

# THE ‘CHARLIE BROWN RAIN CLOUD EFFECT’ IN INTERNATIONAL LAW: AN EMPIRICAL CASE STUDY

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“It rains on the just and the unjust, Charlie Brown.”—Linus Van Pelt<sup>1</sup>

## I. INTRODUCTION

American comic strips have “always been used as a medium for commentary and satire”<sup>2</sup> ever since nineteenth century artist and graphic innovator<sup>3</sup> Thomas Nast, considered “the nation’s first famous cartoonist, political or otherwise,”<sup>4</sup> “created the donkey and elephant as symbols for the two political parties and . . . gave us our modern image of Santa Claus.”<sup>5</sup> While their subject matter encompasses the entire gamut,<sup>6</sup> political cartoons “are a kind of reality cocktail—part fact, part fiction, part

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<sup>1</sup> Quoted in Frank Ahrens, *The Gospel According to ‘Calvin and Hobbes’*, WASH. POST, Mar. 15, 1997, at D09 (quoting *Peanuts* comic strip paraphrasing St. Matthew: “That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.” *Matthew* 5:45 (King James) (emphasis added)).

<sup>2</sup> Karen S. Peterson, *At 100, Comics Earn a Funny Page in History*, USA TODAY, Feb. 16, 1995, at 3D.

<sup>3</sup> Peter Goddard, *Krazy Kat to Peanuts Late, Great Comic Strips*, TORONTO STAR, Nov. 25, 2006, at H09, available at 2006 WLNR 20415948.

<sup>4</sup> Larry Printz, *Nast Exhibit Personifies the Power of the Pen*, MORNING CALL (Pa.), Jan. 24, 1999, at F1. Nast is considered “the father of American editorial cartoons.” Greg Braxton, *Cover Story; He’s Gotta Fight the Powers That Be; Aaron McGruder’s In-Your-Face Cartoon Strip, “the Boondocks,” Takes No Prisoners—Black or White. How Did This Nice Young Man From the Suburbs Get So Mad?*, L.A. TIMES MAG., Apr. 25, 2004, at 10.

<sup>5</sup> Matt Schudel, *Toon Town; Beetle Bailey Creator Mort Walker Has Enlisted His Comic-Strip Friends to Show That Cartoon Art is More Than Just a Joke*, SUN-SENTINEL (Fla.), Mar. 10, 1996, at 12.

<sup>6</sup> “[T]he best cartoons draw people into whatever debate is going on and therefore play a major role in a democratic republic where folks need to be reminded of the issues at stake.” Stephen Goode, *Right to Laugh*, INSIGHT ON THE NEWS, Aug. 13, 2001, at 10, available at 2001 WLNR 4629519.

serious and part frivolous.”<sup>7</sup> As commentators have recognized, “[c]omics have given us more than political opinion.”<sup>8</sup>

Although the “qualities that make a great cartoonist haven’t changed since Thomas Nast,”<sup>9</sup> the medium transformed following World War Two as previously “far more sober” comic strips yielded to a “punchline craze” genre best exemplified by *Beetle Bailey* and *Peanuts*.<sup>10</sup> Created by Charles M. Schulz, *Peanuts*, along with other comic strips appearing in the 1950s, “ushered in the ‘intellectual’ age of comics, works that were more than just humorous—they encouraged readers to think.”<sup>11</sup> What distinguished Schulz’s *Peanuts* from other comic strips of its time, however, was a revolutionary approach<sup>12</sup> coalescing “the innocence of childhood with the cynicism of adulthood to create realistic, idiosyncratic and empathetic icons.”<sup>13</sup> Alongside Nast, Schulz, who “blazed a trail that allowed cartoonists to write honestly of angst and vulnerability and anxiety and guilt,”<sup>14</sup> is recognized as one of the most influential illustrators in American history.<sup>15</sup>

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<sup>7</sup> Howard Kurtz, *Garry Trudeau’s Cartoon Beat; Digging Up News in ‘Doonesbury’*, WASH. POST, May 30, 1992, at B1.

<sup>8</sup> Dick Schneider, Editorial, *Even ‘Funny Pages’ Not Immune to Changing Times*, JACKSON SUN (Tenn.), Apr. 2, 2006.

<sup>9</sup> Goode, *supra* note 6.

<sup>10</sup> Ellen Gartnerman, *Where to Draw the Line; With Competition Fierce and Clinton Scandal Jokes Easy, Cartoonists Say There’s Pressure to Choose Cheap Gaps Over Insightful Commentary*, BALT. SUN, Feb. 4, 1999, at 1E, available at 1999 WLNR 1137063.

<sup>11</sup> Payal Kapadia, *A Brief History of the Comic Strip*, JAPAN TIMES, Mar. 22, 2002, available at <http://search.japantimes.co.jp/cgi-bin/ek20020322a2.html>.

<sup>12</sup> Schulz “‘was probably the first syndicated comic strip artist who put a little bit of pathos in a strip.’” Dave Walker, *Good Grief! Peanuts’ Creator Schultz to Retire, Ending Comic*, ARIZ. REPUBLIC, Dec. 15, 1999 at A1; see also Peter McDonald, *Flypast, Cookies and Root Beer in Final Tribute to Schulz*, EVENING STANDARD (London), Feb. 22, 2000, at 5, available at 2000 WLNR 2719774 (“Charles Schulz was credited with revolutionising the comic pages.”).

<sup>13</sup> Rob Rogers, *Legendary Cartoonist Knows Human Frailty*, PITTSBURGH POST-GAZETTE, Feb. 13, 2000, at A10.

<sup>14</sup> Amy Wilson, *You’re a Good Man, Charles Schulz*, DET. FREE PRESS, Oct. 8 1995, at 1M.

<sup>15</sup> See *International Cartoon Museum Opens First Phase in Boca Raton*, TAMPA TRIB., May 12, 1996, at 5. One commentator noted:

“Peanuts” touched nerves and reached intimate spaces in a way no comic strip ever had: It . . . was featured in exhibits at the Smithsonian . . . and spun catch phrases (“security blanket,” “good

(continued)

A. *The First Element: Illustrating Charlie Brown and Peanuts*

Originally titled *Li'l Folks* when it debuted in 1947, Schulz's *Peanuts* acquired its new name upon syndication<sup>16</sup> three years later.<sup>17</sup> Billed as "cute childhood fluff," *Peanuts* "is actually . . . portentous material best appreciated by adults."<sup>18</sup> The comic depicts a group of "children who, without the interference of narrow-eyed, jaded adults, figured out the world on their own."<sup>19</sup> While Schulz "never publicly admitted to making social statements" in his *Peanuts* comics<sup>20</sup> and "roll[ed] his eyes . . . [w]hen people saw all sorts of meanings in his work,"<sup>21</sup> *Peanuts* has nonetheless been the subject of increased analysis<sup>22</sup> and philosophical interpretation,<sup>23</sup> particularly with regard to its apparent religious overtones.<sup>24</sup>

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grief," "a Charlie Brown Christmas tree"). Snoopy emerged as an enduring 20th century icon, etched on children's tombstones and stenciled on the helmets of U.S. soldiers who fought in Vietnam.

Renee Tawa, Obituary, *Beloved 'Peanuts' Creator is Mourned Worldwide; Obituary: Influential Cartoonist Charles M. Schulz Dies of Cancer the Night Before Farewell Strip Appears. For the Record*, L.A. TIMES, Feb. 14, 2000, at A18; see also Mark Kennedy, *Memories of Charlie Brown Render Ways to Improve Tomorrow*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Feb. 2, 2003, at E5 (stating that "Charles Schulz was one of the most influential writers of our time").

<sup>16</sup> An editor disliked the original title and renamed the comic strip *Peanuts*, much to Schulz's disliking: "'It's totally ridiculous, has no meaning, is simply confusing and has no dignity.'" Lev Grossman, *New Zip for the Old Strip*, TIME, Apr. 2, 2007, at 50 (quoting Schulz during a 1987 interview).

<sup>17</sup> Walker, *supra* note 12.

<sup>18</sup> Hal Niedzviecki, *Really Good Grief*, GLOBE & MAIL (Canada), May 29, 2005, at D8, available at 2005 WLNR 11913239.

<sup>19</sup> Ahrens, *supra* note 1.

<sup>20</sup> Michael Schuman, *Good Grief! A Low-Key Tribute to a Gentle Giant*, TORONTO STAR, Dec. 10, 2005, at K10, available at 2005 WLNR 19858649; cf. Karessa E. Weir & Brian Wheeler, *No Grief with 'Charlie Brown'*, CAPITAL (Md.), Mar. 12, 1999, at 22 ("Charles Schulz's work is still among the most meaningful parts of any newspaper.").

<sup>21</sup> Schuman, *supra* note 20.

<sup>22</sup> The comic strip "inspired college courses, a theology book, a concerto." *60 Minutes: You're a Good Man, Charlie Brown; Charles Schulz on his Life's Work with the Comic Peanuts* (CBS television broadcast Oct. 31, 1999).

<sup>23</sup> See, e.g., Cynthia Gorney, *The 'Peanuts' Progenitor; Charles M. Schulz, Right in Character After 35 Years with his Comic Creations*, WASH. POST, Oct. 2, 1985, at D1 (noting a museum exhibit and catalogue replete with "lengthy essays analyzing 'Peanuts' (continued)

The most identifiable *Peanuts* “comic strip icon”<sup>25</sup> is Charlie Brown, the “lead man/boy”<sup>26</sup> with a “round-faced, bland character, without much personality or anything.”<sup>27</sup> Schulz’s Charlie Brown is a “luckless” boy.<sup>28</sup> The “American personification of failure,”<sup>29</sup> he is constantly surrounded by disappointment—in sports,<sup>30</sup> kite flying,<sup>31</sup> and love.<sup>32</sup> Worse yet, Charlie

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humor, its role in American popular culture, and the philosophical messages implicit in Schroeder’s piano and Linus’ blanket”).

<sup>24</sup> Jaime J. Weinman, *The Sinkable Charlie Brown*, MACLEAN’S, May 15, 2006, at 60; see also Peggy Fletcher Stack, *Charlie, Lucy, Linus and Jesus? Christianity and ‘Peanuts’*, SALT LAKE TRIB., Aug. 24, 2002, at C3.

<sup>25</sup> Eric Michael, *A Good Ol’ Charlie Brown Exhibit*, ORLANDO SENTINEL, July 2, 2006, at K2.

<sup>26</sup> Jeff Webb, *Wanted: Miracle Worker to Run Hernando County*, ST. PETERSBURG TIMES, Mar. 14, 2004, at 2, available at [http://www.sptimes.com/2004/03/14/news\\_pf/Hernando/Wanted\\_miracle\\_worke.shtml](http://www.sptimes.com/2004/03/14/news_pf/Hernando/Wanted_miracle_worke.shtml).

<sup>27</sup> Gorney, *supra* note 23; see also *60 Minutes*, *supra* note 22 (describing Charlie Brown as possessing a “big round, blank face, just a ‘face face’ . . . so forgettable . . . that nobody would ever care”).

<sup>28</sup> Ken Tucker, *Good Grief; Why Did We Love Charles Schulz and His Unforgettable Peanuts Gang? Got a Nickel?*, ENT. WKLY., Feb. 25, 2000, at 28.

<sup>29</sup> David Bowman, *A Failure’s Guide to Charlie Brown and Peanuts*, SANTA FE NEW MEXICAN, Dec. 23, 2005, at PA-40; see also Weinman, *supra* note 24.

<sup>30</sup> Sports “allows Schulz to move freely from childish games to adult concerns.” Franz Lidz, *Good Ol’ Charlie Schulz*, SPORTS ILLUSTRATED, Dec. 30, 1985, at 110. Charlie Brown’s “baseball team rarely wins a game.” Bowman, *supra* note 29. Moreover, Charlie Brown is often depicted “standing in the rain on the pitcher’s mound, hoping to finally win at baseball.” Lenora Nazworth, *In Heaven, Angels Must Be Doing the Snoopy Dance*, TIMES (Shreveport, La.), Feb. 18, 2000, at 11A; see also Ryan Blethen, *A Muddied Mandate for Political Vacillation*, SEATTLE TIMES, Mar. 16, 2007, at B6, available at 2007 WLNR 5060357 (“Like Charlie Brown on his back after Lucy pulls away the football just before he kicks . . .”); Fran Blinbury, *Houston Becomes Jazz’s Dream Destination*, HOUSTON CHRON., May 2, 2007, at 10, available at 2007 WLNR 8308541 (“If they were in a classic comic strip, they’d be poor old Charlie Brown running to kick the football and having Lucy [Van Pelt] pull it away every time.”).

<sup>31</sup> “[W]henver Charlie Brown flew a kite, it ended up in a tree.” Laurel Graeber, *Casting Words on the Wind*, N.Y. TIMES, Mar. 24, 2006, at E34. The victim of a “pesky kite-eating tree,” Charlie Brown has been depicted “standing motionless beneath the tree holding the string of his tangled kite” in defeat. Michael, *supra* note 25.

<sup>32</sup> Charlie Brown’s unrequited love for the Little Red-Haired Girl, who “cruelly toyed with [his] affections,” was a recurring theme. *Red-Headed Sex Bombs*, SUNDAY TIMES (London), Aug. 10, 1997.

Brown is doggedly pursued by a “little dark cloud follow[ing] him, hovering over his head and raining on his parade.”<sup>33</sup>

*B. The Second Element: A Veritable ‘Charlie Brown’ Among Nations*

This “personal black cloud that follows [Charlie Brown] everywhere he goes”<sup>34</sup> signifies more than a graphical metaphor for bad luck befalling a fictional comic strip character. Schulz’s “uncanny way of illuminating what was on our minds . . . and making it palatable”<sup>35</sup> provides an allusion for a very real phenomenon detached neither from the political nor legal realm.<sup>36</sup> In fact, this phenomenon, herein termed the ‘Charlie Brown Rain Cloud Effect’ (the ‘Effect’), manifests itself as a de facto corollary to principles of international law applicable to one—and only one—country: Israel,<sup>37</sup> a nation that has “been a source of tremendous fascination since its establishment in 1948.”<sup>38</sup>

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<sup>33</sup> Webb, *supra* note 26; see also Thomas Becnel, *Summer Rains Leave Behind Slick Courts and Soggy Balls*, SARASOTA HERALD-TRIBUNE (Fla.), July 9, 2005, at E1 (noting that Charlie Brown is “followed by a rain cloud wherever he goes”).

<sup>34</sup> Simon Barnes, *Rusedski Does Himself a Total Disservice*, TIMES (London), June 27, 2000.

<sup>35</sup> Kennedy, *supra* note 15.

<sup>36</sup> See, e.g., *Dow Jones & Co., Inc. v. Ablaise Ltd.*, No. 06-1014, 2008 WL 4571933, at \*3 (D.D.C. Oct. 15, 2008) (invoking the Charlie Brown metaphor in a patent infringement action and stating that “[t]o permit Ablaise to pull its . . . patent out of these cases on the eve of the deadline for filing summary judgment motions—after putting Dow Jones through a year of discovery on the patent—would be like rewarding Lucy for snatching the football away from Charlie Brown”); Chris Ayres, *Constitutional Cloud Hangs Over Davis*, TIMES (London), Oct. 3, 2003, at 23 (extending the metaphor of a “little black rain cloud” over former California Governor Gray Davis, who succumbed to a gubernatorial recall).

<sup>37</sup> See Robert A. Caplen, Note, *Mending the “Fence”: How Treatment of the Israeli-Palestinian Conflict By the International Court of Justice at the Hague Has Redefined the Doctrine of Self Defense*, 57 FLA. L. REV. 717, 746 n.213 (2005) (discussing the International Court of Justice’s 2004 advisory opinion and arguing that the court’s “willingness to render an opinion rapidly represented ‘two sets of rules in international . . . one set which is valid for the entire world and there is an international law applicable only to Israel’”); see also Michael Goodwin, *Give War A Chance: Hezbollah Starts A Fight, So It’s Time to Teach Terror a Lesson*, DAILY NEWS (N.Y.), July 24, 2006 (rejecting a course of conduct “suggest[ing that] Israel should play by different rules than its enemies”).

<sup>38</sup> Wolf Blitzer, *Israel: Daily Life in a Country Under Siege*, WASH. POST, Apr. 6, 1986, at 9.

“[N]o one has suffered more than Charlie Brown,”<sup>39</sup> and the ‘Effect’ has plagued Israel with “more scrutiny on a day-to-day basis than any other foreign country.”<sup>40</sup> Its sources are numerous and include, *inter alia*, “anti-Americanism, media antipathy toward the Jewish state, a perception that Israel is an outgrowth of colonialism, and anti-Semitism.”<sup>41</sup> Other nations appear immune from its specter. For example, while the current war in Iraq “grows increasingly unpopular in the United States”<sup>42</sup> and “[a]ttitudes toward the United States have become increasingly negative among people in the Middle East and other parts of the world, according to recent international public opinion polls,”<sup>43</sup> the Bush Administration remains undeterred and committed to “‘stay the course’ in Iraq.”<sup>44</sup> Such an unwavering position can be attributed, in part, to recognition that “[o]pposition to American policies is not the same as general opposition to the United States.”<sup>45</sup> But the same cannot be said for Israel, which is forced to bend and sway—usually to its detriment—amid any critical climate.<sup>46</sup>

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<sup>39</sup> Meredith Goldstein, *Good Grief*, BOSTON GLOBE, Nov. 21, 2006.

<sup>40</sup> Blitzer, *supra* note 38.

<sup>41</sup> Suzanne Gershowitz & Emanuele Ottolenghi, *Europe’s Problem With Ariel Sharon*, 12 MIDDLE E. Q., Fall 2005, at 13–23.

<sup>42</sup> Mark Danner, *Taking Stock of the Forever War*, N.Y. TIMES MAG., Sept. 11, 2005, at 45.

<sup>43</sup> *America’s Standing in World Opinion Poll Hits New Low*, VOICE OF AM. NEWS, Feb. 7, 2007, available at <http://www.voanews.com/english.archive/2007-02/2007-02-07-voa58.cfm>; see also Felix Rohatyn, *For ‘New America,’ A Fresh Atlantic Alliance; Partnership with Europe*, INT’L HERALD TRIB., May 11, 2004, at 6 (“Continued negative European public opinion about the United States is still harmful to the relationship.”).

<sup>44</sup> Peter Roper, *Bush Veto Leaves Democrats at Loss to Stop War*, PUEBLO CHIEFTAIN (Colo.), May 3, 2007, available at 2007 WLNR 8465512; see also Ann Flaherty, *Sides Try For Iraq Accord; No Resolution for Bush Aides, Democrats*, SUN-SENTINEL (Fla.), May 4, 2007, at 12A (noting that “Democrats said they were acting on a mandate from voters to end the war” but were unable to override President Bush’s veto of legislation establishing a timetable for withdrawal from Iraq).

<sup>45</sup> Joseph S. Nye, Jr., *Our Global Image; Bush Can Reverse America’s Declining Popularity*, NEWSDAY (N.Y.), Dec. 22, 2004, at A43.

<sup>46</sup> “The gross unfairness in the criticisms Israel has nevertheless endured is that the military ordinarily bends over backward to avoid civilian casualties, *even in some situations where it is put at life-threatening disadvantages by its reticence.*” Jay Ambrose, *Unlike Terrorists, Israel Fights by the Rules*, CHI. SUN-TIMES, June 19, 2006, at 31 (emphasis added); see also James P. Pinkerton, *Arab Toughness Would Finish the Job*, NEWSDAY (N.Y.), July 20, 2006, at A41 (noting that it is “impossible” for Israel to extinguish terrorist

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This article explores recent manifestations of and the resulting legal consequences stemming from Israel's subjection to the 'Effect,' an irrational, troubling occurrence that ensures Israel "will continue to lose the war for public opinion"<sup>47</sup> and will be forced to engage in "dramatic departure[s] from the Government's position"<sup>48</sup> in light of virulent international hostility.<sup>49</sup> Illustrating the far-reaching ramifications of the 'Effect,' this Article argues that an omnipresent, extrajudicial, anti-Israel bias has been cultivated and perpetuated in order to impede Israel's legal rights to which it is accorded as a sovereign and a member of the United Nations (U.N.), and to impose impracticalities upon its exercise of those rights.<sup>50</sup> Continually faced with conclusive allegations demonizing it as an occupying, hegemonic colonial power,<sup>51</sup> Israel stands alone as the

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assaults originating from within Lebanon because it "operates under the close scrutiny of a mostly hostile world media"); *see also infra* text accompanying notes 541 & 564.

<sup>47</sup> Hillel Halkin, *Israel's Media Problem*, COMMENTARY, Feb. 2006, at 54, 58; *see also* Colum Lynch, *South Africa's U.N. Votes Disappoint Some*, WASH. POST, Apr. 16, 2007, at A14 (noting South Africa's position that the "only country . . . deserving of international scrutiny is Israel").

<sup>48</sup> Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2118 (2006) (stating that Israeli courts, unlike those in the U.S., emphasize balancing and proportionality and ordered the Israeli government "to make substantial changes to the location of the separation barrier built for security and to make changes in the conduct of an ongoing military operation in Gaza").

<sup>49</sup> *See* Gwynn Dyer, *Dilemma That Faces Israel*, WOODSTOCK SENTINEL REV. (Canada), Apr. 16, 2007, at 4 (stating that Israel must factor Arab public opinion into its foreign policies); *see also* Ben Barber, *Human Rights Report Sets Global Standard*, CHRISTIAN SCIENCE MONITOR, Jan. 26, 1994, at 8 (noting that Israel is subjected to "intense scrutiny").

<sup>50</sup> *See* Gershowitz & Ottolenghi, *supra* note 41, at 23 ("European and U.S. media put the Jewish state's actions under a magnifying glass."); *infra* Parts III.A.3, III.C.1.-3.

<sup>51</sup> *See, e.g.,* Allan Gerson, Book Review, 87 AM. J. INT'L L. 192, 193 (1993) (reviewing JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* (1990)) (discussing Professor Quigley's "rubric expressly designed for Israel," namely "the evils of colonialism, racism and alien occupation," and its "ostensibly meeting all three requirements"); George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 559 (1994) (likening Israel to "other colonial societies"); Daniel Gordis, *Flagging Spirits?*, JERUSALEM POST, Apr. 20, 2007, at 4, 6 (noting descriptions of Israel "as a colonialist venture spawned by European Zionist elites"). Professor John Dugard maintains that Israel "'is clearly in military occupation of the occupied Palestinian territories. At the same time elements of the occupation constitute forms of colonialism and apartheid, which are contrary to international law.'" *Quoted in* (continued)

unwitting beneficiary of the selective and convenient dilution of the U.N. Charter and principles of international law.

“When it comes to hard lessons about life, you’re a good teacher, Charlie Brown.”<sup>52</sup> Similarly, the ‘Effect’ can be a didactic tool to expose the several spheres in which it promotes disparate application of principles of international law. Part II explores the ‘Effect’ within the U.N., setting forth the first instances of institutional bias against Israel through the organization’s own violation of substantive and procedural legal requirements for adjudicating Israel’s membership application. It proceeds to dissect recurring manifestations of the organization’s disparate treatment—reserved only for and limited to Israel—and analyzes the extrajudicial requirement of group membership, an impermissible imposition placed upon Israel to limit the full rights to which it is entitled under the U.N. Charter as a member. Part III discusses the 2004 advisory opinion, issued by the International Court of Justice at the Hague (Hague Court), condemning Israel’s counterterrorism initiative as a violation of international law<sup>53</sup> and proscribing Israel’s ability to exercise self-defense against terrorism. It elaborates upon this proscription—and the accompanying manifestation of the ‘Effect’—by discussing the recent Israeli-Palestinian conflict that erupted in southern Lebanon in July 2006 and the ramifications of the Hague Court’s pronouncement. Ultimately, this Article maintains that, unless the integrity and vitality of law prevail over the numerous extrajudicial requirements and impositions to which Israel is subjected, the various manifestations and permutations of the ‘Effect’ “will pose an existential question for Israel.”<sup>54</sup>

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Tovah Lazaroff, *Dugard May Probe Israeli ‘Apartheid’ in Territories*, JERUSALEM POST, Mar. 16, 2007, at 7.

<sup>52</sup> Susan Wloszczyna, *An Earnest Cancer Lesson By ‘Peanuts’*, USA TODAY, Mar. 15, 1990, § Life, at 3D.

<sup>53</sup> For a discussion of the terms utilized to describe Israel’s counterterrorism initiative—“wall” and “fence”—and the meanings attributed to them, see Caplen, *supra* note 37, at 725 n.48. This Article utilizes “counterterrorism initiative” and “security structure” interchangeably in an effort to maintain objectivity.

<sup>54</sup> Mortimer B. Zuckerman, *A Matter of Timing*, U.S. NEWS & WORLD REPORT, Aug. 14–21, 2006, at 75, 76.

## II. 'E PLURIBUS DUO': EFFECTUATING ISOLATION WITHIN THE U.N.

Since its creation in 1945,<sup>55</sup> the U.N. has served as “the foundation for international cooperation and action on global issues [and] the forum for voicing and discussing areas of concern to all nations . . . .”<sup>56</sup> A “fundamental principle of the United Nations charter is the sovereign equality of *all states*,”<sup>57</sup> and the organization, together with its members, is committed, in theory, “to practice tolerance and live together in peace with one another as good neighbours.”<sup>58</sup> Envisioned as a “community of nations,”<sup>59</sup> the first U.N. Chairman emphasized the organization’s commitment to

the establishment, through cooperation in the economic, social, educational and humanitarian fields, of those conditions of stability and well-being which will ensure peaceful and friendly relations, based on the principle of equal rights and self-determination *among the nations of the world*.<sup>60</sup>

Despite these laudable goals, “it is no secret that the United Nations has been plagued by a virulent strain of anti-Israel fever ever since Israel . . . was born and ever since the United Nations began.”<sup>61</sup> Thus, “E pluribus

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<sup>55</sup> See David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT’L L. 20, 24 (2006) (noting the “creation of the new world order of the United Nations in San Francisco in 1945 and subsequent developments in 1946”); see generally STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS: A STORY OF SUPERPOWERS, SECRET AGENTS, WARTIME ALLIES AND ENEMIES, AND THEIR QUEST FOR A PEACEFUL WORLD (2003) (discussing the 1945 San Francisco Conference and creation of the U.N.).

<sup>56</sup> Peter Jackson, *Yearbook of the United Nations*, U.N. CHRON., Sept.–Nov. 2006, at 22.

<sup>57</sup> *The Treatment of Israel by the United Nations: Hearing Before the House. Comm. on Int’l Relations*, 106th Cong. at 4 (1999) [hereinafter *Treatment of Israel Hearing*] (statement of Rep. Ros-Lehtinen) (emphasis added).

<sup>58</sup> U.N. Charter pmbl.

<sup>59</sup> *Treatment of Israel Hearing*, supra note 57, at 55 (statement of Rep. Gilman).

<sup>60</sup> Statement of Chairman Dr. Zuleta Angel, Opening of the First Part of the First Session of the General Assembly, (Jan. 10, 1946), available at <http://www.un.org/Depts/dhl/landmark/pdf/a-pv1.pdf> (emphasis added).

<sup>61</sup> *Treatment of Israel Hearing*, supra note 57, at 6 (statement of Rep. Rothman); see also Caplen, supra note 37, at 738 (“Israel has been described as ‘the United Nations’ favourite punching bag.”) (footnote omitted).

duo,” or “out of many, two,” aptly describes the “irrational disdain” to which only Israel is subjected by the U.N.,<sup>62</sup> which maintains a “long-standing tradition of singling out Israel.”<sup>63</sup> As this Part demonstrates, Israel has always “had reason to be wary of the United Nations,”<sup>64</sup> and “there is a darker impulse at play”<sup>65</sup> within the organization.

*A. Sowing the Seeds of Exclusion from the International Playground*<sup>66</sup>

“The history of Israel and the United Nations is an extremely complex one”<sup>67</sup> imbued with a “contentious relationship” that “began prior to Israel’s admission to the organization” in 1949.<sup>68</sup> Membership in the U.N. “is open to *all* . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization,

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<sup>62</sup> *Treatment of Israel Hearing*, *supra* note 57, at 7 (statement of Rep. Wexler); *see also* David Tell, *The U.N.’s Israel Obsession*, WKLY. STANDARD, May 6, 2002, at 9 (“Among the nearly 200 nations represented at the U.N., only Israel has ever been assigned special—reduced—membership privileges . . .”).

<sup>63</sup> Permanent Mission of Israel to the United Nations, *Israel-UN Relations: An Uneasy Relationship*, 001 BACKGROUND 1 (July 2007), available at <http://israel-un.mfa.gov.il/mfm/Data/120725.pdf> [hereinafter *Israel-UN Relations*]. The “treatment accorded to Israel by the UN organization itself . . . differs from that accorded by the member states.” *Treatment of Israel Hearing*, *supra* note 57, at 12 (statement of David Welch).

<sup>64</sup> Editorial, *Let Truth Be Told; Ban on U.N. Fact-Finders is Disappointing*, COLUMBUS DISPATCH (Ohio), May 3, 2002, at A12.

<sup>65</sup> Tell, *supra* note 62, at 10.

<sup>66</sup> The metaphor of the U.N. as the international community’s legal ‘playground’ equates Israel’s struggle for equality within the organization with “the struggle [among children] that takes place out on the playground.” Michael Schuman, *Massachusetts Museum; Exhibit of ‘Peanuts’ Is A Happy Comment on Schulz*, NEWSDAY (N.Y.), Nov. 11, 2001, at E14, available at 2001 WLNR 641095; *see also* Eileen O. Daday, ‘Charlie Brown’ Completes Circle For Retiring Teacher, CHI. DAILY HERALD, Apr. 27, 2006, § Neighbor, at 1 (discussing Schulz’s musical “You’re A Good Man Charlie Brown,” wherein “[t]he entire play takes place on th[e] playground” and “there are a lot of life lessons learned on the playground”); Lidz, *supra* note 30, at 115 (“Originally, [Schulz] intended *Peanuts* to depict the battle for dominance in the playground . . .”); Phil Rosenthal, *What Are You Looking At?*, CHI. SUN-TIMES, Oct. 26, 2004, at 49 (“quoting Schulz that “[i]t’s a desperate struggle on the playground to survive.”).

<sup>67</sup> *Treatment of Israel Hearing*, *supra* note 57, at 3 (statement of Rep. Lantos).

<sup>68</sup> Caplen, *supra* note 37, at 738; *see supra* text accompanying note 61.

are able and willing to carry out these obligations.”<sup>69</sup> The U.N. Charter, which “professes to recognize the sovereignty of nations,” nonetheless contains an implicit “except[ion] when it comes to the state of Israel.”<sup>70</sup> The U.N. has perpetuated an atmosphere<sup>71</sup>—predating Israel’s admission to the organization<sup>72</sup>—not unlike that summarized in one *Peanuts* comic strip in which Schulz’s characters Violet and Patty admonish Charlie Brown: “[G]o on home! [W]e don’t want you around here!”<sup>73</sup>

*1. The Hague Court Establishes Conditions for Admission Under the U.N. Charter*

During its second session in November 1947, the General Assembly passed Resolution 113, wherein it requested an advisory opinion from the Hague Court concerning conditions of statehood admission to the U.N.<sup>74</sup>

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<sup>69</sup> U.N. Charter art. 4, para. 1 (emphasis added). Admission to the U.N. “will be effected by a decision of the General Assembly upon the recommendation of the Security Council.” *Id.* at para. 2.

<sup>70</sup> *Treatment of Israel Hearing*, *supra* note 57, at 6 (statement of Rep. Rothman).

<sup>71</sup> Secretary-General Kofi Annan has characterized the relationship as “the tragedy of the estrangement between the organization and Israel . . .” Barbara Crossette, *Annan Calls For Better Treatment of Israel at United Nations*, N.Y. TIMES, Dec. 13, 1999, at A10.

<sup>72</sup> “Israel ‘possesses the only international birth certificate in a world of unproven virtue:’—it was the only state on earth which ‘had the advance assurance that its origin was ordained by the community of nations.’” Herbert W. Briggs, *Community Interest in the Emergence of New States: The Problem of Recognition*, 44 AM. SOC’Y INT’L L. PROC. 169, 169 (1950) (quoting U.N., SCOR, 3d year, 340th mtg. at 30 (July 27, 1948). Statement of Mr. Aubrey Eban.).

<sup>73</sup> Jonathan Franzen, *The Comfort Zone: Growing Up with Charlie Brown*, NEW YORKER, Nov. 29, 2004, 66; *see also* Rosenthal, *supra* note 66 (quoting Schulz that “[k]ids are mean to each other” and “can be very cruel”); *see generally supra* note 66.

<sup>74</sup> *See* G.A. Res. 113 (II), at 19, U.N. Doc. A/RES/113 (Nov. 17, 1947). One question the General Assembly presented, relevant here, was:

Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote . . . on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article?

*Id.* The General Assembly requested a second advisory opinion two years later. *See* G.A. Res. 296 (IV), at 21, U.N. Doc. A/RES/296 (Nov. 22, 1949); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3).

Holding itself competent to address a “purely legal” question,<sup>75</sup> the Court issued an historic “first decision,”<sup>76</sup> but nonetheless noted the limitations it encountered: “the General Assembly can hardly be supposed to have intended to ask the Court’s opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control.”<sup>77</sup> The opinion<sup>78</sup> ultimately served as precedent for the Court to “lean[] in the direction of interpreting the Charter as a constitution.”<sup>79</sup>

Article 4 of the U.N. Charter, the Hague Court emphasized, “clearly constitutes a legal regulation of the question of the admission of new States.”<sup>80</sup> As such, Article 4 established several “requisite conditions” for U.N. membership, namely that an applicant must be: (1) a State; (2) peace-loving; (3) accepting of the Charter’s obligations; and (4) able *and* willing to carry out these obligations.<sup>81</sup> While “these conditions are subject to the judgment of the Organization,”<sup>82</sup> they also “constitute an exhaustive enumeration and are not merely stated by way of guidance or example.”<sup>83</sup>

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<sup>75</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 8 (May 28). The question, however, was political in nature. See *id.*; Lara M. Pair, Note & Comment, *Judicial Activism in the ICJ Charter Interpretation*, 8 ILSA J. INT’L & COMP. L. 181, 200 (2001); *infra* text accompanying note 80.

<sup>76</sup> *International Notes*, 27 INT’L CONCILIATION 434, 436 (1948).

<sup>77</sup> *Conditions of Admission*, 1948 I.C.J. at 7.

<sup>78</sup> The question the Hague Court addressed was whether a member state could make its consent to the admission of an applicant state dependent upon the admission of other states. *Id.* at 11. It held that a member “is not juridically entitled to make its consent . . . dependent on conditions not expressly provided by paragraph 1 of [Article 4.]” *Id.* at 12. The Soviet Union never recognized the ruling as an opinion of the Court and declined to follow it. F. Blaine Sloan, *Advisory Jurisdiction of the International Court of Justice*, 38 CAL. L. REV. 830, 856 (1950).

<sup>79</sup> John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT’L L.J. 129, 166 (2000); see also *Conditions of Admission*, 1948 I.C.J. at 11 (“To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.”).

<sup>80</sup> *Conditions of Admission*, 1948 I.C.J. at 10.

<sup>81</sup> *Id.* at 9. Despite these requirements, “it is generally accepted (although somewhat ironic) that, once admitted, members apparently are no longer formally held to the fulfillment of [the ‘peace-loving’] condition.” Yehuda Z. Blum, *UN Membership of the “New” Yugoslavia: Continuity or Break?*, 86 AM. J. INT’L L. 830, 831 n.3 (1992).

<sup>82</sup> *Conditions of Admission*, 1948 I.C.J. at 9.

<sup>83</sup> *Id.*

Consequently, the Court reasoned, Article 4(1) “would lose its significance and weight, if other conditions, *unconnected with those laid down*, could be demanded.”<sup>84</sup>

The Hague Court acknowledged that the conditions set forth in Article 4(1) of the Charter do “not forbid the taking into account of any factor which it is possible *reasonably and in good faith* to connect with the conditions laid down in that Article,”<sup>85</sup> which implicitly included “relevant political factor[s].”<sup>86</sup> Those factors, however, were limited to “an appreciation . . . of such circumstances *of fact as would enable the existence of the requisite conditions to be verified*.”<sup>87</sup> Thus, questions of admission were limited entirely to an inquiry of “whether or not the prescribed conditions are fulfilled”<sup>88</sup> based upon a purely factual inquiry incorporating reasonable factors brought in good faith to the organization’s attention by member nations.<sup>89</sup> The Court explicitly rejected arguments that Article 4(2) expanded the scope of inquiry by permitting member nations to “advanc[e] considerations of political expediency, extraneous to the conditions of Article 4.”<sup>90</sup> Notwithstanding the ‘advisory’ nature of its opinion,<sup>91</sup> “[c]ompliance, particularly when directed to the UN Membership rather than at a single party, is exactly what the ICJ aims for in its advisory function when it seeks ‘to guide the United Nations in respect of its own action.’”<sup>92</sup>

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<sup>84</sup> *Id.* (emphasis added). The Hague Court further determined that any contrary interpretation of the exhaustive enumeration of prerequisites “would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions.” *Id.* at 10. Had the drafters of the Charter envisioned additional requirements, “they would undoubtedly have adopted a different wording.” *Id.*

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 11.

<sup>89</sup> See *supra* text accompanying notes 85–88.

<sup>90</sup> *Conditions of Admission*, 1948 I.C.J. at 11.

<sup>91</sup> “[T]here is some authority to suggest an advisory opinion may bind the U.N. organ in question.” Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT’L L.J. 1, 21 (1993).

<sup>92</sup> Tomer Broude, *The Legitimacy of the ICJ’s Advisory Competence in the Shadow of the Wall*, 38 ISR. L. REV. 189, 193 (2005).

2. *General Assembly Imposition of Procedural Requirements for Admission*

In 1946, the General Assembly passed Resolution 36, which requested that the Security Council establish procedural rules governing new member admissions to the U.N.<sup>93</sup> A year later, it adopted—together with its request for an advisory opinion from the Hague Court in Resolution 113<sup>94</sup>—a second resolution governing admissions.<sup>95</sup> Pursuant to Resolution 116, the General Assembly required that a nation submit a membership application containing a “declaration, made in a formal instrument, that it accepts the obligations contained in the Charter.”<sup>96</sup> Resolution 116 also provided that, where the Security Council either did not recommend membership or postponed consideration, “the General Assembly may, after full consideration of the special report of the Security Council, send back the application to the Security Council, together with a *full record of the discussion in the Assembly*, for further consideration and recommendation or report.”<sup>97</sup>

Until a state gains membership within the U.N., “it is excluded from participating in several hundred multilateral conventions that provide networks of international co-operation in a variety of fields.”<sup>98</sup> General Assembly Resolution 181, “which provided for the end of the [Palestine] mandate and partition . . . into independent Jewish and Arab states,”<sup>99</sup> committed the U.N. to accord Israel “*sympathetic consideration . . . to its application for admission to membership.*”<sup>100</sup> As early as three days after its declaration of independence in May 1948,<sup>101</sup> Israel commenced and

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<sup>93</sup> G.A. Res. 36(I), at 62, U.N. Doc. A/RES/36 (Nov. 19, 1946).

<sup>94</sup> See *supra* Part II.A.1.

<sup>95</sup> G.A. Res. 116 (II), at 22, U.N. Doc. A/RES/116 (Nov. 21, 1947).

<sup>96</sup> *Id.* Those obligations are contained within Article 4 of the Charter. See *infra* text accompanying note 103.

<sup>97</sup> G.A. Res. 116 (II), *supra* note 95 (emphasis added).

<sup>98</sup> Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT’L L.J. 29, 31–32 (1995).

<sup>99</sup> Caplen, *supra* note 37, at 731.

<sup>100</sup> G.A. Res. 181 (II), at 142, U.N. Doc. A/RES/181 (Nov. 29, 1947) (emphasis added).

<sup>101</sup> See Caplen, *supra* note 37, at 732 (“On May 14, 1948, one day prior to the anticipated termination of the British Mandate over Palestine, Jewish leaders proclaimed the establishment of the State of Israel within territories designated for a Jewish state under the U.N. Partition Plan.”); *Israel Requests Admission to U.N.*, WASH. POST, May 17, 1948, at 3.

“continually applied to the United Nations for membership.”<sup>102</sup> Israel initiated its requests for admission “as a member of the United Nations in accordance with Article 4 of the Charter,”<sup>103</sup> in reliance upon Resolution 181, and in compliance with Resolution 116.

### 3. *The U.N. Violates the Hague Court's Ruling and Its Own Procedural Requirements*

Despite these affirmative acts, Israel's “hopes for admission . . . were dealt a severe blow”<sup>104</sup> by Arab nations still in a state of active war with it.<sup>105</sup> In actions “unprecedented in the history of admissions to the United Nations,”<sup>106</sup> these nations “never let [Israel] play totally at peace. They made the playgrounds dangerous”<sup>107</sup> and successfully campaigned to defeat Israel's application.<sup>108</sup> The initial preclusion of Israel's membership violated the mandate set forth in Resolution 181, the Hague Court's advisory opinion interpreting the requirements for U.N. membership, and Resolution 116. In essence, the U.N. set forth a policy of isolating Israel

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<sup>102</sup> Stacy Howlett, Note, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 129 n.96 (2001). Israel “extended a hand of true friendship to all peace-loving nations, pledging its co-operation, under the auspices of the United Nations, in the preservation and defence of universal peace and progress.” Speech to the General Assembly by Foreign Minister Moshe Sharett (May 11, 1949), available at <http://www.mfa.gov.il>. Its applications were considered by the Security Council on December 2, 15, and 17, 1948. Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 43 AM. J. INT'L L. 288, 299 (1949).

<sup>103</sup> Press Release, United Nations Dept. of Public Information, *Israel Requests Admission to United Nations*, U.N. Doc. PAL/387 (Nov. 29, 1948), available at <http://domino.un.org>; see also Thomas J. Hamilton, *Israel Files U.N. Application; Support by U.S. Is Foreseen*, N.Y. TIMES, Nov. 30, 1948, at 1. Israeli Minister Moshe Shertok asserted that Israel's admission to the organization was “fully consistent with United Nations policy on Palestine.” Press Release, *supra*.

<sup>104</sup> *Israel's U.N. Bid Dealt Severe Blow*, WASH. POST, Dec. 10, 1948.

<sup>105</sup> See *infra* Part II.A.3.b. The 1948 war “engaged regular military forces from Egypt, Transjordan, Syria, Lebanon, Iraq, ‘irregular’ Palestinian forces, the Arab Liberation Army sponsored by the Arab League, and the [Israel Defense Forces].” Caplen, *supra* note 37, at 732. Armistice agreements were not concluded until 1949. *Id.* at 733.

<sup>106</sup> NAT'L STUDIES ON INT'L ORG., ISRAEL AND THE UNITED NATIONS 58 (1956).

<sup>107</sup> Lidz, *supra* note 30, at 115.

<sup>108</sup> Caplen, *supra* note 37, at 738.

*prior to* its admission, thereby fostering a relationship tainted by Israeli mistrust for the organization.<sup>109</sup>

Ignoring Israel's satisfaction of the requirements set forth in Resolution 116,<sup>110</sup> the General Assembly permitted several nations to violate Article 4 and the Hague Court's legal interpretation of that provision<sup>111</sup> by tainting discussion of Israel's qualifications for membership with accusations devoid of "circumstances of fact"<sup>112</sup> and factors not "reasonably and in good faith" connected to Article 4.<sup>113</sup> For example, Iraq objected to Israel's application as "the most daring and unjust proposal which had been submitted" to the organization.<sup>114</sup> Both the Arab Higher Committee and Syria claimed that Israel was not a peace-loving nation, citing an alleged "Jewish record of terrorism," "atrocities and pillage," as well as "atrocities and [Israel's] aggression on territory not assigned to it" as reasons warranting rejection, respectively.<sup>115</sup> Lebanon maintained that "the admission of Jews of Palestine to membership . . . was contrary to the procedure laid down in Article 4" and "contested the legality of the State of Israel."<sup>116</sup> Egypt argued that Israel's application should be summarily rejected because applicants for admission to the U.N. "must be a State" and "no Jewish State existed."<sup>117</sup>

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<sup>109</sup> See William Orme, *The World; Israel, U.N. Now at Odds*, L.A. TIMES, Apr. 30, 2002, at 10.

<sup>110</sup> See *supra* Parts II.A.1.-2.

<sup>111</sup> The Hague Court's decision was issued two weeks after Israel declared its independence. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 8 (May 28). Thus, the General Assembly was aware of the Court's opinion and the legal requirements for membership when it evaluated Israel's application.

<sup>112</sup> See *supra* Part II.A.1

<sup>113</sup> See *supra* text accompanying notes 85-88.

<sup>114</sup> Continuation of the discussion on the progress report of the United Nations Mediator on Palestine, 212th mtg., Dec. 1, 1948, available at <http://domino.un.org/UNISPAL.NSF/85255db800470aa485255d8b004e349a/35b9b641f271dc0485256c72005d81be!OpenDocument> [hereinafter *U.N. Progress Report*].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* But see STATEMENT BY THE PRESIDENT ANNOUNCING RECOGNITION OF THE STATE OF ISRAEL, PUB. PAPERS 258 (1948) (officially according recognition by the United States of the Provisional Government of Israel as the de facto authority of the state); Statement by Philip C. Jessup, U.S. Delegate to the General Assembly, Nov. 28, 1948, 19 DEP'T ST. BULL. 657, 658 (1948) ("The second basic premise is that 'A Jewish state called Israel exists in Palestine and there are no sound reasons for assuming that it will not continue to  
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*a. Linking Admissions Decisions to Recognition*

Under international law, “a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>118</sup> While formal recognition of a state is not required, nations are required to “treat as a state an entity” that satisfies the aforementioned criteria.<sup>119</sup> U.S. Representative Philip C. Jessup reiterated these points before the Security Council in December 1948:

We are all aware that under the traditional definition of a state in international law all of the great writers have pointed to four qualifications:

First: There must be a people.

Second: There must be a territory.

Third: There must be a government.

Fourth: There must be capacity to enter into relations with other states of the world.

...

I believe that there would be unanimity that Israel exercises complete independence of judgment and of will in forming and in executing its foreign policy.<sup>120</sup>

Those nations that disputed or refused to recognize Israel’s existence as a state, therefore, plainly ignored these established principles.<sup>121</sup>

Professor Chang distinguishes between state recognition and government recognition.<sup>122</sup> The former “signifies that the recognizing state is willing to enter into relations with the recognized state on equal

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do so.”); Suzanne Fields, *Celebrate Democracy With Israel*, TIMES UNION (N.Y.), May 1, 2007, at A11, available at 2007 WLNR 8253753 (noting that the Soviet Union recognized Israel three days later after the United States).

<sup>118</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 201.

<sup>119</sup> *Id.* § 202(1); see also *id.* cmt. b (“An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states.”).

<sup>120</sup> *Discussion of Israeli Application for Membership*, 19 DEP’T ST. BULL. 723, 724 (1948) [hereinafter *Israeli Application*].

<sup>121</sup> See *supra* text accompanying note 105.

<sup>122</sup> See Y. Frank Chiang, *State, Sovereignty, and Taiwan*, 23 FORDHAM INT’L L.J. 959, 968 (2000).

footnoting,” is “permanent[,] and cannot be withdrawn unless the recognized state becomes extinct.”<sup>123</sup> The latter, however, recognizes “a certain government as the legitimate representative of another state” and “may be withdrawn or repudiated.”<sup>124</sup> While both usually occur simultaneously,<sup>125</sup> neither are ultimately required under Article 4.<sup>126</sup>

In fact, “in the case of . . . the United Nations, it has been held that the admission to membership of a state not yet recognized by some of the members does not imply recognition by the latter.”<sup>127</sup> Thus, U.N. acceptance of Israel constituted no implicit recognition of it by Arab states.<sup>128</sup> Accordingly, the status attributed to Israel by the Arab countries

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 968.

<sup>125</sup> *See id.* at 969.

<sup>126</sup> *See supra* Part II.A.1.

<sup>127</sup> Philip Marshall Brown, *The Recognition of Israel*, 42 AM. J. INT’L L. 620, 621 (1948).

<sup>128</sup> Representative Jessup argued before the Security Council:

We are aware . . . that there are Members of the United Nations who do not maintain diplomatic relations with other Members of the United Nations. Full membership in the United Nations does not necessarily involve bilateral diplomatic relationships among those Members. I think . . . that confusion has arisen on this subject of the relationship of the recognition of governments and the admission of states to membership in the United Nations . . . .

. . .

[T]he existence of diplomatic relations among Members of the United Nations on a bilateral basis is not a feature inherent in full membership in the organization, so the question of extension of bilateral diplomatic recognition or relationships between a Member of the United Nations and a new Member of the United Nations is not a question which lies at the root of action upon application for membership. Therefore, . . . the issue is not one which should confuse our consideration of the applicability of article 4 of the Charter to any applicant for membership.

*Israeli Application*, *supra* note 120, at 725; *see also* Oscar Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 25 BRIT. Y.B. INT’L L. 91, 114 (1948) (noting that the U.N. should implement a “clear and express rejection of the doctrine of implied recognition as applied to the actions of the organs of the United Nations . . . . [T]here is no legal rule which requires that recognition be implied from the act of an organ admitting a state to membership or participation.”); Briggs, *supra* note (continued)

challenging its admission was ultimately immaterial to the question of whether Israel satisfied the criteria of Article 4 and Resolution 116.<sup>129</sup> Nonetheless, the objections lodged against Israel's admission into the U.N. only solidified reliance upon factual misapprehensions that neither "enable[d] the existence of the requisite conditions to be verified" nor constituted "relevant" political factors.<sup>130</sup>

*b. Influencing Admissions Decisions Through Political Considerations*

Despite the express language of Resolution 181,<sup>131</sup> Syria protested that "sympathetic consideration to an application by Israel for admission [was] premature and could not be justified by the Charter or jurisprudence of the United Nations or by the principles of international law."<sup>132</sup> Like Lebanon and Egypt,<sup>133</sup> Syria advanced a similar argument: whereas "membership in the United Nations was based on the sovereign equality of States[,] . . . the Jewish State could not be considered as having a right to this equality with other Members."<sup>134</sup> Moreover, Syria maintained that Israel "had no

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72, at 178 ("[T]here is no necessary connection between recognition and admission to membership.").

<sup>129</sup> See *infra* Part II.A.4. The Arab League still has not recognized Israel. See Steven Erlanger, *Jordan's King in West Bank to Discuss Peace Efforts*, N.Y. TIMES, May 13, 2007, at 6. Twenty-one nations, including the Palestinian Authority and Eritrea, the latter accorded observer status, comprise the Arab League, which has officially boycotted Israel since 1948. Martin A. Weiss, *Arab League Boycott of Israel*, CRS REPORT FOR CONGRESS, Apr. 19, 2006, at 1 n.1, available at <http://fpc.state.gov/documents/organization/65777.pdf>. Egypt, Jordan, and the Palestinian Authority concluded peace treaties with Israel and ended their boycott. *Id.* at 3.

<sup>130</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 10 (May 28).

<sup>131</sup> See *supra* text accompanying notes 99 & 100.

<sup>132</sup> *U.N. Progress Report*, *supra* note 114. Egypt believed that the U.N. "would wreck its attempts to bring peace to Palestine by considering the Jewish application." *Id.*

<sup>133</sup> See *supra* text accompanying notes 116 & 117.

<sup>134</sup> *U.N. Progress Report*, *supra* note 114. Syria further criticized Israel's recognition by President Harry S. Truman as "hasty," prompting Warren Austin, United States Ambassador to the U.N., to respond:

I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States in the exercise of that high political act of recognition of the *de facto* status of a state. Moreover, I would not admit here . . . that there exists a tribunal

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existence, except what it had gained by aggression.”<sup>135</sup> It added that “Jews were violating [U.N.] resolutions time and time again,” and the U.N. should not “reward them for [these] crime[s]” with admission.<sup>136</sup>

All of these arguments, motivated by political considerations<sup>137</sup> “extraneous to the conditions” of Article 4,<sup>138</sup> nonetheless prompted the General Assembly to ignore Resolution 181<sup>139</sup> and to deny Israel’s request for an “urgent decision” upon its membership application.<sup>140</sup> Instead, the application was “referred” to the U.N.’s “membership committee for study,”<sup>141</sup> during which time the General Assembly conducted “a ‘severe investigation’ wherein the Israeli representative ‘was subjected to a searching cross-examination concerning his government’s views on a number of outstanding topics.’”<sup>142</sup> Its membership application, accorded no “sympathetic consideration” as mandated by Resolution 181<sup>143</sup> and undermined by politically motivated factors the Hague Court expressly held were precluded from the Article 4 calculus,<sup>144</sup> was ultimately

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of justice or of any other kind, anywhere, that can pass upon the legality  
or the validity of that act of my country.

*Quoted in Brown, supra note 127, at 621.*

<sup>135</sup> *Quoted in Liang, supra note 102, at 301.*

<sup>136</sup> *U.N. Progress Report, supra note 114, § XI; cf. Rosalyn Cohen, The Concept of Statehood in United Nations Practice, 109 U. PA. L. REV. 1127, 1134 (1961) (suggesting that Arab states, “led by Syria, contended [only] that since Israel’s borders were contested, its statehood must be denied”).*

<sup>137</sup> *See supra* text accompanying note 105.

<sup>138</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 11 (May 28).*

<sup>139</sup> Israel argued that the General Assembly “had already committed itself in [Resolution 181] to given sympathetic consideration to the applications of either of the two States [one Jewish, one Arab] envisaged in that resolution. If it should now fail to admit Israel, it would be repudiating its own decision.” *U.N. Progress Report, supra note 114.*

<sup>140</sup> Thomas J. Hamilton, *U.N. Council Delays Action on Israel’s Membership Bid*, N.Y. TIMES, Dec. 3, 1948 at 1. On October 24, 1948, President Truman stated that the U.S. “look[s] forward to the admission of the State of Israel to the United Nations and its full participation in the international community of nations.” *Position on Provisional Government of Israel, 19 DEP’T ST. BULL. 582, 582 (1948).*

<sup>141</sup> Hamilton, *supra note 140.*

<sup>142</sup> Caplen, *supra note 37, at 738 n.153.*

<sup>143</sup> G.A. Res. 181(II), *supra note 100, pt. I, ch. 4, pt. F.*

<sup>144</sup> *See supra* Part II.A.1. The General Assembly, in Resolution 197, provided that each member state “in exercising its vote on the admission of new Members, should act in  
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rejected,<sup>145</sup> demonstrating that “admission of members has become so closely tied to the world conflict that applications for membership are not examined on the basis of the applicant’s qualifications for membership as the Charter provides . . . .”<sup>146</sup>

#### 4. *Reapplication with Impermissible Admission Conditions*

Israel’s “long and exhaustive . . . application for membership”<sup>147</sup> process continued when it reapplied in 1949. Again its status as a state was questioned.<sup>148</sup> Upon vote in the Security Council, only Egypt lodged opposition<sup>149</sup> on grounds that the procedure followed and the ultimate recommendation supporting admission were both defective.<sup>150</sup> Security Council Resolution 69 “recommend[ed] to the General Assembly that it admit Israel to membership.”<sup>151</sup> When the General Assembly’s Ad Hoc Political Committee opened discussion of Israel’s application and the Security Council’s recommendation, both Lebanon and Iraq objected.<sup>152</sup>

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accordance with the foregoing opinion of the International Court of Justice.” G.A. Res. 197 (III), at 31, U.N. Doc. A/RES/197 (Dec. 8, 1948).

<sup>145</sup> See Caplen, *supra* note 37, at 738 n.154; Liang, *supra* note 102, at 301 (“The application of Israel was eventually put to the vote and was rejected . . .”).

<sup>146</sup> Joseph E. Black, *The United Nations Charter: Problems of Review and Revision*, 24 U. CIN. L. REV. 26, 47 (1955); see also William Samore, *The New International Law of Alejandro Alvarez*, 52 AM. J. INT’L L. 41, 54 (1958) (“When Members of the United Nations vote on an applicant’s admission, states in fact are mainly guided, not by the requirements for membership in the United Nations, but by their own policy.”).

<sup>147</sup> *U.S. Supports Israeli’s Application for Membership in U.N.*, 20 DEP’T ST. BULL. 655, 655 (1949) [hereinafter *U.S. Supports Israeli’s Application*].

<sup>148</sup> See *The United States in the United Nations*, 20 DEP’T ST. BULL. 295, 296 (1949) (noting that United States Ambassador Warren R. Austin stated “[t]here is no doubt . . . but that Israel constitutes a State within the meaning of that term in International Law”); *supra* text accompanying notes 115–30.

<sup>149</sup> *The United States in the United Nations*, *supra* note 148. The United Kingdom abstained, *id.*, but indicated that “[w]e shall not vote against Israel’s admission . . . we do not intend to use our privileged vote to block the admission of any State which obtains the requisite majority.” Leo Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 YALE L.J., 209, 218 (1951). Of the members of the Security Council, only Egypt did not recognize Israel. Cohen, *supra* note 136, at 1135 n.34.

<sup>150</sup> Gross, *supra* note 149, at 219. Iraq raised similar objections in the General Assembly. See *infra* note 152.

<sup>151</sup> S.C. Res. 69, U.N. Doc. S/1277 (Mar. 4, 1949).

<sup>152</sup> *United States in the United Nations*, 20 DEP’T ST. BULL. 584, 584 (1949). Lebanon proposed that Israel’s admission be postponed until Israel “accepted in principle the  
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Saudi Arabia accused Israel of committing atrocities “not unlike those perpetrated by the Nazis.”<sup>153</sup>

On May 5, 1949, Israeli representative Abba Eban presented a two-hour statement describing Israel’s position on a variety of issues.<sup>154</sup> U.S. Ambassador Warren R. Austin reminded the General Assembly that “we are at this time concerned *solely with the qualifications* of the State of Israel for Membership in the United Nations.”<sup>155</sup> Six days following Israel’s presentation, the General Assembly adopted Resolution 273<sup>156</sup> and “decided that Israel was entitled to recognition as a member of the family of nations.”<sup>157</sup> This decision “was logical [since] the United Nations, which had created the State of Israel, should also admit it to membership.”<sup>158</sup>

Notwithstanding the Hague Court’s determination that admission could not be “dependent on conditions not expressly provided” in Article 4(1),<sup>159</sup>

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internationalization of Jerusalem and the restoration of Arab refugees to their homes.” *Id.* Iraq proposed, but later withdrew, a resolution questioning the legality of the Security Council vote. *Id.* It also requested that the Hague Court rule on the legality of the Security Council’s vote recommending Israel’s admission. Gross, *supra* note 149, at 223. Ultimately, the merits of whether the Security Council’s recommendation was valid were never reached “since it was ruled that the General Assembly had not the power to question a decision of the Security Council.” *Id.* at 219.

<sup>153</sup> U.N. GAOR, 3d Sess., 207th plen. mtg., U.N. Doc. A/PV.207, (May 11, 1949), (statement of Saudi Arabian representative).

<sup>154</sup> *The United States in the United Nations*, *supra* note 152, at 584.

<sup>155</sup> *U.S. Supports Israeli’s Application*, *supra* note 147, at 655 (emphasis added).

<sup>156</sup> G.A. Res. 273 (III), at 18, U.N. Doc. A/RES/273 (May 11, 1949). Twelve nations voted against Israel’s admission: Afghanistan, Burma, Egypt, Ethiopia, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, and Yemen. Briggs, *supra* note 72, at 178 n.36. Syria voted against “admission of the applicant State, the creation of which had been made possible only by the use of force against the Arabs in Palestine. Syria would never accept or condone that fact.” U.N. GAOR, 3d Sess., *supra* note 153 (statement of Syrian representative). Egypt proposed that the resolution’s preamble include language denouncing Israel’s alleged invasion of Palestine, desecration of holy sites, and defiance of the U.N. in the hope that the General Assembly “would not bring everlasting shame and humiliation upon it” by admitting Israel. *Id.* (statement of Egyptian representative).

<sup>157</sup> Elmer M. Million & Arthur S. Katz, *Provisions on Religious Freedom in the Draft Israeli Constitution—A Comparative Study*, 24 N.Y.U. L.Q. REV. 846, 882 (1949).

<sup>158</sup> U.N. GAOR, 3d Sess., *supra* note 153.

<sup>159</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 12 (May 28); *supra* Part II.A.1.

which Cuba cited during discussion of Israel's application,<sup>160</sup> Resolution 273 impermissibly conditioned Israel's admission upon acceptance of Resolutions 181 and 194<sup>161</sup> when it recalled "declarations and explanations made by the representative of the Government of Israel before the *ad hoc* Political Committee."<sup>162</sup> In fact, it was urged that the report on Israel's admission explicitly "take[] note of the assurances given by the representative of the State of Israel."<sup>163</sup> But it was also recognized that Israel "was not in a position to comply with all that was expected of a new state," nor was it required to do so.<sup>164</sup> Membership only requires that a state "accept the obligations of the *Charter*," not resolutions adopted prior to the state's admission.<sup>165</sup> Moreover, Israel's membership "was completely divorced from other resolutions" and the issues set forth in those resolutions "could not be allowed to determine a position" on its admission.<sup>166</sup>

*B. Perpetuating an Unprecedented Separate and Unequal Status*<sup>167</sup>

Israel, which "entered an international arena beclouded by grave conflict,"<sup>168</sup> took its U.N. seat with the expectation that "the democratic

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<sup>160</sup> Cuba stressed that the Hague Court's opinion set forth:

five conditions laid down in Article 4, paragraph 1 of the Charter[, which] were the only conditions to be considered in deciding on admission to membership in the United Nations. Despite that opinion, there had been a tendency, in discussing the application of Israel, to make those conditions contingent upon other considerations.

U.N. GAOR, 3d Sess., *supra* note 153 (statement of Cuban representative).

<sup>161</sup> See G.A. Res. 273, *supra* note 156. Resolution 181 "provided for the end of the [British] mandate and partition of Palestine into independent Jewish and Arab states alongside a special international regime for Jerusalem." Caplen, *supra* note 37, at 731. Resolution 194 established a Palestine Conciliation Commission. See G.A. Res. 194 (III), U.N. Doc. A/RES/194 (Dec. 11, 1948).

<sup>162</sup> G.A. Res. 273, *supra* note 156.

<sup>163</sup> *U.S. Supports Israeli's Application*, *supra* note 147, at 656.

<sup>164</sup> U.N. GAOR, 3d Sess., *supra* note 153 (statement of Polish representative).

<sup>165</sup> Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 4, 9 (May 28) (emphasis added).

<sup>166</sup> U.N. GAOR, 3d Sess., *supra* note 153 (statement of Cuban representative).

<sup>167</sup> "Separate is inherently unequal." Geoffrey Graber, Note, *Choosing the Chosen: The Validity of Racial Restrictions on the Alienation of Property in Israel and the United States*, 73 S. CAL. L. REV. 437, 463 (2000).

<sup>168</sup> U.N. GAOR, 3d Sess., *supra* note 153 (statement of Israeli Foreign Minister).

principle of the equality of nations, small and large, enshrined . . . in the U.N. Charter”<sup>169</sup> would be extended to it. Instead, Israel has “suffered a state of inequality”<sup>170</sup> by having been relegated “second-class status”<sup>171</sup> and “pounded on . . . like a manic drummer.”<sup>172</sup> It has succumbed to a “long-standing tradition” of isolation<sup>173</sup> within the organization, which maintains “a double standard . . . when it comes to . . . the state of Israel.”<sup>174</sup> Since its admission to the U.N., the Security Council “has devoted fully a third of its energy and criticism to the policies of a single country: Israel.”<sup>175</sup> During the sixty-first session of the General Assembly alone, one-fourth of the resolutions adopted “focused on and criticized Israel.”<sup>176</sup> In fact, “[n]o other nation is accorded such scrutinizing treatment.”<sup>177</sup>

Moreover, beginning in the 1960s and lasting over twenty-five years, the General Assembly entertained an “annual vote on expelling Israel,” typically a “kind of litmus test of loyalty to the Arab bloc and the Islamic Conference” with the assistance of the Soviet Union.<sup>178</sup> Numerous other

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<sup>169</sup> Elias Davidsson, *The U.N. Security Council's Obligations of Good Faith*, 15 FLA. J. INT'L L. 541, 561 n.83 (2003); James C. Owens, Note, *Government Failure in Sub-Saharan Africa: The International Community's Options*, 43 VA. J. INT'L L. 1003, 1034 (noting that the U.N. Charter “enshrined the equality of nation-states”); see also G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (Dec. 14, 1960) (reaffirming “the equal rights of . . . nations large and small”).

<sup>170</sup> *Treatment of Israel Hearing*, supra note 57, at 4 (statement of Rep. Ros-Lehtinen).

<sup>171</sup> *Developments in the Middle East: Hearing Before the House Comm. on Int'l Relations*, 105th Cong. 23 (1998) (statement of Rep. Rothman).

<sup>172</sup> Tom Teepen, *The U.N.'s Continuing Anti-Israel Slant*, NEW ORLEANS TIMES PICAYUNE, Dec. 20, 1999, at 7B, available at WLNR 1201189.

<sup>173</sup> *Israel-UN Relations*, supra note 63.

<sup>174</sup> *Treatment of Israel Hearing*, supra note 57, at 6 (statement of Rep. Rothman).

<sup>175</sup> Tell, supra note 62. The General Assembly has similarly been utilized as a “forum for isolating and chastising Israel.” ANTI-DEFAMATION LEAGUE, ANTI-ISRAEL BIAS AT THE U.N. 2 (Sep. 2004), available at [http://www.adl.org/international/2004-09\\_un\\_ant\\_israel\\_bias.pdf](http://www.adl.org/international/2004-09_un_ant_israel_bias.pdf).

<sup>176</sup> Permanent Mission of Israel to the United Nations, *Resolution on the Arab-Israeli Conflict: 62nd Session of the General Assembly* (Sep.–Dec. 2007), available at <http://israel-un.mfa.gov.il/mfm/Data/128874.doc>. [hereinafter *Situation in the Middle East*].

<sup>177</sup> *Israel-UN Relations*, supra note 63.

<sup>178</sup> Jeane Kirkpatrick, *The U.N. Vote on Israel*, WASH. POST, Oct. 23, 1989, at A15. For example, in 1982 the United States warned, in response to a General Assembly vote calling for a complete international boycott of Israel, that “any move to expel Israel from the UN  
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efforts to either expel Israel<sup>179</sup> or “place the legitimacy of the State of Israel in question” have been ongoing.<sup>180</sup> No other nation has engaged in an “ongoing struggle to receive fair treatment” within the U.N.,<sup>181</sup> and no other nation is “excluded . . . when it comes to most United Nations organs.”<sup>182</sup> The unfair treatment to which Israel has been subjected ultimately precludes it from exercising legal rights accorded to all U.N. members.<sup>183</sup>

*1. Implementing the Regional Group System in Contravention of the U.N. Charter*

The “majority of UN membership . . . adhere[s] to the customary and more politically colored ‘regional group’ concept,”<sup>184</sup> which was devised to effectuate equitable distribution policies and the belief that “states within each classification scheme share similar values and preferences.”<sup>185</sup> Regional groups are based upon the “essentially Victorian world view that prevailed when the United Nations regions were established half a century ago.”<sup>186</sup> As an intermediary between individual states and the whole U.N., regional groups “can establish policies keyed to the abilities of states in the

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would have ‘serious consequences.’” Alexander Zvielli, *From Our Archives*, JERUSALEM POST, Feb. 7, 2007, at 14.

<sup>179</sup> See, e.g., Pub. L. 99-93, Title I, 144, 99 Stat. 405, 424–25 (codified at 22 U.S.C. § 278e note) (Supp. III 1985) (noting that the United States would reduce its annual assessed contribution to the U.N. if Israel “is illegally expelled, suspended, denied its credentials, or in any other manner denied its right to participate” in the organization); JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 223 (1990) (advocating that Israel should be expelled from the U.N.).

<sup>180</sup> S. Res. 186, 105th Cong. (1998).

<sup>181</sup> Caplen, *supra* note 37, at 739.

<sup>182</sup> Gerald M. Steinberg, *The UN, the ICJ and the Separation Barrier: War by Other Means*, 38 *ISR. L. REV.* 331, 345 (2005) (quoting Alan M. Dershowitz, *Israel Follows its Own Law, Not Bigoted Hague Decision*, JERUSALEM POST, July 11, 2004).

<sup>183</sup> Teepen, *supra* note 172 (“Crucially, alone of all member nations, Israel has been denied membership in any of the U.N.’s five regional groups. As a result, it is barred from participating and voting in most major U.N. organizations and from being elected as a non-permanent member of the Security Council.”); see *infra* Part II.B.1.

<sup>184</sup> Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 *AM. J. INT’L L.* 632, 640 (2005).

<sup>185</sup> William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 *COLUM. J. TRANSNAT’L L.* 299, 346 (2001).

<sup>186</sup> Barbara Crossette, *For Israel, Long Denied Full U.N. Privileges, Some Progress*, *N.Y. TIMES*, Oct. 24, 1999, at A6.

region to respond.”<sup>187</sup> They also impede the expeditious function of the organization.<sup>188</sup>

The U.N. Charter neither mentions nor mandates the creation of regional groups.<sup>189</sup> In fact, regional groups, established two decades *after* the U.N. Charter was adopted, are “voluntary,” and have “no basis in the UN Charter or in its Resolutions.”<sup>190</sup> Moreover, the Charter speaks only in terms of “equitable geographic distribution” in the appointment of non-permanent members to the Security Council and provides no procedure for achieving such equity.<sup>191</sup> Whereas Article 52 authorizes “collective action”<sup>192</sup> by contemplating the establishment of regional arrangements or agencies whose activities are “consistent with,” the U.N.,<sup>193</sup> these agencies,

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<sup>187</sup> Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 142 n.218 (2004) (quoting BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW & POL’Y* 21-1 (2003)). For example, regional groups have advocated the creation of new, permanent Security Council seats based upon regional representation. See Amber Fitzgerald, *Security Council Reform: Creating a More Representative Body of the Entire U.N. Membership*, 12 PACE INT’L L. REV. 319, 346 (2000).

<sup>188</sup> See IN LARGER FREEDOM: TOWARDS SECURITY, DEVELOPMENT AND HUMAN RIGHTS FOR ALL, REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS (Sept. 2005), U.N. Doc. A/59/2005, available at <http://www.un.org/largerfreedom/chap5.htm> (noting that an increase in the need for consensus, “first within each regional group and then at the level of the whole . . . has not proved an effective way of reconciling the interests of Member States. Rather it prompts the Assembly to retreat into generalities . . .”); see also *Treatment of Israel Hearings*, *supra* note 57, at 94, 99 (noting disparate treatment and dissatisfaction expressed by nations belonging to certain regional groups) (testimony of Harris Schoenberg).

<sup>189</sup> See Sir Robert Jennings, QC, *The Exclusion of Israel from the United Nations Regional Group System* (Nov. 4, 1999), available at <http://www.jewishvirtuallibrary.org/jsource/UN/Jennings.html> [hereinafter *Exclusion of Israel*].

<sup>190</sup> See *Israel’s Request to Join WEOG*, available at <http://www.jewishvirtuallibrary.org/jsource/UN/weog.html>.

<sup>191</sup> See U.N. Charter art. 23(1). Article 23 states that “due regard” is “specially paid . . . to equitable geographical distribution,” but such consideration is tertiary to (1) contributions of the member to the organization for the maintenance of peace and security, and (2) the U.N.’s other purposes. *Id.*

<sup>192</sup> Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT’L L. 765, 770 (1993).

<sup>193</sup> U.N. Charter art. 52(1). Article 52 permits the establishment of “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security.” *Id.*

such as the Organization of American States,<sup>194</sup> are *external* to the U.N. and provide additional fora for discussing issues *before* a U.N. member state elects to approach the Security Council.<sup>195</sup> As such, regional agencies are entirely separate from the *de facto* regional groupings within the General Assembly.

Today, member states are classified within five groupings based upon geographic location:<sup>196</sup> African, Asian, Eastern European, Latin American and Caribbean, and Western European and Others.<sup>197</sup> Despite no precedent authorizing their existence,<sup>198</sup> these 'voluntary' regional groupings<sup>199</sup> "have . . . become an essential part of the whole working structure of the Organisation."<sup>200</sup> More importantly, the organization has implicitly mandated that participation in the U.N. is contingent upon affiliation with a regional group,<sup>201</sup> which serves as the vehicle through which states nominate candidates.<sup>202</sup> Thus, the once voluntary regional group actually operates as *de facto* prerequisite to organizational participation.<sup>203</sup>

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<sup>194</sup> See Shiloh Hoggard, *Preventing Corruption in Colombia: The Need For an Enhanced State-Level Approach*, 21 ARIZ. J. INT'L & COMP. L. 577, 584 (2004). The Organization of American States is a "regional agency" within the U.N., rather than a regional group unto its own. See Charter of the Organization of American States, ch. 1 art. 1, available at <http://www.oas.org/juridico/english/charter.html>.

<sup>195</sup> See Anthony Clark Arend, Symposium, 7 DUKE J. COMP. & INT'L L. 3, 16 (1996).

<sup>196</sup> Aceves, *supra* note 185, at 345. *But see infra* Part II.B.3.

<sup>197</sup> See Committee on the Peaceful Uses of Outer Space, *Results of the Intersessional Informal Consultations on the Composition of the Bureaux of the Committee on the Peaceful Uses of Outer Space and its Subsidiary Bodies*, at 2, U.N. Doc. A/AC.105/L.245 (May 13, 2003); see also Aceves, *supra* note 185, at 345.

<sup>198</sup> See *supra* text accompanying note 189.

<sup>199</sup> See *supra* text accompanying note 190.

<sup>200</sup> Exclusion of Israel, *supra* note 189.

<sup>201</sup> Caplen, *supra* note 37, at 739; S. Res. 186, 105th Cong. (1998) ("[E]ligibility for election to the rotating seats of the Security Council, or other United Nations councils, commissions, or committees, is only available to countries belonging to a regional group."); see also Editorial, *U.N.'s Double Standard*, BOSTON HERALD, Dec. 14, 1999, at 32, available at 1999 WLNR 293707. (noting that "rotating members of the Security Council come from [regional] groups").

<sup>202</sup> Marilyn Henry, *Annan Decries Israeli Isolation at UN*, JERUSALEM POST, Dec. 14, 1999, at 5; see also H.R. 3236, 105th Cong. § 2(a)(1) (1998) (stating that membership in a regional bloc "serve[s] as the basis for participation in important activities of the United Nations, including rotating membership on the United Nations Security Council").

<sup>203</sup> See *infra* Part II.B.2.

2. *Utilizing Regional Groups as a De Facto Prerequisite to Full Membership Participation*

President Harry S. Truman remarked in 1945 that “[n]o one nation, no regional group, can or should expect, any special privilege which harms any other nation.”<sup>204</sup> Despite no constitutional mandate within the U.N. Charter<sup>205</sup> for the creation of regional groups,<sup>206</sup> “[t]here are a myriad of functions and activities of the United Nations in respect of which a Member . . . is not able to take part other than by way of its membership of one of the regional organisations.”<sup>207</sup> In essence, regional group membership ‘confers’ benefits upon member states that are already expressly accorded within the Charter. Nonetheless, the regional group regime has evolved into a *de facto* prerequisite for full membership participation that contravenes both President Truman’s admonition and member equality mandated under the Charter.<sup>208</sup> Nowhere is this impermissible use of regional groups to impose unjustifiable requirements upon member states more apparent than in the selection process for (1) jurists on the Hague Court; and (2) non-permanent, rotating membership on the Security Council.

a. *Representation on and Composition of the Hague Court*

The Hague Court, one of six primary U.N. organs,<sup>209</sup> constitutes “the principal judicial organ” of the U.N.<sup>210</sup> and consists of fifteen jurists.<sup>211</sup> Its composition is determined “regardless of [a judge’s] nationality,”<sup>212</sup> although “no two [judges] may be nationals of the same state.”<sup>213</sup> The General Assembly and Security Council independently elect candidates previously nominated by “the national groups in the Permanent Court of

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<sup>204</sup> *Address in San Francisco at the Closing Session of the United Nations Conference*, 1 PUB. PAPER 138, 141 (June 26, 1945) (emphasis added).

<sup>205</sup> See *supra* text accompanying note 79.

<sup>206</sup> See *supra* text accompanying notes 189 & 190.

<sup>207</sup> Exclusion of Israel, *supra* note 189.

<sup>208</sup> See *infra* Part II.B.3.

<sup>209</sup> The principal organs of the U.N. are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice (Hague Court), and the Secretariat. U.N. Charter art. 7, para. 1.

<sup>210</sup> U.N. Charter art. 92; Statute of the International Court of Justice art. 1 (1945).

<sup>211</sup> Statute of the International Court of Justice art. 3(1).

<sup>212</sup> *Id.* art. 2.

<sup>213</sup> *Id.* art. 3(1).

Arbitration.”<sup>214</sup> National groups comprise “groups of four persons designated by their respective governments pursuant to the 1907 Hague Convention for the Pacific Settlement of International Disputes,” which ensures that nominations to the Court remain independent from government influence.<sup>215</sup>

No other provision in either the U.N Charter or the statute of the Hague Court provides or requires that judges be selected based upon a regional grouping system utilized by the General Assembly. Nonetheless, “[a]lthough not written down, the U.N. custom is for a national of each of the Permanent Members of the Security Council to sit on the Court, with the ten remaining seats divided among jurists from the U.N.’s five regional groups.”<sup>216</sup> Thus, while the statute of the Hague Court requires only that the Court be composed of judges “of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law,” the U.N. has imposed the additional restriction of regional grouping system considerations upon qualified candidates that must be addressed as part of an applicant’s nomination process.<sup>217</sup>

*b. Qualification for Rotating Non-Permanent Security Council Membership*

Perhaps the most important U.N. organ is the Security Council, which is primarily responsible for “the maintenance of international peace and security”<sup>218</sup> and “enabl[ing] the world body to act decisively . . .”<sup>219</sup> Comprised of fifteen members elected by the General Assembly, of which five are permanent and ten are “non-permanent,”<sup>220</sup> the Security Council’s resolutions are binding upon any or all U.N. member states.<sup>221</sup> Non-permanent membership appointment to the Security Council for a two-year

<sup>214</sup> *Id.* art. 4(1); *see also id.* art. 8.

<sup>215</sup> Lori Fisler Damrosch, *Current Developments, The Election of Thomas Buergenthal to the International Court of Justice*, 94 AM. J. INT’L L. 579, 579 (2000).

<sup>216</sup> John R. Crook, Symposium, 1 NW. U.J. INT’L HUM. RTS. 2, 7 (2004).

<sup>217</sup> Statute of the International Court of Justice art. 2.

<sup>218</sup> U.N. Charter art. 24(1).

<sup>219</sup> A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 66 ¶244 (2004), *available at* <http://www.un.org/secureworld/report.pdf>.

<sup>220</sup> U.N. Charter art. 23(1).

<sup>221</sup> Amber Fitzgerald, *Security Council Reform: Creating a More Representative Bond of the Entire U.N. Membership*, 12 PACE INT’L L. REV. 319, 325 (2000).

term<sup>222</sup> is available to all members and is based, according to the U.N. Charter, upon the member's "contribution . . . to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution."<sup>223</sup> Although many member states are not selected for rotating membership in the Security Council, none, save one, have been precluded on account of the regional group membership requirement.<sup>224</sup>

### 3. *Ensuring A Preclusive Effect*

The issue of group membership as a prerequisite for a member state's opportunity to fully participate in the Security Council and appoint a national to the Hague Court has no impact upon any U.N. member state that belongs to a regional group.<sup>225</sup> For Israel, however, the issue has been exacerbated for nearly fifty years. Its consistent denial of an opportunity for membership within a regional group<sup>226</sup> effectively barred Israel from exercising the rights and privileges accorded to it as a member state under the Charter. Even after attaining probationary group membership,<sup>227</sup> which was extended indefinitely,<sup>228</sup> Israel's participatory rights have not equaled those of other members.<sup>229</sup> The constraints Israel's U.N. delegation continues to endure are unauthorized by the U.N. Charter and constitute plain and flagrant violations thereof.

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<sup>222</sup> U.N. Charter art. 23(2).

<sup>223</sup> *Id.* art. 23(1).

<sup>224</sup> Arnold Beichman, *Guess Who's at the U.N. Security Helm*, WASH. TIMES, June 5, 2002, at A14.

<sup>225</sup> In 2000, one report indicated that two nations, Israel and Estonia, belonged to no regional group. See Betsy Pisik, *The U.N. Report*, WASH. TIMES, Apr. 10, 2000, at A17. In fact, Estonia "chose not to join the Eastern European group, holding out for membership in the Western European caucus." *Israel Invited to Join Regional U.N. Group*, SUN-SENTINEL (Fla.), May 28, 2000, at 21A. It joined the Eastern European Group in May 2004. Permanent Mission of Estonia to the U.N., *Estonia in the United Nations*, available at [http://un.estemb.org/estonia\\_in\\_un](http://un.estemb.org/estonia_in_un).

<sup>226</sup> Crossette, *supra* note 186.

<sup>227</sup> See *infra* Part II.B.3.b.

<sup>228</sup> See *infra* text accompanying note 252.

<sup>229</sup> See *infra* Part II.B.3.b.

a. *The Struggle for Regional Group Belonging*

Geographically assigned to the Asian Group,<sup>230</sup> Israel has been “the only longstanding member . . . to be denied acceptance into any of the United Nations regional blocs . . . .”<sup>231</sup> Arab state members of the Asian Group<sup>232</sup> ensured that Israel remains “deliberately excluded”<sup>233</sup> and “frozen out”<sup>234</sup> of the geographical group.<sup>235</sup> Consequently, Israel was the “only member of the U.N. to be denied a chance to serve as a rotating member of the U.N. Security Council,”<sup>236</sup> earning it the dubious distinction of becoming the “*longest-serving* [and] *longest-standing member* of the U.N. to be denied th[at] right.”<sup>237</sup> Israel’s inability to “participate fully in [Security Council] deliberations and decisions”<sup>238</sup> ran afoul of the organization’s purpose of “uphold[ing] the principle of equality of states, which would ordinarily be a key requirement for right process in international decision-making.”<sup>239</sup> In response, Israel embarked upon a

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<sup>230</sup> Caplen, *supra* note 37, at 739; *see also* Haim Shapiro, *News in Brief*, JERUSALEM POST, Nov. 12, 1999, at 4A (noting that Israel has been lobbying to join the European regional group “because the heavily Arab Middle East regional group has rejected its inclusion”).

<sup>231</sup> H.R. 3236, 105th Cong. § 2(a)(1) (1998); *see also* S. 2334, 105th Cong. § 593(b)(1)(A) (1999); S. 2092, 105th Cong. (1998); H.R. 2711, 105th Cong. (1997); Henry, *supra* note 202 (noting that Israel “is the member of the U.N. that does not belong to one of the regional groups.”).

<sup>232</sup> Iran led opposition to Israel “taking up its natural regional affiliation in Asia.” Leslie Susser, *Israel Hoping to be Granted Membership Soon in U.N. Regional Group*, JERUSALEM REPORT, Dec. 20, 1999, at 9.

<sup>233</sup> *U.N.’s Double Standard*, *supra* note 201, at 32.

<sup>234</sup> Henry, *supra* note 202; Barbara Crossette, *Annan Calls For Better Treatment of Israel at United Nations*, N.Y. TIMES, Dec. 13, 1999, at A10; *see also* Teepen, *supra* note 172 (“Israel has always been shut out the Asian group, which includes all other Mideast states . . .”).

<sup>235</sup> *See infra* text accompanying note 261.

<sup>236</sup> *Treatment of Israel Hearing*, *supra* note 57, at 6 (statement of Rep. Rothman).

<sup>237</sup> *Id.* (emphasis added).

<sup>238</sup> *U.N.’s Double Standard*, *supra* note 201 (“Jerusalem has never served on the United Nations’ most important deliberative body.”).

<sup>239</sup> Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415, 488 (2006); *see also* Exclusion of Israel, *supra* note 189 (“Israel’s total exclusion from the regional group system . . . is a breach by Members of their obligations under the Charter. Israel’s continuing exclusion from the regional group system is both *unlawful and strikes at the roots of the principles on which the United Nations exists.*”) (emphasis added).

lobbying campaign for European regional group membership.<sup>240</sup> Those efforts, however, encountered substantial opposition.<sup>241</sup>

The bar against Israel's membership within a regional group was "inimical to the principles under which the United Nations was founded"<sup>242</sup> and only substantiates the fact that the "'international community' . . . has been unkind to Israel."<sup>243</sup> The regional group membership requirement has ensured that Israel—and the election of any Israeli candidate to positions within the organization—"would be impossible as long as Israel remains outside this grouping system."<sup>244</sup> The effects of such preclusion are all-encompassing: "Israel alone is not allowed membership in any of the Geneva-based regional groups that pick ICJ judges, [and therefore] no Israeli judge can sit on the court."<sup>245</sup> Fundamentally, Israel's unjustified preclusion from a regional group constituted a clear violation of Article 2 of the U.N. Charter, which expressly guarantees "sovereign equality of all its Members"<sup>246</sup> and that all members are "ensure[d] . . . the rights and benefits resulting from membership."<sup>247</sup>

*b. A Façade of Equality*

Today, the U.N. boasts that "'Israel is a full and long-standing member of the United Nations with the same rights and obligations as every other member."<sup>248</sup> Following "years of lobbying"<sup>249</sup> and months of delay

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<sup>240</sup> See Shapiro, *supra* note 230.

<sup>241</sup> Caplen, *supra* note 37, at 739–40.

<sup>242</sup> S. Res. 186, 105th Cong. (1998).

<sup>243</sup> Benny Avni, 'International Community' Should Be Led By Israel, N.Y. SUN, July 16, 2007, § Foreign, at 7.

<sup>244</sup> Alan Baker, *The International Criminal Court: Israel's Unique Dilemma*, 18 JUSTICE 19, 24 (Autumn 1998).

<sup>245</sup> Benny Avni, *Pontiff Rebukes Israel over Fence as Hearing Nears*, N.Y. SUN, Feb. 13, 2004, at 1.

<sup>246</sup> U.N. Charter art. 2, para. 1.

<sup>247</sup> *Id.* art. 2, para. 2.

<sup>248</sup> Editorial, *Banning U.N. Corruption*, WASH. TIMES, June 11, 2007, at A16 (quoting Secretary-General Ban Ki-Moon).

<sup>249</sup> Michael J. Jordan, *Can Israel Trust the UN Again*, CANADIAN JEWISH NEWS, Oct. 19, 2000, at 44, available at 2000 WLNR 156958. The United States also pressed for Israel's admission as both the House of Representatives and Senate introduced bills in 1998 "urging equitable treatment of Israel in the U.N." Caplen, *supra* note 37, at 740 (discussing H.R. 3236, 105th Cong. (1998); S. 2092, 105th Cong. (1998)); *supra* text accompanying notes 240–41.

precipitated by the European Union (EU),<sup>250</sup> Israel “attained official—albeit partial and temporary—entry” into the Western European and Others Group (WEOG) in May 2000.<sup>251</sup> Its temporary membership in the WEOG was “officially extended” four years later.<sup>252</sup>

Israel’s admission to the WEOG appeared to have vanquished Israel’s “second-class U.N. member[ship and] little hope of winning key diplomatic appointments.”<sup>253</sup> Lauded as a “breakthrough in Israel’s fifty-year exclusion from UN bodies,”<sup>254</sup> the cessation of a “long-standing, wholly inexcusable exclusion”<sup>255</sup> that “end[ed] its virtual disenfranchisement in the organization,”<sup>256</sup> this “partial[] rectif[ication of] an anomaly[] which has affected no other nation in the world”<sup>257</sup> was nonetheless accompanied by flagrant shortcomings: “Eventually, of course, the objective is to achieve permanent and equal status for Israel in the regional system, consistent with the United Nations Charter’s promise of equal treatment for all member states.”<sup>258</sup>

In fact, Israel’s membership was, at best, “bittersweet,”<sup>259</sup> subject to substantial conditions and constraints, none of which are authorized by or permitted under the U.N. Charter:

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<sup>250</sup> See Barbara Crossette, *After 40 Years, Israel May Be Losing Its Outsider Status at U.N.*, N.Y. TIMES, May 28, 2000, § 1, at 11.

<sup>251</sup> Jordan, *supra* note 249. Israel’s admission to the Western Europe and Others Group was opposed by “[m]ost members of the European Union.” Caplen, *supra* note 37, at 740 n.166.

<sup>252</sup> Permanent Mission of Israel to the United Nations, *Israel and the Western European and Others Group (WEOG)*, 002 BACKGROUND 1 (July 2007), available at <http://israel-un.mfa.gov.il/mfm/Data/120640.pdf> [hereinafter *Israel’s Membership in the WEOG*].

<sup>253</sup> Colum Lynch, *After 40 Years of Exclusion, Israel Allowed to Join U.N. Regional Bloc*, WASH. POST, May 31, 2000, at A24.

<sup>254</sup> MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 118 (2002).

<sup>255</sup> Betsy Pisik, *Tel Aviv Comes Out of Wilderness Joins Regional Bloc at U.N. of Western, Other Democracies*, WASH. TIMES, May 31, 2000, at A9.

<sup>256</sup> Crossette, *supra* note 250.

<sup>257</sup> *Israel-UN Relations*, *supra* note 63.

<sup>258</sup> Letter to the Editor, *On the Brink of Mideast Change*, N.Y. TIMES, June 3, 2000, at A12 (statement of David A. Harris, Executive Director of the American Jewish Committee).

<sup>259</sup> Barbara Crossette, *Israel’s Bittersweet Moment: One Step Out of Isolation at U.N.*, N.Y. TIMES, June 1, 2000, at A6.

One is that temporary membership will be extended initially for only four years, after which Israel's relationship with the group would be reviewed. Israel would also have to forgo seeking elected positions for two years. American officials say intense competition for contested posts was a major factor in keeping Israel out of the Western European group. Other positions in the United Nations system will be closed to Israel for longer periods because of past agreements. Israel must formally accept the limited invitation.<sup>260</sup>

While it accepted admission to the WEOG, Israel also pledged to continue seeking membership "in its natural grouping in the Asian Group that continues to deny it admission."<sup>261</sup>

Such a pledge reflects the extent to which Israel's temporary membership conditions restrict its activities in the organization. Israel's WEOG participation is limited only to New York,<sup>262</sup> effectively barring its presence in WEOG meetings in any other U.N. location,<sup>263</sup> including the U.N.'s European headquarters in Geneva.<sup>264</sup> These geographical limitations prevent Israel "from nominating candidates to positions in UN bodies where elections for those bodies are not organized by the New York regional group system."<sup>265</sup> Another condition of WEOG membership requires Israel to "forgo the chance to hold the most influential seats, including on the Security Council, at least for the foreseeable future."<sup>266</sup> Notwithstanding these conditions, Israel embraced its membership in the

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<sup>260</sup> Crossette, *supra* note 250.

<sup>261</sup> *Israel-UN Relations*, *supra* note 63.

<sup>262</sup> See Statement by Shlomo Ben-Ami, Acting Minister of Foreign Affairs, General Debate of the 55th General Assembly of the United Nations, Sept. 18, 2000, available at <http://www.un.org/ga/webcast/statements/israelE.htm> ("We hope that Israel's admission in the Western Group in the International Organizations based outside of New-York will be secured soon.").

<sup>263</sup> Betsy Pisik, *Tel Aviv Comes Out of Wilderness; Joins Regional Bloc at U.N. of Western, Other Democracies*, WASH. TIMES, May 31, 2000, at A9.

<sup>264</sup> Crossette, *supra* note 259. Israel was also barred from participating in deliberations in Vienna, Austria, and Nairobi, Kenya. Israel's preclusion from U.N. Geneva-based activities bar its participation in "important debates on draft resolutions and . . . selection for high ranking tribunals." Noah Leavitt, *Two Recent Decisions on Israel's Security Barrier*, CNN.COM, July 13, 2004, <http://www.cnn.com/2004/LAW/07/13/leavitt.israel.barrier/>.

<sup>265</sup> *Israel's Membership in the WEOG*, *supra* note 252.

<sup>266</sup> Crossette, *supra* note 259.

WEOG<sup>267</sup> and recently joined the EU's European Neighbourhood Policy, which "promotes greater Israeli involvement in EU policies and programmes as well as greater political and economic integration."<sup>268</sup> Cooperative efforts such as Israel's participation in the EU's European Neighbourhood Policy serve as *prima facie* evidence that the U.N. promotes a façade of equality toward Israel while simultaneously perpetuating both *de facto* and *de jure* discrimination against it.<sup>269</sup>

#### 4. *Imbalanced Human Rights Scrutiny*

The inequity to which Israel is subjected within the U.N. is further highlighted by the organization's newest council charged with advancing human rights.<sup>270</sup> In March 2006, the General Assembly passed Resolution 60/251 establishing the Human Rights Council (HRC) to succeed the U.N. Commission on Human Rights,<sup>271</sup> which was criticized as an "overtly

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<sup>267</sup> Israel's admission to the WEOG "constitutes a historic turning point and a normalization of Israel's status in the UN, in spite of ongoing Arab pressure to undermine the move." Israel Ministry of Foreign Affairs, *Israel Accepted to WEOG: An Achievement for Israeli Diplomacy*, May 28, 2000, available at <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2000/Israel+Accepted+to+WEOG.htm>.

<sup>268</sup> Delegation of the European Commission to the State of Israel, *The European Union & Israel*, at 20, available at <http://www.delisr.ec.europa.eu/newsletter/ENGLISH-FINAL.pdf> [hereinafter *The EU & Israel*]. The European Neighbourhood Policy (ENP) constitutes an effort to "avoid[] the emergence of new dividing lines between the enlarged EU and [its] neighbours and instead [to] strengthen[] the prosperity, stability[,] and security of all concerned." European Commission European Neighbourhood Policy, *What is the European Neighbourhood Policy?*, [http://ec.europa.eu/world/enp/policy\\_en.htm](http://ec.europa.eu/world/enp/policy_en.htm) (last visited Oct. 15, 2008). Israel "was among the first wave of countries to agree on an ENP Action Plan with the European Union." *The EU & Israel, supra*, at 20.

<sup>269</sup> See Arnold Beichman, *Guess Who's at the U.N. Security Helm*, WASH. TIMES, June 5, 2002, at A14 ("But of 189 U.N. member nations, only one is barred by the "laws" of the U.N. from ever even achieving nomination and election to the rotating Security Council memberships reserved for non-permanent members. Only one—Israel, barred 'legally.'").

<sup>270</sup> See *a New Fumble in U.N. Circles*, ADVOCATE, July 31, 2007, at B6 ("Human rights organizations [are] often not friendly to Israel . . .").

<sup>271</sup> G.A. Res. 60/251, at 2, U.N. Doc. A/RES/60/251 (Apr. 3, 2006) ("establish[ing] the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights . . ."). Because the Council is based in Geneva, Israel is barred from any involvement in its activities. See *supra* text accompanying notes 264 & 265. In fact, Israel is absent from the HRC's membership from 2007 through at least 2010. See <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> (last visited Oct. 15, 2008).

political forum<sup>272</sup> that “failed miserably in addressing human rights violations, instead fixating on specious allegations against Israel.”<sup>273</sup> Together with the U.S., Palau, and the Marshall Islands, Israel voted against the resolution establishing the HRC.<sup>274</sup>

Although the HRC is responsible “for promoting universal respect for the protection of *all human rights* and fundamental freedoms for *all, without distinction of any kind and in a fair and equal manner*,”<sup>275</sup> it has failed to do so, opting instead to “disproportionately singl[e] Israel out for criticism.”<sup>276</sup> In fact, the HRC has “institutionalize[d] the condemnation of Israel as a standing item on the agenda”<sup>277</sup> while diverting focus from other “‘graver’ crises such as Darfur.”<sup>278</sup> Israel, the HRC ensured, is “automatically on the council’s agenda for debate while all other countries in the world are dealt with under an overall global subject heading[, and the HRC has] call[ed] for Israel’s activities in the Palestinian territories to be permanently reviewed until it withdraws from the West Bank.”<sup>279</sup>

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<sup>272</sup> Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 375 (2004) (noting that the former commission lacked “a more balanced and judicious approach to human rights findings”).

<sup>273</sup> Editorial, *Despite New Name, U.N. Rights Panel Still A Disgrace*, CHI. SUN-TIMES, Mar. 19, 2007, at 33.

<sup>274</sup> Official Records of the General Assembly, 60th sess., 72nd plen. mtg. at 6, U.N. Doc. A/60/PV.72 (Mar. 15, 2006). Israel cited the General Assembly’s failure to prevent “those responsible for the failure of the Commission on Human Rights to lead the Council down the same road. Indeed, radical failure calls for radical change. That change, unfortunately, is not evident today.” *Id.* at 22 (statement of Israeli Representative Gillerman).

<sup>275</sup> G.A. Res. 60/251, *supra* note 271, at 2 (emphasis added).

<sup>276</sup> Ruthie Blum, *Occupational Hazards*, JERUSALEM POST, July 19, 2007, at 13.

<sup>277</sup> Paul Lungen, *Cotler Calls UN Report One-Sided*, CANADIAN JEWISH NEWS, June 21, 2007, at 33 (quoting Irwin Cotler), available at 2007 WLNR 12976189; *infra* text accompanying note 279.

<sup>278</sup> *Darfur Crisis ‘Graver Than Middle East’—Annan*, IRISH EXAMINER.COM, Nov. 29, 2006, <http://www.irishexaminer.com/breaking/index.aspx?c=ireland&jp=cwidqlauojn>.

<sup>279</sup> Tovah Lazaroff, *Israel Singled Out for Permanent Scrutiny by UN Human Rights Council. Group Halts Investigations into Rights Violations By Belarus, Cuba*, JERUSALEM POST, June 20, 2007, at 2.

Like his predecessor Kofi Annan,<sup>280</sup> Secretary General Ban Ki-Moon has criticized the HRC for “picking on Israel” and “singl[ing] out only one specific regional item given the range and scope of allegations of human rights violations throughout the world.”<sup>281</sup> One of the HRC’s first decisions was to dispatch “relevant special rapporteurs to report to the next session of the Council on the Israeli human rights violations in occupied Palestine” and to “undertake substantive consideration of the human rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories at its next session and to incorporate this issue in following sessions.”<sup>282</sup> Its decision to appoint as special rapporteur John Dugard, “whose anti-Israel bias is, even by UN standards, particularly virulent,”<sup>283</sup> further demonstrated HRC support for “outrageous calumnies against Israel under the seal and imprimatur of the United Nations.”<sup>284</sup>

For example, HRC Special Session Resolution S-1/1 expressed “deep concern” for “breaches by Israel, the occupying Power, of international humanitarian law and human rights law in the Occupied Palestinian

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<sup>280</sup> “Former secretary-general Kofi Annan . . . criticized the Human Rights Council’s treatment of Israel before he left office . . .” *Ban: UN Has Treated Israel Poorly*, JERUSALEM POST, Apr. 10, 2007, at 5; see *supra* text accompanying note 278.

<sup>281</sup> *Ban Ki-moon Criticizes UN Human Rights Council for Singling Israel Out*, HAARETZ, June 21, 2007, available at <http://www.haaretz.com/hasen/spages/873591.html>.

<sup>282</sup> Decision 1/106, Human Rights Situation in Palestine and Other Occupied Arab Territories, A/HRC/DEC/1/106 (June 30, 2006), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=12440](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=12440). The decision passed by a vote of twenty-nine in favor, twelve against, and five abstentions. *Id.*

<sup>283</sup> *The United Nations Human Rights Council: Reform or Regression?: Hearing Before the Comm. on House Int’l Relations Subcomm. on Africa, Global Human Rights and Int’l Operations*, 109th Cong. 53 (2006) (statement of Hillel C. Neuer); see also Benny Avni, *Israeli Groups Call for Dismissal of U.N. Official*, N.Y. SUN, Oct. 20, 2004, § Foreign, at 9 (noting accusations against Dugard that he “us[ed] his official position as a U.N. fact-finder to present his personal anti-Israel views”); *supra* note 51.

<sup>284</sup> Editorial, *Outrageous Calumnies*, CANADIAN JEWISH NEWS, Oct. 5, 2006, at 8, available at 2006 WLNR 18806660. In his report on the non-implementation of HRC Resolution S-1/1, Dugard cautioned that “it was unlikely that Israel would consent to such a mission under my direction in light of my critical reports on Israel’s policies and practices.” HRC, 5th Sess., *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, ¶ 1, U.N. Doc. A/HRC/5/11 (June 8, 2007) (prepared by John Dugard). He added that the “mission contemplated” by Resolution S-1/1 was both “obsolete and impractical.” *Id.* ¶ 4.

Territory.”<sup>285</sup> Additionally, Resolution S-1/1 expressed “grave concern at the violations of the human rights of the Palestinian people caused by the Israeli occupation” and “at the detrimental impact” of Israeli military operations upon the Palestinian people.<sup>286</sup> Utilizing identical language to prior General Assembly resolutions condemning Israel,<sup>287</sup> Resolution S-1/1 demanded that Israel, “the occupying Power, end its military operations in the Occupied Palestinian Territory.”<sup>288</sup> Efforts to amend the draft resolution by including language urging “Palestinian armed groups” to both respect rules of international humanitarian law and refrain from violence against civilian populations were defeated.<sup>289</sup>

In its first year, the HRC “failed to denounce human-rights violations anywhere in the world except Israel.”<sup>290</sup> Between June and December 2006, the HRC “adopted six condemnatory resolutions and held three special sessions solely focused on Israel. And yet it still hasn’t addressed the dire human rights violations in Burma, Cuba, North Korea, [and] has only marginally addressed . . . Darfur.”<sup>291</sup> Human Rights Watch<sup>292</sup>

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<sup>285</sup> HRC Special Session Res. S-1/1, ¶¶ 1–3, U.N. HRC, 1st Spec. Sess., U.N. Doc. A/HRC/S-1/3 (July 18, 2006).

<sup>286</sup> *Id.* ¶¶ 1, 3.

<sup>287</sup> See *infra* text accompanying note 349.

<sup>288</sup> HRC Special Session Res. S-1/1, *supra* note 285, ¶ 2.

<sup>289</sup> The representative from Switzerland proposed the insertion of three new paragraphs, all of which concerned Palestinian conduct and the last of which “[u]rge[d] those who detain the Israeli soldier to treat him humanely.” HRC, *Report on the First Special Session of the Human Rights Council*, ¶ 19, U.N. Doc. A/HRC/S-1/3, (July 18, 2006). The last proposed amendment was subsequently withdrawn. *Id.* ¶ 20. Specific references to “Palestinian armed groups,” changed to “all concerned parties” by the representative of Pakistan on behalf of the Organization of the Islamic Conference, were subsequently adopted. *Id.* ¶ 21.

<sup>290</sup> Benny Avni, *U.N. Official Says Debate Over Israel Boycott ‘A Good Thing’*, N.Y. SUN, June 1, 2007, § Foreign, at 7.

<sup>291</sup> *International Organizations and International Peacekeeping Programs: Hearing Before the Subcomm. on the State, Foreign Operations and Related Programs of the H. Appropriations Comm.*, 110th Cong. (2007) (statement of Rep. Lowey), available at LEXIS 7 CIS H 18188; see also Jay Nordlinger, *A Nation Like No Other*, NAT’L REV. ONLINE, Apr. 18, 2007, <http://article.nationalreview.com/?q=NDRmZTYwMzU4MTVjMmUxNDE4ZTZjNzQ1YWU1Y2NhZDA> (noting the HRC’s failure to pass resolutions against any other country). A total of eleven resolutions were adopted against Israel in the HRC’s first year. Jackson Diehl, *A Shadow on the Human Rights Movement*, WASH. POST, June 25, 2007, at A19.

described the HRC's "singling out the Occupied Palestinian Territories for special attention . . . a cause for concern."<sup>293</sup> The HRC has been condemned for its "continued persecution of" Israel, "continued issuing resolution after trumped up resolution against Israel,"<sup>294</sup> and promotion of an atmosphere of "bias and politicization."<sup>295</sup> Ironically, the HRC's condemnation of Israel is effectuated solely by utilization of the term "Palestine,"<sup>296</sup> an entity that "does not fit easily into defined categories of international status"<sup>297</sup> and an antiquated name attributed to territories during the British Mandate.<sup>298</sup>

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<sup>292</sup> Human Rights Watch, an independent, nongovernmental organization, "investigate[s] and expose[s] human rights violators and hold[s] abusers accountable." About Human Rights Watch, <http://hrw.org/about/> (last visited Oct. 15, 2008).

<sup>293</sup> *U.N.: Mixed Start for New Human Rights Council*, HUMAN RIGHTS NEWS, June 30, 2006, <http://hrw.org/english/docs/2006/06/30/global13685.htm>.

<sup>294</sup> *Despite New Name, U.N. Rights Panel Still A Disgrace*, *supra* note 273.

<sup>295</sup> Brett D. Schaefer, *U.N. Rights Council Vs. Freedom*, WASH. TIMES, Apr. 2, 2007, at A15.

<sup>296</sup> See Diehl, *supra* note 291. Resolutions adopted by the HRC, however, specifically reference Israel's military, condemning "grave situation of human rights in Lebanon caused by Israeli military operations," HRC Res. S-2/1, U.N. Doc. A/HRC/S-2/2 (Aug. 17, 2006), and "[h]uman rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory." HRC Res. S-3/1, U.N. Doc. A/HRC/S-3/2 (Nov. 20, 2006).

<sup>297</sup> Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 89-90 (1997).

<sup>298</sup> See, e.g., Lieutenant Colonel (s) Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 38 (2004) ("[A]-Qaeda demands that the state of Israel must be eliminated and replaced in its entirety by Palestine . . .") (emphasis added); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. INT'L L.J. 171, 205 (1998) (acknowledging that any mandatory Palestinian nationality ceased in 1948 when the territory became Israel); Ziad Asali, *Towards Israeli-Palestinian Peace; U.S., Palestinians, Israelis Face Difficult Decisions*, WASH. TIMES, Feb. 5, 2007, at A19 (urging the U.N. "pass a resolution to establish Palestine") (emphasis added); Orly Halpern, *Hamas: Olmert Must Accept Less*, JERUSALEM POST, Feb. 8, 2006, at 1 (noting that the Palestinian militant organization Hamas "wants Israel to cease to exist and a Palestinian state to be created on all of mandatory Palestine") (emphasis added). But see John Lukacs, *Remapping the Middle East Churchill's Role in Nascent Iraq*, BOSTON GLOBE, Sept. 19, 2004, at D7 (noting that most of the entities created in the Middle East following the fall of the Ottoman Empire, including "Palestine (and a Jewish homeland) are extant . . . even now").

The HRC's "immoral fixation on Israel,"<sup>299</sup> which continued in June 2007 with the passage of two new anti-Israel resolutions,<sup>300</sup> constitutes the latest manifestation of the U.N.'s "anti-Israel bias that is most blatant in Geneva but also informs other U.N. institutions."<sup>301</sup> The organization cultivates and promotes an "obvious anti-Israel . . . bias"<sup>302</sup> that transcends mere rhetoric and condemnation: it effectively undermines and manipulates principles of substantive international law and human rights law exercised by and applicable to Israel. Ultimately, this pervasive institutional bias against Israel galvanizes the 'Effect': the promotion, establishment, and enforcement of a "double standard"<sup>303</sup> and a "different legal reality for Israel."<sup>304</sup>

### III. THE PERFECT STORM: RECENT MANIFESTATIONS OF THE 'EFFECT'

Bias potentially hinders the invocation, preservation, and enforcement of international law.<sup>305</sup> Commentators have long acknowledged the existence of institutional bias over congressional involvement in foreign

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<sup>299</sup> Tovah Lazaroff, *Israel Singled Out for Permanent Scrutiny by UN Human Rights Council. Group Halts Investigations into Rights Violations by Belarus, Cuba*, JERUSALEM POST, June 20, 2007, at 2.

<sup>300</sup> *United Nations Human Rights Council: Hearing Before the Subcomm. on International Operations and Organizations, Democracy and Human Rights, of the S. Comm. on Foreign Relations*, 110th Cong. at 4 (2007) (statement of Brett D. Schaefer); see, e.g., HRC Res. OM/1/2, U.N. Doc. A/HRC/OM/1/L.11 (June 22, 2007) (noting "with regret that Israel, the occupying Power, has . . . hindered the dispatching of the urgent fact-finding missions" set forth in prior resolutions).

<sup>301</sup> Benny Avni, *At U.N., Israel Is Lone Target on Human Rights*, N.Y. SUN, June 11, 2007, § Foreign, at 7.

<sup>302</sup> *The U.N.'s 'Permanent' Corruption*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Apr. 17, 2007, at B7.

<sup>303</sup> Ezra Levant, *Israel Judged By Double Standard; Lebanese Attack Muslim Guerillas With No Concerns About Western Public Opinion*, CALGARY SUN (Canada), Aug. 5, 2007, at 23.

<sup>304</sup> Sarah Williams, *Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel's Separation Barrier*, 24 BERKELEY J. INT'L L. 192, 208 (2006) (quoting an Israeli Prime Minister's Office classified report responding to the Hague Court's 2004 advisory opinion on the legality of Israel's counterterrorism initiative).

<sup>305</sup> See, e.g., Stephanie N. Sackellares, *Twentieth Anniversary Celebration: From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 WIS. WOMEN'S L.J. 137, 160-61 (2005) (noting the disparity in enforcement of international law in Sudan and the former Yugoslavia due to European bias toward resolving the latter, and referencing media bias as the cause of a dearth of coverage of atrocities in Africa).

diplomacy<sup>306</sup> and “mainstream media bias in general.”<sup>307</sup> Most nations harbor a particularly “strong bias (reflected in everything from media images to foreign policy and economic ties) on the issue of Israel and Palestine.”<sup>308</sup> This Part considers the far-reaching consequences of anti-Israel bias—both within and without the U.N.—by exposing recent manifestations and consequences of the ‘Effect’ upon Israel.

A. *A “Gap” Between De Facto and De Jure Circumstances at the Hague*<sup>309</sup>

Hamas,<sup>310</sup> the Palestinian terrorist organization elected to power in Gaza<sup>311</sup> in 2006,<sup>312</sup> “along with the rest of the Islamic world, is dedicated to wiping Israel off the map. . . .”<sup>313</sup> Since its independence in 1948,<sup>314</sup> and

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<sup>306</sup> Susan Milligan & Rick Klein, *Lawmakers Defend Foreign Policy Efforts Critics Say Trips Undermine US*, BOSTON GLOBE, Jan. 1, 2007, at A1.

<sup>307</sup> William Kristol, *The Turn*, WKLY. STANDARD, Aug. 13, 2007, at 9.

<sup>308</sup> James Robertson, *40 Years is Enough*, NEW INTERNATIONALIST, May 1, 2007, at 21.

<sup>309</sup> See Regis Debray, *Palestine: A Policy of Deliberate Blindness*, LE MONDE DIPLOMATIQUE, Aug. 2007, available at <http://mondediplo.com/2007/08/05palestine>.

<sup>310</sup> Hamas “seeks the destruction of Israel and the creation of an Islamic state” in Palestine. Note, *Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence*, 20 B.C. INT’L & COMP. L. REV. 85, 102 (1997). Hamas, also known as the Islamic Resistance Movement, *id.*, “strives to raise the banner of Allah over every inch of Palestine.” Hamas Covenant 1988 art. 6, The Covenant of the Islamic Resistance Movement (Aug. 18, 1988), available at [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp). Its primary objective is to liberate Palestine. See *id.* at introduction. The Hamas Covenant further proclaims that “so-called peaceful solutions, and the international conferences to resolve the Palestinian problem, are all contrary to the beliefs of the Islamic Resistance Movement.” *Id.* art. 13.

<sup>311</sup> For a discussion of Gaza, see generally Robert A. Caplen, *Rules of ‘Disengagement’: Relating the Establishment of Palestinian Gaza to Israel’s Right to Exercise Self-Defense as Interpreted by the International Court of Justice at the Hague*, 18 FLA. J. INT’L L. 679 (2006).

<sup>312</sup> Isabel Kershner, *Hamas Breaks Up Fatah Protest in Gaza*, INT’L HERALD TRIB., Aug. 25, 2007, at 3. “Sixteen months ago Hamas transformed the political landscape of the Middle East by emerging as the dominant force in the Palestinian parliamentary elections. It then had an opportunity, in principle, to end its defining refusal to recognize Israel . . . . Hamas still call[s] for the destruction of Israel . . . .” *Own Worst Enemy*, TIMES (London), June 14, 2007, at 16.

<sup>313</sup> David Forman, *Caught in a Bind*, JERUSALEM POST, Mar. 15, 2006, at 15. U.S. Congressman Tom Delay acknowledged:

Those nations and organizations bent on destroying Israel are now bent on beating back America’s advances in the war on terror . . . . The

(continued)

particularly during the 1967 and 1973 Arab-Israeli wars,<sup>315</sup> Israel has engaged in “desperate feat[s] of survival”<sup>316</sup> against enemies determined “to destroy the tiny Jewish state.”<sup>317</sup> Despite this reality, Israel has been accused of maintaining an unjustifiable “obsession with security.”<sup>318</sup> Declarations of war by Israel’s Arab neighbors have recently been replaced by acts of Palestinian terror during two separate *Intifada* uprising movements<sup>319</sup> and a recent conflict against Hezbollah<sup>320</sup> in Lebanon.<sup>321</sup>

### *1. Reaction to Israel’s Counterterrorism Initiative*

While democratic nations are “still learning how to successfully combat a terrorist offensive,”<sup>322</sup> Israel adopted a non-violent<sup>323</sup> counterterrorism initiative<sup>324</sup> to create a physical separation between itself and Palestinians militants. Between September 2000 and March 2004,

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survival of Israel is essential to America’s victory in the war on terror,  
and America’s victory in the war on terror is essential to Israel’s  
survival.

*Remarks By Representative Steny Hoyer, Representative Tom Delay and Others at American Israel Public Affairs Committee Annual Policy Conference, STATE DEP’T BRIEFING, May 17, 2004, available at LEXIS.*

<sup>314</sup> Blitzer, *supra* note 38, at 9.

<sup>315</sup> See David S. Cloud & Greg Myre, *Israel May Have Violated Arms Pact, U.S. Officials Say*, N.Y. TIMES, Jan. 28, 2007, at 3.

<sup>316</sup> Todd Mendel, *Six Days, 40 Years; Israel’s Offers for Peace Keep Being Met With Rejection*, DETROIT FREE PRESS, June 8, 2007, at 14.

<sup>317</sup> Warren Goldstein, *What if the Earth Really is Round?*, JERUSALEM POST, June 24, 2007, at 13.

<sup>318</sup> Debray, *supra* note 309.

<sup>319</sup> For a discussion of the *Intifada* movements, see Caplen, *supra* note 311, at 696–98; Caplen, *supra* note 37, at 722–25.

<sup>320</sup> Hezbollah is “an umbrella organization of various radical Shi’ite groups and organizations . . . established following the 1982 Peace for Galilee War in Lebanon.” *Hizbullah*, Israel Ministry of Foreign Affairs, *available at* [http://www.mfa.gov.il/MFA/MFAArchive/1990\\_1999/1996/4/HIZBULLAH+-+11-Apr-96.htm](http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1996/4/HIZBULLAH+-+11-Apr-96.htm). Hezbollah “decries the existence of Israel” and desires “the complete destruction of the State of Israel and the establishment of Islamic rule over Jerusalem.” *Id.*

<sup>321</sup> See *infra* Part III.B.

<sup>322</sup> Yoni Goldstein, *Caught in the Present*, CANADIAN JEWISH NEWS, Aug. 31, 2006, at 51.

<sup>323</sup> See *infra* text accompanying notes 326–35.

<sup>324</sup> For a detailed discussion of Israel’s efforts to deter and prevent terrorist attacks, see Caplen, *supra* note 37, at 725–28.

Palestinian suicide bombers killed over 900 Israelis.<sup>325</sup> In response, Israel implemented a “separation”<sup>326</sup> philosophy in order to protect its citizens from attack. In 2000, it began “erecting a security structure separating [its territory] from the West Bank and Gaza,”<sup>327</sup> a \$1.3 billion endeavor whose sole objective was to “prevent infiltration of suicide bombers into Israel.”<sup>328</sup>

Israel’s counterterrorism initiative has “been a lightning rod for international criticism.”<sup>329</sup> Notwithstanding the structure’s success,<sup>330</sup> Israel—rather than those individuals and organizations sponsoring Palestinian terror—has been accused of committing war crimes and crimes against humanity.<sup>331</sup> The initiative, assailed for “constitut[ing] a de facto border” between Israel and Palestinian territories,<sup>332</sup> was defended by Israel as “not a political border,”<sup>333</sup> and it is today acknowledged that “the purpose of the security wall *is not, as is believed, to trace a border.*”<sup>334</sup>

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<sup>325</sup> *Id.* at 725 n.50.

<sup>326</sup> David Makovsky, *Rabin: We Need Border with Palestinians*, JERUSALEM POST, Oct. 20, 1994, at 1 (quoting Israeli Prime Minister Yitzhak Rabin).

<sup>327</sup> Caplen, *supra* note 37, at 725.

<sup>328</sup> Andrew R. Malone, Comment, *Water Now: The Impact of Israel’s Security Fence on Palestinian Water Rights and Agriculture in the West Bank*, 37 CASE W. RES. J. INT’L L. 639, 643 (2005); *see also* Dr. Barry A. Feinstein & Justus Reid Weiner, *Israel’s Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT’L L. REV. 309, 368 (2005) (quoting Daniel Taub, Director of the General Law Department of the Israel Foreign Ministry, as to the effectiveness the structure has in reducing suicide bombings by at least thirty percent).

<sup>329</sup> Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT’L L. 1, 76 (2005).

<sup>330</sup> *See, e.g.*, Amos N. Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 SAN DIEGO INT’L L.J. 125, 154 (2005) (noting the statistical validity of Israel’s pre-construction claims that a security structure would “prove effective in preventing the infiltration of suicide bombers into Israel”).

<sup>331</sup> *See* Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT’L L. 297, 321 (2003).

<sup>332</sup> Gerald M. Steinberg, *Concrete Separation, Not Road Maps*, JERUSALEM POST, May 16, 2003, at 9A.

<sup>333</sup> Caplen, *supra* note 311, at 699.

<sup>334</sup> Debray, *supra* note 309 (emphasis added).

Palestinians nonetheless accused Israel of “creating ‘facts on the ground’ to make it impossible to return all the West Bank to Palestinian control.”<sup>335</sup>

The General Assembly denounced Israel for erecting a “racist wall which devours Palestinian territories.”<sup>336</sup> The U.S. rejected draft resolutions as “unbalanced and . . . not . . . address[ing] . . . the devastating suicide attacks that Israelis have had to endure.”<sup>337</sup> In an emergency session in 2003, the General Assembly adopted a series of resolutions condemning Israel for committing “extrajudicial killings”<sup>338</sup> and demanding that “Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory . . . which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law.”<sup>339</sup> Citing “unanimous opposition by the international community to the construction of that wall,” the General Assembly was “[g]ravelly concerned at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory.”<sup>340</sup>

## 2. *Unauthorized Legal Proceedings and the Politicization Thereof*

In an act that Congress condemned as manipulating the Hague Court into a “political forum for denunciation of Israel and its legitimate actions in self-defense,”<sup>341</sup> the General Assembly adopted Resolution ES-10/14,

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<sup>335</sup> Storer H. Rowley, *Rabin Wants to Separate Jews, Arabs; Goal is to Stem Wave of Terror*, CHI. TRIB., Jan. 24, 1995, at 1.

<sup>336</sup> G.A. Res. 1/30-PAL, 57th Sess., Annex 3, at 33, 35, U.N. Doc. A/57/824-S/2003/619 (2003).

<sup>337</sup> U.N. SCOR, 58th Sess., 4842d mtg. at 2, U.N. Doc. S/PV.4842 (Oct. 14, 2003).

<sup>338</sup> G.A. Res. ES-10/12, at 1, U.N. GAOR, 10th Emer. Spec. Sess., 20th plen. mtg., U.N. Doc. A/RES/ES-10/12 (Sept. 25, 2003).

<sup>339</sup> G.A. Res. ES-10/13, at 2, U.N. GAOR, 10th Emer. Spec. Sess., 21st plen. mtg., U.N. Doc. A/RES/ES-10/13 (Oct. 27, 2003).

<sup>340</sup> G.A. Res. ES-10/14, at 1, U.N. GAOR, 10th Emer. Spec. Sess., 23d plen. mtg., U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).

<sup>341</sup> H.R. Con. Res. 390, 108th Cong. (2004). The General Assembly “sought to politicize the conflict and exert additional pressure on Israel. Caplen, *supra* note 37, at 745 n.207. *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 223 (July 9) (separate opinion of Judge Kooijmans) (“An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process.”).

which invoked Article 96(1) of the U.N. Charter<sup>342</sup> to request an advisory opinion on the legality of Israel's counterterrorism initiative. Pursuant to Article 65(1) of its statute, the Hague Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."<sup>343</sup> As required by Article 65(2) of the Hague Court statute, "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required."<sup>344</sup>

Typically, "the person who frames the issue is the person who will usually win the debate."<sup>345</sup> The General Assembly, recognizing that the Hague Court "never ruled on an issue of this magnitude relative to state practice in this area,"<sup>346</sup> presented a question "couched in partisan language,"<sup>347</sup> the answer to which was "a foregone conclusion long before deliberations began".<sup>348</sup>

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?<sup>349</sup>

Judge Kooijmans, writing separately, questioned, "What was the Assembly's purpose in making the request? . . . . Evidently the Assembly

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<sup>342</sup> Article 96(1) provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." U.N. Charter art. 96(1).

<sup>343</sup> Statute of the International Court of Justice art. 65(1).

<sup>344</sup> *Id.* art. 65(2).

<sup>345</sup> Thomas R. Haggard, *The Scrivener: Writing Persuasive Briefs*, 7 S. CAROLINA LAWYER 13 (1995).

<sup>346</sup> Tovah Lazaroff, *Court Could Undermine Rules of Self-Defense*, JERUSALEM POST, July 11, 2004, at 3; *infra* text accompanying note 349.

<sup>347</sup> *ICJ Ruling Another Example of UN Bias Towards Israel*, CANBERRA TIMES (Austl.), July 15, 2004, at 17A, available at <http://www.canberratimes.com.au/news/local/news/opinion/icj-ruling-another-example-of-un-bias-towards-israel/719942.aspx>.

<sup>348</sup> *Id.*

<sup>349</sup> G.A. Res. ES-10/14, *supra* note 340.

finds it necessary to take speedy action [and] needs the views of the Court. But the question remains: Views on what?”<sup>350</sup>

Israel’s protestations that the “advisory opinion request is *ultra vires* the competence of the 10th Emergency Special Session of the General Assembly”<sup>351</sup> were rejected.<sup>352</sup> Moreover, Israel objected to the use of the term “wall” because it “reflect[ed] a calculated media campaign to raise pejorative connotations . . . of great concrete constructions of separation such as the Berlin Wall . . . .”<sup>353</sup> In her separate opinion, Judge Higgins protested that portions of the advisory opinion, like the question presented,<sup>354</sup> were “neither balanced nor satisfactory.”<sup>355</sup> Similarly, Judge Kooijmans lamented that the advisory opinion “could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts . . . are in my view not sufficient . . . .”<sup>356</sup>

The Hague Court’s decision to issue an advisory opinion “signaled the first time that an international judicial organ has ruled . . . on a prominent aspect of the [Israeli-Palestinian] problem by applying rules of international law.”<sup>357</sup> Moreover, the decision constituted “a hostile act . . . against the Jewish state and not . . . a simple response to a simple request.”<sup>358</sup> Ultimately, “given the anti-Israel bias of some of its judges, it comes as no shock that the [Hague Court] rejected Israel’s right to build a security fence.”<sup>359</sup>

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<sup>350</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 225 (July 9) (separate opinion of Judge Kooijmans).

<sup>351</sup> Written Statement of the Government of Israel on Jurisdiction and Propriety 4 (Jan. 30, 2004), <http://www.icj-cij.org/docket/files/131/1579.pdf> [hereinafter Written Statement by Israel].

<sup>352</sup> *Legal Consequences*, 2004 I.C.J. at 148–50.

<sup>353</sup> Written Statement by Israel, *supra* note 351, at 10–11.

<sup>354</sup> *See supra* text accompanying note 349.

<sup>355</sup> *Legal Consequences*, 2004 I.C.J. at 211 (separate opinion of Judge Higgins).

<sup>356</sup> *Id.* at 223 (separate opinion of Judge Kooijmans).

<sup>357</sup> Caplen, *supra* note 311, at 703 (quoting Pieter H.F. Bekker, *The World Court’s Ruling Regarding Israel’s West Bank Barrier and the Primacy of International Law: An Insider’s Perspective*, 38 CORNELL INT’L L.J. 553, 556 (2005)); *see supra* note 91.

<sup>358</sup> Caroline B. Glick, *Supreme Injustice*, JERUSALEM POST, July 2, 2004, at 1.

<sup>359</sup> Abraham Cooper & Harold Brackman, *Justice Weak on Other Side of the Wall*, DAILY NEWS OF L.A., July 13, 2004 at N13.

### 3. *Enigmatic, Indefensible Self-Defense at the Hague Court*

The legal question presented by the General Assembly to the Hague Court was outcome determinative.<sup>360</sup> The judicial body “ultimately concluded that Israel’s construction of its security structure violated international law.”<sup>361</sup> In order to reach that determination, however, the Hague Court, in an effort to “produce a predetermined answer”<sup>362</sup> against Israel, ignored the broader implications of its legal pronouncements. In effect, it “place[d] in question the future of international law itself.”<sup>363</sup> Ultimately, the Hague Court created “a separate legal standard for Israel’s reliance upon self-defense”<sup>364</sup> and, more generally, established “two sets of rules in international law . . . [O]ne set which is valid for the entire world and . . . an international law applicable only to Israel.”<sup>365</sup>

#### a. *Creating an Article 51 Quandary*

Israel justified the construction and implementation of its counterterrorist initiative by noting it was “wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter.”<sup>366</sup> Although the Hague Court addressed the question of “whether state involvement . . . is needed to trigger Article 51 of the U.N. Charter,”<sup>367</sup> the advisory opinion it issued “has been notoriously unable to provide a coherent answer.”<sup>368</sup> The reasons for this are twofold. First, the Hague Court ignored the plain language of Article 51 when it concluded that the provision only “recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>369</sup>

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<sup>360</sup> See generally Caplen, *supra* note 37, at 747–56; *supra* text accompanying notes 346–49.

<sup>361</sup> Caplen, *supra* note 311, at 706.

<sup>362</sup> Caplen, *supra* note 37, at 768.

<sup>363</sup> Andrew C. McCarthy, *The End of the Right of Self-Defense? Israel, the World Court, and the War on Terror*, COMMENTARY, Nov. 2004, at 17.

<sup>364</sup> Caplen, *supra* note 37, at 765.

<sup>365</sup> *Exclusive Interview with Dr. Meir Rosenne* (IsraCast.com broadcast, Jan. 17, 2004), available at [http://www.isracast.com/Transcripts/Rosenne\\_transcript.htm](http://www.isracast.com/Transcripts/Rosenne_transcript.htm).

<sup>366</sup> U.N. GAOR, Emergency Spec. Sess., 21st plen. mtg. at 6, U.N. Doc. A/ES-10/PV.21, at 6 (Oct. 20, 2003).

<sup>367</sup> Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT’L L. 265, 266 (2007).

<sup>368</sup> *Id.*

<sup>369</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9).

In fact, the term ‘state’ is wholly absent from Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”<sup>370</sup> Judge Higgins explicitly questioned this interpretation:

I do not agree with all that the Court has to say on the question of the law of self-defence . . . . There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and Against Nicaragua*. It there held that military action by irregulars could constitute an armed attack . . . .<sup>371</sup>

Citing that Israel “does not claim that the [Palestinian] attacks against it are imputable to a foreign State,”<sup>372</sup> the Hague Court determined that “Article 51 of the Charter *has no relevance*.”<sup>373</sup> Judge Higgins found this contention “unpersuasive.”<sup>374</sup>

*b. Deliberately Bypassing a ‘New Element’ in the Law of Self Defense*

The second flaw in the Hague Court’s determination centered upon Security Council Resolutions 1368 and 1373, “both of which were adopted immediately after the September 11 terrorist attacks.”<sup>375</sup> In addition to invoking Article 51, Israel relied upon these resolutions for recognizing “the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.”<sup>376</sup> Resolution 1368 reaffirmed “the inherent right of individual or collective self-defence”<sup>377</sup> “without reference to attacks perpetrated by

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<sup>370</sup> U.N. Charter art. 51; *see also Legal Consequences*, 2004 I.C.J. at 242 (declaration of Judge Buergethal) (“[T]he United Nations Charter . . . does not make its exercise dependent upon an armed attack by another State . . .”).

<sup>371</sup> *Legal Consequences*, 2004 I.C.J. at 215 (separate opinion of Judge Higgins) (emphasis in original) (citation omitted).

<sup>372</sup> *Id.* at 194 (advisory opinion).

<sup>373</sup> *Id.* (emphasis added).

<sup>374</sup> *Id.* at 215 (separate opinion of Judge Higgins).

<sup>375</sup> Caplen, *supra* note 37, at 757–58.

<sup>376</sup> U.N. Doc. A/ES-10/PV.21, *supra* note 366.

<sup>377</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

state or nonstate actors.”<sup>378</sup> Resolution 1373, which “[r]eaffirm[ed] the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368,”<sup>379</sup> also recognized the “need to combat *by all means* . . . threats to international peace and security caused by terrorist acts.”<sup>380</sup> In addition, Resolution 1373 called upon states to “tak[e] additional measures to prevent and suppress . . . preparation of *any acts* of terrorism.”<sup>381</sup> Together, the two resolutions “consecrated the international community’s newfound obdurate will in combating terrorism.”<sup>382</sup>

Despite these pronouncements and a reaffirmation that the U.N. Charter affords member states an “inherent right of . . . self-defence,”<sup>383</sup> the Hague Court reached a “legally dubious conclusion”<sup>384</sup> when it “characterized Israel’s security needs as ‘different from that contemplated’” by these resolutions.<sup>385</sup> Its pronouncement contained no analysis or justification,<sup>386</sup> a shortcoming both Judges Buergenthal and Kooijmans emphasized. Judge Buergenthal addressed “two principle problems” with the Hague Court’s opinion: (1) imputing state action as a prerequisite to exercising self-defense under Article 51; and (2) that the originating situs of Palestinian terrorist actions precludes Israeli self-defensive measures.<sup>387</sup> With respect to the latter, Judge Buergenthal

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<sup>378</sup> Caplen, *supra* note 37, at 758 n.280. Resolution 1368 committed the Security Council “to combat, by all means, threats to international peace and security caused by terrorist attacks.” Symposium, *America Fights Back: The Legal Issues*, 11 CARDOZO J. INT’L & COMP. L. 831, 839 (2004).

<sup>379</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>380</sup> *Id.* (emphasis added).

<sup>381</sup> *Id.* (emphasis added).

<sup>382</sup> Vincent-Joel Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT’L L. 615, 637–38 (2005).

<sup>383</sup> S.C. Res. 1373, *supra* note 379.

<sup>384</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 242 (July 9) (declaration of Judge Buergenthal).

<sup>385</sup> Caplen, *supra* note 37, at 757–58. *But see* Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT’L L. REV. 645, 670–71 (2006) (arguing that the Hague Court’s argument was correctly reasoned).

<sup>386</sup> *Legal Consequences*, 2004 I.C.J. at 194–95. The Hague Court “merely referred to the two resolutions (thereby suggesting that they do have a certain impact on international law).” Ruys, *supra* note 367, at 281.

<sup>387</sup> *Legal Consequences*, 2004 I.C.J. at 242 (declaration of Judge Buergenthal).

dismissed Judge Kooijman's claim that Israel could not invoke Article 51 because it "is a rule of international law and thus relates to international phenomena."<sup>388</sup> With respect to the former, Judge Buergenthal emphasized that the Security Council, by implementing Resolutions 1368 and 1373, never limited or implicitly assumed application to terrorist attacks only by state actors.<sup>389</sup>

Judge Kooijmans disagreed with Judge Buergenthal's first 'principle problem' by maintaining that Article 51 permits self-defensive action only by *states*.<sup>390</sup> He recognized, however, that Article 51, as applicable to Israel, "is, with all due respect, beside the point" in light of Security Council Resolutions 1368 and 1373.<sup>391</sup> Thus, Judge Kooijmans concurred with Judge Buergenthal's second 'principle problem':

[These resolutions] recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security . . . . And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 . . . . The Court has regrettably bypassed this new element, the legal implications of which cannot as yet be assessed . . . .<sup>392</sup>

The Hague Court's failure to consider this "new element" in combating terrorism constituted an "embarrassment for logic and common sense"<sup>393</sup> that produced a "breathhtakingly one-sided"<sup>394</sup> determination specifically tailored against Israel. It "substantially limited Israel's right to exercise

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<sup>388</sup> *Id.* at 230 (separate opinion of Judge Kooijmans); *id.* at 242 (declaration of Judge Buergenthal).

<sup>389</sup> *Id.* at 242 (declaration of Judge Buergenthal).

<sup>390</sup> *Id.* at 230 (separate opinion of Judge Kooijmans).

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> Samuel Herman, *The International Court of Injustice*, J. NEWS (Westchester County, N.Y.), July 27, 2004, at 4B.

<sup>394</sup> *The UN's Blinkers*, GLOBE & MAIL (Canada), July 22, 2004, at A14.

self-defense under Article 51<sup>395</sup> and entirely eliminated Resolutions 1368 and 1373 from Israel's self-defense and counterterrorism calculus.

*c. Legacy of the Hague Court Advisory Opinion*

The Hague Court's repudiation of Israel's counterterrorism initiative "failed to recognize the security threat posed by terrorists that are not associated with a State"<sup>396</sup> and proved "shallow and unpersuasive."<sup>397</sup> In effect, it "engaged in the 'splitting of a legal hair' that defies legal reasoning, invalidates a state's right to defend itself against terrorism, and enables terrorists to manipulate and operate outside of the international legal system."<sup>398</sup> Essentially, the advisory opinion "called into question what had been considered legitimate security policies of many States, particularly of the United States,"<sup>399</sup> which has prompted "a growing number of authors [to] suggest[] that the legal restrictions on self-defense ought to be eased."<sup>400</sup> Ultimately, the precedent set forth in the Hague Court's advisory opinion enabled the Security Council to reject, once again, Israel's right to exercise or to characterize Israeli military action as self-defense in accordance with Article 51 and Resolutions 1368 and 1373 during another wave of terrorist attacks Israel recently encountered from Hezbollah in Lebanon.<sup>401</sup>

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<sup>395</sup> Caplen, *supra* note 311, at 707.

<sup>396</sup> Rebecca Kahan, Note, *Building a Protective Wall Around Terrorists—How the International Court of Justice's Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 *FORDHAM INT'L L.J.* 827, 832 (2005).

<sup>397</sup> Alberto De Puy, Comment, *Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories*, 13 *TUL. J. INT'L & COMP. L.* 275, 302 (2005).

<sup>398</sup> Caplen, *supra* note 37, at 762 (footnotes omitted).

<sup>399</sup> Kahan, *supra* note 396, at 832; see also Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?*, 16 *IND. INT'L & COMP. L. REV.* 1, 24 (2005) ("The ICJ therefore seemed to imply, remarkably, that the September 11 attacks on the United States were armed attacks, within the meaning of Article 51, only to the extent that those attacks were imputable to Afghanistan."); Caplen, *supra* note 37, at 764–66.

<sup>400</sup> Ruys, *supra* note 367, at 266–67.

<sup>401</sup> See Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 *CATH. U.L. REV.* 871, 921 n.254 (2007).

*B. Pillars of Smoke and Mirrors During the “[S]econd Lebanon War”*<sup>402</sup>

As memorable as the image of Charlie Brown standing beneath a storm cloud inundated by rain has become, imagine a more diabolical scenario: multiple clouds descending upon Charlie Brown with as much tenacity as the kite-eating tree that forever plagues him.<sup>403</sup> While anything is possible in Schulz’s fictional world, the recent conflict between Israel and Hezbollah in Lebanon demonstrates the extent to which reality can be fictionalized to effectuate particular outcomes. As Israel engaged in self-defensive measures, the ‘Effect’ undercut those efforts within the press, which “create[d] a reality instead of report[ing] on one,”<sup>404</sup> and on the battlefield,<sup>405</sup> ensuring that Israel’s ability to lawfully preserve the legal rights to which it is accorded as a sovereign nation was substantially compromised.

*1. Defending Against an Armed Hezbollah Attack*

On July 12, 2006, Hezbollah, in order to “‘fulfill[] its pledge to liberate . . . prisoners and detainees’ of Israel,”<sup>406</sup> “crossed the border into Israel”<sup>407</sup> from southern Lebanon, attacked an army border patrol between the towns of Zarit and Shtula,<sup>408</sup> and took two Israeli Defense Forces (IDF)

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<sup>402</sup> Meyrav Wurmser, *Up to No Good; Iran and Syria’s Sinister Mideast Offensive Strikes Gaza and Lebanon*, WKLY. STANDARD, June 25, 2007, at 24; Sheri Shefa, *Ex-UN Ambassador Speaks About Threats to Israel*, CANADIAN JEWISH NEWS, May 17, 2007, available at 2007 WLNR 10484087. The “first” Lebanon war lasted from 1982 until 2000. Oakland Ross, *Waiting at the Border: Israel Girds For Attack; New Hezbollah Clash ‘Just a Question of Time’*, TORONTO STAR, Aug. 4, 2007, at AA01, available at 2007 WLNR 14968416.

<sup>403</sup> Laurel Graeber, *Casting Words on the Wind*, N.Y. TIMES, Mar. 24, 2006, at E34 (“Fans of ‘Peanuts’ will recall that whenever Charlie Brown flew a kite, it ended up in a tree.”); Patrick Kidd, *Kites and Trees*, TIMES (London), at 2 Mar. 4, 2005 (“Kites and trees don’t go too well together—just ask Charlie Brown.”); see *supra* text accompanying note 31.

<sup>404</sup> Israel Democracy Institute, *Media Coverage During the Recent War*, at <http://www.idi.org.il/english/article.asp?id=06092006141936>.

<sup>405</sup> See *infra* Part III.C.2.a.

<sup>406</sup> *The Crisis Widens: Israel, Palestine and Lebanon*, ECONOMIST, July 15, 2006, at 45.

<sup>407</sup> Steven Erlanger, *Attack to Continue Until Hezbollah Is Neutralized, Israel Says*, INT’L HERALD TRIB., July 15, 2006, at 4.

<sup>408</sup> Ruys, *supra* note 367, at 268.

soldiers hostage before killing eight others.<sup>409</sup> Israel's response was designed primarily to rescue the hostages.<sup>410</sup> Considering Hezbollah's action as an act "of war,"<sup>411</sup> Israel launched a "series of *targeted* airstrikes"<sup>412</sup> designed to "chok[e] off transport in and out of Lebanon"<sup>413</sup> "in an attempt to keep Hezbollah from moving the captured soldiers farther north."<sup>414</sup>

In response, Hezbollah leader Sheik Hassan Nasrallah declared his organization's "read[iness] for an open war."<sup>415</sup> To that end, Hezbollah, which "view[s] the citizens of . . . nations as legitimate targets for attack,"<sup>416</sup> commenced rocket launches "deep into northern Israel"<sup>417</sup> and

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<sup>409</sup> Erlanger, *supra* note 407; *cf.* *The Crisis Widens*, *supra* note 406 (claiming only three soldiers were killed).

<sup>410</sup> Israel's current offensive into southern Lebanon is intended to recover its captured soldiers. Editorial, *A Dream Dies; Blame Hamas and Hezbollah, Not Israel*, SAN DIEGO UNION-TRIBUNE, July 14, 2006, at B-8, available at 2006 WLNR 12246548. *But see Putin Questions Israel's Motives*, CBS NEWS, July 15, 2006, available at <http://www.cbsnews.com/stories/2006/07/15/world/main1807090.shtml> (stating that Putin "believed Israel was pursuing wider goals in its military campaign than the return of abducted soldiers").

<sup>411</sup> Dan Murphy, *Escalation Ripples Through Middle East*, CHRISTIAN SCIENCE MONITOR, July 14, 2006, at 1; *The Race to Destroy Hezbollah Before the World Calls For Peace*, TIMES (London), July 22, 2006, at 6. Israeli Prime Minister Ehud Olmert stated:

This morning's events were not a terrorist attack, but the action of a sovereign state that attacked Israel for no reason and without provocation. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.

Ehud Olmert, Israeli Prime Minister, Press Conference: Lebanon is Responsible and Will Bear the Consequences (July 12, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-+Lebanon+is+responsible+and+will+bear+the+consequences+12-Jul-2006.htm>.

<sup>412</sup> Murphy, *supra* note 411 (emphasis added).

<sup>413</sup> Richard Roth, *Middle East Crisis Between Israel and Lebanon Escalates*, EARLY SHOW, July 14, 2006 (CBS News transcript), available at LEXIS.

<sup>414</sup> Greg Myre & Steven Erlanger, *Israel Hits Lebanon Targets; Bush Voices Concern that Action Might Topple Government*, INT'L HERALD TRIB., July 14, 2006, at 1.

<sup>415</sup> Hamza Hendawi, *Hezbollah Warns Israel of 'Open War'*, STAR-LEDGER (N.J.), July 15, 2006, at 1.

<sup>416</sup> Manuel E.F. Supervielle, *Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L L. REV. 191, 213 (2005).

as far south as the port city of Haifa.<sup>418</sup> By the end of July 2006, Israeli police estimated that “3,699 Hezbollah rockets landed in Israel.”<sup>419</sup>

The Katyusha rockets that Hezbollah launched<sup>420</sup> in “wave[s]”<sup>421</sup> “have never before been used by individual terrorists or terrorist cells.”<sup>422</sup> Numbering nearly 12,000 and comprised of “varying ranges and types,”<sup>423</sup> these weapons were “capable of targeting large areas of northern Israel”<sup>424</sup> and were “hitherto . . . employed only by terrorist states.”<sup>425</sup> In fact, the rockets were supplied by both Syria and Iran.<sup>426</sup>

Israel’s objective was “to flex its muscles in Lebanon without starting a war, and to put on enough pressure to make Hizbullah think twice about keeping the hostages, exporting them, or taking any more.”<sup>427</sup> As the

<sup>417</sup> Steven Erlanger & Hassan M. Fattah, *Israeli Forces Blockade Lebanon; Hezbollah Steps Up Rocket Fire*, INT’L HERALD TRIB., July 14, 2006, at 1. During the first three days of the conflict, Hezbollah launched over 300 rocket attacks into Israel, wounding 150 and killing four civilians. Steven Erlanger, *Attacks to Continue Until Hezbollah Is Neutralized, Israel Says*, INT’L HERALD TRIB., July 15, 2006, at 4.

<sup>418</sup> *Seven Weeks of Conflict*, FINANCIAL TIMES (London), Aug. 14, 2006, at 6.

<sup>419</sup> Ruys, *supra* note 367, at 291 n.160.

<sup>420</sup> See, e.g., Joshua Mitnick, *Combat Rocks Lebanon; 250 Rockets Slam Israel Day Before Cease-Fire*, WASH. TIMES, Aug. 14, 2006, at A1.

<sup>421</sup> Zuckerman, *supra* note 54.

<sup>422</sup> Deborah Weiss, *A Consensus on Lebanon*, NAT’L REV. ONLINE, July 31, 2006, at <http://article.nationalreview.com/?q=N2ZiMTE4ODM3MmRmZjY4YTE1ZThhYjQ1NDc0NTQyOGQ=>.

<sup>423</sup> Erlanger, *supra* note 407.

<sup>424</sup> Efraim Halevy, *Blind Date*, NEW REPUBLIC, August 14–21, 2006, at 9.

<sup>425</sup> Weiss, *supra* note 422.

<sup>426</sup> Zuckerman, *supra* note 54 (noting that Iran and Syria supplied and financed Hezbollah); Editorial, *Resolution Needs Resolve*, BOSTON GLOBE, Aug. 12, 2006, at A16 (noting Iranian financing and shipment through Syria). Reports indicate that Iran “helped teach Hezbollah how to organize itself like an army, with special units for intelligence, anti-tank warfare, explosives, engineering, communications and rocket launching.” Steven Erlanger & Richard A. Opiel, Jr., *Israel Surprised by Militants’ Arsenal and Tactics*, INT’L HERALD TRIB., Aug. 8, 2006, at 5. “For Iran, . . . terrorist attacks upon Israel are only the opening salvo of a much greater war, a ‘softening’ strategy that weakens the Jewish State for subsequent direct assault.” Louis Rene Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 DICK. J. INT’L L. 187, 191 (1996).

<sup>427</sup> *The Crisis Widens*, *supra* note 406. Israel criticized the Lebanese government for its failure to uphold Security Council Resolution 1559, which required it to disarm and control Hezbollah. See S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004); Hassan M. Fattah

(continued)

conflict progressed, Israel endeavored to “‘expand and deepen’ its military offensive until the threat of Hizbollah rocket attacks was removed and its two captured soldiers were released.”<sup>428</sup> Israel had hoped to deliver against Hizbollah a “quick, decisive blow with air attacks and a few ground assaults,” but its efforts were unsuccessful.<sup>429</sup> At the conclusion of the thirty-four day conflict,<sup>430</sup> it appeared that Israel “lost”<sup>431</sup> and that Hizbollah emerged as “a perceived victor[.]”<sup>432</sup>

## 2. *Defending Against an Armed Media Attack*

The perceived Israeli failure<sup>433</sup> was a self-fulfilled prophecy for the media. While the American public generally understood the nature of the Second Lebanon War,<sup>434</sup> “the press in Europe and the Middle East present[ed] a biased view of the . . . conflict.”<sup>435</sup> In fact, there was “a huge gap between what is said because we want to hear it . . . and what is being done on the ground.”<sup>436</sup> In an effort to further undermine Israel’s campaign, “media sources . . . questioned [its] motives in going to war

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& Steven Erlanger, *Israel Blockades Lebanon, Wide Strikes By Hezbollah*, N.Y. TIMES, July 14, 2006, at A1. Resolution 1559 “has never been fully implemented.” Weiss, *supra* note 422.

<sup>428</sup> Harvey Morris, *Israel Pledges to Step Up Its Offensive Against Hizbollah*, FINANCIAL TIMES (London), Aug. 1, 2006, at 1, available at 2006 WLNR 13250133.

<sup>429</sup> *Resolution Needs Resolve*, *supra* note 426.

<sup>430</sup> See, e.g., Leslie Susser, *Lebanon War One Year Later: Was It Israel’s Wake-Up Call?*, CANADIAN JEWISH NEWS, at 9, July 12, 2007, available at 2007 WLNR 14593603.

<sup>431</sup> Wurmser, *supra* note 402; see *infra* Part III.C.2.a.

<sup>432</sup> Zuckerman, *supra* note 54.

<sup>433</sup> See *supra* text accompanying notes 431 & 432; *infra* Part III.B.2–3.

<sup>434</sup> “The American public understands [that] the war between Israel and Hezbollah . . . is about the fate of the democratic State of Israel, which was attacked, once again, by enemies dedicated to its destruction.” Zuckerman, *supra* note 54. According to Gallup public opinion polls, approximately 83% of Americans polled agreed that “Israel is justified in its military action,” and 76% “disapprove of Hezbollah’s attacks on Israel.” *Id.* Arab commentators, however, cite an “imbalance in the American justice system, which is blind to pro-Israel atrocities and the one-sided pro-Israel American media.” Ray Hanania, *One-Sided News Coverage Only Worsens Violence*, CHI. DAILY HERALD, July 4, 2005, at 6.

<sup>435</sup> Weiss, *supra* note 422; see also Gershowitz & Ottolenghi, *supra* note 41 (noting assumptions that “underlie the European media’s bias against Israel”); Anna Bar-Eretz, *Flagged*, JERUSALEM POST, Mar. 26, 2006, at 6 (discussing “relentless bias against Israel in large sections of the Australian media”).

<sup>436</sup> Debray, *supra* note 309.

against Lebanon.”<sup>437</sup> Ultimately, the media’s reporting of the conflict buttressed criticism against Israel for its alleged “disproportionate character of the use of force.”<sup>438</sup>

Widespread media attention, including from within the United States, focused more upon Israel’s strategic attacks at Beirut’s airport and their consequences than upon Hezbollah’s strikes in Israel.<sup>439</sup>

The Israeli attack on the Beirut airport . . . blasted craters into all three runways, but did not hit the main terminal. Israeli planes later attacked the fuel stores at the airport, setting at least one tank on fire and filling the night sky with flames. And early Friday, another airstrike took out the main road between the airport and the capital.

It came at the height of the tourist seasons, and travelers were stranded all over the Middle East.<sup>440</sup>

Given less media coverage was IDF-initiated strategic bombings<sup>441</sup> that commenced only “after dropping leaflets warning civilians to evacuate”<sup>442</sup> residential areas. Additionally, reports of a Hezbollah attack upon an Israeli warship, “the most dramatic incident” in the first few days of a conflict “careening out of control,”<sup>443</sup> were also downplayed.

In fact, media coverage of civilian casualties in Lebanon outweighed the “devastation wrought by Hezbollah [Katyusha] rockets,”<sup>444</sup> which “demonstrate[d] that Israel has not been able to stop [Hezbollah] from striking at Israeli population centers.”<sup>445</sup> Rather than condemn Hezbollah’s strategic use of women and children and construction of bunkers in crowded Beirut residential areas,<sup>446</sup> disproportionately imbalanced reports of IDF bombings required Israel to cease operations in Southern Lebanon

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<sup>437</sup> Ruys, *supra* note 367, at 271.

<sup>438</sup> *Id.* at 293.

<sup>439</sup> Erlanger & Fattah, *supra* note 417.

<sup>440</sup> Fattah & Erlanger, *supra* note 427.

<sup>441</sup> See text accompanying *supra* note 412.

<sup>442</sup> Roth, *supra* note 413.

<sup>443</sup> Hendawi, *supra* note 415.

<sup>444</sup> Joel Greenberg, *Israel’s Arabs Caught in the Middle of Latest Conflict*, CHI. TRIB., Aug. 8, 2006; see also Paul Harris, *Israel: The Bloodiest Day; Hezbollah Rockets Kill 12 Soldiers at Kibbutz, then Pound Port City*, DAILY MAIL (London), Aug. 7, 2006, at 8 (reporting on the “devastating barrage of Hezbollah rockets”).

<sup>445</sup> Mitnick, *supra* note 420.

<sup>446</sup> Zuckerman, *supra* note 54.

prematurely in order “to allow for an investigation into [a] bombing that killed at least 54 civilians.”<sup>447</sup> As one reporter noted:

[The press] present it as though the two sides are moral equivalents. They make it sound as though Israel started firing missiles into Lebanon out of the blue. In truth, Hezbollah has been firing missiles into Israel since . . . the year 2000. . . . Were this to happen in the U.S. or any other country, the world would not demand that we look the other way. Yet *there is a double standard when it comes to Israel*. Even worse, there is international Arab support for Hezbollah’s goal of destroying Israel.<sup>448</sup>

Instead, the press and the U.N.<sup>449</sup> ignored Hezbollah’s violations of “the most basic laws of war”<sup>450</sup> and Protocol I of the Geneva Conventions, which prohibits, *inter alia*, “locating military objectives within or near densely populated areas” and requires “precautions to protect the civilian population.”<sup>451</sup>

Ultimately, Hezbollah’s concealment of “weaponry among civilians”<sup>452</sup> was overshadowed by the “worldwide condemnation” of and accusations of war crimes against Israel<sup>453</sup> following an air raid that killed several hundred civilians in Qana.<sup>454</sup> “After pictures of the Qana children were flashed around the world, for instance, public outrage was directed at Israel, prompting Israeli officials to declare a 48-hour cease-fire.”<sup>455</sup> Warnings given by the IDF to residents “‘several days in advance’ to leave

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<sup>447</sup> Dennis Staunton, *Israel Agrees to Suspend Bombardment for 48 Hours*, IRISH TIMES, July 31, 2006, at 8. Israel provided advance warning “several days in advance” to civilians in Southern Lebanon advising them to “leave their homes.” Steven Erlanger & Hassan Fattah, *Israel Strike Kills Dozens in Lebanon; 20 Children Among Dead; Rice Cancels Beirut Trip*, INT’L HERALD TRIB., July 31, 2006, at 1; *infra* text accompanying notes 452–55.

<sup>448</sup> Weiss, *supra* note 422 (emphasis added).

<sup>449</sup> Hezbollah’s conduct and human rights violations “don’t attract much international condemnation, especially from the anti-Israel United Nations.” Zuckerman, *supra* note 54.

<sup>450</sup> *Id.*

<sup>451</sup> Geneva Conventions Additional Protocol I (1977), art. 58(b), (c).

<sup>452</sup> Zuckerman, *supra* note 54.

<sup>453</sup> Ori Nir, *Israeli Military Policy Under Fire After Qana Attack*, FORWARD, Aug. 4, 2006, at 6, available at <http://www.forward.com/articles/575/>.

<sup>454</sup> *Id.*

<sup>455</sup> Kathleen Parker, *Manipulating History*, CHI. TRIB., Aug. 9, 2006, at 23.

their homes,<sup>456</sup> however, went unreported, as did the collapse of buildings nearly eight hours *after* the bombing concluded.<sup>457</sup>

More importantly, the media cited twice the number of actual casualties,<sup>458</sup> and photographs of and videotaped footage from Qana suggested that “the Qana tragedy might have been staged by Hezbollah.”<sup>459</sup> Nonetheless, these revelations were reported “with almost no fanfare or media coverage.”<sup>460</sup> Ultimately, the media’s coverage raised a recurring, but heretofore unanswered, question: “Why is an Arab killed by a Jew news, but not an Arab killed by an Arab?”<sup>461</sup>

### 3. *Defending Against Hyperbolic Photojournalistic Attacks*

While Israel was accused of conducting its campaign “in a fascist fashion,”<sup>462</sup> a new dimension of warfare was introduced against Israel: photojournalistic hyperbole. Described as “a little anti-war, anti-Semitic buck-up,”<sup>463</sup> a Lebanese photographer working for Reuters, the British news agency known for a “clear anti-Israel slant to [its] reporting” and “an institutional bias against Israel,”<sup>464</sup> single-handedly “raised several questions about the standards of photo-journalism in the age of widespread digital photography.”<sup>465</sup> The incident, together with other revelations of

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<sup>456</sup> Steven Erlanger & Hassan M. Fattah, *Israel Suspending Lebanon Air Raids After Dozens Die*, N.Y. TIMES, July 31, 2006, at A1; *supra* text accompanying notes 441–43.

<sup>457</sup> Zuckerman, *supra* note 54.

<sup>458</sup> *Distortion in Reporting the War on Hizbollah*, HERALD (Glasgow), Aug. 10, 2006, at 12; . . . *And Behind the ‘News’*, N.Y. POST, Aug. 8, 2006, at 38 (“Human Rights Watch disclosed that the actual death toll at Qana was only half the figure first announced.”).

<sup>459</sup> Parker, *supra* note 455.

<sup>460</sup> . . . *And Behind the ‘News’*, *supra* note 458. It is now accepted that “the IDF committed no atrocities . . .” Caroline B. Glick, *The Media and Enduring Narrative*, JERUSALEM POST, July 8, 2008, at 15.

<sup>461</sup> Levant, *supra* note 303.

<sup>462</sup> Uri Dan, *Hez Hits Near Tel Aviv; Iran Admits It Supplies Terror Missiles to Bloodthirsty Goons*, N.Y. POST, Aug. 5, 2006, at 8 (quoting Venezuelan president Hugo Chavez).

<sup>463</sup> *Jihad Journalism?*, INVESTOR’S BUS. DAILY, Aug. 8, 2006, at A13.

<sup>464</sup> Philip Klein, *Fog of Reuters*, AM. SPECTATOR, Aug. 11, 2006, available at [http://www.spectator.org/dsp\\_article.asp?art\\_id=10210](http://www.spectator.org/dsp_article.asp?art_id=10210). A former Reuters reporter, Klein recalled: “I was often a lone voice of dissent in the New York newsroom when I tried to point out to my colleagues the blatant bias in our reporting on Israel’s struggle against Palestinian terrorism.” *Id.*

<sup>465</sup> *Today in Business*, N.Y. TIMES, Aug. 14, 2006, at C2.

manipulation,<sup>466</sup> added a new element to media coverage wrought with “distortion.”<sup>467</sup>

Reuters “disclosed that at least two images sent out over its wire from Beirut were deliberately doctored so as to suggest greater damage inflicted by Israel.”<sup>468</sup> In one image, the photographer “show[ed] extra flares being dropped” from an Israeli warplane.<sup>469</sup> This effect depicted an “Israeli F-16 flying over Lebanon to make it appear the jet fighter dropped three flares rather than one.”<sup>470</sup> A second photograph displayed “more dark smoke rising from buildings” following an Israeli bombing than what actually occurred.<sup>471</sup> In the second photograph, “cloned buildings” also accompanied the ““enhanced”” smoke plumes.<sup>472</sup> In both cases, the manipulations were designed for “dramatic effect.”<sup>473</sup>

These incidents were not isolated. Online press monitors and internet ‘bloggers’<sup>474</sup> “soon turned up not only doctored images, but also numerous staged and falsely captioned pictures by various photographers—all designed to incite outrage against Israel.”<sup>475</sup> Moreover, other photographs of “the same phenomenon” were published several weeks apart in order to manufacture the appearance of greater civilian casualties and destruction

<sup>466</sup> See *infra* text accompanying notes 474–81.

<sup>467</sup> *Distortion in Reporting the War on Hizbollah*, *supra* note 458.

<sup>468</sup> . . . *And Behind the ‘News’*, *supra* note 458.

<sup>469</sup> Susan Ihne, *A Picture Paints A Thousand Words, and Can Launch Even More Conspiracy Theories*, ASHEVILLE CITIZEN-TIMES (N.C.), Aug. 27, 2006, at 5B.

<sup>470</sup> *Jihad Journalism?*, *supra* note 463; Parker, *supra* note 455.

<sup>471</sup> Ihne, *supra* note 469.

<sup>472</sup> *Reuters Doctoring Photos From Beirut?*, at [http://littlegreenfootballs.com/weblog/?entry=21956\\_Reuters\\_Doctoring\\_Photos\\_from\\_Beirut&only](http://littlegreenfootballs.com/weblog/?entry=21956_Reuters_Doctoring_Photos_from_Beirut&only). Charles Johnson “turned Little Green Footballs from a how-to Web design site into a political blog after the Sept. 11, 2001, attacks.” Paul Farhi, *Blogger Takes Aim At News Media and Makes a Direct Hit*, WASH. POST, Aug. 9, 2006, at C1. Johnson’s weblog deconstructed the duplications inherent in the doctored photo, including the “possible original for [the] faked photo.” *Reuters Doctoring Photos From Beirut?*, *supra*. Johnson’s “exposure of the doctored airstrike photo was a coup for [him] and his four-year-old political blog . . .” Farhi, *supra*.

<sup>473</sup> *To Our Readers*, S.F. CHRON., Aug. 10, 2006, at A2.

<sup>474</sup> The term blog “is a foreshortening of Web log. ‘Log’ suggests a record, typically cast in words or images. The log is published, or posted, on the World Wide Web. . . . Once published, if the blogger allows it, readers can comment on the posts, creating a dialogue impossible in other media.” John Lindner, *So, You Wanna Be A Blogger?*, SEATTLE TIMES, Sept. 27, 2006, at F7.

<sup>475</sup> Tim Rutten, *Regarding Media: Effects of Cost-Cutting Are Felt in Reuters Flap*, L.A. TIMES, Aug. 19, 2006, at E1 (emphasis added).

by the IDF.<sup>476</sup> As one commentator noted, “[t]errorists are as adept at manipulating images as they are at making bombs.”<sup>477</sup>

The digital manipulation<sup>478</sup> of the two Reuters photographs resulted in the removal of 920 photographs from Reuters’s archives.<sup>479</sup> Commentators questioned “how these patently phony pictures were distributed in the first place and why they weren’t detected by the news agencies that received them.”<sup>480</sup> Notwithstanding their removal and retraction, the altered photographs were distributed long enough to possess “the power to sway public opinion and to alter the course of history.”<sup>481</sup> The incidents, however, were endemic of “a larger, underlying issue: the role of images in fairly portraying the conflict between Hezbollah and Israel.”<sup>482</sup> Ultimately, the ‘Effect’ succeeded: the “intentionally misleading”<sup>483</sup> photographs “put Israeli military actions against terrorists. . . in an unjustly harsh light,”<sup>484</sup> and “the distorted footage put out by the media made it impossible for Israel to defend itself in the court of public opinion.”<sup>485</sup>

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<sup>476</sup> See *Reuters Calls the Doctor, Take 2*, POWER-LINE NEWS (Aug. 6, 2006 weblog), at <http://www.powerlineblog.com/archives/014919.php>; see also *Seeing What They Want to See?*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Aug. 11, 2006, at B7 (“[S]ome ‘victims’ seemed to appear repeatedly in pictures.”).

<sup>477</sup> Editorial, *Our Views; Reuters at War*, PRESS ENTERPRISE (Cal.), Aug. 9, 2006, at B08b.

<sup>478</sup> Computer software programs such as Adobe Photoshop enable users to “create and manipulate images.” Michael L. Siegel, Comment, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 396 n.150 (1999).

<sup>479</sup> *Distortion in Reporting the War on Hizbollah*, *supra* note 458; James Wallace, *Photographers Adhere to Ethics*, RICHMOND TIMES DISPATCH (Va.), Sept. 17, 2006, at E-4.

<sup>480</sup> Rutten, *supra* note 475, at E16; see also Sheera Claire Frenkel, *Reuters Pulls ‘Doctored’ War Photo. Web Logs Claim Victory in Battle Against Mainstream Media*, JERUSALEM POST, Aug. 7, 2006, at 4 (questioning how “a photograph that appears so clearly doctored to so many non-professional photographers made it past the Reuters photo editor who oversaw the photographer’s work”).

<sup>481</sup> Parker, *supra* note 455.

<sup>482</sup> *Today in Business*, N.Y. TIMES, Aug. 14, 2006, at C2; see also *Seeing What They Want to See?*, *supra* note 476.

<sup>483</sup> Parker, *supra* note 455.

<sup>484</sup> *Seeing What They Want to See?*, *supra* note 476.

<sup>485</sup> Glick, *supra* note 460.

C. *The Effects of the 'Effect'*

The Hague Court's equivocal application of international law principles to Israel's exercise of self-defense under the U.N. Charter, coupled with hostile media coverage insinuating that "Israel pursued wider goals than merely the return of its abducted soldiers,"<sup>486</sup> undermined Israel's ability to implement the necessary self-defensive campaign to free the captured soldiers and neutralize Hezbollah.<sup>487</sup> The conflict "made the Jewish state into an object of international vituperation. For daring to defend herself against terror, Israel, not for the first time, was all but banished from the society of civilized nations."<sup>488</sup> The digital media, serving both as a "curse and a blessing,"<sup>489</sup> played its role by presenting coverage that was highly "prejudicial toward Israel."<sup>490</sup>

While "the public must be wary of allowing news reports to shake its resolve,"<sup>491</sup> Israel "is highly sensitive to its image in the international community and is eager to maintain a reputation as a democratic nation that venerates and adheres to the ideals of the rule of law."<sup>492</sup> Thus, the media's "creat[ion of] a reality instead of report[ing] on one"<sup>493</sup> presented a view that reverberated within the international community, translating the reality on the ground into another manifestation of the 'Effect' that further constrained Israel's legal rights under international law.

1. *Déjà vu: Questioning Self-Defense and Armed Attacks Anew*

It is recognized that a single incident "may be sufficient to bring into play the inherent right of self-defense."<sup>494</sup> Thus, Hezbollah's incursion into Israeli territory triggered an Israeli response defensible under the U.N.

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<sup>486</sup> Ruys, *supra* note 367, at 271–72.

<sup>487</sup> See Erlanger & Fattah, *supra* note 447 (citing Israeli Prime Minister Ehud Olmert's explanation that Israel "needed another 10 to 14 days to complete its war aims against Hezbollah").

<sup>488</sup> Jacob Laksin, *Terror and Double Standards*, FRONTPAGEMAGAZINE.COM, June 6, 2007, available at <http://frontpagemag.com/Articles/Read.aspx?GUID=A5096996-290E-466B-94CF-74F063655A56>.

<sup>489</sup> Parker, *supra* note 455.

<sup>490</sup> *Id.*

<sup>491</sup> . . . *And Behind the 'News'*, *supra* note 458.

<sup>492</sup> Bisharat, *supra* note 51, at 547.

<sup>493</sup> Israel Democracy Institute, *Media Coverage During the Recent War*, at <http://www.idi.org.il/english/article.asp?id=06092006141936>.

<sup>494</sup> Ruys, *supra* note 367, at 272 (citing *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6)).

Charter. Notwithstanding strong diplomatic support for Israel's actions<sup>495</sup>—including Secretary-General Annan's statement that “[n]o one disputes Israel's right to defend itself” in response to “an unprovoked Hizbollah attack on Israel”<sup>496</sup>—strong elements within the U.N. refused to recognize that right. One draft resolution in the General Assembly denied Israel's right to self defense, instead “urg[ing] Israel to halt this *illegal aggression* and to cease the bloodletting, and inhumane attacks on Lebanese territory.”<sup>497</sup> Israel was further accused of “flouting all international customs and laws . . . through the use of internationally banned weapons.”<sup>498</sup>

Embracing descriptions of Israel unleashing a “war machine . . . against Lebanon on the pretext of the right to legitimate self-defence,”<sup>499</sup> the Security Council carefully crafted its condemnation of the violence in terms that fell without the scope of Article 51. Relying upon the presumed legal status of Hezbollah as a non-state actor, the Security Council embraced the “considerable controversy . . . as to when attacks carried out

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<sup>495</sup> See, e.g., Murphy, *supra* note 411 (“One EU official said Israel's unilateral withdrawal from southern Lebanon six years ago, and UN Resolution 1559 that called for the disarming of Lebanon's militias and for the country's military to control its southern region, made it impossible to justify Hizbullah's attacks.”); Alec Russell, *America Bush Lays the Blame on Hizbollah Aggression*, DAILY TELEGRAPH (London), July 14, 2006, at 4 (indicating President Bush's “staunch support of Israel” and discussing a U.S. veto of a U.N. Security Council resolution condemning Israel's alleged “disproportionate use of force”).

<sup>496</sup> U.N. SCOR, 61st Sess., 5498th mtg. at 3, U.N. Doc. S/PV.5498 (July 30, 2006). Annan nonetheless characterized Israel's response as “excessive.” *Seven Weeks of Conflict*, FIN. TIMES (London), Aug. 14, 2006, at 6. One commentator questioned, “But what exactly is a ‘proportionate’ response when a whole people and their society are threatened with extinction, when hostilities are initiated without provocation, when every act of restraint invites a vicious contempt?” Zuckerman, *supra* note 54, at 76.

<sup>497</sup> U.N. GAOR, 60th Sess., 95th plen. mtg. at 14, U.N. Doc. A/60/PV.95 (July 20, 2006) (agenda items 117 and 120) (statement of the representative from Qatar) (emphasis added). The Security Council, however, did adopt a statement expressing “its extreme shock and distress at the shelling by the Israeli Defense Forces of a residential building . . . in southern Lebanon” for which it sent “its deepest condolences to the families of the victims and to the Lebanese people.” U.N. SCOR, 61st Sess., 5499th mtg. at 2, U.N. Doc. S/PV.5499 (July 30, 2006).

<sup>498</sup> U.N. Conference on Disarmament, 31st plen. mtg., at 30 U.N. Doc. CD/PV.1031 (Aug. 3, 2006) (statement of the Algerian representative).

<sup>499</sup> U.N. GAOR, 60th Sess., 96th plen. mtg. at 12, U.N. Doc. A/60/PV.96 (July 21, 2006) (statement of the Libyan Arab Jamahiriya representative).

by non-state actors qualify as 'armed attacks' in the sense of Article 51" to adopt a resolution that intentionally removed self-defense from an available right Israel was entitled to exercise.<sup>500</sup>

*a. Characterizing Another Inapplicable Article 51 Legal Reality*

Security Council Resolution 1701 expressed "utmost concern" for escalating hostilities since Hezbollah's "attack,"<sup>501</sup> but it failed to invoke key terminology from Article 51, which sanctions self-defensive measures specifically against an "armed attack."<sup>502</sup> Although Hezbollah's "diversionary rocket attacks suggest that this was a deliberate 'armed attack,'"<sup>503</sup> the term 'armed' was inexplicably absent from Resolution 1701. Given the Hague Court's interpretation that Article 51 applies only to an armed attack by one state against another,<sup>504</sup> it is not surprising that the Security Council sought to analogize Israel's conduct in Lebanon with its construction of the security structure. That non-violent endeavor,<sup>505</sup> the Hague Court found, violated international law.<sup>506</sup> The implication of Resolution 1701 is that Israel once again violated international law by acting in self-defense absent any legal right.

Moreover, Resolution 1701 never utilized the term 'self-defense,' thereby wholly removing Article 51 from consideration. Instead, it called for "the immediate cessation by Israel of all *offensive military operations*."<sup>507</sup> Essentially, Resolution 1701 "implicitly views Israel as an aggressor"<sup>508</sup> and, as one scholar recognized, contains intentionally ambiguous language: "were *all* of Israel's operations 'offensive,' or were some offensive and others defensive? In either case, Israel must have been considered to have acted outside the scope of lawful self-defense."<sup>509</sup> Furthermore, Resolution 1701 made no mention of either Resolutions 1368 or 1373,<sup>510</sup> once again suggesting that Israel could invoke *no* authority to

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<sup>500</sup> Ruys, *supra* note 367, at 274.

<sup>501</sup> S.C. Res. 1701, at 1, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

<sup>502</sup> U.N. Charter art. 51.

<sup>503</sup> Ruys, *supra* note 367, at 273.

<sup>504</sup> *See supra* Part III.A.3.a.

<sup>505</sup> *See supra* Part III.A.1.

<sup>506</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9).

<sup>507</sup> S.C. Res. 1701, *supra* note 501 (emphasis added).

<sup>508</sup> Delahunty, *supra* note 401, at 922 n.254.

<sup>509</sup> *Id.*

<sup>510</sup> *See* S.C. Res. 1701, *supra* note 501.

justify its actions. Thus, although “the attack by Hezbollah was sufficient to trigger the right to self-defense,”<sup>511</sup> the Security Council uncompromisingly refused to acknowledge “any right to self-defense on Israel’s part against Hezbollah.”<sup>512</sup>

*b. Imputation of State Responsibility For Armed Attacks*

In light of the Hague Court’s pronouncements finding Israel within a separate legal reality for invocation of Article 51, “it is little wonder that Israel traveled the road least contested and invoked state responsibility” upon Lebanon for Hezbollah’s attacks.<sup>513</sup> Indeed, Hezbollah “is functioning not just as a state within a state but almost as the state itself.”<sup>514</sup> Lebanon’s violation of Security Council Resolution 1559, which required the Lebanese government to exert control “over all Lebanese territory,”<sup>515</sup> ensured that southern Lebanon remained “open for terrorist occupation”<sup>516</sup> by Hezbollah. In May 2005, eight months after Resolution 1559 was adopted, Hezbollah was elected to fourteen seats in the Lebanese Parliament.<sup>517</sup> In that capacity, Hezbollah now “can count on the support of five ministers, a third of Lebanon’s government, thanks to the backing of Shia Muslims, Lebanon’s largest religious group, and to some astute political deals.”<sup>518</sup>

Hezbollah’s assumption of certain “governmental functions in the absence of Lebanese authorities”<sup>519</sup> and Lebanon’s abdication of its responsibility to “fulfill its obligations as a sovereign state to extend its control over its own territory,”<sup>520</sup> leads to the conclusion that “Hezbollah’s attack could be considered an attack by a state, making the Hezbollah-

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<sup>511</sup> Ruys, *supra* note 367, at 273.

<sup>512</sup> Delahunty, *supra* note 401, at 922 n.254.

<sup>513</sup> Ruys, *supra* note 367, at 276.

<sup>514</sup> Christopher Allbriton & Nicholas Blanford, *Hizballah Nation*, TIME, July 31, 2006, at 44.

<sup>515</sup> S.C. Res. 1559, *supra* note 427.

<sup>516</sup> Weiss, *supra* note 422.

<sup>517</sup> Allbriton & Blanford, *supra* note 514, at 45. “The mistake Lebanon made was welcoming Hezbollah into its arms and into its parliament.” Weiss, *supra* note 422.

<sup>518</sup> *The Crisis Widens*, *supra* note 406.

<sup>519</sup> Ruys, *supra* note 367, at 293.

<sup>520</sup> Statement by Foreign Minister Deputy DG Gideon Meir (July 13, 2006), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2006/Statement+by+Foreign+Ministry+Deputy+DG+Gideon+Meir+13-Jul-2006.htm> [hereinafter Meir Statement].

administered territory liable to a counterattack in self-defense<sup>521</sup> under Article 51. Israel has maintained that it “is now reacting to an act of war by a neighboring sovereign state. Israel views Lebanon as responsible for the present situation, and it shall bear the consequences for this act.”<sup>522</sup> While Israel “did not accuse Lebanon of supporting Hezbollah,”<sup>523</sup> it held the country responsible for failures to implement Resolution 1559<sup>524</sup> and to disarm Hezbollah, and for Israel being “compelled to act, not against Lebanon, but against the monster that Lebanon had allowed to hold it hostage.”<sup>525</sup> Notwithstanding the Security Council’s belief to the contrary, this position is defensible under Article 51 or Resolutions 1368 and 1373, even if Hezbollah’s attack “was not imputable to the Lebanese government.”<sup>526</sup>

Just as “a close association between the al Qaeda network and Afghanistan renders the actions of the former ‘imputable to the state of Afghanistan’<sup>527</sup> and therefore justified the United States military strikes in response to the September 11 terrorist attacks, Hezbollah’s conduct may similarly be imputed to Syria and Iran.<sup>528</sup> Financial aid and provisions of weaponry have been long recognized as valid connections between terrorists and states.<sup>529</sup> Emphasizing that Lebanon “is not the only responsible party,” Israel has accused Syria of “provid[ing] support to the Hizbullah, including the transfer of arms, munitions and operatives through the Damascus airport and border crossings into Lebanon.”<sup>530</sup> Similarly, Iran “provides funding, weapons and directives for this terrorist

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<sup>521</sup> Ruys, *supra* note 367, at 293.

<sup>522</sup> Meir Statement, *supra* note 520.

<sup>523</sup> Ruys, *supra* note 367, at 277.

<sup>524</sup> See *supra* text accompanying notes 515–16.

<sup>525</sup> Press Release, Security Council, Immediate, Comprehensive Ceasefire Needed in Lebanon Prior to Political Discussion, U.N. Doc. SC/8796 (July 31, 2006), available at <http://www.un.org/News/Press/docs/2006/sc8796.doc.htm>.

<sup>526</sup> Ruys, *supra* note 367, at 278.

<sup>527</sup> Caplen, *supra* note 37, at 766 (quoting Guruli).

<sup>528</sup> See *supra* text accompanying note 426. “Syria is bent on reestablishing its hegemony in Lebanon” via the militant party Hezbollah. Wurmser, *supra* note 402; accord Weiss, *supra* note 422.

<sup>529</sup> Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 598 (1989).

<sup>530</sup> Meir Statement, *supra* note 520.

organization[, which f]or all practical purposes, . . . is merely an arm of the Teheran Jihadist regime.”<sup>531</sup>

The Second Lebanon War enabled Hezbollah to “truly earn its credentials in the Arab world,”<sup>532</sup> and its actions “enforc[e] the notion that Hezbollah’s efforts to destroy Israel are state-sponsored.”<sup>533</sup> Some commentators argue that Syria and Iran, both of which orchestrated the July 2006 conflict “by proxy,” are prepared for “their next logical strategic move[:] initiate another conflict with Israel,”<sup>534</sup> which further justifies Israel’s *necessity* to defend itself from incursions into its borders under Article 51 or Resolutions 1368 and 1373. Unfortunately, no matter the surrounding circumstances, the ‘Effect’ does—and will continue to—deprive Israel of both its right and existential need to defend itself.

## 2. *The ‘Effect’ Resonates Militarily and Politically*

Of course, an open conflict instigated by Iran or Syria against Israel would *require* Israel to exercise self-defense under Article 51, and such actions would be difficult to re-characterize as falling without the scope of that provision.<sup>535</sup> Nonetheless, the ‘Effect’ would ensure, as it did during the Second Lebanon War, that extrajudicial considerations preclude Israel from engaging in the appropriate self-defensive campaign it deems necessary to conduct. In this respect, the ‘Effect’ reverberated both on the military battlefield and within Israel’s political establishment to facilitate a further destabilizing process that prejudices Israel’s exercise of its legal rights and leaves unanswered questions about how, when faced with the next assault,<sup>536</sup> Israel can—and to what extent the international community will permit it to—respond.

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<sup>531</sup> *Id.*

<sup>532</sup> Efraim Halevy, *Blind Date*, NEW REPUB., August 14–21, 2006, at 10.

<sup>533</sup> Weiss, *supra* note 422.

<sup>534</sup> Wurmser, *supra* note 402.

<sup>535</sup> For example, during the 1973 Yom Kippur War in which “Syrian and Egyptian armies simultaneously ‘launched an offensive against Israel’ from the north and south, respectively,” Caplen, *supra* note 311, at 694, the Security Council never denied, by Resolution, Israel’s right to engage in self-defense. *See, e.g.*, S.C. Res. 338, U.N. Doc. S/RES/338 (Aug. 15, 1973).

<sup>536</sup> *See supra* text accompanying note 534.

*a. A Dangerous Military 'Effect'*

With hyperbolic press reports,<sup>537</sup> digital media manipulations,<sup>538</sup> and accusations of ulterior motivations,<sup>539</sup> Israel's military encountered not only a hostile enemy on the battlefield but a particularly dangerous psychological manifestation<sup>540</sup> of the 'Effect.' One journalist noted:

The negative perception and presentation of Israel starkly impacts on the degree of Israeli military response that international public opinion . . . is prepared to tolerate. The problems . . . that Israel is encountering on the media battlefield, in short, constitute a significant factor in circumscribing its military room for maneuver.<sup>541</sup>

The most blaring instance in which the IDF found itself capitulating to world-wide outrage was best exemplified by manipulated images from and exaggerated reports of civilian devastation in Qana, all of which forced Israel to declare a cease-fire.<sup>542</sup>

Israel emerged from the conflict having felt the full wrath of the 'Effect': "weakened, even paralyzed . . . and militarily confused."<sup>543</sup> It "failed to stop Hezbollah's attacks, destroy the organization and its leaders, and create an effective security zone along its northern border."<sup>544</sup> Prime Minister Ehud Olmert acknowledged that these failures required Israel "to fix, to deploy, to renovate and to strengthen."<sup>545</sup> More significantly, for a

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<sup>537</sup> See *supra* Part III.B.2.

<sup>538</sup> See *supra* Part III.B.3.

<sup>539</sup> See *supra* note 410.

<sup>540</sup> See, e.g., Orit Arfa, *Engaging the Disengagers*, JERUSALEM POST, Aug. 10, 2007, at 22 (discussing psychological effects upon Israeli soldiers, including mental preparedness, from Gaza disengagement training and the Second Lebanon War).

<sup>541</sup> David Horowitz, *The Ethical Dilemmas of the Jewish State at War*, JERUSALEM POST, Aug. 8, 2006, at 3; cf. Pinkerton, *supra* note 46 (stating that Muslim extremists are "not fearful of international norms or international law").

<sup>542</sup> See *supra* text accompanying notes 447 & 455. Israel is "probably the only government that drops leaflets warning civilians to evacuate before bombing. She is taking every precaution possible . . ." Weiss, *supra* note 422.

<sup>543</sup> Wurmser, *supra* note 402.

<sup>544</sup> *Id.*

<sup>545</sup> Conal Urquhart, *Lebanon War Was A Success, Says Olmert*, GUARDIAN (London), July 13, 2007, at 22.

nation that “has swapped hundreds of prisoners for a single soldier in the past,”<sup>546</sup> Israel failed to rescue the soldiers Hezbollah captured.<sup>547</sup>

These ‘failures’ cannot be wholly blamed upon Israeli incapacity, military shortcomings, or the fact that Israel “had no strategic vision.”<sup>548</sup> In fact, some commentators emphasize that “anti-Israel bias in the international media led to the situation being misreported as an Israeli defeat.”<sup>549</sup> Regardless, the obstacles Israel endured during the Second Lebanon War were consequential, imposed upon Israel as an unwitting and unwilling participant. Previously, Israel successfully defended against “massive military threats to its existence,” but now it must “fight long, debilitating campaigns over a few soldiers”<sup>550</sup> under scrutiny by a hostile press corps. As one journalist recognized, the recent war against Hezbollah, “the first Israel had fought in almost a quarter century,”<sup>551</sup> accentuated and “underscored the Jewish state’s difficulties in confronting Islamic adversaries on its doorstep.”<sup>552</sup> In essence, the ‘Effect’ that

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<sup>546</sup> *The Crisis Widens*, *supra* note 406.

<sup>547</sup> Richard Boudreaux, *The World; Soldier Dies in Israel’s Gaza Raid*, L.A. TIMES, July 13, 2007, at A7. On July 16, 2008, the bodies of IDF soldiers Ehud Goldwasser and Eldad Regev, which were described by U.N. officials as “‘mutilated,’” were returned to Israel in black coffins as part of a prisoner swap in which Israel was required to release five live prisoners. Carolynne Wheeler, *Hizbollah Gives Hero’s Welcome to Freed Child Killer; Israel Exchanges Prisoners for Return of Dead Soldiers in Emotional Scenes at Border Crossing*, DAILY TELEGRAPH (London), July 17, 2008, at 15. The prisoner swap was highly controversial in Israel, Dion Nissenbaum, *Now Free, Militant Becomes Symbol of Resistance; Freed by Israel, a Convicted Child Killer’s Release is Fueling Hezbollah*, MIAMI HERALD, July 21, 2008, at A13, particularly since Hezbollah “had refused to clarify whether the men had been killed at the time of their capture in 2006 or afterward, although it had long been assumed in Israel that they were no longer alive.” Isabel Kershner & Graham Bowley, *Hezbollah Delivers Bodies of Israeli Soldiers; In Exchange, 5 Men Return to Lebanon*, INT’L HERALD TRIB., July 17, 2008, at 4. The prisoner swap “proved to many in Lebanon and elsewhere that ‘through violence and resistance you can achieve your aims with Israel, whereas through negotiations, you can’t.’” Brenda Gazzar, *Lebanon Wants a National Dialogue to Discuss Hizbullah’s Weapons*, JERUSALEM POST, July 23, 2008, at 9.

<sup>548</sup> Wurmser, *supra* note 402.

<sup>549</sup> John Keegan, *Why Israel Will Go to War Again*, SAN DIEGO UNION-TRIBUNE, Nov. 26, 2006, at G-1, available at 2006 WLNR 20616855.

<sup>550</sup> *The Crisis Widens*, *supra* note 406.

<sup>551</sup> Roger Cohen, *Israel’s Open Society Takes Leaders to Task*, INT’L HERALD TRIB., May 2, 2007, at 2.

<sup>552</sup> Boudreaux, *supra* note 547. The Second Lebanon War not only “damage[ed] Israel’s image as the Middle East’s dominant military force, . . . it empowered Hezbollah,  
(continued)

undermined Israel's military actions in self-defense under international law also unraveled it from within.

*b. A Precarious Political 'Effect'*

Israel's shortcomings during the Second Lebanon War necessitated the formation of the Winograd Inquiry Commission, appointed by the Israeli government in response "to a strong sense of a crisis and deep disappointment with the consequences of the campaign and the way it was conducted."<sup>553</sup> The Commission examined "the preparation and conduct of the political and the security levels concerning all the dimensions of the Northern Campaign which started on July 12th 2006"<sup>554</sup> and issued a "devastating"<sup>555</sup> interim report in April 2007.<sup>556</sup> That report revealed that "the greatest failure in the Israel-Hizbullah war was . . . the absence of strategic thinking,"<sup>557</sup> though "[n]o one knows what exactly will be in the final Winograd report, or even when it will come out."<sup>558</sup> Convened "to study why Israeli forces were not victorious,"<sup>559</sup> the Winograd Commission "lambaste[d] Prime Minister Ehud Olmert for outright incompetence in his conduct of the war . . . and berate[d] him for 'a serious failure in exercising judgment, responsibility and prudence."<sup>560</sup> The interim report underscored a more ominous reality: that Israel still "has not managed to deliver itself from the threat to its existence"<sup>561</sup> and the international community perpetuates Israel's struggle through the 'Effect'.

Indeed, this reality was reflected within the final Winograd Commission report, which was released on January 30, 2008, nine months

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which has most-recently used its clout to secure veto-power for the first time within Lebanon's new coalition government." Nissenbaum, *supra* note 547.

<sup>553</sup> Winograd Commission Submits Interim Report, (April 30, 2007), *available at* <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Winograd+Inquiry+Commission+submits+Interim+Report+30-Apr-2007.htm>.

<sup>554</sup> *Id.*

<sup>555</sup> Cohen, *supra* note 551.

<sup>556</sup> Herb Keinon, 'Historic' Talks with Arab League Envoys Take Place Today, JERUSALEM POST, July 25, 2007, at 1.

<sup>557</sup> Irwin Cotler, *A Dearth of Strategic Thinking*, JERUSALEM POST, July 10, 2007, at 1.

<sup>558</sup> Gil Hoffman & Rebecca Anna Stoil, *Home Safe?*, JERUSALEM POST, June 22, 2007, at 14.

<sup>559</sup> Cal Thomas, *Israel's Next War*, VIRGINIAN-PILOT, May 29, 2007, at B11, *available at* 2007 WLNR 10044150.

<sup>560</sup> Cohen, *supra* note 551.

<sup>561</sup> *Id.*

after its preliminary report and seventeen months following the cessation of formal hostilities.<sup>562</sup> The summary of the final report, which was released “to present its highlights,” explicitly indicated that “[f]ear of criticism . . . may lead to defensive reactions, working by the book, and abstention from making resolute decisions and preferring non-action. Such behavior is undesirable and also dangerous.”<sup>563</sup> One commentator observed:

As the Winograd Commission documented in its final report on the Second Lebanon War[,] the media reports of the fabricated massacre of Lebanese civilians by an [Israeli Air Force] bomber in Kafr Kana in South Lebanon caused US Secretary of State Condoleeza Rice to end US support for an Israeli military victory over Iran’s Lebanese proxy and to pressure Israel to accept a cease-fire leaving Hizbullah intact.<sup>564</sup>

Indeed, the final report summary noted that “a series of miscommunications between Jerusalem and Washington played a decisive role in shaping the war’s outcome,”<sup>565</sup> particularly in light of the media’s fabricated reporting of the conflict. Ultimately, many of the findings contained in the interim report were reiterated in the final report,<sup>566</sup> the latter of which contained neither surprises nor revelations.<sup>567</sup>

### 3. *An Ominous Future Clouded By the ‘Effect’*

Israel’s difficulties navigating through and overcoming the ‘Effect’ reach an existential level. Hezbollah achieved substantial gains in its war

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<sup>562</sup> Steven Erlanger, *Panel faults conduct of Israel’s war in Lebanon; But report stops short of censuring Olmert*, INT’L HERALD TRIB., Jan. 31, 2008, at 8.

<sup>563</sup> *English Summary of the Winograd Commission Report*, N.Y. TIMES, Jan. 30, 2008, available at <http://www.nytimes.com/2008/01/30/world/middleeast/31winograd-web.html> [hereinafter *Final Winograd Commission Report*].

<sup>564</sup> Glick, *supra* note 460.

<sup>565</sup> *Winograd Report Uncovers Diplomatic Breakdown*, FORWARD, February 8, 2008, at A3. During the height of the conflict, “communication between the highest echelons in Jerusalem and Washington went dramatically off track.” *Id.*

<sup>566</sup> *Final Winograd Commission Report*, *supra* note 563.

<sup>567</sup> Erlanger, *supra* note 562.

against Israel,<sup>568</sup> in which it declared itself the “divine victor[.]”<sup>569</sup> and strengthened its alliance with Iran.<sup>570</sup> The Winograd Commission reports have fostered an atmosphere of political uncertainty<sup>571</sup> and a “sudden turn toward timidity.”<sup>572</sup> A legacy of the Second Lebanon War suggests that “[a]ny future Israeli government will find it difficult to initiate large military operations, even in the face of provocation.”<sup>573</sup> Overall, the atmosphere is ominous as “Hezbollah is re-arming with bigger and better rockets”<sup>574</sup> while Israel becomes increasingly wary of war, performing “everyone’s anti-terrorist dirty work [that is] still too much for the faint hearts of the West,”<sup>575</sup> and frustrated by “repeated failure[s] of every gesture of peace.”<sup>576</sup>

Most agree that “[t]here will soon be another war in the Middle East [that is] inevitable and unavoidable.”<sup>577</sup> Hezbollah seeks to engage in a war of attrition against Israel.<sup>578</sup> Iran has already declared that Israel must be “wiped off the map”<sup>579</sup> and that, “with the force of G-d behind it, we shall soon experience a world without . . . Zionism.”<sup>580</sup> For both Syria and

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<sup>568</sup> Stanley Kurtz, *Hawkish Gloom*, NAT’L REV. ONLINE, Aug. 8, 2006, available at <http://article.nationalreview.com/?q=OGFIY2Q5Y2E5ODNlZjcyODNmZTRIMTY4YzZhZWJmY2E>.

<sup>569</sup> Zvika Krieger, *Exhibition Game*, NEW REPUBLIC, Aug. 27, 2007, at 13 (describing a new Hezbollah war museum displaying relics and artifacts “destroyed by the [Hezbollah] resistance” from the Second Lebanon War).

<sup>570</sup> *Israel Will Cease to Exist After US Mideast Pullout Hezbollah Envoy to Iran*, BBC MONITORING INT’L REPORTS, Aug. 16, 2007 (available at LEXIS).

<sup>571</sup> Keinon, *supra* note 556.

<sup>572</sup> Yoni Goldstein, *Lucky Bystanders—For Now*, CANADIAN JEWISH NEWS, June 14, 2007, at 47.

<sup>573</sup> Wurmser, *supra* note 402.

<sup>574</sup> Leslie Susser, *Lebanon War One Year Later: Was It Israel’s Wake-Up Call?*, CANADIAN JEWISH NEWS, July 12, 2007, at 9.

<sup>575</sup> Levant, *supra* note 303.

<sup>576</sup> Kurtz, *supra* note 568.

<sup>577</sup> Keegan, *supra* note 549.

<sup>578</sup> Ze’ev Schiff, *Will There Be A War This Summer?*, CANADIAN JEWISH NEWS, May 31, 2007, at 10.

<sup>579</sup> Nazila Fathi, *Iran’s New President Says Israel ‘Must Be Wiped Off the Map’*, N.Y. TIMES, Oct. 27, 2005, at A8.

<sup>580</sup> U.S. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 32 (Feb. 6, 2006), available at <http://www.defenselink.mil/qdr/report/Report20060203.pdf> (quoting Iranian President Ahmadinejad).

Iran, Israel's emergence from the Second Lebanon War leaves the Jewish state "a vulnerable, tempting target"<sup>581</sup> for future attack.

Two uncertainties remain. The first is whether Israel's right to defend itself—under Article 51, Resolutions 1368 and 1373, or any other established principle of international law—will again be simultaneously recognized in theory while denounced in practice.<sup>582</sup> The second is against whom Israel's self-defensive conduct will be exaggerated by the media, criticized as excessive and disproportionate, and ultimately condemned as anathematic and violative of international law. The reality Israel faces, therefore, is preordained. Like Charlie Brown's eternal, yet unsuccessful, quest to kick the football, the question is when—not whether—the international community, performing the role of Lucy Van Pelt "pull[ing] the football away every time Charlie Brown is about to kick it,"<sup>583</sup> will utilize the 'Effect' to undermine Israel's next struggle for survival.

#### IV. CONCLUSION

In 1948, the U.N. "created the State of Israel."<sup>584</sup> Since even before its inception into the organization,<sup>585</sup> however, the U.N. has adopted a peculiar stance toward Israel by encouraging or facilitating—whether overtly or tacitly—rhetoric and action seeking to undermine its right to exist. Charged with the responsibility to "practice tolerance and live together in peace with one another as good neighbors,"<sup>586</sup> the U.N. is constitutionally<sup>587</sup> proscribed from either destroying Israel<sup>588</sup> or promulgating both an atmosphere and legal standard that encourage its

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<sup>581</sup> Wurmser, *supra* note 402.

<sup>582</sup> See *supra* text accompanying notes 494–98.

<sup>583</sup> John C. Zink, *The Charlie Brown Syndrome; Nuclear Reactions*, POWER ENGINEERING, July 1, 2007, at 10; see Blinbury, *supra* note 30.

<sup>584</sup> Anti-Israel Bias at the U.N., Anti-Defamation League, available at <http://www.adl.org/international/Israel-UN-1-introduction.asp>; *supra* text accompanying note 158.

<sup>585</sup> See *supra* Part II.A.1–3.

<sup>586</sup> U.N. Charter pmb1.

<sup>587</sup> See *supra* text accompanying note 79.

<sup>588</sup> To the contrary, the U.N. must "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. Charter art. 1.

demise.<sup>589</sup> To that end, the U.N. has been a forum for entertaining Israel's expulsion<sup>590</sup> while also ensuring that no single source can be cited as the epicenter of anti-Israel sentiment. Rather, a coalescence of numerous biases from various sources<sup>591</sup> has given rise to the 'Effect', that "darker impulse at play"<sup>592</sup> designed to cast aspersions upon Israeli conduct and undermine Israel's legal status under the U.N. Charter and established principles of international law.<sup>593</sup>

As this article demonstrates, the practical and legal constraints imposed upon Israel by the 'Effect' foster two dangerous scenarios. First, the legal principles enunciated by the Hague Court to undermine Israel's security produced an advisory opinion in which the judicial organ of the U.N. was "notoriously unable to provide a coherent answer"<sup>594</sup> to the question of self-defense under Article 51 or Resolutions 1368 and 1373.<sup>595</sup> In its effort to answer a legally conclusive question presented to it by the General Assembly with a predetermined answer,<sup>596</sup> the Hague Court "manipulated principles of international law,"<sup>597</sup> equally applicable to *all* nations, in order to condemn one.<sup>598</sup> Consequently, as it subjected Israel to a separate legal standard,<sup>599</sup> the Hague Court ignored the far-reaching consequences of its pronouncements: applying its standards in macrocosm establishes a precedent that precludes *any* nation "targeted by terror from responding to and preventing security threats against its citizens."<sup>600</sup>

Second, continued manifestations of the 'Effect' that deprive Israel of its legal right to defend itself from terrorist attacks create an inherent existential dilemma. Given the multifaceted and unprecedented condemnation of Israel's conduct during the Second Lebanon War against

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<sup>589</sup> The U.N. must "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." U.N. Charter pmbl.

<sup>590</sup> See *supra* text accompanying notes 178–82.

<sup>591</sup> See *supra* text accompanying note 41.

<sup>592</sup> See *supra* text accompanying note 65.

<sup>593</sup> See *supra* text accompanying notes 47–51.

<sup>594</sup> Ruys, *supra* note 367, at 266.

<sup>595</sup> See *supra* Part III.A.3.b.

<sup>596</sup> See *supra* text accompanying notes 356–61.

<sup>597</sup> Caplen, *supra* note 37, at 768.

<sup>598</sup> See *supra* Part III.A.3.a.–c.

<sup>599</sup> See *supra* Part III.A.3.a.–c.

<sup>600</sup> Caplen, *supra* note 37, at 769.

Hezbollah,<sup>601</sup> it is entirely foreseeable that any future action—violent or non-violent—taken by Israel to defend itself would be subject to similar scrutiny. While other countries unwaveringly implement a course of conduct,<sup>602</sup> the Second Lebanon War exposed the heightened sensitivities to which Israel is subjected and which forced it to dramatically alter its conduct, ultimately requiring it to abandon efforts to rescue its captured soldiers.<sup>603</sup> Consequently, the ‘Effect’ left Israel exposed, vulnerable to further attacks,<sup>604</sup> and fostered an unstable atmosphere in the Middle East that encourages, rather than suppresses, “acts of aggression or other breaches of the peace”<sup>605</sup> in contravention of the U.N. Charter.

As an extrajudicial phenomenon, the ‘Effect’ may not inform any determination of a state’s right to (1) exist, (2) defend itself and its citizens from terrorism, or (3) participate fully in the judicial decision-making processes within the international community. Nonetheless, the ‘Effect’ ultimately places Israel in the same, unenviable position in which Schulz’s Charlie Brown continually finds himself: “unable to find a game where [it] can win.”<sup>606</sup> Held to disparate standards by its international counterparts,<sup>607</sup> which consistently condemn Israeli actions and cast aspersions upon them,<sup>608</sup> Israel, like Charlie Brown, is “chronically and acutely under attack”<sup>609</sup> and finds itself isolated within a global community whose majority of members “[s]eldom . . . stop[] to consider their actions” and the ramifications thereof.<sup>610</sup> And yet, like Charlie Brown, who “is

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<sup>601</sup> See *supra* Parts III.B.1.–3.

<sup>602</sup> See *supra* text accompanying notes 42–45.

<sup>603</sup> See *supra* Part III.C.2.a.

<sup>604</sup> See *supra* Parts III.C.2.a., III.C.3.

<sup>605</sup> U.N. Charter art. 1(1).

<sup>606</sup> Craig Muder, *There’s a Little Charlie Brown in Each of Us*, OBSERVER-DISPATCH (N.Y.), Dec. 4, 2005, at 1F.

<sup>607</sup> “Israel has been voted, in country after country, one of the world’s two or three least popular states.” Hillel Halkin, *Greatest Danger For Israel*, N.Y. SUN, Apr. 17, 2007, at 7.

<sup>608</sup> See, e.g., Ethan Bronner, *Israel, Citing Success, Exits Shiite Towns; Rocket Fire Later Kills Israeli Girl*, BOSTON GLOBE, Feb. 22, 1992, at 1, available at 1992 WLNR 1887000 (noting “close media and international scrutiny, including condemnation of Israel” at the United Nations); Paul Michaels, *The Uphill Battle to Change Israel’s Reputation*, CANADIAN JEWISH NEWS, Mar. 29, 2007, at 39, available at 2007 WLNR 7644241 (discussing the United Nations Human Rights Council’s “one mission: to condemn Israel and thus to add to its isolation and delegitimization in world public opinion”).

<sup>609</sup> David Mamet, *The Catchall Solution: First Blame the Jews*, BALTIMORE SUN, Aug. 10, 2006, at 17A, available at 2006 WLNR 13821680.

<sup>610</sup> Muder, *supra* note 606.

spurned by everyone,” Israel nonetheless “has to keep braving the fates”<sup>611</sup> and maneuver around a reality in which propaganda against it “will always win.”<sup>612</sup> Until the international community actively resists and eradicates the ‘Effect’ it appears to have nurtured, the U.N. will continue to perpetuate the gravest, ongoing violation of international law within the past sixty years.

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<sup>611</sup> Henry Allen, *The Cartoonist Who Drew From Experience*, WASH. POST, Feb. 14, 2000, at C01.

<sup>612</sup> Benny Avni, *New United Nations Body Is Anti-Israel From Start*, N.Y. SUN, June 19, 2006, at 5.



