The status of the West Bank under international law

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Executive Summary: 2017 marks the 50th anniversary of the Six Day War when Israeli forces took control of Sinai, Gaza, The West Bank and The Golan Heights in 6 days. For many today, the West Bank is seen as being occupied by Israeli forces in defiance of international law. Israel is depicted as a colonialist power that seized the territory illegally and which continues to hold it to the detriment of regional peace and stability. Israel control of this territory is held up as the prime barrier to peace. In fact, Israel took control of this territory in a legitimate act of self defence and continues to hold it lawfully until a peace agreement changes its status. Israel is not required to return the territory unilaterally, nor to return it in its entirety. Moreover, handing this territory back to Palestinian control would not be a guarantee of peace as recent events have shown.

June 2017 marks the 50th anniversary of the Six Day War when Israeli forces conquered the West Bank, the Golan Heights, Gaza, and the Sinai Desert from Jordan, Syria and Egypt. They also captured East Jerusalem and unified the city under Israeli control. Those territories were seized during a war that lasted less than a week and which would go on to transform the conflict between Israelis and Arabs and, more specifically, the lives of Israelis and Palestinians, for decades to come. Today, only two of those territories remain in Israel's hands following the conclusion of the Egypt-Israel peace treaty in 1979 and the unilateral withdrawal from the Gaza enclave in 2005.

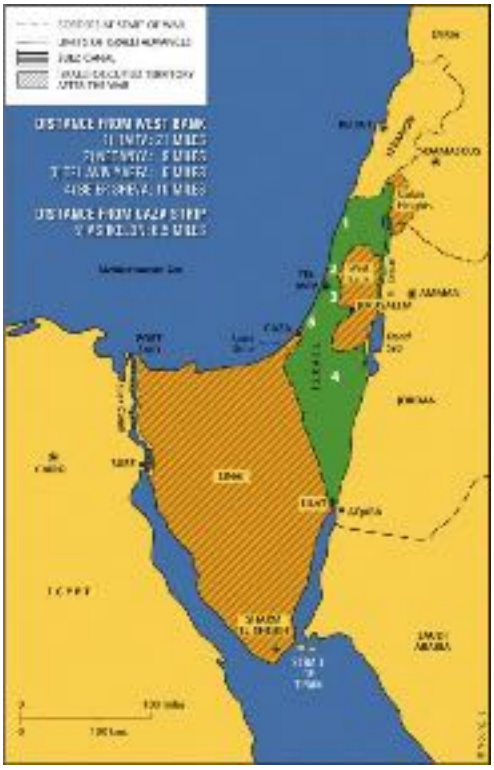
Yet what is a cause for celebration among many in Israel is equally a cause for lament within western intellectual circles. Among academics, media commentators and public policy figures, 2017 marks the 50th anniversary of an ongoing 'illegal' occupation of Palestinian land by a belligerent and expansionist Jewish state intent on the permanent subjugation of its indigenous population. Israel is frequently blamed for prolonging the conflict in the region and for souring relations between the Arab and Muslim worlds and the West. Israel is accused of colonialism, apartheid and genocide and of being a serial abuser of human rights. But it is essential to understand the context for Israel's actions in 1967 and the legal status of the West Bank which is far from being held in defiance of international law.

A brief note on historical context: The West Bank (Judea and Samaria) was originally part of the territory allotted for a Jewish national home in the San Remo conference, a decision subsequently ratified by the League of Nations mandate for Palestine in 1922. Developments in the 1930s, most notably the rise of fascism in Europe and the growing antipathy from

Palestinian Arabs, forced the need for compromise and the Zionist leadership accepted that Palestine would have to be split into an Arab and Jewish state. Hence the Zionist acceptance of the principle of partition as proposed by the Peel Commission report in 1937. Under the 1947 UN partition plan, the West Bank (among other areas of mandate Palestine) was to have become the Arab Palestinian state. But while the Zionist leadership voted for partition, the Arab states rejected it and made a concerted effort to drive the Jews out of the country within days of the resolution being passed. Jordan illegally seized control of the West Bank and held it between 1949 and 1967, though it did not declare a Palestinian Arab state there.

Since 1967, under Israeli control, the West Bank has been in a state of legal and political limbo. In the words of one scholar sympathetic to Israel, it is both 'occupied and disputed'[i], its fate awaiting a credible Palestinian leadership willing to both build a future for its Arab inhabitants, end terror and incitement and also legitimise Israeli sovereignty as a Jewish state.

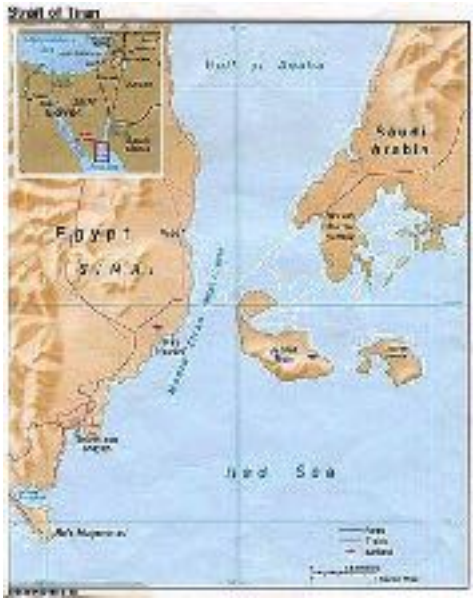
Since the Oslo II accords, signed in 1995, the West Bank has been divided into three administrative regions: Area A, Area B and Area C. Area A (some 18% of the territory) is under full Palestinian civil and security control and includes all the major Palestinian population centres (Nablus, Jenin, Qalqilya, Ramallah, Bethlehem, Jericho and most of Hebron). Israeli citizens are not allowed to enter these areas. Area B (some 22% of the territory) contains some 440 small Palestinian villages and is under joint Israeli-Palestinian security control and Palestinian civil control. There are no Israeli settlements in either Area A or B. Area C forms the remainder of the territory (some 60%) where Israel has full civil and security control. Since 1999, Israeli governments have sought final status agreements with the Palestinians (predicated on creating a contiguous, sovereign Palestinian state) but talks have fallen apart, in part due to the upsurge of terror from the Second Intifada and continuing Palestinian insistence on the right of return and control of the Old City of Jerusalem.



Map showing the borders at the start of the war and the territory that Israel gained in 1967.

<u>Historical context of the Six Day War</u>:

Israel came to occupy Gaza and the West Bank following the Six- Day War in June 1967, the background to which is crucial to evaluating Israel's subsequent actions. Far from being an imperialist war designed to enlarge the borders of the Jewish state, this was a war of self defence by Israel in response to Arab aggression. The *casus belli* was a decision by Egyptian leader Nasser to mass his troops in the Sinai Peninsula and force the UN Emergency Force to withdraw from the area.[ii] The UNEF had been stationed in the Sinai as a buffer as part of an agreement to end the 1956 Suez war but was withdrawn after Egypt's request. In addition, Nasser decided to close the Straits of Tiran (an important international waterway) to Israeli shipping, an action that Israel had previously declared to be an act of war. Nasser's actions were a clear breach of international agreements.



As Egypt, Syria and Jordan massed their troops on Israel's borders, it was clear that these Arab nations were planning a war of extermination. Nasser declared on May 27th 1967 that his country's basic objective would be "the destruction of Israel."[iii] Egypt threatened to massacre the civilian population of Tel Aviv and their soldiers were equipped with poison gas. Seized Jordanian documents revealed plans for the capture of Jewish villages near the Jerusalem corridor and the slaughter of their inhabitants. Iraq's President Abdul Rahman Arif said: "the existence of Israel is an error which must be rectified. This is an opportunity to wipe out the ignominy which has been with us since 1948."[iv]

Iraq's PM predicted that after a successful Arab invasion, there would be "practically no Jewish survivors," while Hafiz al Assad of Syria exhorted his soldiers to "pave the Arab roads with the skulls of Jews."[v] Ahmed Shuqairy, the head of the PLO, had vowed to "wipe Israel off the face of the map," adding ominously, "No Jew will remain alive." Such genocidal rhetoric led many Israelis (a significant section of whom were Holocaust survivors) to fear they would be slaughtered. Trenches were built in civilian areas, gas masks were distributed and graves were dug in the lead- up to the war.

In the end, Israel decided to launch a pre-emptive strike against the air forces of Egypt, Syria and Iraq, providing the Jewish state with air superiority for the rest of the war. Far from being an act of aggression, this action was undertaken because it was militarily necessary, in order to prevent a genocidal assault by the country's enemies.

In general, international law prohibits the "use of force against the territorial integrity or political independence of any state" under article 2 (4) of the UN Charter.[vi] However, under article 5 of the charter, exception is given for the use of force in self- defence: "Nothing 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, until the Security Council has taken measures necessary to maintain international peace and security." Any sovereign UN member state is thus perfectly entitled to defend itself from attack by another state. The problem here is that, barring the aggressive acts of the Arab countries, the first shots were fired by Israel. Israel acted first, in anticipation of its enemies' collective aggression, by launching a series of pre-emptive strikes. Some have argued that there is no scope in international law for anticipatory self defence or pre-emptive action.

But this is somewhat unrealistic. A state that was unable to defend itself until an enemy attacked might find that its civil and military infrastructure was damaged beyond recognition. If it faced imminent destruction as a result, the whole notion of self-defence under article 5 would be robbed of any value. As President Kennedy said in 1962 during the Cuban Missile Crisis: "We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril."[vii] In other words, the right of self defence is not to be interpreted as if it were a passive right.

More recently, the Bush administration in 2002 acknowledged the following: "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and

air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."[viii] Pre-emption can be justified if it is "a response to an impending unjustified attack." The test under international law for the pre-emptive use of force is one of necessity. There must be a "credible, imminent threat" and there must have been an "exhaustion of peaceful remedies."

Naturally this begs the question of what is meant by imminence. One leading test case much cited by scholars is the *Caroline* incident.[ix] In 1837 British troops attacked the ship *Caroline,* which was carrying supplies to Canadian rebels. These rebels, led by William Lyon Mackenzie, were seeking a Canadian Republic and had fled to the Canadian side of the Niagra River. They were given money and arms via the *Caroline* from sympathizers. One night a British force from Canada entered the United States and attacked the *Caroline,* a move that caused outrage among American politicians. According to U.S. Secretary of State Daniel Webster, the action could only be a justifiable form of self-defence if the need for action was "instant, overwhelming" and left "no choice of means, and no moment for deliberation." The principles of the *Caroline* case have been recognized by states as the vital components of self- defense, arguably of a legal right to pre-emptive defense.

Expanding on when pre-emption becomes a legitimate tool for warfare, the eminent philosopher Michael Walzer offers three criteria in his *Just and Unjust Wars*. He writes that there must be "a manifest intent to injure," "a degree of active preparation that makes that intent a positive danger," and finally a "general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."[x]

Using these criteria, it is clear, first, that the incendiary threats of extermination from several Arab leaders in 1967 created intent to injure. Second, the decision to close the Straits of Tiran followed by the expulsion of UN troops from Sinai and finally massing troops on Israel's borders constituted active preparation. Third and above all, the Israelis were entitled to believe, together with outsiders, that inaction would have magnified the risk of destruction. They genuinely sensed their imminent destruction at the hands of mortal foes. Thus the philosopher Ted Honderich is wrong when he describes Israel's actions in the Six- Day War as "less a pre-emptive attack by the Israelis" and more "aggression by way of pretence of believing something about an imminent attack."[xi]

But is the continuing occupation of the West Bank illegal?

The Palestinians and their supporters around the world cite UN Security Council resolution 242 as proof that Israel's continued presence in the West Bank is illegal. They further claim that Israel must surrender this land unilaterally under the terms of this resolution as the West Bank is designated as the future Palestinian state. They appear to be supported by (as of 2015) some 136 member states of the UN who recognise 'Palestine' as having non-member observer status there. But the claim that Israel must hand back territory unilaterally is belied by the specific wording of the resolution.

British diplomat Lord Caradon, the chief author of resolution 242

What Security Council Resolution 242 emphasizes is the "inadmissibility of the acquisition of territory by war" and also calls for the "establishment of a just and lasting peace in the Middle East" based on "withdrawal of Israel armed forces from territories occupied in the recent conflict" and the "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." It specifically affirms the need for "guaranteeing freedom of navigation through international waterways," achieving "a just settlement of the refugee problem" and "guaranteeing the territorial inviolability and political independence of every State in the area."[xii]

Nothing in this resolution demands a *unilateral* Israeli withdrawal from the West Bank. For such a withdrawal is inextricably linked to the need for a "just and lasting peace" and that necessitates Israel's acquiring "secure and recognized boundaries free from threats or acts of force." In other words, Israel is not required to act alone but to negotiate a political settlement with her neighbours. No just and lasting peace can be made without reference to the regional actors, and today that includes the PA. As the Jerusalem Centre for Public Affairs puts it,

"The provision on the establishment of 'secure and recognized boundaries' proves that the implementation of the resolution required a prior agreement between the parties."[xiii]

The political obligations set out in resolution 242 are multilateral not unilateral. Thus in 1979, Israel and Egypt concluded peace talks that eventually led to the political normalisation of relations and the withdrawal of Israeli forces from Sinai. In 1994, a peace treaty was signed between Israel and Jordan that dealt with border issues, water, trade and security. Israel was not required to hand back Egyptian territory or offer Jordan water in the absence of these peace agreements. Attempts to broker a peace between Israel and Syria failed in 2000.

Resolution 242 was also passed under chapter 6 of the UN Charter, not chapter 7. Unlike chapter 7 resolutions, which deal with "threats to the peace, breaches of the peace, and acts of aggression," chapter 6 resolutions are non-binding in nature. They are more in the form of recommendations of an advisory nature and, as such, may be indicative of state practice. As spelled out in article 33 (chapter 6), "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[xiv] This is precisely the process that Israel underwent with Egypt and Jordan. Bilateral negotiations between Israel and Egypt led to the Camp David accords and the withdrawal from the strategically important Sinai Desert, which constituted 90 percent of the occupied territories.

By contrast, chapter 7 resolutions require countries to comply with the directives that are set forth, deliberately allowing no room for negotiation or conciliation. Nor does resolution 242 imply that there is anything illegal about Israel's continuing control of the West Bank. While it is deemed inadmissible to "acquire" land in war, it is not inadmissible or illegal to occupy it during an armed conflict or prior to a post- conflict negotiated settlement. Were it to be otherwise, then any state acting in self-defence following armed aggression from a neighbouring state would have to return to the *status quo ante* at the cessation of hostilities, an absurd and unworkable proposition. This position is supported in a speech given by US President Lyndon Johnson on 8 June 1967. In it he said: "There are some who have urged, as a single, simple solution, an immediate return to the situation as it was on June 4. As our distinguished and able Ambassador, Mr. Arthur Goldberg, has already said, this is not a prescription for peace but for renewed hostilities."[xv]

One can also turn to the 1970 UN General Assembly "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States," which upheld the legality of military occupation provided the force used to establish it was not in contravention of the UN Charter. Similarly, despite the bias of the ICJ, its former president, Rosalyn Higgins, has stated, "There is nothing in either the Charter or general international law which leads one to suppose that military occupation pending a peace treaty is illegal."[xvi]

Another misconception is that resolution 242 calls for Israel to return *all* of the West Bank to Arab control. The wording of resolution 242 is clear: Israel should return "territories" rather than "the territories" captured in 1967, allowing for the kind of political leeway that would enable Israel to live in "secure and defensible borders." In fact in 1967, Israel did not have borders as such. It merely had demarcation lines resulting from the various armistice agreements that the state signed with its Arab neighbours at the end of the first Arab-Israeli war in 1949. These were transitional, their purpose being to "delineate the lines beyond which the armed forces of the respective Parties shall not move" (Israel-Jordan armistice agreement, Article VI.) Permanent ones would have to be negotiated as part of a peace agreement. They left Israel a mere 9 miles wide (the so called 'Auschwitz borders' as Abba Eban described them) at its narrowest point and left the country intensely vulnerable to attack from a neighbouring state. Resolution 242 was designed to rectify that.

The view that Israel was not required under international law to withdraw from the entire West Bank was confirmed by George Brown, British foreign secretary in 1967, on January 1970:

"The phrasing of the Resolution was very carefully worked out, and it was a difficult and complicated exercise to get it accepted by the UN Security Council. I formulated the Security Council Resolution. Before we submitted it to the Council, we showed it to Arab leaders. The proposal said "Israel will withdraw from territories that were occupied," and not from "the" territories, which means that Israel will not withdraw from all the territories."[xvii]

<u>Immoral to reward aggression</u>:

It would also be immoral to expect that Israel simply hand back the West Bank to Arab control. The land was gained in a war of self defence, a war of necessity as previously

discussed. In general, aggressor states should not expect to regain land that they lost as a result of their belligerent actions. States that defend themselves should not be forced to reward the aggressors. A reversion to the *status quo ante* is immoral, for what would deter a state from launching further hostile acts if it had nothing to lose? If there were automatic protection for warlike nations whose wars of aggression had resulted in defeat, it would give a green light to belligerent behaviour and undermine the interests of peace and stability. So when it is claimed that Israel must relinquish the West Bank without preconditions, this goes beyond the requirements of international law and arguably of international morality too.

A sine qua non of peace?

In addition, it is a myth that the Israeli withdrawal from land is a guarantee for peace. In 2005, Israel made the painful concession of withdrawing from the Gaza Strip and uprooting the area's 9,000 Jewish inhabitants. The Palestinians had the chance to prove their honorable intentions, build a viable mini state and demonstrate that they could be trusted with further acquisitions of land. But in 2007 Hamas government seized control of the enclave in a violent coup and over the next decade, there was a surge in rocket and missile attacks on towns across southern Israel.

But this should not have come as a surprise. A poll of Palestinians in 2004, conducted by the Development Studies Programme at Birzeit University, showed majority support for continuing terror attacks from Gaza if the Israelis withdrew.[xviii] Among those surveyed, support for violence was higher among those living in Gaza. Similarly, when Israel withdrew unilaterally from Lebanon in 2000, Hezbollah built up a formidable arsenal of missiles in clear defiance of international law. Within six years, the terror group was in a position to abduct Israeli soldiers, sparking a conflagration that lasted several weeks and killed thousands of people. Today, the internationally proscribed terror group is more powerful than ever before.

In these past cases, Israeli withdrawal simply created a vacuum that was exploited by the radical actors and which led to an upsurge in the terror threat. Today, Israelis naturally ask what would happen if there were to be a withdrawal from the strategically more vital West Bank. They are being pressured to make concessions to Fatah and its ageing leader, Mahmoud Abbas, who lacks a democratic mandate. Abbas, for tactical reasons of self interest, allows co-operation between Israeli and Palestinian forces in a bid to thwart a Hamas

takeover in Area B. But in the event of future elections, Hamas could conceivably win power. With Iran flexing its muscles around the Middle East, it is likely that Hamas could be seen as a valuable Islamist proxy whose local wars with Israel serve Tehran's regional interests.

Conclusion:

Israel took control of territory to which she had legal title in a war of self defence. Under Resolution 242, she was under no obligation to return it without a guarantee of peace and security and her continuing control is not a violation of international law. Simply handing it back today would also be a recipe for further wars of aggression directed at Israel, given the level of Iranian influence through its terror proxies. Only when the regional climate changes and today's Palestinian leadership is ready for political compromise can Israel securely withdraw from the West Bank and create the two state solution she has long supported.

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[i] See Robin Shepherd: *Israel: A State Beyond the Pale.*

[ii] http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html

[iii] http://www.sixdaywar.org/content/threats.asp

[iv] http://www.jewishvirtuallibrary.org/background-and-overview-six-day-war

[v] Michael B. Oren, Six Days of War (Oxford University Press, 2002), p293

[vi] http://www.un.org/en/sections/un-charter/chapter-i/

[vii] http://www.nationalarchives.gov.uk/education/heroesvillains/transcript/g2cs2s1t.htm

[viii] https://2001-2009.state.gov/r/pa/ei/wh/15425.htm

[ix] http://www.historycentral.com/Ant/caroline.html

[x] Michael Walzer, Just and Unjust Wars (2015), p. 81

[xi] Ted Honderich, "Terrorisms in Palestine," in *Israel, Palestine and Terror,* ed. S. Law (London: Continuum, 2008, 6.

[xii] https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136

[xiii] Professor Ruth Lapidot, "Security Council Resolution 242: An Analysis of Its Main Provisions," *Jerusalem Centre for Public Affairs,* 4 June 2007.

[xiv] http://www.un.org/en/sections/un-charter/chapter-vi/

[xv] http://www.presidency.ucsb.edu/ws/?pid=28308

[xvi] Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council,"64 *Am. J. Int'l L.* 1 (1970).

[xvii] Quote taken from *The Jerusalem Post* January 3 1970

[xviii] Shepherd, A State Beyond the Pale. P. 127

Note: This paper is modelled on sections of the author's *Refuting the Anti Israel Narrative*, Chapter 1.