excludes the existence of the State of Israel in the Middle East. The popular view within the international community limits the territorial claims to the "occupied Palestinian territory"—which is also the starting point of the Oslo Agreements.

6.3 Assuming the Palestinian Arabs have such a right, the right to self-determination does not confer an automatic right to statehood. Self-determination may be implemented in several forms. Separate independent statehood is just one of these forms and, as such, is not imposed by international law. Recognition of the right to self-determination of a Palestinian people should, in any case, be accommodated with the right to self-determination of the Jewish people and the rights of the State of Israel to territorial integrity and political inviolability.

6.4 Notwithstanding the "accession" of Palestine to many international treaties (including the Statute of the International Criminal Court (ICC)),

and its "recognition" by many other states, the "State of Palestine" does not yet exist as a matter of law, as it does not satisfy the criteria for statehood under international law. Further, admission of Palestine as a member of the UN requires demonstration that it is both able and willing—as a political entity—to comply with the most fundamental UN Charter principles. These include the obligation to respect other states, the prohibition of force and the requirement of friendly relations. At present, Palestine does not satisfy these requirements.

6.5 We have dwelled on the origins of the problem of Palestinian refugees, as well as on the comparable problem of the Jewish refugees, who had to flee Arab countries in the years 1947-1949. The legal aspects of the refugee issue are complex. First of all, the concept of a Palestinian refugee, used in the UNRWA practice, is totally different from the regular definition of a refugee, as included in the Convention on the Status of Refugees of 1951. Furthermore, there is the claim of a right of return, which is predominantly based on a non-binding General Assembly Resolution. There is arguably no "right of return" under international law. Moreover, an implementation of the right of return, as envisaged by Palestinian leaders, would mean the end of Israel as a Jewish State. Thus, we conclude that the parties concerned should negotiate the contours of another solution.

7. A State at War

7.1 Israel is a state at war. Israel has to contend daily with the application of international law designed to restrict the use of force. Its actions are continually scrutinized by the media while the actions of Israel's enemies generally receive less critical attention. Regarding the right to enter into war (*jus ad bellum),* the right to invoke and exercise the right of self-defense is an inherent right of states under international law.

7.2 Israel is entitled to invoke and exercise this right, also if non-state terrorist groups, such as Hezbollah and Hamas, attack it. The ICJ, in its Wall Advisory Opinion, in perhaps the most severely criticized part of its Opinion, has denied Israel this right in the case of attacks that are

not imputable to another state, including attacks by terrorist groups. The ICJ has adopted an inaccurate interpretation of international law—more precisely, Article 51 of the UN Charter—on this point. It denies the State of Israel one of the most fundamental rights of a state—the right to defend itself and protect its citizens. It is difficult to understand how the ICJ could have come to this interpretation in an era where, generally speaking, warfare is between states and terrorist groups rather than inter-state.

7.3 Israel is also criticized regarding its application of international humanitarian law. There is ample evidence that Israel accepts, seeks to apply, and generally successfully applies the fundamental principles of distinction and proportionality. It is also important to realize that Israel is operating under incredibly difficult circumstances in defending itself against guerrilla warfare waged by its enemies, which include non-state actors such as Hezbollah and Hamas. This type of warfare involves the use of tactics that make it virtually impossible to make a clear distinction between combatants and non-combatants. The deliberate use of civilians and civilian buildings as shields, a practice employed by these militant groups, constitutes a violation of international humanitarian law.

7.4 In relation to possible violations of humanitarian law, the possibilities and impossibilities of bringing Israeli officials to trial before an international or a foreign tribunal has been discussed. It remains to be seen whether this is purely theoretical, having regard to the accession of Palestine to the ICC, which may bring changes in this respect. So far, prosecution before a foreign criminal court that applies the universality principle (or another principle establishing jurisdiction over foreigners) has not been successful. However, it is likely that those involved in *lawfare* against Israel will not give up easily. In principle, there is not a valid reason for the involvement of international or foreign courts. Israeli civil and military courts have proven to be well-equipped to deal with these matters.

Israel on Trial - Executive Summary and Conclusions

thinc.

THE HAGUE INITIATIVE
for INTERNATIONAL CO-OPERATION

An initiative to study the relationship between Israel and the nations, in order to promote international peace and security, friendly relations amongst nations, and peaceful resolution of disputes based on the principles of justice and international law.