ARTICLES

THE UNITED NATIONS ACTION AGAINST IRAQ: A PRECEDENT FOR ISRAEL'S ARAB TERRITORIES?

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The action taken by the United Nations (U.N.) against Iraq for its occupation of Kuwait last year contrasts starkly with the U.N. action taken against Israel for its occupation of the Arab Territories1 during and after the 1967 war.2 The difference can partly be explained by the protection that the United States, as a permanent member of the Security Council, provides to Israel.3 Furthermore, there is a perception in the United States and in Europe that the two situations differed: Israel had acted in self-defense while Iraq had not.4 The fact that the U.N. Security Council found Iraq guilty of aggression in its occupation of Kuwait5 lent a sense of urgency to the situation which was lacking with respect to the Israeli occupation. If the Security Council had found Israel responsible for aggressive acts immediately following its invasion of the Arab Territories, it would likely have moved with greater dispatch to secure Israel's withdrawal. Even today, if the Security Council determined that

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1. For the purposes of this article, the Arab Territories include the Gaza Strip, the Golan Heights, the Sinai Peninsula, and the West Bank.


3. See, e.g., Israeli and Palestinian Affairs in Brief; PLO's Fariq Qaddumi on U.S. Veto of Security Council Resolutions on Israeli Actions in Territories, BBC SUMMARY OF WORLD BROADCASTS, Nov. 10, 1989, available in LEXIS, Nexis library, Archiv. file (quoting PLO representative that United States' veto of Security Council Resolutions condemning Israeli policy in the Occupied Territories proves that the United States does not wish to deal with the Middle East crisis).

4. See infra notes 56, 65 and accompanying text.

Israel committed aggression in taking the Arab Territories, the case for strong action in the U.N. would be more compelling.

The Iraqi occupation of Kuwait on August 2, 1990, brought the question of the Arab-Israeli dispute to the fore of international attention when Iraq raised the issue of linkage: after it occupied Kuwait, Iraq asserted that it would discuss withdrawing from Kuwait only in the context of negotiations for Israel's withdrawal from the Arab Territories. Linking the two events was appealing because it focused attention on the Arab-Israeli dispute which has long been on the U.N. agenda. More importantly, it presented an opportunity to remove Iraq from Kuwait without the use of military force, and to end the Israeli occupation of the Gaza Strip, West Bank, and the Golan Heights. The General Assembly, therefore, resolved to ask the Security Council "to convene the International Peace Conference on the Middle East." While most members of the Security Council agreed, the United States refused to link the two issues and threatened to veto any Security Council resolution that set a date for such a conference. As a result, Resolution 681, addressing the Palestinian-Israeli conflict, was silent on the topic of a Middle East peace conference. Thus, the United States precluded consideration of the Palestinian-Israeli issue in the context of the Kuwaiti crisis.

After the Security Council adopted Resolution 678, which authorized "all necessary means" to get Iraq out of Kuwait, President George Bush announced that although Secretary of State James Baker would hold talks with Iraq, he "[would] not be negotiating the Palestinian question." The Bush administration reasoned that any linkage would

7. S.C. Res. 242, supra note 2 (illustrating that the Security Council had debated the issue as early as 1968).
10. President Gorbachev favored a conference on both Iraq's occupation of Kuwait and Israel's occupation of the Arab Territories. Jessica Lee, Soviets Balk at Use of Force; Bush at a Loss, USA TODAY, Nov. 21, 1990, at A6 (Yemen, Cuba, Malaysia, and Colombia pushing for linking the two occupations).
14. U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations,
reward Iraq for its occupation of Kuwait, and that Iraq did not invade Kuwait to settle the Palestinian question.\textsuperscript{15}

The Iraqi government characterized the United States' stance as a propaganda ploy to excuse Israel's aggression against neighboring Arab peoples and represented an effort to distract world attention from Israel's occupation.\textsuperscript{16} The former Soviet Union also disagreed with the United States. Then Soviet Foreign Minister Eduard Shevardnadze pointed out that the Security Council had been working on the Palestinian-Israeli conflict for many years:

Why should we stop all this now? Are we in some strange way intimidated by the word "linkage"? We believe that we should continue what we have been doing and what we ought to be doing now: seeking a path towards a comprehensive settlement of the whole complex of Middle East problems that existed prior to 2 August. That is not rewarding anyone; it is just sound policy and common sense.\textsuperscript{17}

In an immediate sense, the military action taken against Iraq in 1991 rendered the linkage dispute moot. Since the end of the Gulf war, efforts have been underway toward a Palestinian-Israeli settlement.\textsuperscript{18} Still, the linkage issue retains its importance for two reasons. First, the asserted differences between the two occupations are still raised as objections to an Israeli withdrawal from the Arab Territories that it occupied in 1967. Second, it appears that the U.N. has applied a double standard by treating Iraq severely while issuing only verbal injunctions to Israel.

This article argues that Israel, like Iraq, committed aggression, and that the U.N. should have acted against Israel as severely and expeditiously as it did against Iraq. The fact that Israel has been able to maintain control of the Occupied Territories since 1967 does not diminish the U.N. obligation to take necessary action. If Israel cannot be convinced through negotiation to withdraw from the Gaza Strip and the West Bank, the U.N. is obliged by the U.N. Charter to take economic and

\textsuperscript{15} Secretary Baker's Statement Before the Senate Foreign Relations Committee, October 17, 1990, and House Foreign Affairs Committee, October 18, 1990, FOREIGN POLICY BULL., Nov.-Dec. 1990, at 43-44 ("He is not raping Kuwait to advance the Palestinian cause.").


\textsuperscript{18} See, e.g., Thomas Friedman, After the War: Diplomacy; 8 Arab Countries Back Bush's Plan on Mideast Peace, N.Y. TIMES, Mar. 11, 1991, at A1 (reporting that eight Arab countries agreed to the broad outline of President Bush's peace plan for the Middle East).
diplomatic sanctions to force Israel out.\textsuperscript{19} If such sanctions fail, then the U.N. should apply military sanctions.\textsuperscript{20}

I. THE IRAQI RATIONALE FOR OCCUPYING KUWAIT

The Iraqi rationale for invading Kuwait originated from economic and territorial claims. In the months preceding its 1990 invasion, Iraq raised a number of commercial complaints against Kuwait.\textsuperscript{21} Kuwait had loaned money to Iraq to support Iraq in its war with Iran and upon which Iraq sought a waiver of repayment. Iraq argued that Kuwait had profited at Iraq's expense by picking up Iraqi oil sales that had been reduced by wartime destruction.\textsuperscript{22} Furthermore, when the fighting between Iran and Iraq finally ended, Kuwait, instead of cutting production to let Iraq recoup some of its losses, pumped more oil than the quota agreed upon in the Organization of Petroleum Exporting Countries (OPEC), helping to further drive down oil prices.\textsuperscript{23} Iraq suspected that by increasing production, Kuwait was seeking concessions on outstanding territorial issues.\textsuperscript{24} Furthermore, during the Iran-Iraq war Kuwait set up oil rigs in the buffer zone between Iraq and Kuwait, a move that Iraq considered provocative.\textsuperscript{25}

Iraq also sought improved access to the Gulf. As a result of the borders drawn in the 1920s between Iraq and Kuwait, Iraqi territory is connected to the Gulf only by a narrow stretch of water and thirty miles of coastal marshland.\textsuperscript{26} In order to provide improved access to the Gulf and to allow it to better protect its short shoreline and port facilities, Iraq claimed two uninhabited marshland islands that belonged to Kuwait—Warbah and Bubiyan.\textsuperscript{27} During the spring of 1990, Kuwait refused to make concessions on these territorial issues,\textsuperscript{28} telling King Hussein of

\begin{itemize}
\item 19. U.N. CHARTER arts. 39-41 (authorizing the Security Council to determine threats to the peace and to take appropriate action).
\item 20. Id. art. 42.
\item 22. Id.
\item 24. Schuler, supra note 23, at M4.
\item 25. Hayes, supra note 23, at A7.
\item 27. Khadduri, supra note 26, at 33.
\item 28. Youssef M. Ibrahim, \textit{Iraq Seeks Bigger Role in OPEC}, N.Y. TIMES, June 27, 1990, at D1; Schuler, supra note 23, at M4 (noting Iraqi release of allegedly secret Kuwaiti report on U.S.-Kuwaiti meetings in which the two agreed that Kuwait should pressure Iraq on the oil pricing issue to get a good border settlement).
\end{itemize}
Jordan that it was assured of United States intervention if Kuwait experienced trouble with Iraq.29

A. The Historical Dispute

Iraq's territorial claim is also a part of a larger historical dispute with Kuwait. Until World War I, the region was part of the Ottoman Empire and the people of present day Iraq had ready access to Gulf ports.30 However, in a 1915 secret pact (Sykes-Picot), France and Britain agreed to create the states of Iraq, Palestine, and Transjordan under British rule and the states of Lebanon and Syria under French rule.31 After occupation by Britain and France, they became part of the League of Nations mandate system.32 Early in World War I, Britain promised Kuwait its independence.33

Following the war, Britain did recognize Kuwaiti independence, albeit under British protection.34 From Iraq's perspective, the creation of Kuwait as a state was disturbing because its effect was to deny Iraq ready access to the Gulf. Britain divided the Gulf between Iran and Kuwait; Iran received the eastern side of the Gulf, and Kuwait received the western, leaving Iraq sandwiched in between the two. In addition, if Iraq were to control Kuwait City — the only deep water port in the Gulf — it would be preeminent in the region.35 Therefore, Iraq initially refused to recognize Kuwaiti independence.36 Iraq suspected that

31. See Correspondence Embodying Sykes-Picot Agreement, Apr. 26-Oct. 23, 1916, 4 DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939, at 241-51 (1st ser. 1940). Britain had staked a claim to Kuwait even before World War I. In the late nineteenth century, Kuwait was administered from the Ottoman provincial center at Basra, which after World War I became part of Iraq. In 1899, Britain was concerned that Germany might build a railway to Baghdad, or that Russia might build one to Kuwait, threatening Britain's hold on India. To ensure its control of the port of Kuwait, Britain concluded a secret agreement with Kuwait that bound Kuwait not to receive the representative of any foreign power, or to cede or lease any of its territory, without Britain's consent. Khadduri, supra note 26, at 11.
32. LEAGUE OF NATIONS COVENANT art. 22. Under the Mandate system, states taking Ottoman territory were to administer their territory with accountability to the League.
33. Khadduri, supra note 26, at 23.
34. Id.
Britain wanted to prevent any single state from becoming too strong. Britain could thereby be assured of better access to the region's oil by playing the states off against each other.

Britain further restricted Iraq's access to the Gulf in 1923, when the British High Commissioner of Iraq recognized Kuwaiti sovereignty over the islands of Warbah and Bubiyan despite the fact that they had never before belonged to Kuwait. The two islands lie on the Iraq-Kuwait border and command the entrance to Um Qasr, an Iraqi port. The action of the High Commissioner was never ratified formally by Iraq and thus is not legally binding on Iraq. Even after Iraq became independent in 1932, the two countries were unable to come to an agreement on this mutual border. Kuwait continues to control the two islands despite a British proposal that Kuwait lease Warbah, the smaller of the two islands, to Iraq.

B. The Invasion of Kuwait

In the summer of 1990, Iraqi President Saddam Hussein discussed the border issue with the United States ambassador to Iraq, who indicated that the United States did not have a position on Iraq's border dispute with Kuwait. Kuwait showed little willingness to discuss the border issue or Iraq's financial claims. It is possible that, had Kuwait...

37. Current Documents, supra note 30, at 287.
38. Id.
39. Khadduri, supra note 26, at 27.
40. Id. Apart from the Gulf port of Um Qasr, the only other Iraqi city connected to the Gulf is Basra, which is thirty miles inland from the Gulf up the Shatt al-Arab river. The river has been a matter of constant dispute with Iran. Edmund Ghareeb, The Roots of Crisis: Iraq and Iran, in THE PERSIAN GULF WAR: LESSONS FOR STRATEGY, LAW, AND DIPLOMACY 21, 27 (Christopher C. Joyner ed., 1990); Raymond Habiby, Securing a Harbor: Iraqi-Iranian Relations 15 (paper presented at Center of Iranian Research & Analysis, Ann Arbor, Mich., Apr. 5-7, 1991) (on file with author). In the Iran-Iraq war that began in 1980, one of Iraq's first military objectives was the capture of the eastern shore of the Shatt al-Arab. However, Iraq was never able to gain complete control over the Shatt al-Arab, preventing the use of the port of Basra throughout the entire decade of 1980s. Chaim Herzog, A Military-Strategic Overview, in THE IRAN-IRAQ WAR: IMPACT AND IMPLICATIONS 255, 259-60 (Efraim Karsh ed., 1987).

Once the Iran-Iraq war ended, the two nations sparred over who would pay the cost of dredging the Shatt al-Arab of the silt that had built up during the war and of clearing it of war debris. Habiby, supra, at 15. When this issue was not readily resolved, Iraq decided to construct a new waterway connecting Basra to the Gulf at Um Qasr, having concluded that this would be less expensive. Id. at 16. However, access to the Gulf at Um Qasr was blocked by the islands of Warbah and Bubiyan, leading Iraq to renew its claims to them and demand border rectification around Um Qasr. Khadduri, supra note 26, at 32; Habiby, supra, at 16.
41. Khadduri, supra note 26, at 28.
42. Id. at 29-30.
43. Current Documents, supra note 30, at 295 (excerpts from the Minutes of the Audience Given by His Excellency President Saddam Hussein to Miss April Glaspie, the U.S. Ambassador to Iraq, July 25, 1990, quoting Ambassador Glaspie telling President Hussein that the U.S. had "no opinion" on "inter-Arab disputes, such as your border disagreement with Kuwait").
agreed to formal or informal negotiations, the invasion might have been avoided.\footnote{44}

However, on August 2, 1990, Iraq invaded Kuwait. At the time of the invasion, Iraq announced the formation of a new government in Kuwait that ceded to Iraq the two islands of Warbah and Bubiyan and some territory around the port of Um Qasr.\footnote{45} This action suggested that Iraq’s initial goal may have been to get concessions on the two islands and on the area around Um Qasr (as well as on its financial claims) in exchange for a withdrawal from the rest of Kuwait.\footnote{46} It was not until the United States airlifted troops into Saudi Arabia a few days later that Iraq announced a “comprehensive and eternal merger” of Kuwait into Iraq.\footnote{47} Iraq declared that the two islands and the border area around Um Qasr would become a part of Basra province, while the rest of Kuwait would form a new province of Iraq.\footnote{48} Iraqi President Saddam Hussein said that “we are now one people, one state,” and Iraq’s Revolutionary Command Council said it had decided to return Kuwait to “the Iraq of its origins.”\footnote{49} The U.N. Security Council condemned the annexation.\footnote{50}

At this time, Iraq dropped its previous demand on Iran that the clearing of the Shatt al-Arab river\footnote{51} should precede both an exchange of prisoners still held from the Iran-Iraq war,\footnote{52} and Iraq’s evacuation of small portions of Iranian territory still held from the war.\footnote{53} In a reversal of policy, Iraq also agreed to recognize the validity of the 1975 agreement with Iran that specified the \textit{thalweg} of the Shatt al-Arab as the Iran-Iraq border.\footnote{54}
Iraq's position on its invasion of Kuwait is based on territorial claims that have, as a matter of history and international law, a certain plausibility. Despite the plausibility of its claims, Iraq was not free to enforce them by force of arms. If Kuwaitis and Iraqis considered themselves to be one people, a merger should have resulted from some expression of sentiment by the governments or people, but Iraq had no right to bring about a merger on its own initiative. Its invasion and occupation of Kuwait constituted aggression, as the Security Council determined.

C. The International Response

However, the fact that real disputes underlay the Iraqi invasion was relevant to the international response. Under Article 39 of the U.N. Charter, the Security Council is obliged to recommend peaceful means to resolve conflicts between warring parties. When, as with Kuwait and Iraq, territorial and financial disputes are at issue, the Council must promote negotiation. The Security Council did this in its first resolution on the Iraq-Kuwait situation, calling on Iraq and Kuwait "to begin immediately intensive negotiations for the resolution of their differences." However, the Security Council did not follow up on this suggestion in its subsequent actions and declarations, moving instead to impose economic sanctions against Iraq within a few days.

Some observers did suggest that Iraq and Kuwait engage in binding arbitration to resolve their differences, and the Arab League explored common ground for a negotiated settlement. However, the Security Council never pursued this route of negotiation between the parties. The exiled Kuwaiti government also did not show any willingness to negotiate, and the Security Council did not pressure it to do so. Thus, in dealing with Iraq's aggressive occupation of Kuwait, the U.N. virtually

or most navigable channel, as distinguished from the geographic center or a line midway between the banks. BLACK'S LAW DICTIONARY 1477 (6th ed. 1990).


56. U.N. CHARTER art. 2, para. 4; S.C. Res. 660, supra note 5, at 1.

57. U.N. CHARTER art. 39. See also John Quigley, The United States and the United Nations in the Persian Gulf War: A New Order or Disorder?, 25 CORNELL INT'L L. J. 401, 434-35 (stating that Article 39 obliges the Security Council to make recommendations to the parties as an initial step and, if necessary, follow with sanctions under Articles 41 and 42).


59. S.C. Res. 660, supra note 5, para. 3.


ignored outstanding issues between the two parties and proceeded quickly first to economic, and then to military sanctions.\(^{63}\)

II. ISRAEL'S RATIONALE FOR OCCUPYING NEIGHBORING ARAB TERRITORIES

The rationale asserted by Israel for its 1967 occupation of the West Bank, the Gaza Strip, the Sinai Peninsula, and the Golan Heights was quite different from Iraq's rationale for occupying Kuwait. Far from raising a territorial claim, Israel claimed that it was attacked by Egypt, and that it had responded defensively against Egypt and its allies, Jordan and Syria.\(^{64}\) Israel's claim of self-defense was said to justify a weaker U.N. reaction to Israel in 1967 than that taken toward Iraq in 1990.\(^{65}\) Furthermore, if Israel had acted defensively, it would legitimize Israel's initial use of force,\(^{66}\) putting Israel in a more favorable light than Iraq. It might, in addition, color the terms of a settlement of the territorial issue; if Israel were deemed to be in a vulnerable position, it would have a stronger argument for expanding its borders at strategic points. Therefore, the claim that Israel acted defensively bears examination.

A. Historical Background of the 1967 War

The military action that began the 1967 war was ordered by the Israeli cabinet on June 4 of that year.\(^{67}\) At dawn on June 5, the Israeli air force bombed Egyptian fighter aircraft, parked at their home bases. Taking the Egyptian air force by surprise,\(^{68}\) Israel demolished almost 300 of Egypt's 340 combat aircraft.\(^{69}\) By the end of the day on June 5, Israel had destroyed the air war capacity not only of Egypt, but also of

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63. See S.C. Res. 678, supra note 13 (concerning military sanctions); S.C. Res. 661, supra note 60 (concerning economic sanctions); infra notes 73-75 and accompanying text.
64. See infra notes 73-75 and accompanying text.
66. U.N. CHARTER art. 51.
Jordan, Syria, and Iraq. Simultaneously, Israeli ground forces attacked Egypt, moving quickly through the Gaza Strip and into the Sinai Peninsula.

In the U.N., Egypt charged Israel with aggression. Israel countered that Egypt had struck first; Israeli Foreign Minister Abba Eban told the Security Council:

[O]n the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hashelosha we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the U.N. Charter, Israel responded defensively in full strength.

Eban added that “approaching Egyptian aircraft appeared on our radar screens.”

Egypt did not strike first. The Security Council, however, did not inquire into the facts. While the United States was aware that Israel struck first, it did not provide this information to the Security Council.

1. Israel’s Claim of Anticipatory Self-Defense. After the war in 1967, Israeli Prime Minister Levi Eshkol implicitly admitted that Eban had lied to the Security Council about who struck first. Eshkol said that Israel had initiated military action. He also claimed that Israel attacked Egypt

70. DONALD NEFF, WARRIORS FOR JERUSALEM: THE SIX DAYS THAT CHANGED THE MIDDLE EAST 203 (1984); Stephens, supra note 69, at 498.
73. U.N. SCOR, 22d Sess., 1347th mtg., supra note 72, at 1 (communication of Permanent Representative of Israel to President of Security Council).
74. Id. See also WEIZMAN, supra note 68, at 215 (explaining concern among Israeli commanders in the days preceding June 5 that the U.N. and the major powers would try to enforce a cease-fire shortly after Israel attacked Egypt).
75. Admission on Attack, TIMES (London), July 8, 1967, at 3 (stating that Eshkol “buried the often-repeated statement that Egyptian [air] and land forces attacked Israel before she launched her devastating lightning offensive on June 5”).
79. Admission on Attack, supra note 76, at 3.
to in what he termed "legitimate defence" to forestall an imminent Egyptian invasion.\footnote{Id.}

President Chaim Herzog stated Israel's claim that Egypt had been on the verge of attacking. Before the U.N., he said Israel was:

the victim of aggression when President Nasser with great fanfare moved his armies into Sinai and in an atmosphere of Arab frenzy and hysteria undertook publicly to annihilate Israel. He closed the Straits of Tiran, peremptorily ordered the United Nations forces out of Sinai and Gaza, and gathered around Israel an international Arab army bent on the destruction of our country—as he put it in Arabic, "El-Kadaa a la Israel"—the total annihilation of our people—men, women and children.\footnote{Statement of President Chaim Herzog, supra note 81, at 868.}

Herzog also accused Jordan of aggression against Israel. Six hours after Israel began its invasion of Egypt, Jordan shelled Israel around Jerusalem.\footnote{Jordan, which had a defense treaty with Egypt, shelled Israel at half a dozen locations around the country. O'BALLANCE, supra note 68, at 181; William O'Brien, International Law and the Outbreak of War in the Middle East, 1967, 11 ORBIS 692, 703 (1969).} Herzog declared that Jordan had "launched a military attack on Jerusalem along the Israeli border, indiscriminately bombing, shelling and attacking Israeli towns and villages, including the Holy City of Jerusalem."\footnote{Statement of President Chaim Herzog, supra note 81, at 868.} Jordan did initiate the attack on Israel before Israel fired at it, and Jordan's actions would constitute aggression unless Jordan had acted in lawful defense of Egypt.\footnote{U.N. CHARTER art. 51. See also Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 102-03, 120 (June 27) (finding that under Article 51 of the U.N. Charter, one state may act in the defense of another state that has been attacked, as "collective self-defense").}

Herzog characterized Israel's action as solely defensive.

As a result of this unprovoked Arab attack, which took place when we were sitting along the 1967 lines, . . . the territories under discussion [the Gaza Strip and West Bank] fell under Israeli control where they are today. We sought no war. We were promised annihilation. A new holocaust was our prospect. We fought back to defend ourselves, our wives, our children, our homes from a grim and unthinkable fate—a fate, I repeat, openly promised us over every Arab medium by every Arab leader in a wave of uncontrolled hysteria which is in itself frightening and horrifying to recall to this day.\footnote{Statement of President Chaim Herzog, supra note 81, at 868.}
One major obstacle, however, stands in the way of Israel's claim of self-defense. Article 51 of the U.N. Charter permits the use of force in self-defense only "if an armed attack occurs." Most commentators read this clause to permit defensive force only in response to an armed attack that has already begun, or at least is so imminent as to be obvious. This was not the case when Israel opened hostilities with Egypt: Egypt did not initiate an attack, nor were its forces making obvious preparations for an imminent attack.

In fact, a number of Israeli officials contradicted Eshkol's claim that Israel acted on the morning of June 5, 1967 because it thought Egypt was about to attack. The Israeli Chief of Staff, General Itzhak Rabin, stated that he did not believe that Egyptian President Gamel Abdul Nasser wanted war. He felt that the two divisions that Nasser sent into Sinai on May 14 would not have been enough to unleash an offensive against Israel. Rabin claimed that both Egypt and Israel knew that was the case. General Matitiahu Peled, a member of Israel's general staff in 1967, declared that the thesis according to which Israel struggled for its physical existence was only a bluff born and developed after the war. According to Peled, the General Staff never told the government that the Egyptian military threat represented any danger to Israel or that Israel was unable to crush Nasser's army, which, according to Peled, with unheard-of foolishness, had exposed itself to the devastating might of the Israeli army. Menachem Begin, a former Israeli Prime Minister and

86. U.N. Charter art. 51.
87. Louis Henkin, How Nations Behave: Law and Foreign Policy 141-43 (1979); John L. Hargrove, Abating the Middle East Crisis Through the United Nations (and Vice Versa), 19 Kan. L. Rev. 365, 367 (1971); Oscar Schachter, In Defense of International Rules on the Use of Force, 53 U. of Chi. L. Rev. 113, 133 (1986). At least one commentator reads Article 51 more expansively as incorporating a customary norm permitting an anticipatory use of force. Derek W. Bowett, Self-Defence in International Law 188-93 (1958). That view still requires evidence that an attack is so imminent so as not to enable the victim state to wait for the attack. 2 John B. Moore, Digest of International Law 412 (1906) (Secretary of State Daniel Webster articulating the standard that the “necessity of self-defense is instant, overwhelming and leaving no choice of means, and no moment of deliberation”). Even under this approach, which gives a state greater latitude to make an assessment that it is about to be attacked, Israel had no factual basis to substantiate that an imminent Egyptian attack was likely. See infra notes 90-95 and accompanying text. In particular, U.S. military intelligence, which was monitoring the situation, did not expect an Egyptian attack on Israel. Alfred J. Hotz, Legal Dilemmas: The Arab-Israeli Conflict, 19 S.D. L. Rev. 242, 264 (1974).
89. See infra notes 90-95 and accompanying text.
93. Id.
a member of the cabinet which voted to attack Egypt, said that "[i]n June 1967, we again had a choice. The Egyptian Army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him." As for why Israel attacked Egypt, Begin said that it was to "take the initiative and attack the enemy, drive him back, and thus assure the security of Israel and the future of the nation."95

2. Actions of Egypt Cited by Israel. Prime Minister Eshkol's administration pointed to the recent conclusion of an Egyptian-Jordanian defensive alliance,96 and to verbal threats by President Nasser against Israel97 to demonstrate that Egypt was about to attack. In addition, Israel also relied upon three Egyptian actions: the partial closure of the Straits of Tiran to Israeli-flag vessels; the movement of Egyptian troops up to the Israeli-Egyptian border; and, Egypt's request that the U.N. withdraw peacekeeping forces stationed on the Egyptian side of the Egyptian-Israeli border.98

However, the complaints raised by Israel can partly be explained by other evidence. Nasser did make belligerent statements toward Israel, but they were conditioned upon an Israeli invasion of Syria.99 Israel's second complaint concerns Egypt's decision on May 22, 1967, not to permit passage of Israeli flag vessels, or any vessel carrying strategic material to Israel through the Straits of Tiran.100 Israel argued that the closure gave it reason to expect an imminent attack by Egypt.101 However, Nasser cited Israel's threats against Syria and a presumed Israeli troop build-up facing Syria as his rationale for the closure.102

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98. 1967 U.N.Y.B., supra note 96, at 195-96; Gerson, supra note 97, at 71; Shapira, supra note 97, at 76.

99. F. YAHIA, THE PALESTINE QUESTION AND INTERNATIONAL LAW 152-54 (1970). In a speech in which he stressed Israel's threats against Syria, President Nasser said, "[w]hen we said we were ready for battle, we meant that we would indeed fight if Syria or any other Arab State was subjected to aggression." Text of Nasser's Speech on the Blockade of Aqaba, N.Y. TIMES, May 26, 1967, at A16.

100. Id.

101. U.N. SCOR, 22d Sess., 1348th mtg., supra note 72, at 14 (statement of Mr. Eban, Israel).

102. 16 KEESENG'S CONTEMPORARY ARCHIVES 22065 (1967).
Third, Israel cites the fact that Egypt moved troops to the Israel-Egypt 1949 armistice line in mid-May. However, Egypt announced that the troop movements were intended only to deter an Israeli attack on Syria as his rationale for closure.\textsuperscript{103}

Finally, Israel claims that Egypt's May 18 request to the U.N. to withdraw the U.N. forces from the Egyptian-Israeli border gave it reason to expect an attack.\textsuperscript{104} These troops had been stationed on the Egyptian side of the 1949 armistice line following the 1956 Egypt-Israel war.\textsuperscript{105} The U.N. commander reported that Egypt said it was preparing for "action against Israel, the moment it might carry out any aggressive action against any Arab country."\textsuperscript{106} This again suggests that Egypt planned to attack Israel only if Israel invaded Syria. Following the Egyptian request, U.N. Secretary-General U Thant asked Israel to let him move the U.N. forces to the Israeli side of the armistice line, but Israel declined.\textsuperscript{107} U Thant also proposed "that a U.N. representative go to Israel, Egypt, and Jordan to arrange a settlement . . ." Egypt accepted the idea, but Israel rejected it.\textsuperscript{108}

3. The Syrian Factor. The Egyptian concern for an Israeli attack on Syria was not irrational.\textsuperscript{109} In April 1967, the Israeli army had undertaken cultivation of land in a demilitarized zone between Israel and Syria in violation of the 1949 Israel-Syria armistice.\textsuperscript{110} Israel, over

\textsuperscript{103}. Akehurst, \textit{supra} note 68, at 240. Evidently, the Israeli Ministry of Defense accepted this explanation, because General Rabin reported to the Israeli cabinet that the Egyptian forces were in a "defensive posture." NEFF, \textit{supra} note 70, at 93. See \textit{supra} notes 90-94 and accompanying text.

\textsuperscript{104}. U N SCOR, 22d Sess., 1348th mtg., \textit{supra} note 72, at 14.


\textsuperscript{107}. \textit{Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force, U.N. GAOR, 22d Sess., 5th Emerg. Spec. Sess. at 11, U.N. Doc. A/6730/Add.3 (1967).} U Thant suggested that "if only Israel had agreed to permit UNEF to be stationed on its side of the border, even for a short duration, the course of history could have been different. Diplomatic efforts to avert the pending catastrophe might have prevailed and war might have been averted." U THANT, \textit{VIEW FROM THE UN} 223 (1977). If Israel had been concerned about an Egyptian attack, the logical response would have been to accept U Thant's offer. Quincy Wright, \textit{The Middle Eastern Crisis}, 64 PROC. AM. SOC'Y INT'L L. 80 (1970). Israel's rejection suggested that it was not concerned about an Egyptian invasion. Akehurst, \textit{supra} note 68, at 240. But see Ruth Lapidoth, \textit{The Security Council in the May 1967 Crisis: A Study in Frustration}, 4 ISRAEL L. REV. 534, 536 n.9 (1969) (justifying Israel's rejection of the offer on the grounds that the stationing of the U.N. forces in Israel at that time would not have prevented an Egyptian attack).


Security Council objections and Syrian protests, had consistently claimed sovereignty in the portion of the demilitarized zone that fell on the Israeli side of the 1949 armistice line. On April 7, 1967, in order to stop the cultivation, Syria attacked the demilitarized zone and Israel retaliated.

Israeli officials also levelled threats toward Syria. General Rabin stated that it was necessary to overthrow the Syrian government to protect Israel's national security, and on May 12, Israeli officials communicated to Syria a threat to occupy Damascus and overthrow the Syrian government. It seems clear that Israel “definitely contemplated some kind of action against Syria in the course of the month of May.”

In addition to the Israeli threats, other circumstances suggested to President Nasser that Israel might invade Syria. Armored units were absent from the May 15 Independence Day parade in Jerusalem, indicating to Nasser that the tanks were being massed for an attack. The Soviet government told Nasser that Israel had moved troops towards the Syrian border, and on May 24, the former Soviet government announced publicly that Israeli forces at the Syrian border were in a state of battle readiness. Nasser became convinced that an Israeli attack on Syria was imminent.

The Israeli military leadership apparently concluded that Egypt intended either to intervene in the event of an Israeli attack on Syria, or to deter such an attack, but that Egypt did not intend to invade.

112. OVENDALE, supra note 108, at 178; La genèse de la guerre, LE MONDE, June 7, 1967, at 3.
113. OVENDALE, supra note 108, at 178.
114. MARTIN, supra note 71, at 155; Charles W. Yost, The Arab-Israel War: How it Began, 46 FOREIGN AFF. 304, 307 (1967) (public speech, Tel Aviv).
115. NADAV SAFRAN, FROM WAR TO WAR: THE ARAB-ISRAELI CONFRONTATION, 1948-1967, at 306 (1969). Israel claimed that it had the right to attack Syria to forestall cross-border terrorist attacks which it claimed were sponsored by Syria. On May 11 Eshkol, referring to cross-border attacks from Syria, said, “[t]he focal point of the terrorists is in Syria, but we have laid down the principle that we shall choose the time, the place and the means to counter the aggressor.” Yost, supra note 114, at 307 (citing radio interview). See also Weekly News Bulletin (Government of Israel), May 9-15, 1967, at 20, cited in Shapira, supra note 97, at 66.
117. OVENDALE, supra note 108, at 178.
119. KIMCHE & BAWLY, supra note 67, at 91; ARTHUR LALL, THE UN AND THE MIDDLE EAST CRISIS, 1967, at 7-8 (1970); Stephens, supra note 69, at 467. There was, in fact, no unusual Israeli troop concentration near Syria, according to observers of the U.N. Truce Supervision Organization. Syrian military commanders were operating under the belief that such maneuvers were at hand. Report of the Secretary-General on the Withdrawal of the United Nations Emergency Force, supra note 107, at 11.
120. Le général Rabin ne pense pas que Nasser voulait la guerre, supra note 91, at 1 (stating...
While they had previously thought they could attack Syria without incurring Egyptian intervention, "[t]he [Israeli] military now became convinced that Nasser meant to intervene in case of an Israeli attack against Syria . . . ."\textsuperscript{121} Egypt's belief that Israel might invade Syria apparently motivated its dispatch of troops toward Israel, its partial closure of the Straits of Tiran, and its request for a withdrawal of U.N. troops.\textsuperscript{122}

B. The Closure of the Straits of Tiran as a Cause of War

Israel also claims that Egypt's May 22 partial closure of the Straits of Tiran gave it a right to use military force against Egypt.\textsuperscript{123} Israel argued, first, that the closure was an "armed attack" against Israel, giving it a right of self-defense, and second, that the closure violated a customary right to passage through the Straits which would permit Israel to use force to secure passage.\textsuperscript{124} However, Israel was entitled to use force only if there actually existed aggression and if so, its response would have to have been in proportion to that aggression.

1. The Closure of the Straits as an Act of Aggression. In justifying Israel's actions, Abba Eban told the U.N. General Assembly, "[b]lockades have traditionally been regarded, in the pre-Charter parlance, as acts of war. To blockade, after all, is to attempt strangulation."\textsuperscript{125} It is doubtful, however, that the Egyptian closure of the Straits of Tiran in 1967 constituted a blockade for the purposes of establishing acts of aggression because the Straits are within Egyptian territorial waters.\textsuperscript{126} No situation has arisen in international practice in which a state was considered to have committed aggression by establishing a blockade in its own territorial waters.\textsuperscript{127} But even if the action were deemed a violation of Israel's maritime rights, it would not be a blockade, but only a violation of a right of innocent passage.\textsuperscript{128} Thus, the portrayal of
Egypt's closing of the Straits as constituting an act of aggression is not supportable under international legal principles.

Moreover, Egypt's action was defensive in nature.\(^{129}\) Egypt was concerned that if Israel invaded Syria, Israel would, with the U.N. troops gone, use the Straits to bring in war materiel.\(^{130}\) Egypt did not declare an intent to restrict non-Israeli flag vessels carrying non-strategic materials, nor did it declare an intent to restrict Israeli registered vessels chartered to a non-Israeli carrier.\(^{131}\) Rather, the partial closure was aimed at enhancing Egypt's ability to respond if Israel invaded Syria.

Nasser made his decision only after U.N. Secretary General U Thant removed the U.N. forces from Sharm el-Sheikh, which commands the entrance to the Straits of Tiran.\(^{132}\) Although Nasser had requested removal of U.N. forces from their border positions, he had not requested their withdrawal from Sharm el-Sheikh.\(^{133}\) Nasser evidently had not planned to close the Straits until "the total evacuation of the UN forced his hand."\(^{134}\)

Even if the Egyptian action did constitute an aggressive blockade, Israel was entitled to act in self-defense only within the bounds of proportionality.\(^{135}\) Here Israel undertook a full-scale invasion of Egypt, destroying its air force and sending troops deep into Egyptian territory.\(^{136}\) However, Israel's government had determined that the closure did not constitute as much of a security threat to Israel as did the Egyptian troop concentrations in the Sinai.\(^{137}\) Publicly, Israel claimed it faced "economic strangulation,"\(^{138}\) yet Israel had barely used the Gulf of Aqaba, at the end of which sit the Straits of Tiran, for commercial transportation.\(^{139}\) The most significant cargo for which Israel used Eilat was oil, carried on non-Israeli flag vessels, which is why Egypt was concerned about Israel's use of the Straits in the event of an Israeli invasion of Syria.\(^{140}\)

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130. HENRY CATRAN, PALESTIN AND INTERNATIONAL LAW 174 (1976).

131. See supra note 99.

132. 16 KEESENG'S CONTEMPORARY ARCHIVES, supra note 102, at 22064.

133. KIMCHE & BAWLY, supra note 67, at 92.

134. Id. at 95.


136. See supra notes 67-71 and accompanying text.


139. During the two years preceding June 1967, no Israeli flag vessel had used the port of Eilat. NEFF, supra note 70, at 87. Cf. LALL, supra note 119, at 37 (stating that the last Israeli ship to enter the Straits of Tiran had done so eighteen months earlier). Most of Israel's exports and imports used Mediterranean ports. Mandel, supra note 137, at 31.

140. STEPHENS, supra note 69, at 488-89; Lewan, supra note 123, at 89. See also WEIZMAN,
2. The Closure of the Straits of Tiran as a Violation of a Customary Right. Israel also asserted that the partial closure of the Straits of Tiran violated Israel's right under customary law to use the Straits, and that this violation justified Israel's attack on Egypt. Egypt said, to the contrary, that it was under no duty to permit such use, and that even if it was, the breach of such a duty would not permit Israel to resort to force.

Egypt's position, that it was not required to permit Israeli-flag vessels through the Straits of Tiran, was based on two propositions. First, Egypt argued that Egypt and Israel had been in a state of war since 1948; as a result, Egypt was not required to afford Israel (as a belligerent) rights to which it might have been entitled during peacetime. Responding to this argument, Israel contended that the 1949 Egyptian-Israeli armistice terminated the state of war between Egypt and Israel. However, an armistice "does not terminate a state of war existing between the belligerents, either de jure or de facto. . ." The "Israeli-Arab Armistice General Agreements did not create even a de facto termination of the war between those states."

Israel also argued that a state of war no longer existed with Egypt because, under the U.N. Charter, a state of war between two U.N. member states is an impossibility. The Charter prohibits members from resorting to aggressive war: "our mutual obligations are still defined by the Charter of the U.N. which rules out any concept of a 'state of war.'"

Generally, however, most states reject that view, because it

supra note 68, at 248 (indicating that Sharm el-Sheikh was not an immediate objective of the IDF attack on Egypt but was attacked on June 7 to rationalize Israel's having made a casus belli of Egypt's partial closure of the Gulf of Aqaba).

141. Abdel Latif Zeidan, The Emergence of the Gulf of Aqaba Problem, 35 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1, 16 (1979) (account of Egypt's arguments).

142. Id. at 53.

143. Id. at 54-56.


146. Selak, supra note 144, at 670.


148. Levy, supra note 147, at 886.

would lead to the conclusion that no law governs the conduct of belligerents once war begins.\(^\text{150}\)

Second, Egypt argued that under customary law Israel did not have a right to use the Straits of Tiran. Although straits are open to all, only a passage between two areas of the high seas constitutes a strait.\(^\text{151}\) Under this definition, the Straits of Tiran is not actually a strait since it leads from the high seas into a bay.\(^\text{152}\) Taking a different approach, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone defined “strait” to include a passage between the high seas and the territorial sea of a state, which would cover the Straits of Tiran.\(^\text{153}\) However, Egypt did not ratify that convention precisely because it objected to that definition.\(^\text{154}\)

States have differed on whether there existed a customary international law right of passage through the Straits of Tiran.\(^\text{155}\) United States Secretary of State John Foster Dulles maintained that there was such a right of passage, but conceded that there was “plausibility from the standpoint of international law” to Egypt’s position.\(^\text{156}\) At the Geneva Conference leading to the 1958 Convention, a substantial minority held that no such right of passage existed.\(^\text{157}\) The head of the United States delegation to the Geneva Conference said that the Convention adopted a “new rule,” one “which clearly applied to the Israeli-Arab controversy.”\(^\text{158}\) Thus, there was no consensus on a customary law right of passage through the Straits of Tiran. Even if Israel had a right to passage through the Straits of Tiran, it would not be entitled to attack Egypt to assert that right. An unlawful Egyptian refusal to permit passage would give rise to a dispute the resolution of which would need to be sought by peaceful means.\(^\text{159}\)

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154. Ali A. El-Hakim, The Middle Eastern States and the Law of the Sea 156 (1979). See also Leo Gross, Passage through the Straits of Tiran and in the Gulf of Aqaba, 33 LAW & CONTEMP. PROBS. 125, 144 (1968); Quincy Wright, The Middle East Problem, 64 AM. J. INT’L L. 270, 279 (1970) (both authors stating that international law obliged Egypt to permit Israeli ships through the Straits of Tiran).
155. See infra note 157 and accompanying text.
159. U.N. CHARTER art. 32.
C. Israel's Retention of the Arab Territories

On June 9, 1967, Israel invaded Syria, and rapidly advanced through the Golan Heights, a highland area of western Syria, before moving deeper into Syrian territory. Since the beginning of the Israeli occupation of the Arab Territories, a number of theories have been advanced to justify its continued presence. These theories all assume that Israel acted in self-defense during the 1967 war. One commentator argued that a state which takes territory in self-defense may lawfully annex it. But that view attracted little following, as it disregards Article 51, which allows only so much force as is necessary to repel the aggression. Thus, even if Israel had acted in self-defense, its continued retention of those Occupied Territories would not be justified. Under the U.N. Charter, there can be no lawful territorial gains from war, even by a state acting in self-defense.

Another theory suggested that Israel's taking of the Arab Territories was necessary and proportional in relation to its security needs, and that this necessity did not immediately subside. One commentator said that, when a state has taken territory defensively

[a]s a condition of its withdrawal from such territory, that state may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it of such a nature as to justify exercise of self-defense.

160. BAILEY, supra note 69, at 84-85; STEPHENS, supra note 69, at 499 (noting several minor attacks by Syria against Israel on June 5 and 6).


162. MARTIN, supra note 71, at 261-65.

163. See supra note 135 and accompanying text.

164. J.R. GAINSBOROUGH, THE ARAB-ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS 149 (1986) (stating that Israel's retention of the Occupied Territories exceeded the limits of proportionality); id. at 158 ("When one considers the total geographic area of Arab lands still occupied by Israel since 1967 it seems that the area occupied far exceeds Israel's present security needs.").

165. Quincy Wright, The Palestine Conflict in International Law, in MAJOR MIDDLE EASTERN PROBLEMS IN INTERNATIONAL LAW 13, 27 (Majid Khadduri ed., 1972); Wright, supra note 154, at 270.


Along this same line, one commentator said that Israel might lawfully retain the territories pending a peace agreement between itself and the Arab states. 168

The danger of these justifications is illustrated by Israel’s occupation; a state that has taken territory defensively will always argue that there remains a danger of a repeat attack. After Israel took the Gaza Strip, the West Bank, and the Golan Heights, the armies of Jordan, Egypt, and Syria were in no condition to attack Israel. They were left with virtually no air power. Israel enjoyed such a commanding position militarily that its defensive right evaporated, and it was obligated to withdraw. 169

Other commentators have argued that Israel might permanently and lawfully retain these territories on the theory that Jordan and Egypt did not hold lawful title to the Gaza Strip and the West Bank. Without an original sovereign to whom the territories could revert, 170 it is argued that Israel had a better claim to title than anyone else by taking the territories defensively. 171 One commentator stated that: “Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.” 172

However, uncertainty over sovereignty provides no ground to retain territory taken in hostilities. Even if Jordan only held the West Bank on a de facto basis, Israel could not acquire title if it were acting in self-defense. 173 To determine title to the territory, one must follow the accepted indicia of sovereignty.

D. Israel’s Reasons for the Occupation

Despite President Herzog’s statement that “[w]e sought no war,” 174 Israel had long coveted the Gaza Strip and West Bank, both part of Palestine. 175 The founders of Israel aimed to turn the whole of Palestine into a Jewish state and, therefore, sought ways to acquire the West Bank and Gaza Strip. 176 In late 1948 and early 1949, the Israeli

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171. STONE, supra note 170, at 52; Blum, supra note 170, at 294.
172. Schwebel, supra note 167, at 346.
174. Statement of President Chaim Herzog, supra note 81, at 868.
175. QUIGLEY, supra note 67, at 87-89; Editorial, Troubled Truce, ECONOMIST, Aug. 21, 1948, at 289, 289-90.
176. LIVIA ROKACH, ISRAEL’S SACRED TERRORISM: A STUDY BASED ON MOSHE SHARET’S PERSONAL DIARY AND OTHER DOCUMENTS 18 (1980) (entry in diary of Prime Minister Moshe
government planned to attack these territories, but backed off under pressure from Britain and the United States.\(^{177}\) Again, in 1955, Prime Minister David Ben Gurion proposed the invasion and permanent occupation of the Gaza Strip. However, the Israeli cabinet refused to permit the invasion due to concern over the probable worldwide negative reaction.\(^{178}\) In 1956, Israel did invade Egypt and occupied the Gaza Strip but withdrew a few months later under international pressure. Israel's army nonetheless continued to make contingency plans to invade Egypt, Syria, and Jordan.\(^{179}\)

Apparently, Israel's reason for attacking Egypt in 1967 was to take the segments of Palestine that had eluded it in 1948.\(^{180}\) Israel spurned efforts by King Hussein of Jordan to negotiate a cease-fire until after it had captured the West Bank.\(^{181}\) Mordecai Bentov, a cabinet minister who attended the June 4 meeting and voted to invade Egypt, stated that "[t]he entire story about the danger of extermination was invented of whole cloth and exaggerated after the fact to justify the annexation of new Arab territories."\(^{182}\) General Ezer Weizman, chief of the General Staff Branch in 1967, said the war was "a direct continuation" of the 1948 hostilities, by which he meant that it was a war for territory.\(^{183}\) The tension that had built up gave Israel an opportunity to attack under circumstances that it could publicly depict as threatening to its existence.\(^{184}\)

Since Israel had no right to attack Egypt in 1967, Jordan's use of force against Israel was a lawful and defensive action in support of Egypt. Therefore, Israel's counterattack against Jordan and its occupation of the West Bank was part of its illegal aggression against Egypt.

Israeli President Herzog characterized Israel's occupation of the Golan Heights as a defensive reaction to Syria's participation in Egypt's aggressive acts.\(^{185}\) However, Egypt did not commit aggression against

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\(^{177}\) Tom Segev, \textit{1949: The First Israelis} 3 (1986).

\(^{178}\) Rokach, \textit{supra} note 176, at 50.

\(^{179}\) Kimche & Bawly, \textit{supra} note 67, at 179; Hotz, \textit{supra} note 87, at 254-55.

\(^{180}\) Wright, \textit{supra} note 107, at 80.

\(^{181}\) Neff, \textit{supra} note 70, at 228 (Hussein efforts for cease-fire June 6); \textit{id.} at 238 (Hussein still seeking cease-fire June 7).

\(^{182}\) Kapeliouk, \textit{supra} note 92, at 4 (quoting Bentov).


\(^{184}\) Stephens, \textit{supra} note 69, at 491.

\(^{185}\) Statement of President Chaim Herzog, \textit{supra} note 81, at 185 (stating that Egypt organized an "international Arab army" in which Herzog presumably meant to include Syria).
Israel, and Syria did not attack Israel prior to Israel's invasion of the Golan Heights.\textsuperscript{186} Even if Syria had attacked following Israel's invasion of Egypt, the action would be similar in character to the Jordanian action and, thus, part of the collective self-defense of Egypt. It follows that Israel's invasion of Syria was also an act of aggression.

After the 1967 war, Prime Minister Eshkol said Israel would keep what he called "the new areas."\textsuperscript{187} "Be under no illusion," Eshkol said, "that the State of Israel is prepared to return to the situation that reigned up to a week ago . . . . The position that existed until now shall never again return."\textsuperscript{188} Eshkol ordered Israel's cartographers to delete the lines separating Israel from the Occupied Territories on new maps.\textsuperscript{189} Foreign Minister Eban told the U.N. General Assembly that "the suggestion that everything goes back to where it was before 5 June is totally unacceptable."\textsuperscript{190} Itzhak Shamir, who became prime minister of Israel in 1983, said that the 1967 war "put the stamp of permanency on the state's borders."\textsuperscript{191} Within three months of the war, Israel began settling its citizens in the West Bank.\textsuperscript{192} Its settlement agency declared, "no political victory, no proclamation, can convert these territories into Jewish territories if they are not settled by Jews."\textsuperscript{193}

The Israeli government was particularly clear in its intent not to return East Jerusalem, which it captured from Jordan as part of the West Bank. The Knesset passed a statute that applied Israeli law and administration to East Jerusalem, effectively annexing it.\textsuperscript{194} Later it declared the entire city to be Israel's capital.\textsuperscript{195} In 1981 the Knesset passed a similar law regarding Syria's Golan Heights, declaring the application of Israeli law and administration over the area and effectively annexing it.\textsuperscript{196} Without asserting any historical claim to the Heights,

\begin{itemize}
\item \textsuperscript{186} See supra notes 160-61 and accompanying text.
\item \textsuperscript{187} BAILEY, supra note 69, at 129.
\item \textsuperscript{188} Eshkol Offers Arabs Peace with Us as We Are, JERUSALEM POST, June 13, 1967, at 2; Sydney Gruson, Eshkol Rejects Return of Israel to Old Frontiers, N.Y. TIMES, June 13, 1967, at A1.
\item \textsuperscript{191} Joel Greenberg, Shamir: Our Rule as Long as Jordan's, JERUSALEM POST (int'l. ed.), June 14, 1986, at 3 (quoting Shamir).
\item \textsuperscript{192} Hedrick Smith, U.S. Chides Israelis on Settler Program, N.Y. TIMES, Sept. 27, 1967, at A1.
\item \textsuperscript{194} Law and Administration Ordinance (Amendment No. 11), 21 LAWS OF THE STATE OF ISRAEL 75 (1967).
\item \textsuperscript{195} Basic Law: Jerusalem, Capital of Israel, 34 LAWS OF THE STATE OF ISRAEL 209 (1980).
\item \textsuperscript{196} Golan Heights Law, 36 LAWS OF THE STATE OF ISRAEL 7 (1981).
\end{itemize}
Israel's government said it would not return them because of their geo-
strategic importance. As for the West Bank, Prime Minister Shamir 
declared in 1991 that the "green line," meaning the eastern border of 
Israel, "does not exist." His Health Minister, Ehud Olmert, said, "we 
believe our boundaries are at the Jordan River," which would include 
the West Bank.

III. THE IRAQI ACTION AS A PRECEDENT

In Resolution 242, the U.N. Security Council noted that "the 
inaudmissibility of the acquisition of territory by war" required the 
"[w]ithdrawal of Israel armed forces from territories occupied in the 
recent conflict." In this Resolution, the Security Council also called 
for the "[t]ermination 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." The Security Council appeared to be calling for an 
overall peace settlement between Israel and its Arab neighbors.

However, the Security Council left it unclear whether Israel was 
obliged to withdraw only after settlement with its neighbors or whether 
it was required to withdraw independently of such a settlement. In 
1980, the Security Council resolved that the forcible taking of territory 
was unacceptable and "reaffirm[ed] the overriding necessity to end the 
prolonged occupation of Arab Territories occupied by Israel since 1967, 
including Jerusalem." The Security Council viewed Israel's 
obligation to withdraw independently of other outstanding issues in the 
region.

The U.N. General Assembly, refusing to take a position in 1967 on 
the initiation of the hostilities, has repeatedly and clearly called for an 
unconditional Israeli withdrawal. For example, a 1983 General Assembly 
resolution stated "that the acquisition of territory by force is inadmissible 
under the Charter of the United Nations," and that "Israel must
withdraw unconditionally from all the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem.\textsuperscript{205} The U.N. has also condemned Israel's annexation of East Jerusalem\textsuperscript{206} and its legislation designating Jerusalem as Israel's capital city.\textsuperscript{207} It has also declared Israel's legislation annexing the Golan Heights invalid.\textsuperscript{208} Perhaps the sternest resolution adopted by the U.N. regarding Israel's occupation is a General Assembly call for an end to economic and military aid to Israel because such aid helps Israel maintain the occupation.\textsuperscript{209}

As illustrated by the U.N. action against Iraq, the U.N. Charter contemplates stronger action than verbal calls for withdrawal when territory is taken by force. Article 39 of the U.N. Charter states: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."\textsuperscript{210}

These provisions of Chapter VII of the U.N. Charter reflect the heart of the dream that inspired the creation of the U.N. The Security Council requires that the Security Council impose economic sanctions:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the U.N. to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

\textit{Id.} art. 41.

If these measures are insufficient to thwart the aggression, the U.N. Charter requires the Security Council to take military action under Article 42, which provides:

Should the Security Council decide that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the U.N.

\textit{Id.} art. 42.

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\textsuperscript{208} S.C. Res. 497, U.N. SCOR, 36th Sess. at 6, U.N. Doc. S/INF/37 (1982) (the Council "decides that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect.").


\textsuperscript{210} U.N. CHARTER art. 39. If a negotiated settlement cannot be achieved, Article 41 requires that the Security Council impose economic sanctions:
is charged to stop armed conflict wherever it might occur. While Articles 41 and 42 use the permissive "may," it was contemplated that the Council had an obligation to exercise its powers in the face of state aggression.\textsuperscript{211} The Charter gave the Security Council "primary responsibility for the maintenance of international peace and security . . . ."\textsuperscript{212} Article 39 imposes an absolute obligation on the Security Council, stating that it "shall" make a determination, where the peace has been broken and it "shall" take action under Article 41, and Article 42 if necessary, to restore the peace.\textsuperscript{213}

In the case of Iraq's invasion of Kuwait, the Security Council immediately made a finding of aggression and called on the parties to negotiate their differences in the hope that this might lead to an Iraqi withdrawal.\textsuperscript{214} However, when Israel attacked its Arab neighbors, the Security Council made no such finding of aggression and waited five months to call on the parties to negotiate their differences.\textsuperscript{215} The Security Council has moved beyond the call to negotiate by demanding that Israel withdraw,\textsuperscript{216} but it has not yet moved to economic or military sanctions to ensure Israeli compliance with this demand.\textsuperscript{217}

In 1967, Israel's initial claim that Egypt attacked first gained sufficient world-wide acceptance that the Security Council, ignorant of the facts involving the Israeli attack, did not condemn Israel for its aggression. Furthermore, after Prime Minister Eshkol acknowledged that Israel struck first,\textsuperscript{218} Israel was still able to maintain sufficient acceptance of the anticipatory self-defense claim to preclude a finding of aggression. Even though Israel committed aggression,\textsuperscript{219} the Security Council has not returned to the issue. From 1967 to the present, the Council has not taken the Article 41 or Article 42 action that the Charter requires of it in the face of an act of aggression.

The Security Council's inaction relating to the Israeli occupations has given Israel time to establish itself in the Occupied Territories in a way that has made it increasingly difficult for the Security Council to secure an Israeli withdrawal. Israel installed over two hundred thousand of its civilians as residents of the Occupied Territories.\textsuperscript{220} It took direct

\begin{itemize}
\item \textsuperscript{211} LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 293 (3d ed. 1969) (discussing Article 39); \textit{id.} at 314 (discussing Article 42).
\item \textsuperscript{212} U.N. CHARTER art. 24(1).
\item \textsuperscript{213} U.N. CHARTER art. 39.
\item \textsuperscript{214} S.C. Res. 660, \textit{supra} note 5.
\item \textsuperscript{215} S.C. Res. 242, \textit{supra} note 2.
\item \textsuperscript{216} S.C. Res. 476, \textit{supra} note 2; S.C. Res. 242, \textit{supra} note 2.
\item \textsuperscript{218} \textit{See supra} notes 79-80 and accompanying text.
\item \textsuperscript{219} \textit{See supra} notes 91-95 and accompanying text.
\item \textsuperscript{220} \textit{See GEOFFREY ARONSON, CREATING FACTS: ISRAEL, PALESTINIANS AND THE WEST BANK
control over half of the land area and bars the local Arab inhabitants from its use.\textsuperscript{221} It drained a substantial amount of the water supply from under the West Bank for use inside Israel.\textsuperscript{222} It dynamited or sealed thousands of Arab homes as punishment for supporting the Palestinian uprising in the Occupied Territories.\textsuperscript{223} Further, by tightly controlling the commercial activities in these areas, Israel drove large numbers of young Arabs to emigrate in search of employment.\textsuperscript{224} Finally, by ruling through military edict, Israel deprives the inhabitants of a role in their own governance.\textsuperscript{225}

A. Action by the General Assembly

Avoiding potential United States vetoes in the Security Council,\textsuperscript{226} the General Assembly took a number of steps to promote Israel's withdrawal from the Occupied Territories. In 1974, the General Assembly invited the Palestine Liberation Organization to participate in its work as an observer.\textsuperscript{227} The Assembly established three agencies to deal with the issue. In 1968 it set up the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, which reported on the treatment of the Arab populations in the Gaza Strip and West Bank.\textsuperscript{228} In 1975, it established the Committee on the Exercise of the Inalienable Rights of the Palestinian People, to seek a political solution.\textsuperscript{229} In 1977, the Assembly created an office within the U.N. Secretariat to assist the latter Committee — the Special Unit on Palestinian Rights,\textsuperscript{230} which was upgraded in 1979 to the status of a division of the Secretariat.\textsuperscript{231} In 1983, the General Assembly called for an international conference at which Israel's withdrawal from the Occupied Territories would be negotiated.\textsuperscript{232} However, Israel refused to participate, and the United


\textsuperscript{221. REPORT OF THE NATIONAL LAWYERS GUILD, supra note 220, passim.}

\textsuperscript{222. Id.}

\textsuperscript{223. Id.}

\textsuperscript{224. Id.}

\textsuperscript{225. Id.}

\textsuperscript{226. See infra notes 242-45 and accompanying text.}


States opposed such a conference. The considerable efforts of the General Assembly, therefore, have had little success in wresting Occupied Territories from Israel.

B. United States Influence

The United States reacted differently to Israel's 1967 invasion than it did to Iraq's 1990 invasion. In the case of the Iraqi invasion, President Bush called firmly for the protection of the sovereignty of Kuwait. Bush further warned that "we must keep all our options open to ensure that Iraq's unlawful occupation of Kuwait is ended and Kuwait's legitimate government is restored." In 1967, the United States administration took quite a different approach toward Israel. While Abba Eban told the Security Council that Israel had been invaded by Egypt, the United States delegate sat silent, even though the United States' administration was well aware that Israel had initiated military action. President Johnson was intimately involved in seeking a compromise between Egypt and Israel and followed the situation closely. Similarly, when Israel changed its version of the events of 1967 and sought to mitigate its responsibility with claims of self-defense, the United States did not challenge that analysis, even though the administration knew Israel's claims to be false.

During the few days that fighting continued, the Johnson administration voted for the Security Council's call for a ceasefire and pressured Israel to withdraw its troops from Syria. However, once Israel consolidated its hold on the Sinai Peninsula, the Gaza Strip, the West Bank, and the Golan Heights, the United States linked an Israeli withdrawal with an overall Arab-Israeli peace settlement.

The Soviet Union, on the contrary, sought an immediate Israeli withdrawal without consideration of other issues. The approach taken by the United States, which sought an overall settlement before withdrawal, would have required lengthy negotiations. This led Soviet
prime minister Alexei Kosygin to accuse the United States of helping Israel protect the fruits of its aggression by delay. In calling for an Israeli withdrawal, Kosygin spoke in a fashion not unlike that of President Bush following Iraq's occupation of Kuwait:

[t]here are many regions in the world where there are likely to be those eager to seize foreign territories, where the principles of territorial integrity and respect for the sovereignty of States are far from being honoured. If Israel's claims are not rejected today, then tomorrow new aggressors, large or small, may attempt to overrun the lands of other peaceful countries.

Kosygin claimed that "[t]erritorial conquests, if they were recognized by various states, would lead only to new and perhaps even larger conflicts and peace and security in the Middle East would remain illusory." Kosygin tabled a Soviet draft resolution that, in terms similar to those of the Security Council resolutions on Iraq, condemned Israel's action as aggression and demanded both withdrawal and reparation for damage caused by Israel.

The United States opposed the Soviet draft resolution, maintaining its position that Israel should be asked to withdraw only in the context of an overall Middle East peace settlement. The United States explained its pro-linkage position on the grounds that achievement of an overall settlement would be the only way to guarantee long-term peace in the Middle East. In contrast, when the argument was made in 1990 that long-term peace could be assured only by resolving outstanding differences between Kuwait and Iraq, the United States insisted that Iraqi withdrawal was the only issue.

In 1991, after military action was taken against Iraq, the United States initiated a process for Palestinian-Israeli negotiations to address the question of Israel's occupation of the Gaza Strip and the West Bank. If that process succeeds in securing an Israeli withdrawal, the Security Council will be relieved of its obligation to secure a withdrawal. It will,

244. Id.
245. Id. at 6.
247. Id. (statement of Amb. Goldberg of the United States, that a reversion to pre-June lines would leave many underlying problems unresolved).
248. See supra notes 13-15 and accompanying text.
of course, have been remiss for over two decades in carrying out its duties under Chapter VII, and that failure has caused untold hardship and loss of life and property.

However, if the United States-sponsored peace process does not secure an Israeli withdrawal from the Occupied Territories, the Security Council will remain obligated by Article 39 to move to economic sanctions first, and then, if necessary, to military sanctions under Article 42. International pressure is essential to secure an end to Israel's occupation. Israel is a small country heavily dependent on foreign commerce for raw materials and foreign markets for its products and, therefore, is an ideal target for economic sanctions. That being the case, the likelihood of a need to move to Article 42 military sanctions is remote. Effective international economic sanctions against Israel should suffice to convince Israel to abandon the West Bank, the Gaza Strip, and the Golan Heights.

It was argued by one commentator, albeit prior to the U.N. action against Iraq, that economic or military sanctions against Israel were not feasible because they would not gain the necessary support from the United States or Europe. To be sure, strong support from the United States and Europe would be essential, but to argue that these states, as a matter of practical politics, are not likely to participate is not an argument against the appropriateness of economic sanctions. Moreover, whatever the posture may have been prior to the U.N. action against Iraq, the use of sanctions in that situation puts pressure on states to do the same in other comparable situations.

When it initiated a peace process in 1991, the United States recognized the Security Council's role regarding the Occupied Territories.

250. See supra notes 210-12.
251. MALLISON & MALLISON, supra note 2, at 420 ("[T]here will be no solution of the Palestine problem until effective sanctions are applied to the Government of Israel."); Falk & Weston, supra note 220, at 157 ("[T]he moral clarity of the legal situation suggests the appropriateness of mobilizing as much international pressure as possible to end the circumstance of unlawful occupation and to encourage the proper fulfillment of Palestinian claims of self-determination.").
253. It is increasingly difficult to argue that practically speaking the United States is unlikely to support economic sanctions. The United States administration has recently questioned Israeli actions in the Arab Territories. The Bush administration has sought to add a condition to its loan guarantees on behalf of Israel that such loans not be used in the construction of Jewish settlements in the Occupied Territories. See John M. Goshko, U.S. Details Loan Plan for Israel; Offer Called 'Very Fair and Balanced,' WASH. POST, Mar. 19, 1992, at A23 (reporting that the Bush administration unconditionally offered Israel $300 million in loan guarantees, but would not approve a further $10 billion request unless Israel agreed to freeze the building of Jewish settlements in the Occupied Territories).
In a letter of assurances that it sent to the Palestinian delegation, the United States Department of State wrote:

With regard to the role of the United Nations, the UN Secretary General will send a representative to the conference as an observer. The co-sponsors (the United States and the Soviet Union) will keep the Secretary General apprised of the progress of the negotiations. Agreements reached between the parties will be registered with the UN Secretariat and reported to the Security Council, and the parties will seek the Council's endorsement of such agreements. Since it is in the interest of all parties for this process to succeed, while this process is actively ongoing, the United States will not support a competing or parallel process in the United Nations Security Council.254

By suggesting that the parties seek the endorsement of the Security Council, the State Department acknowledged the Security Council's responsibility to settle the dispute. By stating that it would not support action in the Security Council while the peace process was on going, it further recognized that the Security Council does have the power to take measures aimed at securing an Israeli withdrawal. The thrust of the paragraph was that the United States wanted to forestall attempts by the Security Council to take an approach that was different from that to which the parties themselves might agree.255 Furthermore, the State Department's posture on this point was consistent with U.N. Charter Article 39, which requires attempts at negotiation between the parties as the first step in resolving a breach of the peace.256

This contrasts strongly, however, with the United States' posture following Iraq's invasion of Kuwait. Despite the Security Council's call for negotiation in its initial resolution,257 the United States ignored the possibility of negotiation between the parties, immediately moving to unilateral economic sanctions against Iraq.258

The Security Council could take as a starting point Resolution 242, which calls on Israel to withdraw from the Arab Territories as part of a package that includes ending the state of belligerency with neighboring Arab states.259 Such a package deal is politically feasible, as Arab states

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254. United States Department of State, Letter of Assurances 2 (Oct. 18, 1991) (on file with author). See also Ghassan Bishara, U.S. Letters of Assurance Were Very Difficult to Write, AL-FAIR, Dec. 2, 1991, at 4 (reporting on the content of United States letters of assurance to the Palestine Liberation Organization, assuring the PLO that while the United States would "work for serious negotiations," the United States "took a stand against the U.N. dealing with the process while the American-Soviet sponsored conference continues").


256. See supra note 57 and accompanying text.

257. S.C. Res. 660, supra note 5.


259. See supra notes 200-04
appear willing to conclude peace agreements with Israel in the context of Israel's withdrawal from the Arab Territories.\footnote{260} The major obstacle to international action aimed at an Israeli withdrawal is the United States, which, since 1967, has stood in the way of stronger action. If a draft resolution were proposed in the Security Council to invoke Article 41 economic sanctions against Israel, the United States, as a permanent member of the Security Council, would have the power to cast a veto to defeat the measure.\footnote{261} If that occurred, the General Assembly could act on the matter, on the basis of its power to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions . . . setting forth the purposes and principles of the United Nations."\footnote{262} Refraining from the use of force against other states is a "principle" of the U.N.\footnote{263}

The General Assembly could act, more specifically, under the Uniting for Peace Resolution, adopted during the Korean war.\footnote{264} That resolution authorizes the Assembly to recommend economic or military action when the Security Council fails to address a breach of the peace "because of lack of unanimity of the permanent members."\footnote{265} Any action that the General Assembly might take under the Uniting for Peace Resolution would be non binding, since the Assembly has no power to require member states to follow its recommendations.\footnote{266} However, concerted action by the world community to isolate Israel economically would constitute community pressure that would be difficult for Israel to ignore.

There is precedent for invoking the Uniting for Peace Resolution to deal with this dispute. In June 1967, after the Security Council failed to move beyond calls for a cease-fire, the former Soviet Union asked the Secretary-General to convene a special session to take action to secure Israel's withdrawal from the territories it had just seized.\footnote{267} Of all the U.N. member states, only the United States, Israel, and Botswana...
opposed the Soviet request for a special session.\textsuperscript{268} Again, as in the Security Council, the United States delegate sat silent. The General Assembly, after two weeks of debate, failed to take any significant action aimed at an Israeli withdrawal, perhaps in large part because most members did not view Israel as the aggressor.\textsuperscript{269} If a request for a meeting under the Uniting for Peace Resolution were to be made today, it would be difficult to maintain that the Security Council was dealing with the matter since the occupation has continued since 1967 without any solution.

IV. CONCLUSION

Both Israel and Iraq made legal arguments to justify their military actions in 1967 and 1990, respectively. Iraq at first asserted a claim only to small parcels of territory near its border, claims for which it had a legal basis. After seeing the reaction of the United States, Iraq broadened its claim to one of sovereignty over the whole of Kuwait. While Israel harbored a sovereignty claim to the Gaza Strip and the West Bank, it did not assert a sovereignty claim over these territories at the time of its invasion. Had Israel asserted its sovereignty over the Arab territories as its justification for the attack, it would have gained little support from the international community.\textsuperscript{270}

However, Israel was successful in convincing the world of its self-defense claim. Even after Israel acknowledged that it had lied about Egypt attacking first, Israel still maintained general acceptance for its anticipatory self-defense claim.

From a sovereignty standpoint, Iraq has a stronger claim to the border area and the two islands than Israel does to the West Bank or to the Gaza Strip. Yet the U.N. challenged Iraq much more swiftly than it did Israel. The rapid action against Iraq reflected a double standard at the U.N.\textsuperscript{271}

The role of the United States in the two situations is the key. Regarding Israel, the United States stands against any stronger action by the world body to wrest the Arab Territories from Israel's control. The
United States is an ally of Israel and its sole provider of financial aid. Aware that Israel's action was aggressive, the United States participated in the aggression by covering up for Israel in the Security Council.

However, given the action taken against Iraq, there is no principled reason for the U.N to continue the go-slow approach to Israel's occupation of Arab Territories. If the U.N. is to maintain credibility as a body committed to international peace, it cannot sit idly by while Israel's unlawful occupations continue.