Conceived in Law: The Legal Foundations of Resolution 242

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UN Security Council Resolution 242 endorsed the "inadmissibility of the acquisition of territory by war" and called for "withdrawal of Israeli armed forces from territories occupied" in the June 1967 war. Since then, a debate has raged over whether these provisions call for a complete Israeli withdrawal, a minor revision of borders, or license for Israel to retain sovereignty over some of the conquered lands. This article argues that the resolution must be read through the lens of international law. A principled legal interpretation clarifies 242's ambiguities on withdrawal and re-establishes the importance of universal rights to a just and durable peace in the Middle East.

Forty years after its passage in November 1967, Security Council Resolution 242—the United Nation's cornerstone document on achieving a lasting peace in the Middle East—has become its most famous and most frequently cited resolution.[1] It is also one of the United Nation's most salient political failures. Since its adoption, the region has witnessed three large-scale wars involving Israel and its neighbors; two sustained Palestinian uprisings against the prolonged occupation; tens of thousands of (predominately civilian) deaths; numerous moribund peace initiatives launched in its name; and a political situation in 2007 where a just and durable settlement of the Israeli-Palestinian conflict is further out of reach than ever before. While 242 can claim several successful offspring, among them the peace treaties that Israel concluded with Egypt and Jordan, only one of the five territories captured by the Israelis in the June War—the Sinai—has been returned *in toto* to the Arabs under its auspices.[2] Most acutely, its accomplishments regarding the region's core dispute between Israel and the Palestinians have been remarkably sparse. Arguably, 242 could never have delivered a lasting settlement and an authentic reconciliation between Israelis and Palestinians as long as its focus was on the consequences of 1967 rather than those of 1948. Be that as it may, its present ability to fashion a genuine peace out of the tattered cloth of 1967 now seems entirely doomed.

Yet even within the limited horizon of 242, was this outcome fated? The resolution, it must be remembered, is a legal as well as a political document. The

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patent ambiguity of the resolution's language—its strength, claim its drafters; its downfall, argue its critics—certainly acquired layered and contradictory political meanings as it was employed by regional adversaries. The most enduring consequence of this ambiguity is that it has allowed Israel to claim compliance while continuing to occupy and colonize its most valued territorial acquisitions from 1967. A careful legal analysis of the origins of the resolution, however, provides a clarity and direction to the authentic meaning of 242. Read within the context of the UN debates surrounding its formulation and the foundations provided by international law, the most important and contentious provision in Resolution 242—Israel's obligation to withdraw from territories conquered in 1967—escapes the interpretative fog that has shrouded it for much of the past forty years.

Unsurprisingly, a broad and purposive legal reading of Resolution 242's withdrawal provision has been frequently challenged. Legal scholars from Israel and others sympathetic to it have given the resolution a claustrophobic interpretation over the years. They have argued that 242 does not compel Israel to make more than a partial withdrawal from the captured territories; that the waging of a defensive or preemptive war does not force Israel to surrender the lands it conquered; and that Israel's occupation is legal until a final peace agreement establishes "secure and recognized borders."[3] But these interpretations are possible only by cherry-picking the diplomatic record and diluting the liberal purposes of modern international law. Resolution 242—whether it retains any life today as a viable tool for regional peace or survives only as the museum relic of a failed diplomatic opportunity—does not deserve to be disfigured into a justification for the acquisition of the fruits of conquest rather than the protection of universal rights.

The Formation of Resolution 242

Between the end of the war on 10 June 1967 and late October of that year, both the Security Council and the General Assembly convened a number of meetings to address the Middle East crisis. While most of the work of the two bodies during this period focused on immediate concerns—ceasefire violations, humanitarian assistance, and Israel's annexation of East Jerusalem—a significant diplomatic effort began in the General Assembly in early July to establish an international consensus to end the occupation and establish the foundations for a sustainable peace. Two draft resolutions were debated and voted upon by the assembly. One, introduced by a group of Latin American and Caribbean countries, demanded a full Israeli withdrawal from the territories occupied in June and declared that the acquisition of territory by force is inadmissible. The second draft, presented by Yugoslavia on behalf of a number of nonaligned nations, also called for a complete Israeli withdrawal. Both resolutions received a simple majority vote in the assembly, but neither achieved the requisite two-thirds approval.[4] (Abba Eban, Israel's foreign minister, would later write that the failure of the Yugoslav resolution to muster the

necessary super-majority in the General Assembly was one of his country's greatest political victories.[5]) While the resolutions were technically unsuccessful, the principles that both expressed would form the basis for the Security Council debate on Resolution 242 four months later.

After its moment of military victory, Israel began sending out conflicting signals with respect to its intentions regarding the future of the conquered territories. According to U.S. Secretary of State Dean Rusk, Israeli prime minister Levi Eshkol had pledged on Israeli radio during the first day of the war that Israel had no territorial ambitions.[6] On 19 June, the Israeli cabinet narrowly voted (10–9) to offer Egypt and Syria a return to the international borders in exchange for full peace and security. (The offer was silent, however, on Gaza, Jerusalem, and the West Bank.[7]) But in the following weeks, Israel's territorial intentions became increasingly transparent. On 27 June, both the Israeli cabinet and the Knesset voted for the "municipal fusion" of Jerusalem by annexing Arab East Jerusalem and some of the surrounding West Bank.[8] Within the Israeli Cabinet, the strongest ministers—Moshe Dayan, Yigal Allon, and Menachem Begin—were presenting plans for retaining some or all of the "new lands." Quietly, the cabinet began approving projects during the summer of 1967 to colonize the occupied territories, and the first settlements soon began appearing in East Jerusalem, the West Bank, and the Golan, usually under the guise of military camps.[9] When Rusk reminded Eban later in the summer about Israel's earlier pledge, Eban shrugged his shoulders and said, "We've changed our minds."[10] "Israel's keeping territory," Rusk warned his U.S. foreign policy colleagues as they debated what position the United States should take, "would create a revanchism for the rest of the twentieth century."[11]

In mid-July, Arthur Goldberg, the U.S. ambassador to the United Nations, and Andrei Gromyko, the Soviet foreign minister, reached an agreement at the United Nations based on the text of the Latin American draft resolution that had failed in the General Assembly several weeks before. The agreement would have compelled Israel to return to its 4 June 1967 lines and affirmed the principle that the conquest of territory by war is inadmissible.[12] Gromyko could not sell the proposal to the Arab diplomats, because it would have required acknowledgment of the right of Israel to exist in peace and security without addressing the rights of the Palestinian refugees.[13] Nor could Goldberg interest the Israelis. Abba Eban wrote that, when presented with the text by the U.S. ambassador, it was "a terrifying moment for me" and "my concern leapt up to an astronomical height"[14] because it required the return of all of the territorial fruits of Israel's victory. He expressed his adamant opposition to the text, arguing that the inadmissibility of conquest of territory by war was "a doubtful principle."[15] As Eban was preparing himself for an indignant departure, he and Goldberg received word that the Arab delegation had rejected the proposal, thus saving Israel, in Eban's words, from "international embarrassment" and a public split with the Americans.[16]

After a late summer recess, the General Assembly and the Security Council resumed their respective discussions on resolving the Middle East crisis in

September 1967. A broad consensus on a set of conflict-resolution principles remained elusive, and the situation on the ground remained fluid. The humanitarian crisis arising from the hundreds of thousands of new Arab refugees (primarily Palestinian) following the June war dominated newspaper articles and broadcast reports in the international media. In October, the Egyptians sank an Israeli destroyer, with heavy loss of life, and Israel responded with massive shelling around the Suez Canal. The ceasefire now looked shakier than ever, and at the United Nations a new sense of diplomatic urgency was taking hold.

By mid-October, however, the debate on the Middle East at the General Assembly had stalemated. The president of the General Assembly suggested that, with no agreement in sight, the assembly should turn to other matters, passing the diplomatic focus on to the Security Council. During a number of informal meetings through October and into early November among various groupings of the fifteen council members,[17] numerous proposals were mooted, amended, rejected, reformulated, and floated again. With no initial consensus, five draft resolutions were prepared and circulated to the Security Council in early and mid-November.[18]

The first draft—the "nonaligned" draft—was advanced by India, Mali, and Nigeria and was based on the Latin American and Caribbean draft resolution submitted to the General Assembly in July. It included the principle that the "occupation or acquisition of territory by military conquest is inadmissible"; affirmed that Israel must make a full withdrawal from "all the territories occupied" in June; endorsed the right of all states in the area to live in peace and security free from threats; and called for "a just settlement of the question of the Palestinian refugees."

The second draft resolution was the original Latin American and Caribbean resolution that had been voted upon by the General Assembly in July. (Neither of the two Latin American members of the Security Council, Argentina and Brazil, had requested its circulation—it was introduced by India, and while it was not formally presented to the council, it was considered during the informal negotiations.) The Latin American and Caribbean draft stated that the occupation or acquisition of territories by war should not be recognized; urgently requested Israel to withdraw from "all the" occupied territories; called for an end to the state of belligerency as a prerequisite to building regional friendship; and sought to achieve "an appropriate and full solution of the problem of the refugees." For Abba Eban, the potential adoption of this text by the council was "depressingly probable."[19]

The third proposal came from the United States. The Americans had changed their position substantially since the July agreement with the Soviet Union: Gone from their new proposal were the inadmissibility principle and the requirement for a full Israeli withdrawal. Instead, there was a vaguer reference to "embracing withdrawal of armed forces from occupied territories." The American draft also sought a "just settlement of the refugee problem." Like the nonaligned draft, the U.S. proposal further called for the appointment of a special

representative of the UN Secretary-General to work with the parties in order to advance solutions for resolving the conflict. The U.S. draft had been vetted in late October by Abba Eban, who insisted upon indefinite language—no use of "the" or "all"—in the withdrawal provision.

After the circulation of the first three drafts, Lord Caradon, the British ambassador to the United Nations, took the diplomatic temperature of the Security Council and decided that none of the resolutions was likely to pass. (Caradon, a member of a prominent political family—his brother, Michael Foot, would later lead the British Labor party—knew the politics and geography of the Middle East from his service as a colonial official in Mandate Palestine.) After holding intensive discussions with the Arab and Israeli delegations, as well as with other council members, Lord Caradon formally introduced a British draft on 16 November. This proposal, he argued, was "fair, just, and impartial."[20] The draft resolution took features from the three existing drafts so as to ensure, Caradon thought, the greatest possibility of support by council members. From the U.S. text, he borrowed the wording of the withdrawal clause and the refugee clause, as well as an express reference to Article 2 of the UN Charter, which requires UN members to act in "good faith" and to seek peaceful means for the resolution of international disputes. From the nonaligned and Latin American texts, and from the July agreement between the Americans and the Soviets, he took the inadmissibility principle. The inclusion of this principle, Lord Caradon would later write, was vital to ensure "this balance, this equality, which was the essence of the unanimous Resolution."[21]

On the withdrawal obligation, the draft (which would be adopted with this language intact) read:

> *Emphasizing* the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security. . .
>
> 1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East. . .
>
>   (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict. . .

The final draft presented to the Security Council came from the Soviet Union, introduced on 20 November. It, too, had an inadmissibility clause and required a withdrawal of all forces to prewar positions. The Soviet draft also called for an end to all belligerency in the area, affirmed the right of all states to live in peace and security, and urged "a just settlement of the question of the Palestine refugees." Its late appearance on the eve of the council vote meant that it was not taken seriously by the other permanent members, and it was not formally debated.

As soon as Lord Caradon formally presented the British draft resolution on 16 November, all diplomatic attention became focused on it. Over the next

several days, Caradon continued his intensive lobbying among council members and the Arab and Israeli delegations to win support. To the Americans and the Israelis, he would point to the indefinite language, while to the Arab delegations, the Soviet bloc, and the third world countries, he would stress the inadmissibility principle. (According to Gideon Rafael, the Israeli ambassador to the United Nations, Lord Caradon had tried to insert "the" before "territories" in the drafting, but was rebuffed by the Americans and the Israelis.[22]) For Abba Eban, the indefinite language was a "perceptible loophole" that authorized "territorial revision" for Israel's benefit.[23] This was not Caradon's view. As he would later state, he was prepared to see some insubstantial and mutually beneficial alterations to the 1949 armistices lines, such as a realignment of the boundary at Latrun and Tulkarm, to resolve some border awkwardness.[24] But he opposed any territorial annexation. In Caradon's own words, written in 1981:

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> . . . it is necessary to say again that the overriding principle was the 'inadmissibility of territory by war' and that meant that there could be no justification for annexation of territory on the Arab side of the 1967 line merely because it had been conquered in the 1967 war.[25]

Other prominent diplomats in this era, including Dean Rusk and William Rogers, took positions similar to that of Caradon.[26]

On 22 November 1967, the day of the unanimous Security Council vote for the British proposal, spokespersons for each of the council members delivered public statements explaining their affirmative vote. Because official statements and speeches surrounding the enactment of a formal document—such as a statute, a treaty, or a UN resolution—may be employed to determine its legal meaning,[27] a close look at the council statements illuminates the authentic reading to be given to Resolution 242.

The Soviet Union[28] and Bulgaria[29] both asserted in the council debates that the resolution required Israel's full withdrawal. In his statement to the council, the Soviet deputy foreign minister expressly linked the withdrawal clause to the inadmissibility principle: "We understand the decision to mean the withdrawal of Israel forces from all, and we repeat, all territories belonging to Arab states and seized by Israel following its attack on those states on 5 June 1967. This is borne out by the preamble to the United Kingdom draft resolution that stresses the 'inadmissibility of the acquisition of territory by war'."[30] The six third world members of the 1967 Security Council also delivered speeches that supported a broad interpretation of the resolution's withdrawal provision. Argentina[31] and Brazil[32] both emphasized that the occupation or acquisition of territories by the use of force should not be recognized. Ethiopia,[33] Mali,[34] and Nigeria[35] each stated explicitly that Israel must withdraw from all of the territory it occupied as a result of the June war. The Indian delegate, in his speech, maintained that the

resolution committed the council to apply the principle of "total withdrawal of Israeli forces from all of the territories. . . "[36] As support for India's reading of the resolution, he cited two recent speeches that George Brown, the British foreign secretary, had delivered to the General Assembly on the Middle East crisis. Brown had warned in late June against "territorial aggrandizement"[37] and in September declared that "a State should [not] be allowed to extend its frontier as a result of war."[38]

The formal attitude of the British at the Security Council on withdrawal was less emphatic, but Lord Caradon neither said nor implied anything that could mean any territorial advantage for Israel. Speaking immediately after and in response to the Indian delegate's speech, Lord Caradon said to the council that "we [the United Kingdom] stand by our votes and we stand by our declarations."[39] He went on to stress that the resolution "must be considered as a balanced whole" that could not be added to or detracted from without threatening "the wide measure of agreement we have achieved together," a plain reference to the link between the inadmissibility principle and the withdrawal provision.

The French delegate, M. Bérard, stated that his preference was for the two General Assembly resolutions presented by the nonaligned states and the Latin American and Caribbean nations in July, but acknowledged that they had not received the desired agreement. Leaving little doubt of France's position favoring full Israeli withdrawal from all of the territories occupied, Bérard went on to state:

> No one will be surprised, therefore, if I say that we would have preferred the text [of Resolution 242] to be more explicit on certain points, including the terms of reference of the special representative.
>
> We must admit, however, that on the point which the French delegation has always stressed as being essential—the question of withdrawal of the occupation forces [*celui du retrait des forces d'occupation*]—the resolution which has been adopted, if we refer to the French text which is equally authentic with the English, leaves no room for any ambiguity [*ne laisse place à aucune amphibologie*], since it speaks of withdrawal "*des territories occupés,*" which indisputably corresponds [*ce qui donne une interprétation indiscutable*] to the expression "occupied territories."
>
> We were likewise gratified to hear the United Kingdom representative stress the link between this paragraph of his resolution and the principle of inadmissibility of the acquisition of territories by force. . . [40]

Bérard's point was that the English term "occupied territories" possessed a meaning identical to "*des territories occupés,*" which translates into English

as "from the occupied territories." Since English and French have primary and equal status at the Security Council, a legal interpretation must strive for a meaning that harmonizes possible distinctions between the different linguistic texts of a resolution.[41] Plainly, the harmonious meaning would be the "complete withdrawal" reading, which is also, as shall be argued, the only reading consistent with the inadmissibility principle (which Bérard explicitly linked to the withdrawal provision) and the obligations of modern international law.

The other five council members—Canada, China (Taiwan), Denmark, Japan, and the United States—gave no indication in their respective statements during the council debate on 22 November as to their position on the withdrawal provision (although Japan specifically referred to the inadmissibility principle).[42] More to the point, none of them stated that they read the resolution to mean that Israel would be entitled to retain some or any of the conquered lands, or that a partial withdrawal would satisfy the obligations of 242. The U.S. ambassador, Arthur Goldberg, had said to the Security Council a week earlier (before Resolution 242 was introduced) that the armistice lines of 1949 were not secure or recognized boundaries, and that these had yet to be agreed upon. But he also went on to say that "[s]ecure boundaries cannot be determined by force; they cannot be determined by the unilateral action of any of the States; and they cannot be imposed from the outside."[43] The closest Goldberg would get on 22 November to indicating that the United States may have had a different reading on the resolution was in his statement, "I, and I assume other members of the Council, voted for the draft resolution and not for each and every speech that has been made."[44]

INTERNATIONAL LAW AND THE WITHDRAWAL PROVISION IN RESOLUTION 242

The legal interpretation of Security Council resolutions is an evolving science. While much of the focus of international law with respect to the rules of interpretation has dealt with treaties,[45] it makes good legal sense to apply these interpretative principles to the more underdeveloped area of how to read Security Council resolutions.[46] While Security Council resolutions are not always drafted with the care and precision of treaties, a number of them are intended to delineate the rights of, and obligations upon, states and international actors. Moreover, these interpretative principles are not unique to international treaties but rather are widely applicable because they employ the established legal method of investigating the surrounding context of an international document's creation in order to determine its authentic meaning. Consequently, the well-accepted principles for reading treaties fit quite well with the task of construing those Security Council resolutions that are meant to have a legal effect, such as Resolution 242.

The authoritative starting point in international law would be the *Vienna Convention on the Law of Treaties*.[47] Drawing from this work, the most relevant and important of these interpretative principles would include (a) the

terms of the resolution; (b) the preparatory work; (c) the context, objectives, and purposes of the resolution; (d) subsequent practice; (e) consistency with the prevailing rules of international law; and (f) linguistic harmony.[48]

The Terms of the Resolution

The actual terms and wording of a resolution are the logical starting point in the determination of its meaning. If a clear and unambiguous meaning can be derived from the text, then the interpretative quest stops there. However, if the resolution is ambiguous, or if a significant and reasonable interpretative difference arises, then recourse can be had to the other principles in order to yield its proper meaning.

In the case of the withdrawal provisions in Resolution 242, three persuasive reasons are available to find that a plain and ordinary reading of the adopted language compels Israel to return all of the conquered lands from the 1967 war. First, the withdrawal provision must be read in conjunction with the "inadmissibility" principle (the entire resolution—283 words long—was drafted as a single sentence), and the natural language of the principle employed in 242 leaves no doubt that anything less than complete evacuation on the conquered lands by the Israeli military would be in breach of the Security Council's directives. Second, the resolution is absolutely silent on permitting Israel to retain some or any of the captured lands. Had the council decided to revive a defunct and discredited legal doctrine—in this case, the acquisition of title through conquest—it would have to have said so in explicit language. And third, John McHugo has argued that the absence of the words "all" or "the" in the resolution do not thereby imply that "some" was intended.[49] By analogy, he notes that in paragraph 2(a) of Resolution 242, the council guaranteed "freedom of navigation through international waterways in the area." McHugo points out that there are a number of waterways in the region, and the absence of "all" before the term "international waterways" cannot mean that the Security Council intended the stipulation to apply only to some of them, because good faith and the natural meaning of the provision require otherwise.

Israeli and American legal scholars who support a circumscribed interpretation of the withdrawal provision have argued that its natural meaning revolves around the missing "all" or "the." Eugene Rostow, who was Lyndon Johnson's undersecretary of state during 1967 and later taught law at Yale, maintained that the missing words were a deliberate choice of the Security Council (given the use of definite language in most of the other draft resolutions) and could therefore only mean that the council endorsed territorial retention by Israel.[50] Arthur Goldberg, after he retired from public life, took the same approach,[51] as has Ruth Lapidoth of Hebrew University.[52] Their position collectively amounts to the purported application of the legal principle *expressio unius est exclusio alterius* (the expression of one thing necessarily means the exclusion of other things). However, this maxim and the natural-meaning approach to Resolution 242 could have validity only if the inadmissibility principle and the significant body of international law behind it were discarded. As they do in much of their

reading of 242, these legal scholars isolated the withdrawal provision from the language of the broader resolution, ignoring the interpretive dictum that legal documents have to be read within a contextual whole.[53]

At any rate, let us assume that the withdrawal provision of Resolution 242 remains ambiguous even after applying a plain and natural reading to the Security Council's language. The analysis now turns to the next interpretive steps, which would be to utilize the accepted principles of extrinsic evidence—the legal context surrounding the resolution's adoption and use—in order to ascertain its authentic meaning in international law.

The Preparatory Work

The background documents and official statements leading up to the birth of an international legal document such as a treaty, a convention, or a UN resolution are regularly accepted as significant and persuasive interpretative tools. Known as *travaux préparatoires*, the two most important background tools in our investigation of Resolution 242 would be the other draft resolutions that appeared before the Security Council and the verbatim record of the Security Council debates surrounding the 22 November 1967 vote.

Three of the other four draft resolutions submitted to the Security Council in November 1967—the nonaligned, the Latin American, and the Russian—used definite language in their formulation of the withdrawal provision. They all also contained an explicit reference to the inadmissibility principle. Only the American draft employed indefinite wording and lacked any reference to the inadmissibility principle. Resolution 242 grew directly out of the nonaligned, the Latin American, and the American drafts. (The Russian proposal, as noted above, had been introduced after Lord Caradon submitted the British draft.) It borrowed the indefinite language from the American draft while incorporating the inadmissibility principle from the others. One cannot be read without the other, and the two provisions together were essential in obtaining the full support of the Security Council. As Lord Caradon stressed in an unofficial comment made in 1981, "[w]ithout that, there could have been no unanimous vote."[54] Ruth Lapidoth has argued that the presence of definite language in the earlier drafts, and its conspicuous absence in 242, meant that the Security Council was consciously endorsing territorial revision for Israel,[55] but her argument fails to square with the council's incorporation of the inadmissibility principle taken from these same drafts.

The official comments made by the Security Council members immediately before and after the 22 November 1967 vote on the resolution are a compelling endorsement of the complete-withdrawal interpretation of 242. Eight of the fifteen council members explicitly stated that the resolution required Israel to return all of the territories captured in the June 1967 war. Two other members—England and France—said as much, but in somewhat more muted diplomatic language. The other five members, including the United States, said virtually nothing on the record regarding their reading of the withdrawal provision. None of them asserted, however, even implicitly, that 242 permitted Israel

to withdraw from only some of the 1967 lands. Unsurprisingly, virtually none of the legal advocates for a more circumscribed reading of 242 have reckoned with the formal council statements, and when they have, they have misread the point of the statement.[56]

The Object and Purpose of the Resolution

The overriding purpose of Resolution 242, in the eyes of its creators, was to bring an end to the Israeli occupation of the lands taken in 1967 and to create the political and legal foundations for an enduring peace in the region. In the view of the major political and diplomatic figures who commented on the Middle East situation in the months leading up to Resolution 242, a constantly voiced prerequisite to the achievement of both these objectives was the withdrawal of Israeli armed forces from the territories occupied.[57] The need for a comprehensive withdrawal was articulated by UN Secretary-General U Thant shortly after the June 1967 war:

> There is the immediate and urgently challenging issue of the withdrawal of the armed forces of Israel from the territory of neighboring Arab states occupied during the recent war. There is near unanimity on this issue, in principle, because everyone agrees that there should be no territorial gains by military conquest. It would, in my view, lead to disastrous consequences if the UN were to abandon or compromise this fundamental principle.[58]

Subsequent Practice

Subsequent actions or statements by the Security Council, or by other major UN bodies empowered to make legal pronouncements, are important indicators in determining a resolution's authentic meaning. Had the council or the United Nations indicated that it had intended, through the reiteration of words or phrases, to attach a specific meaning or importance to Resolution 242, this would have provided significant interpretive clues. Moreover, the later practice of the parties themselves is a relevant consideration in establishing how the ambiguous or unclear provisions of a treaty, resolution, or document should be interpreted.

In the aftermath of 242, the Security Council has repeatedly stated that the inadmissibility principle applies to the 1967 territories,[59] that Israel's practices attempting to alter the character and status of the territories (including East Jerusalem) are unlawful,[60] and that all these territories and their indigenous peoples are occupied, and as such, are fully protected by the Fourth Geneva Convention of 1949.[61] Three issues of legal importance emerge from these later resolutions. First, the council's repeated reiteration of the inadmissibility principle (it appears in six subsequent resolutions) emphasizes that this modern international law precept is integral to the Israeli-Palestinian conflict and that its

inclusion in 242 was not the consequence of momentary diplomatic lightheadedness in November 1967.[62] Second, the council's regular reaffirmation that *all* the 1967 lands captured by Israel constitute occupied territories supports the complete-withdrawal reading of 242, because no sovereign title flows from the belligerent occupation of lands.[63] And third, the council's condemnations of Israel's efforts (primarily through civilian settlements and legislation) to assert permanent control and sovereignty over any part of the occupied territories belie the interpretation of Resolution 242 by Israel and its supporters that the Security Council intended to permit Israel to withdraw from only part of the 1967 lands.

In terms of practice, when Israel withdrew its military from Egypt (1982), Lebanon (2000), and the Gaza Strip (2005),[64] it returned to the international borders that existed prior to its occupations. Israel's full return of the Egyptian Sinai Peninsula was conducted in accordance with its peace treaty with Egypt, which specifically referenced Resolution 242 and stated that "Israel will withdraw all of its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine. . . "[65] Israel withdrew its armed forces unilaterally from Lebanon and Gaza, and in both cases claimed to be in full compliance with the boundaries that existed prior to 1967 (Israel's conquest of Gaza) and 1978 (Israel's invasion of Lebanon).

Consistency with the Prevailing Rules of International Law

The biggest challenges for advocates of the partial-withdrawal reading of 242 are the inadmissibility principle and the solid consensus among legal scholars that since the end of World War II, international law has forbidden the acquisition of territory through military conquest or force. Their line of attack on the inadmissibility principle's inclusion in the resolution has been varied. Stephen Schwebel, Julius Stone, Arthur Goldberg, and Meir Rosenne have each argued that the inadmissibility principle does not apply to Israel and the 1967 territories because these lands were captured through a war of self-defense rather than a war of aggression.[66] For Eugene Rostow, the inadmissibility principle was a "murky" and "obscure" idea, "devoid of content"; "no one seems to know how [it] crept into the draft of the Resolution."[67] Abba Eban maintained that the inadmissibility principle was a legal concept specifically shaped by its birth in Latin America, with no applicability elsewhere.[68]

The emergence of the inadmissibility principle as a cornerstone of modern international law and international relations grew out of the bitter experiences of World War II. The UN Charter, adopted in 1945, declared that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[69] This article embodied the already prevailing legal principle of "no title by conquest" that had been expressed through numerous international conferences, doctrines, and treaties since the late nineteenth century.[70] Among modern international law scholars, there is little dispute that the threat or use of force in order to

acquire or retain territory from other state has been prohibited since the adoption of the UN Charter.[71] These scholars also point to the codification of the prohibition against title by conquest by the UN General Assembly. In its *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*,[72] adopted by the unanimous consensus of the assembly in 1970, Article 1, paragraph 11 provides:

> The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

Furthermore, international law makes no distinction between wars of self-defense and wars of aggression for the purposes of the inadmissibility principle.[73] Even if Israel could present a compelling historical case that its initiation of the June 1967 war was a legitimate preemptive attack, this would not improve its legal claim for title to any of the captured territories.

This full-withdrawal requirement of international law has been reinforced by the International Court of Justice (ICJ). In its seminal 2004 *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[74] the ICJ expressly cited Resolution 242's emphasis of the inadmissibility principle.[75] It also stated that "all these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."[76] Several paragraphs later, the ICJ expressly endorsed the prevailing international law precept that prohibits the territorial acquisition resulting from the threat or use of force.[77] Taken together, these comments by the ICJ point in one direction only: All of the territories captured by Israel in 1967 are deemed to be occupied, and Israel cannot assert a lawful claim of territorial sovereignty over any of these occupied lands. Since modern international law stipulates that an occupation is, by its very nature, temporary, and cannot be prolonged by the occupying power beyond the time reasonably necessary to establish security and organize an orderly return of sovereignty,[78] Israel has no lawful basis for continuing its long-term belligerent presence in the Palestinian (and Syrian) territories, let alone for asserting that it is entitled to acquire at least some of these lands on the hollow assertion that it is not legally required to withdraw.

CONCLUSION

The failure of Resolution 242 has sometimes been attributed to the overconfident reliance of its diplomatic drafters on the virtues of constructive ambiguity. This is an intriguing but shallow explanation. In the 1970s and 1980s, the Security Council adopted a number of clearly expressed resolutions—on Jerusalem, the Golan Heights, the settlements, withdrawal from Lebanon, and the application of the Fourth Geneva Convention—which Israel evaded or

defied without paying an insurmountable political price. A more persuasive explanation for the failure of 242 can be found in the resolute marginalization of international law by the major players in modern Middle East diplomacy. The lack of political will to enforce compliance with universally recognized rights and obligations—the result of Israeli obstinacy, American exceptionalism, UN obeisance, Arab paralysis, and Palestinian impotence—has eroded the efficacy of international law and, more tragically, thwarted the aspirations of Israelis, Palestinians, and Arabs in the Levant to escape the shadow of incessant strife. But this does not mean that the purposes of 242 are a dead letter. Although Resolution 242 may be today encased in an elegant tomb, the international law principles which shaped its conception can—with political will, activism, legal imagination, critical scholarship, and an empathetic popular conscience—yet lead to a compassionate peace.

NOTES

1. United Nations Security Council (UNSC) Res. 242, UN Doc. S/RES 242 (22 November 1967). The two standard accounts of the creation of Resolution 242 are Sydney Bailey, *The Making of Resolution 242* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1985); and Arthur Lall, *The UN and the Middle East Crisis, 1967* (New York: Columbia University Press, 1968).

2. The five territories conquered by Israel in June 1967 were the Sinai Peninsula and the Gaza Strip from Egypt, the Golan Heights from Syria, and the West Bank and East Jerusalem from Jordan.

3. Among the legal scholars who have given variations of these readings to 242 are Meir Rosenne, "Legal Interpretations of UNSC 242," in *UN Security Council Resolution 242: The Building Block of Peace-Making* (Washington: Washington Institute for Near East Policy, 1993); Ruth Lapidoth, "Security Council Resolution 242 at Twenty Five," *Israeli Law Review* 26 (1992), p. 295; Eugene Rostow, "The Perils of Positivism: A Response to Professor Quigley," *Duke Journal of Comparative & International Law* 2 (1992), p. 229; Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Baltimore: Johns Hopkins University Press, 1981); Allan Gerson, *Israel, the West Bank and International Law* (London: Cass, 1978); Arthur Goldberg, "United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East," *Columbia Journal of Transnational Law* 12, no. 2 (1973), p. 187; and Stephen M. Schwebel, "What Weight to Conquest?" *American Journal of International Law* 62, no. 2 (1970), p. 344.

4. For the text of the two draft resolutions, see Lall, *UN and the Middle East Crisis*, pp. 165–66 and 296–97.

5. Abba Eban, *An Autobiography* (New York: Random House, 1977), p. 440.

6. Dean Rusk (as told to Richard Rusk, edited by Daniel Papp), *As I Saw It* (New York: W.W. Norton and Co., 1990), p. 388.

7. Gershom Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967–1977* (New York: Henry Holt and Co., 2006), p. 52.

8. Gorenberg, *Accidental Empire*, pp. 58–60. This action drew two immediate rebukes from the UN General Assembly (UNGA): UNGA Res. 2253, UN Doc. A/RES/2253 (ES-V) (4 July 1967); and UNGA Res. 2254, UN Doc. A/RES/2254 (ES-V) (14 July 1967).

9. Gorenberg, *Accidental Empire*, chaps. 3 and 4.

10. Rusk, *As I Saw It*, p. 388. Rusk went on to say: "With that remark, a contentious and even bitter point with the Americans, he turned the United States into a twenty-year liar."

11. Quoted in Gorenberg, *Accidental Empire*, p. 55.

12. Abba Eban, *Personal Witness: Israel Through My Eyes* (New York: G.P. Putnam's Sons, 1992), p. 453.

13. Lall, *UN and the Middle East Crisis*, pp. 212–13; Bailey, *The Making of Resolution 242*, pp. 126–27.
14. Eban, *Personal Witness*, p. 453.
15. Bailey, *The Making of Resolution 242*, p. 127.
16. Eban, *Personal Witness*, p. 454.
17. The fifteen members of the Security Council in 1967 consisted of the five permanent members (the United States, the Soviet Union, the United Kingdom, France, and China, represented then by Taiwan) and ten nonpermanent members (Argentina, Brazil, Bulgaria, Canada, Denmark, Ethiopia, India, Japan, Mali, and Nigeria).
18. The texts of the five draft resolutions can be found in Bailey, *The Making of Resolution 242*, pp. 205–7.
19. Eban, *An Autobiography*, p. 450.
20. UNSC Official Record (UN SCOR), 1381st Meeting (20 November 1967), para. 30.
21. Lord Caradon, "Security Council Resolution 242," in *U.N. Security Council Resolution 242: A Case Study in Diplomatic Ambiguity* (Washington: Institute for the Study of Diplomacy, 1981), p. 9.
22. Gideon Rafael, *Destination Peace: Three Decades of Israeli Foreign Policy—A Personal Memoir* (London: Weidenfeld & Nicolson, 1981), p. 189.
23. Eban, *An Autobiography*, p. 451.
24. Caradon, "Security Council Resolution 242," p. 13.
25. Caradon, "Security Council Resolution 242," p. 13.
26. Dean Rusk, in his memoirs, stated that he wanted to see the 1949 armistice boundaries in the West Bank "rationalized," but that the United States had "never contemplated any significant grant of territory to Israel as a result of the June 1967 war." *As I Saw It*, p. 389. His successor as U.S. secretary of state, William Rogers, stated in 1969 that "any change in the preexisting lines should not reflect the weight of conquest and should be confined to insubstantial alterations required for mutual security. We do not support expansionism." *Speech to the Adult Education Conference in Washington* (9 December 1969), accessed at http://www.bitterlemons.org/docs/rogers.html.
27. See Michael Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law* 2 (1998), pp. 90–91, 93, 94–95.
28. UN SCOR, 1382d Meeting (22 November 1967), para. 119.
29. Ibid., para. 139.
30. Ibid., note 28.
31. Ibid., para. 162.
32. Ibid., para. 127.
33. Ibid., para. 33.
34. Ibid., para. 189.
35. Ibid., para. 76.
36. Ibid., para. 52.
37. Ibid., para. 50, citing UNGA Official Record (UN GAOR) 1529th Meeting (21 June 1967), para. 15.
38. Ibid., para. 51, citing UN GAOR 1567th Meeting (26 September 1967), para. 91.
39. Ibid., para. 57.
40. Ibid., paras. 110–12. M. Bérard delivered his statement in French, and the quotation is the official UN translation.
41. This rule derives from Article 33 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [entered into force 27 January 1980]. Article 33 stipulates that the terms of a treaty are presumed to have the same meaning in each authentic text, and, where a difference in meaning arises between the different authentic linguistic texts, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." For a more circumscribed approach, see Shabtai Rosenne, "On Multi-Lingual Interpretation," *Israel Law Review* 6 (1971), p. 360.
42. UN SCOR, 1382d Meeting (22 November 1967), para. 173.
43. UN SCOR, 1377th Meeting (15 November 1967), para. 65.
44. UN SCOR, 1382d Meeting (22 November 1967), para. 186.
45. *Vienna Convention on the Law of Treaties*.
46. Wood, "Interpretation of Security Council Resolutions," note 27.
47. *Vienna Convention on the Law of Treaties*, note 41, Articles 31–33.
48. *Vienna Convention on the Law of Treaties*, Articles 31–33. Linguistic harmony has already been dealt with above.
49. John McHugo, "Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict Between Israel and the Palestinians," *International*

and Comparative Legal Quarterly 51 (2002), p. 851.

50. Rostow, "The Perils of Positivism," p. 243.

51. Goldberg, "Prospects for Peace," p. 190.

52. Lapidoth, "Security Council Resolution 242," p. 307.

53. *Vienna Convention on the Law of Treaties*, Article 31.

54. Caradon, "Security Council Resolution 242," p. 9.

55. Lapidoth, "Security Council Resolution 242 at Twenty Five," p. 309.

56. Ruth Lapidoth correctly quotes the French representative, M. Bérard (whom she mistakenly calls Bernard), as saying that " '*des territories occupés*' indisputably corresponds to the expression 'occupied territories' " (as quoted above), but goes on to suggest that it is the French version of the phrase that is ambiguous and the English version that is clear. She mangles the thrust of Bérard's statement—that the Israeli withdrawal must be full and complete—which is clearly evident not only in his reference to the inadmissibility principle, but also in the unambiguously broader meaning of the French version of the withdrawal phrase. Lapidoth, "Security Council Resolution 242 at Twenty Five," pp. 307–8.

57. See generally Bailey, *The Making of Resolution 242*, chaps. 7, 10, and 12, and Lall, *The UN and the Middle East Crisis*, chaps. 8, 9, and 14, where they quote the various speeches and declarations of Lyndon Johnson (United States), Maurice Couve de Murville (France), George Brown (United Kingdom), and Alexei Kosygin (Soviet Union), among many others, between June and November 1967.

58. *Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1966—15 June 1967*, General Assembly, Official Records: 22d Session, Supplement No. 1A (15 September 1967), para. 47.

59. UNSC Res. 478, UN Doc. S/RES/478 (20 August 1980); UNSC Res. 476, UN Doc. S/RES/476 (30 June 1980); UNSC Res. 298, UN Doc. S/RES 298 (25 September 1971); UNSC Res. 267, UN Doc. S/RES/267 (3 July 1969); and UNSC Res. 252, UN Doc. S/RES/252 (21 May 1968). All five resolutions, speaking specifically about occupied East Jerusalem, state: "Reaffirming that acquisition of territory by military conquest [or force] is inadmissible. . . " The Security Council also expressly reaffirmed the inadmissibility principle with respect to Israel's occupation of the Syrian Golan Heights: UNSC Res. 497, UN Doc. S/RES/497 (17 December 1981).

60. UNSC Res. 497, ibid.; UNSC Res. 478, ibid.; UNSC Res. 476, ibid.; UNSC Res. 465, UN Doc. S/RES/465 (1 March 1980); UNSC Res. 452, UN Doc. S/RES/452 (20 July 1979); UNSC Res. 446, UN Doc. S/RES/446 (22 March 1979); UNSC Res. 298, ibid.; UNSC Res. 267, ibid.; and UNSC Res. 252, ibid.

61. UNSC Res. 497, ibid.; UNSC Res. 478, ibid.; UNSC Res. 476, ibid.; UNSC Res. 465, ibid.; UNSC Res. 452, ibid.; and UNSC Res. 446, ibid.

62. Even a renowned Middle East scholar such as William Quandt seems to accept this. In his seminal *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967* (Washington: Brookings Institute Press, 2005) (3d ed.), he states that the inadmissibility language was added to 242 "as a sop to the Arabs" (p. 46).

63. Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993, 2004), p. 184.

64. Many international law scholars persuasively argue that Gaza remains occupied territory because Israel controls, directly or indirectly, all land border points as well as air space and coastal waters. My only point here goes to Israel's acknowledgment of the formal 1967 frontier between Israel and Gaza.

65. *Treaty of Peace between the Arab Republic of Egypt and the State of Israel* (26 March 1979, 1136 U.N.T.S. 101), at Article 1(2).

66. Rosenne, "Legal Interpretations of UNSC 242," pp. 30–31; Goldberg, "Resolution 242 After Twenty Years," p. 4, accessed at: www.ncafp.org/projects/MiddleEast/UNres242.htm; Schwebel, "What Weight to Conquest?" p. 345; Stone, *Israel and Palestine*, pp. 52–53.

67. Rostow, "The Perils of Positivism," pp. 243–44 ("devoid of content"; "how this phrase"); Rostow, "Legal Aspects of the Search for Peace in the Middle East," *American Society of International Law Proceedings* 64 (1970), p. 69 ("murky"; "obscure").

68. UN SCOR, 1375th Meeting, 13 November 1967, para. 49.

69. 26 June 1945, 59 Stat. 1031, entered into force 24 Oct. 1945, Article 2(4).

70. To name only a few, the first International Conference of American States (1890) ("conquest shall not . . . be recognized as admissible under American public law"); the Buenos Aires Declaration of 1936 ("Proscription of territorial conquest and that, in consequence, no acquisition made through violence shall be recognized"); and the Atlantic Charter (1941) ("no territorial changes that do not accord with the freely expressed wishes of the peoples concerned").

71. G. von Glahn, *Law Among Nations. An Introduction to Public International Law* (New York: McMillan Publishers Co., 1992) (6th ed.), p. 376: ". . . the coming into force of the United Nations Charter ended . . . the legality of title to territory through conquest. . . ").

72. UNGA Res. 2625 (XXV) (24 October 1970).

73. Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996), pp. 259–60 (". . . there has been widespread support for the view that Israel's incorporation of East Jerusalem is illegal on the grounds that . . . the acquisition of territory by war, whether defensive or aggressive, is inadmissible. . . ").

74. ICJ, "Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory," *International Legal Materials* 43, no. 1009 (2004).

75. Ibid., para. 74.

76. Ibid., para. 78.

77. Ibid., para. 87.

78. Benvenisti, *The International Law of Occupation*, p. 146.