

Israeli sovereignty over the Golan Heights: international legal considerations concerning recognition

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We placed on Earth firm mountains, lest it should shake with them (Quran 21:31)

Peace hath her victories No less renowned than war. (John Milton 1652)

Let the mountains bring peace (Bible Psalm 72 v.3)

On 25 March 2019, the USA formally recognized Israeli sovereignty over the Golan Heights. Was this action sound under international law and, if so, should other countries do likewise? The global legal, security and ethical considerations for or against recognition of Israeli sovereignty in the Golan Heights are argued here to be determined by mostly common factors for all countries. Minor political or economic retaliation risks are particular to each country's exposure. Eleven international legal considerations are analysed, leading to the conclusion that recognition of Israeli sovereignty over the Golan Heights is a legally sound course. A brief evaluation of the relevant historic, geographic and strategic features of the Golan Heights indicates that such recognition by further countries would be conducive to stable peace in the Middle East.

Historic and Geographic Background

Authority over the Golan Heights has long been shifting in regional power plays. In ancient history, the Golan Heights were controlled by various peoples: the Amorites (from about 2000

BC), Israelites (1200BC) until depopulated by the Assyrian conquest (723BC) and revived under Judaea as part of the Persian, Greek Seleucid and then Roman empires (from 500BC).¹ The Hebrew biblical book of Deuteronomy refers to ‘Golan in Bashan, of Manasseh’ (an Israelite tribe).² The ruins of ancient and medieval Jewish villages in the Golan such as Gamla and Katzrin are currently archaeological parks there. During the Byzantine empire, the Christian Ghassanid kingdom ruled (250AD) until medieval times, when the Golan Heights were conquered by Mohammedan forces (637AD).³ In Damascus they established regional administrations that governed the Golan Heights for well over a millennium, until 1917, for a succession of broad caliphates in the Levant that were Arab, Kurdish or Turkic, i.e. the Ummayyad, Abassid, Fatimid, Seljuk, Ayubid, Mamluk and Ottoman caliphates.⁴

After Imperial Germany and the Ottoman and Austro-Hungarian empires fell in World War I, the 1920 San Remo Conference decided new administrative borders, among which the Golan Heights, in accordance with the 1920 British-French boundary agreement,⁵ formed an area to be administered by Britain. A British Mandate to establish a Jewish homeland including that area was authorized by the then newly established League of Nations.⁶ However, the Golan

* The author thanks Ambassador David Goss (ret.) for his helpful suggestions on earlier drafts. All responsibility for errors or omissions remain with the author.

¹ Nadav Na’aman, *The Kingdom of Geshur in History and Memory*, 26 SCAND. J. OLD TESTAM. 88 (2012); MICHAEL AVI-YONAH, *THE HOLY LAND – FROM THE PERSIAN TO THE ARAB CONQUESTS 536 B.C. TO A.D. 640: A HISTORICAL GEOGRAPHY* 170 (Baker Book House, revised ed. 1979).

² *Deuteronomy* 3:1, and 4:43. Bashan was the larger region within which the Golan is located. See also *Joshua* 13:29-30. ‘And Moses gave inheritance unto the half tribe of Manasseh: and this was the possession of the half tribe of the children of Manasseh by their families. And their coast was from Mahanaim, all Bashan, all the kingdom of Og king of Bashan, and all the towns of Jair, which are in Bashan, threescore cities.’

³ Robert Gregg, *Marking Religious and Ethnic Boundaries: Cases from the Ancient Golan Heights*, 69 CHURCH HIST 519 (2000); Stephen Rubin, *Discovering Jewish History on the Golan Heights* THE TOWER, (Apr. 2014), <http://www.thetower.org/article/rebuilding-jewish-history-on-the-golan-heights>.

⁴ BERNARD LEWIS, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS*, 70-129 (Scribner, 1995).

⁵ Franco-British Convention on Certain Points Connected with the Mandates for Syria and the Lebanon, Palestine and Mesopotamia, Dec. 23, 1920, *League of Nations Treaty Series* No. 564 (1924) 354, in 16 AMERICAN JOURNAL OF INTERNATIONAL LAW, 122–6, (1922).

⁶ The League of Nations, *British Mandate* in THE ISRAEL ARAB READER: DOCUMENTARY HISTORY OF THE MIDDLE EAST 30 (Walter Laqueur & Barry Rubin (eds), Penguin, 2008).

Heights were renegotiated by Britain to France in a land exchange in 1923⁷ and administered by France until they became part of independent Syria, which was decolonized by France in 1945. Syria controlled the Golan Heights as sovereign from 1946 (when French troops left) until 1967, i.e. for 21 years. Israel has since 1967 controlled the Golan Heights as occupying power.

Geographically, the Golan Heights is mostly a volcanic basalt plateau, where the peak of Mt Hermon rises to 2,814m.⁸ Its area is 1,800 km², of which Israel controls the western two thirds, i.e. 1,200 km².⁹ Its precipitation is higher than the regional average, and includes winter snow that supplies much of the Jordan River watershed and the freshwater of the Sea of Galilee. It provides 30% of Israel's freshwater. Israel and neighbouring Arab States agreed to a water-sharing scheme under the Eric Johnston plan in the early 1960s, sponsored by the USA. Nevertheless, the Arab League commenced construction works in 1965 to divert away the Hasbani and Banias rivers from the Jordan River headwaters to the Yarmouk River in the State of Jordan specifically to eliminate what was at the time the majority of the Israeli water supply. Consequently, in 1967, Israeli military air strikes hit the diversion works.¹⁰ This history demonstrates that the Golan Heights are a strategically important source of freshwater.

⁷ Agreement between His Majesty's Government and the French Government Respecting the Boundary Line between Syria and Palestine from the Mediterranean to El Hamma, Mar. 7, 1923, *League of Nations Treaty Series*, No. 56, (1924) 364; (known as the Paulet-Newcombe Agreement adopted pursuant to *Franco-British Boundary Commission Report*, Feb. 3, 1922). These boundaries were the ones for the League of Nations Palestine and Syria Class A Mandates. As the Mandates' boundaries were set by League of Nations resolutions in 1922, based on multilateral decisions of the San Remo Conference in 1920, the bilateral change by Britain and France in 1923 was of doubtful procedural legality, although this illegality can be regarded as cured by the subsequent League of Nations minutes adopted on 29 September 1923.

⁸ Central Intelligence Agency, *The World Fact Book*, CENTRAL INTELLIGENCE AGENCY (Oct.7 2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>.

⁹ Alfred B. Prados, *CRS Issue Brief for Congress: Syria: U.S. Relations and Bilateral Issues*, CONGRESSIONAL RESEARCH SERVICE (JAN. 19, 2006), https://www.everycrsreport.com/files/20060119_IB92075_8946198a6994be1ef82149ca1b9588f41aaf53b5.pdf

¹⁰ MASAHIRO MURAKAMI, *MANAGING WATER FOR PEACE IN THE MIDDLE EAST: ALTERNATIVE STRATEGIES* 287 (United Nations University Press, 1995).

In the twenty-first century, the majority of the population of the Israeli-controlled western Golan Heights is predominantly Druze, numbering 27,000, who share the Golan Heights with 22,000 Jewish citizens of Israel, comprising a total regional population of almost 50,000.¹¹ The majority of other Arab and Muslim peoples fled the western Golan during and following the 1967 Arab-Israel war. The refugee numbers and circumstances are disputed but might be reckoned at about 50,000.¹² About 10% of Druze have chosen Israeli citizenship while others have Israeli residence, social security benefits and travel rights.¹³ The older generation tends to loyalty to Syrian Druze clans and Syria, while the younger generation inclines toward fellow Druze in Israel and are loyal to Israel. The Golan Druze gradual trend to take Israeli citizenship is growing together with prosperity, especially since 2011 when the Syrian civil war impacted Syrian Druze villages.¹⁴

¹¹ Israel Central Bureau of Statistics (Apr. 4, 2018), CENTRAL BUREAU OF STATISTICS, https://www.cbs.gov.il/he/publications/doclib/2018/2.%20shnatonpopulation/st02_17.pdf; BBC News, *Golan Heights Profile*, BBC (Mar. 25, 2019), <https://www.bbc.com/news/world-middle-east-14724842>.

¹² At an extreme is the Syrian government claim that 500,000 Arab villagers were uprooted; see Syrian Foreign Minister Farook Shara, *Speech on the renewal of Syrian-Israeli negotiations*, Dec. 15, 1999 extracted in Laqueur and Rubin, *supra* note 6, at 547. A more likely claim is 130,000: Tayseer Mara'i & Usama R. Halabi, *Life under Occupation in the Golan Heights* 22 J PALESTINE STUD, 78-93; Nizar Ayoub, *Introduction in* FORGOTTEN OCCUPATION: LIFE IN THE SYRIAN GOLAN AFTER 50 YEARS OF ISRAELI OCCUPATION, 8 (Al-Marsad, Arab Human Rights Centre in the Golan Heights, 2013). However, this number is given as political advocacy and it is likely inflated. The number of 50,000 is given by an esteemed academic author; see 'Gilbert *Atlas*' in MARTIN GILBERT, THE ARAB-ISRAELI CONFLICT: ITS HISTORY IN MAPS, 96 (Routledge, 10th ed, 2011). Furthermore, in 1974 Israel withdrew from areas it occupied in 1967, including the town of Quneitra – the main population Golan centre – and from an additional margin of territory taken in 1973, to which Syrian Arabs could return; see *Id.* at 96. As a further caution on the figures, the reader should note potential misleading conflation of the population numbers across different timeframes, and conflation of the eastern and the western Golan Heights populations. From another perspective, some exchange of populations can be considered to have taken place, as about 20,000 Syrian Jews left prior to 1948 amid increasing persecution and, following the establishment of Israel, the remaining 4,500 were hostage until released at the end of the Cold War, (see, *Id.* at 48; Adam Entous, *A Brief History of the Syrian Jewish Community*, WALL STREET JOURNAL (Dec. 1, 2014), <https://www.wsj.com/articles/a-brief-history-of-the-syrian-jewish-community-1417491186>.

¹³ BBC News, *Golan Heights Profile* (Mar. 25, 2019), BBC, <https://www.bbc.com/news/world-middle-east-14724842>.

¹⁴ Julian Cole Phillips, *The Anti-Assad Campaign in the Occupied Golan Heights, 2011-2012: Reimagining Syrian Nationalism in a Contested Borderland*, L'ESPACE POLITIQUE (2015), <https://journals.openedition.org/espacepolitique/3576>.

The population of the Syrian western Golan Heights is difficult to assess since Syrian rebel groups took and then lost control there from 2012 to 2018, including the main town of Quneitra.¹⁵ These groups included the *Southern Front* (Syrian Democratic Forces), *Al Nusrah* (Al Qaeda faction), *Yarmouk Martyrs Brigade* and *Jaish Khalid ibn al Walid* (ISIS factions).¹⁶ From the second half of 2018, the Syrian government regained nominal control, dominated by Iran and Iranian proxies.¹⁷

Military Strategic Significance

The military strategic importance of the Golan Heights is fundamental. Syria is still technically at war with Israel. It initiated three military ventures to eliminate the Jewish State in 1948, 1967 and 1973. There are no formal diplomatic or economic Syrian-Israeli interconnections. Armistice lines were agreed in 1949. The Israeli area of occupation 1967-1973 followed the 1967 ceasefire line.¹⁸ From 1974, a demilitarized buffer zone was established, as discussed below.

The importance of the Golan Heights is mainly military. The Golan Heights overlook Israeli towns and villages southward and westward below them, providing dominating vantage points for surveillance and fortified positions for the launching of rockets and artillery into Israel below. A line of volcanic hills provides a natural line of defence for surveillance and

¹⁵ Sam Dagher & Joshua Mitnick, *Rebels in Syria Capture Border Crossing With Israel*, THE WALL STREET JOURNAL (Aug. 27, 2014), <https://www.wsj.com/articles/rebels-in-syria-capture-border-crossing-by-israel-1409166944>; Maayan Lubell & Suleiman al Khalidi, *Syrian Flag Raised in Quneitra on Syrian Side of Golan Heights*, REUTERS, (July 26, 2018), <https://www.reuters.com/article/us-mideast-crisis-syria-quneitra/syrian-flag-raised-in-quneitra-on-syrian-side-of-golan-heights-idUSKBN1KG1Y5>.

¹⁶ Syrian Observatory for Human Rights, *At least 38 militants were killed in Sahem al-Jolan and Quneitra countryside* (Apr 29, 2015), THE SYRIAN OBSERVATORY FOR HUMAN RIGHTS, <http://www.syriahr.com/en/?p=18423>.

¹⁷ Syrian Observatory for Human Rights, *Syrian troops, Hezbollah launch offensive against rebels near Golan* (Feb. 13, 2015), THE SYRIAN OBSERVATORY FOR HUMAN RIGHTS, <http://www.syriahr.com/en/?p=12405>.

¹⁸ Report of the Secretary-General concerning the Agreement on Disengagement between Israel and Syrian Force, U.N. Doc S/11302/Add.1, (May 30, 1974).

fortification against attacks from Damascus in the north and east.¹⁹ A clear case can be made for the defensive necessity of Israeli control of at least the slopes looking south and west into Israel, if not also for the territory up to and including the line of volcanic hills.

In the 1948 war against the establishment of Israel, Syria made use of the strategic advantages of the Golan Heights. Early in the war, Syria successfully advanced into and occupied two pockets of the former British Mandate along the low land south-east coast of the Sea of Galilee and east of the Jordan River. Under the armistice following the war, Syria withdrew its forces from these areas, which were demilitarized.²⁰ The Golan region above was then fortified by networks of Syrian bunkers, tunnels and artillery positions that also provided launching positions for artillery attacks and raids into Israel.²¹ From 1949 to 1967, there were thousands of incidents of Syrian shelling of Israeli agricultural collective farms, called kibbutzim, on the lowlands below, including Almagor, Shamir, Ein Gev, Dagania, Sha'ar HaGolan, moshav Dishon and other areas in the Galilee.²²

On 5 June, the first day of the 1967 June Six Day War, intense Syrian military shelling of Israeli villages and military positions located on the lowlands below commenced,²³ augmented in the

¹⁹ Dore Gold 'Statement of Ambassador Dore Gold to House Of Representatives Subcommittee on National Security of the Committee on Oversight and Government Reform' in *A New Horizon in U.S.-Israel Relations: From An American Embassy In Jerusalem To Potential Recognition Of Israeli Sovereignty Over The Golan Heights*, House Of Representatives Subcommittee on National Security of the Committee on Oversight and Government Reform Hearing Before the 115th Congress, Second Session, (July 17, 2018) <https://oversight.house.gov/legislation/hearings/a-new-horizon-in-us-israel-relations-from-an-american-embassy-in-jerusalem-to>. See also BBC News, *Golan Heights profile*, BBC (Mar. 25, 2019) <https://www.bbc.com/news/world-middle-east-14724842>.

²⁰ BENNY MORRIS, 1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR, Ch 5, n 329 (Yale University Press, 2008).

²¹ MICHAEL OREN, SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST, 46 (Oxford University Press, 2002).

²² This activity intensified in the first half of 1967; *id.* at 42-6. For a map of northern Israel and the Golan Heights showing Israeli agricultural settlements and Syrian artillery ranges and firing 1949-1967. See Gilbert, *supra* note 12, at 63-4.

²³ HAL KOSUT, ISRAEL AND THE ARABS: THE JUNE 1967 WAR, 89 (Facts on File, 1968).

morning by 12 Syrian jet aircraft bombing Galilee collective farms.²⁴ Syria declared that it had attacked Israel.²⁵ In response, Israeli antiaircraft guns shot down three of the aircraft²⁶ and that evening the Israeli air force attacked Syrian military airfields, destroying much of its air force on the ground.²⁷ Syrian shelling continued throughout the war and, on 9 June, the night of the fifth day, Israeli airplanes and ground forces advanced against Syrian positions on the Golan Heights.²⁸ The Syrian positions fell through combat often conducted face to face. Although Syria had declared a ceasefire hours before the Israeli counterattack, hostilities had not been suspended and the Israeli assault on the Golan Heights was clearly a defensive response.²⁹ A Soviet sponsored vote in the Security Council condemning Israeli aggression failed to achieve the necessary majority.³⁰

The 1973 October War was launched by Syria and Egypt after several threats and feints that forced mobilizations and demobilizations of Israeli military reserves and caused Israeli strategic confusion.³¹ Crafting the advantage of surprise, Syrian and Egypt launched the war on the Jewish Day of Atonement. Syria retook the Golan Heights and Syrian artillery advanced

²⁴ Oren, *supra* note 21, at 186.

²⁵ Oren, *supra* note 21, at 195.

²⁶ Oren, *supra* note 21, at 186; David W Lesch, *Syria: playing with fire in THE 1967 ARAB-ISRAELI WAR: ORIGINS AND CONSEQUENCES*, 79, 92 (Wm Roger Louis & Avi Shlaim (eds), Cambridge University Press, 2012).

²⁷ Oren, *supra* note 21, at 195. Valuable intelligence concerning Syrian airfields and military positions was provided by an Israeli spy, Eli Cohen, who infiltrated high levels of the Syrian military establishment; see MARTIN GILBERT, *IN ISHMAEL'S HOUSE - A HISTORY OF JEWS IN MUSLIM LANDS*, 283, (Yale University Press, 2010). A website is dedicated to this history at <http://www.elicohen.org.il/>.

²⁸ Oren, *supra* note 21, at 280; Britain Israel Communications and Research Centre, *Causes and consequences of the Six-Day War*, BICOM, (Mar. 2017), <http://www.bicom.org.uk/analysis/bicom-briefing-causes-consequences-six-day-war-1967/>.

²⁹ Some authors characterize the attack as aggression constructed through conspiracy; see: JOHN QUIGLEY, *THE SIX-DAY WAR AND ISRAELI SELF DEFENCE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR*, 115, (Cambridge University Press, 2013). However, the historical record demonstrates that this characterization lacks credibility (cp. similar allegations made by Syria six years later in the 1973 Day of Atonement War; see LESTER SOBEL (ed), *ISRAEL AND THE ARABS: THE OCTOBER 1973 WAR*, 92, (Facts on File, 1974).

³⁰ Quigley, *supra* note 29, at 98.

³¹ Israelis considered the many casualties of the 1973 Day of Atonement War a debacle, so a national commission of enquiry was established to investigate its failures, producing the Agranat Commission Report (1974); see PNINA LAHAV, *JUDGEMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY*, 227 (University of California Press, 1997); Sobel, *supra* note 29, at 93, 130-132.

almost down to the plains of the Galilee but, after the initial surprise advance, Syrian artillery and infantry hesitated and were forced back, at the cost of heavy casualties among Israeli troops. Ultimately, in 1973, Israel gained further territory in the north eastern Golan Heights than in 1967, but drew back from those advance positions, and also from the area around Quneitra occupied in 1967, in favour of the establishment there of a demilitarized zone under United Nations supervision.³² The line of Israeli control is colloquially called the ‘purple line’ on the western border of the demilitarized zone.³³

Since 2018, the Iranian Revolutionary Guard Corps (IRGC) and its proxy militia Hezbollah (Shiite Party of God, considered the most capable Islamist militia and a global terrorist group)³⁴ have established bases in the eastern Golan Heights region under Syrian control.³⁵ Their presence, directed to the purpose of ‘erasing Israel from the map’³⁶ currently involves military build-up and occasional rocket strikes on Israel, and Israeli bombing of their munitions bases.³⁷ Increasing numbers of explosive rocket and unmanned aerial vehicle attacks launched from under Syrian jurisdiction and extensive Israeli strikes upon launch and ammunition facilities,³⁸

³² I.e. the ‘UNDOF zone’, see subheading ‘Regional Legal Arrangements’ below; S.C. Res. 2428, U.N. SCOR, U.N. Doc S/RES/2428 (June 2, 2018; Sobel, *supra* note 29, at 161-165.

³³ Zvi Hauser & Isaac Zarfati, *Recognition of Israel’s Sovereignty over the Golan Heights*, 23, COALITION FOR THE ISRAELI GOLAN (Jan. 2018), https://www.golancoalition.org/wpcontent/uploads/2018/06/Recognition_of_Israels_Sovereignty_Over_the_Golan_Heights_EN_Policy_Papaer.pdf.

³⁴ An extensive description and analysis of Hezbollah can be found in MATTHEW LEVITT, *HEZBOLLAH: THE GLOBAL FOOTPRINT OF LEBANON’S PARTY OF GOD*, 357 (Georgetown University Press, 2013).

³⁵ Jonathan Spyer, *A New Order Emerges in South Syria*, JONATHAN SPYER MIDDLE EAST ANALYSIS AND REPORTAGE (Dec. 1, 2018), <https://jonathanspyer.com/2018/12/01/a-new-order-emerges-in-southern-syria>; Jonathan Spyer, *Is southern Syria heading for ‘Lebanonization’?*, JONATHAN SPYER MIDDLE EAST ANALYSIS AND REPORTAGE (July 13, 2018), <https://jonathanspyer.com/2018/07/13/is-southern-syria-heading-for-lebanonization>.

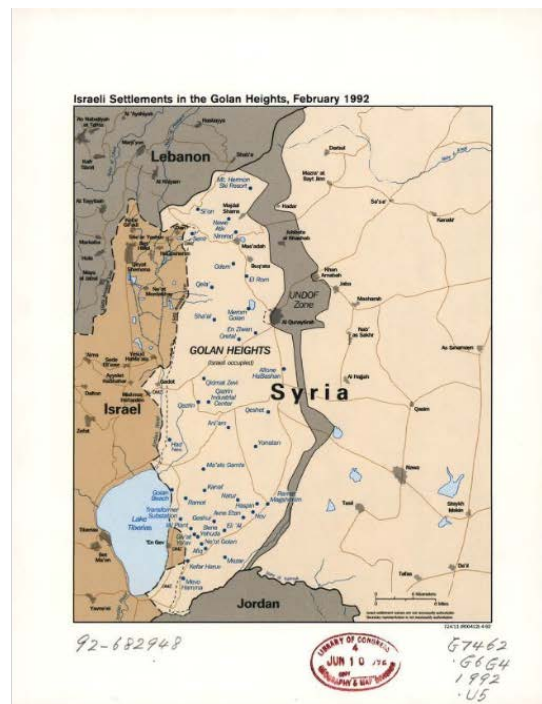
³⁶ Jeffrey Goldberg, *The Iranian Regime on Israel’s Right to Exist*, THE ATLANTIC. (Mar. 9, 2015), <https://www.theatlantic.com/international/archive/2015/03/Iranian-View-of-Israel/387085>.

³⁷ Shmuel Even, *The Campaign against Iran in Syria: Are Israel’s Statements Helpful?*, THE INSTITUTE FOR NATIONAL SECURITY STUDIES, (Feb. 6, 2019), <https://www.inss.org.il/publication/campaign-iran-syria-israels-statements-helpful>

³⁸ Asaf Orion, *“You Cannot Step into the Same River Twice”: The Disengagement of Forces Agreement on the Golan of 1974 and UNDOF of 2018*, THE INSTITUTE FOR NATIONAL SECURITY STUDIES, (July 22, 2018), <https://www.inss.org.il/publication/cannot-step-river-twice-disengagement-forces-agreement-golan-1974-undof-2018>.

colloquially termed a ‘war between wars’, make apparent that Syrian control of the eastern Golan Heights would catalyse more violence and that these mountains have ongoing strategic importance in current times.

Figure 1. Library of Congress map *Israeli Settlements in the Golan Heights*³⁹



Regional Legal Arrangements

The 1949 *General Armistice Agreement* emphasized, in accordance with Syrian demands, that

‘the following arrangements for the Armistice Demarcation Line between Israeli and Syrian armed forces are not to be interpreted as having any relation whatsoever to ultimate territorial arrangements affecting the two Parties to this Agreement’.⁴⁰

³⁹ United States Central Intelligence Agency, *Israeli settlements in the Golan Heights, February 1992*, LIBRARY OF CONGRESS, <https://www.loc.gov/resource/g7462g.ct000487>.

⁴⁰ Israeli-Syrian General Armistice Agreement, 42 UNTS 327 (signed and entered into force 20 July 1949) art V.

The demarcation line was abrogated by Syrian resumptions of hostilities in 1967 and 1973. In any event, there is no agreed Israel-Syria border.

Despite their defeat in the 1967 war, the 22 members of the Arab League collectively maintained in its aftermath that there would be no negotiations, no recognition of and no peace with Israel.⁴¹ Syria still demands the full return to Syria of the Golan Heights as a precondition to any discussion of recognition.⁴² Fresh Israeli overtures for peace negotiations with Syria occurred in 1992, 1995, 2000 and 2008 but were unsuccessful.⁴³ In contrast, peace treaties were agreed with Israel by Egypt in 1979 and by Jordan in 1994.⁴⁴

There is limited regular contact between the two countries. Syria does not recognize Israeli passports or allow travel by Syrian passport holders to Israel. Golan Druze apples are allowed into Syria and Syria supplies 10% of the water for the Druze cross-border town of Majdal Shams.⁴⁵ Movement is permitted in both directions for United Nations peacekeepers, and at

⁴¹ League of Arab States, 4th Summit, Resolution 1, 1 September 1967 (Khartoum, Sudan): Khartoum Resolution, para 3 adopted the "The 3 No's", discussed in Yoram Meital, *The Khartoum Conference and Egyptian Policy after the 1967 War: A Reexamination*, 54, 64 MIDDLE EAST J (2000).

⁴² Syria also demands the transfer to its control of the pocket of territory of the British Mandate area at the base of the Golan Heights along the lower south-east coast of the Sea of Galilee that it occupied during the 1948 war. See DENNIS ROSS, *THE MISSING PEACE – THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE*, 583 (Farrar Straus and Giroux, 2005).

⁴³ *Id.*, at 107-114 (1992 negotiations), 238-245 (1995), 509-590 (2000); regarding 2008 negotiations, see: Milad Alodet Allah, *An account of the 2008 Israeli-Syrian negotiations in Turkey*, 9, 100-114, CONTEMPORARY ARAB AFFAIRS (2016). See also Israel Ministry of Foreign Affairs, *Israel-Syria Negotiations - The Bilateral Negotiations*, STATE OF ISRAEL, (May 21, 2008), <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-syria%20negotiations.aspx>; Isabel Kershner, *Secret Israel-Syria Peace Talks Involved Golan Heights Exit*, THE NEW YORK TIMES (Oct 12, 2012), <https://www.nytimes.com/2012/10/13/world/middleeast/secret-israel-syria-peace-talks-involved-golan-heights-exit.html>; Staff and Agencies, *Timeline: Israel, Syria and the Golan Heights*, THE GUARDIAN, (May, 21 2008, 21:33), <https://www.theguardian.com/world/2008/may/21/golan.background>.

⁴⁴ Peace Treaty Between the State of Israel and the Arab Republic of Egypt, signed 26 March 1979, UNTS 17813 (entered into force 1 January 1980); Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, signed 26 October 1994, 2042 UNTS 393 (entered into force 26 October 1994). However, both Arab countries decline economic, political and cultural relations with Israel.

⁴⁵ Haaretz Service, *Israeli Druze Minister: Syria Should Give Water to Golan Towns*, HAARETZ, (Feb. 14, 2010, 17:42), <https://www.haaretz.com/1.5030124>; Majdal Shams, *A would-be happy link with Syria*, THE ECONOMIST, (Feb. 19, 2009).

the Quneitra crossing for Druze pilgrims, students and brides.⁴⁶ Syria has refused to repatriate for burial the remains of fallen Israeli soldiers missing in action.⁴⁷

The United Nations Disengagement Observer Force (UNDOF) is a multinational peace keeping force that was deployed on the Golan Height under United Nations Security Council (UNSC) Resolution 350 on 31 May 1974, on the same day as the signing of the Israel-Syria *Agreement on Disengagement*.⁴⁸ It became a new part of the existing United Nations Truce Supervision Organization (UNTSO) established in 1949 to monitor disengagement commitments under armistices agreed with Israel by surrounding Arab countries (Egypt, Lebanon, Syria and TransJordan) following their 1948-9 war against it.⁴⁹ The UNDOF mandate is renewed biannually by the UNSC.⁵⁰

The UNDOF mandate is to monitor the disengagement of Syrian and Israeli armed forces in the Golan Heights and, in particular, to ensure the absence of their armed forces in the Area of Separation, which is a demilitarized zone located primarily on the Syrian side of the ‘purple line’ and the limitation of forces and equipment on either side.⁵¹ It also engages in demining activities in Syrian minefields.⁵² The UNDOF comprises about 1000 personnel, with command

⁴⁶ The unique situation of Israeli Golan Heights Druze brides leaving to marry grooms in Syria but unable to return has been dramatized in film and analysed in feminist theory: Rose Brister, *Replacing Women's Bodies in Eran Riklis's The Syrian Bride* 39 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 927, 927-948 (2014).

⁴⁷ Syrian implacability is exemplified by the refusal to return remains of Israeli soldiers missing in action against Syrian forces in Lebanon in June 1982 and then hidden in Syria. Michael Zubovskiy, *How Russia Views the Return of Israel MIA Zachariah Baumel's Body*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, (Apr. 7, 2019), <http://jcpa.org/russias-hand-in-returning-an-israeli-mia-soldiers-body>.

⁴⁸ Agreement on Disengagement, Israel–Syria, signed 31 March 1974, S/11302/Add.1, annexes I and II (30 May 1974); reproduced at 13(4) INTERNATIONAL LEGAL MATERIALS, 880 (July 1974).

⁴⁹ S.C. Res. 350, U.N. SCOR, U.N. Doc S/RES/350 (May 31, 1974).

⁵⁰ Security Council Report, *June 2019 Monthly Forecast*, SECURITY COUNCIL REPORT (May 31, 2019), <https://www.securitycouncilreport.org/monthly-forecast/2019-06/undof-golan-heights-3.php>.

⁵¹ United Nations Peacekeeping, *UNDOF Fact Sheet*, UNITED NATIONS, <https://peacekeeping.un.org/en/mission/undof>; S.C. Res. 350, U.N. SCOR, UN Doc S/RES/350 (May 31, 1974).

⁵² See generally Landmine Monitor Core Group, *Landmine Monitor Report 2002: Toward a Mine-free World*, (Human Rights Watch, 2002), report was presented to the Fourth Meeting of States Parties to the Mine Ban Treaty in Geneva in September 2002); Budget for the United Nations Disengagement Observer Force for the

headquarters in Damascus and a budget decided annually by the United Nations General Assembly (UNGA), which was about US\$ 60 million in 2018.⁵³ The UNDOF peacekeepers come primarily from Fiji, India, Ireland, Nepal, the Netherlands and Philippines. Their capability reputation suffered significant setbacks at the hands of Islamist rebels during the Syrian civil war: 21 Filipino peacekeepers were taken hostage in March 2013⁵⁴ and another four in May 2013 by the Yarmouk Martyrs Brigade⁵⁵ and, later, another 40 were besieged for seven hours before fleeing when 45 Fijian peacekeepers were taken hostage in August 2014 by the *Al Nusra Front*.⁵⁶

Israel has not formally annexed the western Golan Heights to be under its sovereign territory but in 1981 passed a law tantamount to annexation. The *Golan Heights Law* applies Israeli law, jurisdiction and administration to the Golan Heights. The 1981 legislation came about after 15 years of application by Israel of the international law of military occupation. In contrast, Israeli domestic laws do not apply to the Arab population in the disputed/occupied West Bank/Judaea and Samaria, where Israel administers law principally under international rules for military occupation.⁵⁷ There is some debate and uncertainty as to whether the *Golan Heights Law*

period from 1 July 2011 to 30 June 2012: Report of the Secretary-General, 65th sess, Agenda Item 156(a), UN Doc A/65/710 (Feb. 2, 2011).

⁵³ "The UN General Assembly approved a budget of \$60,295,100 from July 2018 through June 2019." Approved resources for peacekeeping operations for the period from 1 July 2018 to 30 June 2019: Note by the Secretary-General, 5th Comm, 72nd sess, Agenda Item 149, U.N. Doc A/C.5/72/25, <https://undocs.org/A/c.5/72/25>.

⁵⁴ BBC News, *Freed UN hostages in Jordan after Syria release*, BBC, (Mar. 9, 2013), <https://www.bbc.com/news/world-middle-east-21725991>; Louis Charbonneau & Manuel Mogato, *How U.N. troops defied orders, opened fire and escaped Syrian rebels*, REUTERS, (Sep. 13, 2014), <https://www.reuters.com/article/us-syria-crisis-peacekeepers-un-insight/how-u-n-troops-defied-orders-opened-fire-and-escaped-syrian-rebels-idUSKBN0H724T20140912>.

⁵⁵ Ilan Ben Zion & AP, *Syrian rebels grab UN peacekeepers near Golan*, THE TIMES OF ISRAEL, (May 7, 2013, 5:38), <https://www.timesofisrael.com/syrian-rebels-detain-un-peacekeepers-near-golan>.

⁵⁶ The Guardian, *Golan Heights peacekeeper crisis: Filipinos escape, Fijians taken hostage*, THE GUARDIAN, (Sept. 1, 2014), <https://www.theguardian.com/world/2014/aug/31/syria-fiji-filipinos-peacekeepers-golan-heights-al-nusra>.

⁵⁷ These are principally Jordanian civil laws, applied together with Israeli military laws. See Sharon Weill, *The judicial arm of the occupation: the Israeli military courts in the occupied territories*, 89 INT REV RED CROSS 395, 406, (2007).

amounts to *de jure* annexation under Israeli law but it is certainly *de facto* annexation.⁵⁸ The international legal consequences of the *Golan Heights Law* are discussed below.

International Law and United Nations Resolutions

Israel is a party to the *Fourth Geneva Convention on Protection of Civilians* 1949. It provides that 'penal laws of the occupied territory shall remain in force' (Article 64).⁵⁹ In addition, the *Hague Convention IV* 1907 respecting the laws and customs of war on land is considered customary international law and binding on Israel. It provides, in the *Regulations Annex*, Section 3 in relation to military authority over the territory of the hostile State, that

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁶⁰

Thus, Israel is legally bound to maintain and enforce Syrian penal and civil law in the Golan Heights, until such time as it ceases to occupy the area, or formally annexes it.

In response to the Israeli *Golan Heights Law*, passed on 14 December 1981, the United Nations Security Council (UNSC) promptly met on 17 December 1981 and unanimously adopted

⁵⁸ Asher Maoz, *Application of Israeli Law to the Golan Heights Is Annexation*, 20 BROOKLYN JOURNAL OF INTERNATIONAL LAW 355, 355-396 (1994). For an opposing opinion, see Leon Shelef, *Application of Israeli Law to the: Heights Is Not Annexation*, 20 BROOKLYN JOURNAL OF INTERNATIONAL LAW 333 (1994).

⁵⁹ Geneva Convention (IV) *Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 49.

⁶⁰ Convention (IV) *Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910) art 43.

Resolution 497 under Chapter VI of the Charter, which empowers the Security Council to adopt recommendations not entailing coercive measures. It states that

‘the Israeli decision to impose its laws, jurisdiction, and administration in the occupied Syrian Golan Heights is null and void and without international legal effect’.⁶¹

As the Israeli law was not meanwhile rescinded (a deadline of two weeks had been set), the Security Council reconvened four weeks later, on 20 January 1982, to consider sanctions action under Chapter VII of the United Nations (UN) Charter, which empowers coercive measures. A draft resolution cast the Israeli law ‘an act of aggression under article 39 of the Charter of the United Nations’. It called upon Member States to:

consider applying concrete and effective measures in order to nullify the Israeli annexation of the Golan Heights and to refrain from providing any assistance or aid to and cooperation with Israel in all fields in order to deter Israel and its policies and practices of annexation’.⁶²

⁶¹ S.C. Res. 497, U.N. SCOR, U.N. Doc S/Res/397 (Dec. 17, 1981).

⁶² Draft resolution – Jordan: revised draft resolution, U.N. Doc S/14832/Rev.1 (Jan. 20, 1982). This was a period during the Cold War of Soviet predominance in the U.N., in which the USSR used Israel as a wedge issue to isolate the USA. See, for example: Theodore Friedgut, *Soviet anti-Zionism and Antisemitism—Another Cycle* 14 SOVIET JEWISH AFFAIRS 3, (1984).

The USA vetoed the proposed Security Council sanctions.⁶³ It considered the Golan Heights Law a breach of the *Fourth Geneva Convention* but also considered that the Golan Heights themselves had not been *de jure* annexed.⁶⁴

In response, on 29 January 1982, the General Assembly opened an emergency special session and adopted Resolution 37/123A, which used the language of UNSC Resolution 497 labelling the Golan Heights Law as ‘null and void’, having ‘no legal validity and/or effect whatsoever’.⁶⁵ It deplored the United States veto in the Security Council and called upon all States and international agencies to boycott Israel in its totality:

13. ... (a) To refrain from supplying Israel with any weapons and related equipment and to suspend any military assistance that Israel receives from them;
- (b) To refrain from acquiring any weapons or military equipment from Israel;
- (c) To suspend economic, financial and technological assistance to and co-operation with Israel;
- (d) To sever diplomatic, trade and cultural relations with Israel;
14. Reiterates its call to all Member States to cease forthwith, individually and collectively, all dealings with Israel in order totally to isolate it in all fields...⁶⁶

Two earlier relevant resolutions of fundamental importance were adopted by the UNSC. In the wake of the June 1967 war, Resolution 242 of 22 November 1967 emphasizes in its preamble

⁶³ *Draft Resolution – Mideast situation/Golan*, U.N. Doc S/14831/Rev.1 (Jan. 19, 1982).

⁶⁴ As reported by Syrian delegate, *UNSC Official Records: S.C. 2329th Meeting*, 37th Official Records S/PV.239, 20 January 1982, para.s 207-209, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/906E017E71607D778525737E004F33AA>.

⁶⁵ Yehuda Z. Blum & Luke W. Finlay, *The Seventh Emergency Special Session of the UN General Assembly: An Exercise in Procedural Abuse* 80 AM J INT LAW, 587, (1986).

⁶⁶ *The Situation in the Middle East*, GA Res 37/123A, U.N. Doc A/RES/37.123A (Dec. 16, 1982). This was adopted 86 for, 21 against, 34 abstentions.

‘the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace’. Its first operational paragraph then:

1. *Affirms* that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force...⁶⁷

Resolution 242 does not specify under which chapter of the UN Charter it is adopted. Neither does UNSC Resolution 338, adopted towards the end of the 1973 war. The latter ‘calls for’ a ceasefire and for the parties to implement Resolution 242. It also ‘decides that’ they should commence negotiations under ‘appropriate auspices aimed at establishing a just and durable peace in the Middle East’.⁶⁸

Evaluation of Legal Implications

Twelve observations evaluating legal implications follow from the above summary of Israeli law, the international treaty law and the UN resolutions. Five concern Israeli law and its status under international law, the following four concern the interpretation and status of UN

⁶⁷ S.C. Res. 242, U.N. SCOR, U.N. Doc S/RES/242 (Nov. 22, 1967).

⁶⁸ S.C. Res. 338, U.N. SCOR, U.N. Doc S/RES/338 (Oct. 22, 1973).

resolutions, and the last three concern principles of general international law applicable to acquisition of territory in armed conflict:

- (1) It is uncertain that the Israeli Golan Heights were annexed *de jure* and therefore they technically and formally remain militarily occupied;
- (2) *De facto* annexation of the Golan Heights by Israel has been occurring incrementally;
- (3) The Israeli 1981 *Golan Heights Law* is in breach the international laws of military occupation;
- (4) Continuing Israeli military occupation of the Golan Heights is legitimate under laws of armed conflict;
- (5) There has been gradual supersession of Syrian sovereignty in the last half century;
- (6) Relevant UNSC resolutions do not explicitly require a transfer of the Golan Heights to Syria;
- (7) UNSC Resolution 497 is a recommendation without coercive effect;
- (8) UNGA resolutions on the Golan Heights are all recommendations without coercive effect;
- (9) UNGA resolutions on the Golan Heights are without extrinsic binding legal effects;
- (10) In 1967, international law did not reward wars of aggression, such as Syria's against Israel, with restoration of an aggressor's lost territory;
- (11) Supposing that a rule prohibiting defensive conquest had emerged in recent times, international law permits departure from its rules in situations of necessity (such as in the Golan Heights); and
- (12) It is lawful within international law at the present time for Israel formally to annex the Golan Heights.

First, at the time of the *Golan Heights Law* in 1981, the Israeli government maintained that the *Golan Heights Law* was not an annexation, although the then Israeli coalition government

policy was not to give up the Golan Heights.⁶⁹ That law was not in itself formal, *de jure*, annexation. Israel in practice supported the notion that the Golan Heights were not annexed to it, as Israel initiated negotiations to hand the Golan Heights to Syria in consideration of a peace treaty and security guarantees in 1992, 1996, 2000 and 2008.⁷⁰ In early 2016, the Israeli government declared, again informally and perhaps in light of the Syrian civil war and history of hostility, that the Golan Heights will remain part of Israel.⁷¹ Yet, annexation has not clearly occurred *de jure* and the formal legal situation remains ambiguous.

Second, although not formally annexed, the Golan Heights were annexed in a *de facto* manner by the application of Israeli domestic law in 1981. Although there was in the past considerable Israeli domestic opposition to the 1981 *Golan Heights Law*, due to its possible obstruction of peace negotiations, advocacy for retaining the Golan Heights annexation has strengthened and now has widespread and bipartisan support in Israel.⁷² Informal incremental *de facto* annexation is occurring.

Third, the Israeli 1981 *Golan Heights Law* is implemented in breach of the international laws of occupation, specifically Article 64 of the *Fourth Geneva Convention on Protection of Civilians* and Section 3 of the *Hague Convention IV 1907 Regulations*, Annex. However, that breach is not one considered a grave breach under international laws of armed conflict; i.e. it

⁶⁹ Israel (Begin Second Coalition Government) *Agreement on Fundamental Policy Guidelines* (Aug. 5, 1981), in Laqueur and Rubin, *supra* note 6, at 234.

⁷⁰ *Supra* note 43.

⁷¹ William Booth, *Netanyahu vows that Israel will never give up the Golan Heights*, THE WASHINGTON POST, (Apr. 16, 2017), https://www.washingtonpost.com/world/middle_east/netanyahu-vows-that-israel-will-never-give-up-golan-heights/2016/04/17/c7639e16-04a7-11e6-bfed-ef65dff5970d_story.html?noredirect=on.

⁷² William Cubbison, *What do Israelis think about the Golan Heights?*, ISRAEL DEMOCRACY INSTITUTE, (Mar. 31, 2019), <https://en.idi.org.il/articles/26456>.

is not specified in the *Fourth Geneva Convention on Protection of Civilians* as one to which sanctions apply.⁷³

Fourth, while war is still technically ongoing, with no permanent peace or borders agreed but with major active hostilities suspended by ongoing armistices, and no clear *de jure* annexation, the international laws of armed conflict continue to apply in the Golan Heights. The Israeli military occupation of the Golan Heights was a measure of self-defence in response to wars initiated by Syria⁷⁴ and it continues to remain legitimate in the absence of peace.⁷⁵

Fifth, supersession of Syrian sovereignty is apparent in the circumstances of the last half century. The ethical notion of supersession of injustice suggests that, when considering redress for an historic injustice to a local indigenous population, changing circumstances on the ground effect a shift in applicable ethical factors.⁷⁶ In the case of the Golan Heights, the local Druze population of 27,000 does not claim an independent sovereignty competing with Israeli or Syrian sovereignty. A decade of Syrian civil war is a factor that inclines some of the Druze population against transfer to Syria of control over the Golan Heights. In addition, the interests of the 22,000 Jews now living in the Golan Heights carries weight in ethical

⁷³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 147. More ambiguously, amendments to the Rome Statute of the International Criminal Court entered into force on 17 July 2017, instituting 'annexation by the use of force' as a crime of aggression. Neither Israel or Syria are parties to the Statute, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 8bis(2)(a).

⁷⁴ Quigley summarizes legal analysis for and against Israel's right of self-defence as exercised in June 1967, Quigley *supra* note 29, at 120-127, 132-137. He concludes that the weight of authority is in favour of the right of anticipatory self-defence and of Israel's legitimate exercise of it in 1967, although he himself is not of the same view: at 149. However, his analysis focuses on the Egyptian front and not the law as applied to the Golan Heights, where Syrian unilaterally launched attacks days before the Israeli ground forces counterattack. For a detailed account of the Six Day War. See: Oren, *supra* note 21, at 186, 260, 280.

⁷⁵ For in-depth discussion of the law of occupation, see: EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (Oxford University Press, 2nd ed, 2012).

⁷⁶ Jeremy Waldron, *Superseding Historic Injustice* 103 ETHICS 4, 4-28 (1992); Jeremy Waldron, *Settlement Return and the Supersession Thesis* 5(2) THEORETICAL ENQUIRIES IN LAW 236 (2004).

considerations of the region's future. They are disinclined to be transferred to Syrian control, obviously due to Syrian internal strife, persecution of Jews, belligerence against them and the insecurity of any potential peace. The 50,000 Arab Syrian refugees who fled in 1967 from the Golan Heights have resettled in Syria and 4,500 Jewish Syrian refugees have resettled in Israel.⁷⁷

Sixth, none of the relevant Security Council resolutions explicitly requires a return of the Golan Heights to Syria. The language used in UNSC Resolution 242 does not mandate this. Ongoing legal debate over interpretation of Resolution 242 has already endured for half a century.⁷⁸ The resolution states that 'establishment of a just and lasting peace in the Middle East should include the application of both the following principles...' territorial withdrawal and secure borders.⁷⁹ Israel interprets the reference to 'withdrawal of Israel armed forces from territories occupied ...' (para. 1(i)) rather than '*the* territories' – which was language used in an earlier draft – as signifying that not all the territories that it occupied during 1967 must be surrendered. This interpretation is in accordance with the drafting history and recollections of the key English language Security Council representatives who were its drafters⁸⁰ but was contested by other representatives.⁸¹ The immediately following affirmation of the principle of the 'right to live in peace within *secure* and recognized boundaries free from threats' supports that interpretation, whereby Israel argues that it is

⁷⁷ *Supra* note 12.

⁷⁸ Compare the views of Eugene Rostow, *Legal Aspects of the search for peace in the Middle East* 64(5) AM J INT LAW 64, (1970); with Henry Cattán, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict* 3(1) INTERNATIONAL JOURNAL OF LEGAL INFORMATION 110 (1975).

⁷⁹ S.C. Res 242, U.N. SCOR, U.N. Doc S/RES/242 (Nov. 22, 1967) para 1(i).

⁸⁰ Lord Caradon, United Kingdom representative (SYDNEY D. BAILEY THE MAKING OF RESOLUTION 242, 153 (Martijnus Nijhoff, 1985) and Justice Goldberg, U.S. representative (Arthur J. Goldberg, *Resolution 242 after 20 years in The Middle East: Islamic Law and Peace—U.N. Resolution 242: Origin Meaning and Significance*, NATIONAL COMMITTEE ON AMERICAN FOREIGN POLICY, (Apr. 2002), https://web.archive.org/web/20150203052019/http://www.mefacts.com/cached.asp?x_id=10789I).

⁸¹ Bailey, *ibid*. Advocates for Syrian sovereign control of the Golan assert that the 'inadmissibility of the acquisition of territory by war' as broadly stated in the preamble should be read in innovative fashion to extend even to wars in self-defence, discussed at point 10 in the text below.

necessary for security to retain the Golan Heights.⁸² The resolution's preamble is not an operational paragraph and it must be read as applying to use of force in wars of aggression (as discussed in point eight below). Unsurprisingly, UNSC Resolution 242, a product of compromise language between Cold War and other political adversaries, is constructed ambiguously to accommodate conflicting meanings.⁸³ One can only say with certainty that it is premised on the notion of negotiation of territories for peace. In UNSC Resolution 338, two of the three paragraphs do not use mandatory language (i.e. they merely 'call for' actions) but the third paragraph does say that the UNSC 'decides' that the parties are to engage in negotiations.⁸⁴

Seventh, the relevant UNSC resolutions are in the form of recommendations without inherent coercive effect. Security Council resolutions 242, 338 and 497 do not follow the common practice of stating explicitly that the resolutions are adopted under Chapter VII,⁸⁵ nor indeed are they made under that Chapter rather than Chapter VI. Security Council resolutions adopted under Chapter VI of the UN Charter are recommendations for action. They carry no coercive or judicial authority even when expressed as mandatory decisions or judicial judgements. There is a fundamental difference between the legal status of resolutions under Chapters VI and VII, i.e. between *recommendations* under Chapter VI and *decisions* under Chapter VII. The language used in each is distinct, separating 'recommendations' in Chapter

⁸² S.C. Res. 242, U.N. SCOR, U.N. Doc S/RES/242 (Nov. 22, 1967) para 1(ii). See discussion concerning the rule of necessity at point 8 in the text below.

⁸³ Eugene Kontorovich *Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal* 16(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 127, (hereinafter 'Kontorovich Resolution 242'), 141 (2015).

⁸⁴ Although the argument has been made that this paragraph in UNSC Resolution 338 strengthens a call for negotiations under UNSC Resolution 242 in the previous paragraph, which in turn strengthens the Resolution 242 so as to give that resolution implicit Chapter 7 status, the argument is unpersuasive. It distorts the clear meaning of the words in UNSC Resolution 338. It also lays postulations upon each other, building an even weaker structure than any of the individual resolutions have by themselves.

⁸⁵ A Chapter VII resolution usually says explicitly that the situation constitutes a threat to international peace and security and that its operative paragraphs are actions by the Security Council under Chapter VII; e.g. UNSC Resolution 706 (Iraq-Kuwait) (Aug. 15, 1991).

VI⁸⁶ from ‘decisions’ in Chapter VII.⁸⁷ Leading academic commentators affirm the opinion that distinguishes between binding and non-binding Security Council resolutions.⁸⁸

In recent decades, the UNSC has exerted its political authority through quasi-legal judgements but its purported absorption of judicial functions is legally dubious. The UNSC is not an overarching international constitutional Court that can nullify laws by recommendation, as it purported to do in Resolution 497.⁸⁹ A question remains as to any extrinsic legal effect of the declaration in Resolution 497 that the Israeli *Golan Heights Law* is illegal. According to the *Namibia Advisory Opinion*, a legal consequence might flow from a declaration of illegality only if the resolution was binding, which was not the case for Resolution 497. The UNSC may make findings of fact or law as necessary premises for Chapter VII recommendations concerning international peace and security but its mandate does not include powers to determine borders or to settle competing territorial claims. Further, just as Chapter VI recommendations concerning the Golan Heights made by the Security Council are not legally binding, furthermore they cannot bind indirectly by forming customary international law. Security Council membership at any time comprises less than 8% of UN Member States, so its recommendations cannot represent globally uniform State

⁸⁶ Chapter VI provides that ‘The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, *recommend* appropriate procedures or methods of adjustment’ (Article 33(1)) (*emphasis added*).

⁸⁷ Chapter VII provides that ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or *decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’ Article 39 (*emphasis added*). Further, ‘The Security Council may *decide* what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures’ (Article 41) (*emphasis added*).

⁸⁸ E.g. Michael C Wood, *The Interpretation of Security Council Resolutions*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 73, 77-8 (1998); MALCOLM SHAW, *INTERNATIONAL LAW* (Grotius Publications Limited, 2nd ed., 1986) 557; ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL*, 39 Hart Publishing, 2004).

⁸⁹ ‘The Security Council is not a judicial organ, nor in any real sense does it exercise quasi-judicial functions, though, like the General Assembly it does have the power, in certain circumstances and in connection with particular situations or disputes, to establish judicial or quasi-judicial organs, such as the Yugoslav and Rwanda International Criminal Tribunals and the Iraq-Kuwait Boundary Demarcation Commission’, Wood, *supra* note 88, at 73, 78.

opinion, *a fortiori* when resolutions are merely recommendation or not adopted unanimously (e.g. by vote or by abstention). Its resolutions have far less persuasive power in forming *opinio juris* than do General Assembly resolutions. They are principally political positions rather than as global legal policy. Further, rules of customary international law are rules of general application and are not exclusively for a specific country.

Eighth, UNGA resolutions on matters of international peace and security are recommendatory.⁹⁰ Any resolution on a particular situation, such as on the Golan Heights, addresses international peace and security and is, therefore, necessarily a recommendation. General Assembly recommendations lack power under the Charter to create obligations that are legally binding for Member States.⁹¹

Ninth, the relevant resolutions of the General Assembly do not have extrinsic effects by forming customary international law solely by themselves. In the *Libya v Texaco* arbitration, the ‘legal value’ of a General Assembly resolution as customary international law was considered and found unable by itself to create new law.⁹² The resolutions might contribute

⁹⁰ UN Charter Article 18(2) ‘Decisions of the General Assembly on important question shall be made by a two thirds majority of the members present and voting. These questions shall include recommendations with respect to the maintenance of international peace and security...’.

⁹¹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14, 699-700 (Clarendon Press, 4th ed, 1990); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 6 EUR J INT LAW 883 (2006). See also *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Judgment)* [1966] ICJ Rep 98. Its binding decision-making powers relate only to internal aspects of the functioning of the UN, on matters such as budget, procedure, membership, and trusteeship; e.g. budgetary powers at UN Charter at Art. 17. Member States were considered bound only to consider General Assembly resolutions in the case on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa (Advisory Opinion)* [1955] ICJ Rep 67, Separate Opinion of Judge Klaestad, at 88; Separate Opinion of Judge Lauterpacht, at 119.

⁹² *Texaco Overseas Petroleum Company v Government of the Libyan Arab Republic*, YEARBOOK OF COMMERCIAL ARBITRATION 177 (1979); reproduced in 1 INTERNATIONAL LEGAL MATERIALS (1978); 1979 Int. L. Rep. 389. The case considered a UN General Assembly Resolution on permanent sovereignty over natural resources with a view to determining whether it formed customary international law. It found that ‘In fact, while it is now possible to recognize that resolutions of the United Nations have a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and its provisions....’ [85], and ‘... the absence of any binding force of the resolutions of the General Assembly of the United Nations implies

to the creation of international customary law when they express general principles and reflect a shared *opinio juris* of the Member States.⁹³ However, to form international law, *opinio juris* evidenced in resolutions must be accompanied by relevant State practice that is widespread and virtually uniform.⁹⁴ The next difficulty facing the assertion that General Assembly resolutions formulate a special *opinio juris* concerning the Golan Heights is that principles of law are by nature of general application. There can be no principle of customary international law that is particular to Israel or exclusive to the Golan Heights. To assert otherwise is discriminatory negation of equality before the law, inimical to a fundamental principle of rule of law.

Even the merely moral authority of UNGA resolutions is diminished in the area of the Arab-Israel conflict by the prevalence of widely acknowledged inbuilt politicization within UN institutions. Economic and political pressure is exerted by the Organization of Islamic Cooperation (OIC) members that comprise almost a third of the UN membership,⁹⁵ and influence other UN Member States with convergent interests, such as their neighbouring

that such resolutions must be accepted by the members of the United Nations in order to be legally binding' [86], and that various circumstances must be looked to identify whether it has been accepted as a declaration of *opinio juris*. The arbitrator in this case, Prof. René Jean Dupuy, was appointed by the International Court of Justice. See also Stephen M Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 P AM S IN L 301 (1979).

⁹³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgement) [1986] ICJ Rep 14, 99–100 [188]. Even then, objections, explanations of vote, interpretations and public statements expressed by Member States must be considered in order to contextualize and qualify consensus or majority vote decisions. The International Court of Justice substantiated this view in its *Nuclear Weapons* opinion '[I]t is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule', *Legality of the Use or Threat of Nuclear Weapons* [1996] ICJ Rep, 254–255, [70]. See also Schwebel, *Id.*

⁹⁴ *North Sea Continental Shelf Cases (Germany v Denmark)* (Judgement) [1969] ICJ Rep 3, 43.

⁹⁵ The Organization of Islamic Cooperation comprises 56 of the 193 members of the UN. See United Nations, Member States, <https://www.un.org/en/member-states>.

States⁹⁶ and allies,⁹⁷ and oil-dependent trading partners.⁹⁸ Yet further countries simply acquiesce to this bias to remain ‘within the consensus’.⁹⁹ Thus, condemnation of Israel is a widely recognized price for doing business in UN negotiations. The broader political bias of UN members against the Jewish State has been noted in formal statements made by the UN’s highest level officials, including consecutive Secretaries-General¹⁰⁰ who condemned the bias.¹⁰¹

Tenth, it is bad policy to reward perpetrators of wars of aggression. International law has not done so in the past. Indeed, State practice demonstrates that aggression leads to forfeiture of the aggressor’s territory. States that failed in their war of aggression in World War I suffered territorial losses, illustrated by break ups of the Ottoman Empire and of the Austro-Hungarian

⁹⁶ Neighbouring States of members of the Organization of Islamic Cooperation are primarily the 54 members of the Africa regional bloc (28% of UN members) and the 53 members of the Asia bloc (27.5% of UN members).

⁹⁷ The Arab League forms a market of 320 million people with considerable purchasing power as well as wealth. For example, British-Arab trade and investment excels in education, training, armaments, management, banking services, oil, etc. <https://www.abcc.org.uk/>; see also French economic, cultural and strategic engagement in Africa, <https://www.lorientlejour.com/article/1121294/la-france-puissance-musulmane-.html>.

⁹⁸ China, India, Japan and South Korea collectively are the world’s gross largest importers of oil and all East and South Asian industrial economies are heavily dependent upon oil for energy fuel imported from the Persian Gulf (where the littoral States are primarily Arab League members).

⁹⁹ E.g. New Zealand’s sponsorship of S.C. resolution 2334, U.N. SCOR, U.N. DOC S/RES/2334 (Dec. 23, 2016), demonstrated an instance of a country without substantial material or religious interests in the status of Jerusalem seeking a leadership profile safely located within this UN consensus.

¹⁰⁰ The three most recent UN Secretaries-General - Antonio Guterres, Ban Ki Moon and Kofi Anan, – have critiqued organs of the UN for anti-Israel bias: Toi Staff & AFP, *UN chief vows to stand up against anti-Israel bias, anti-Semitism*, TIMES OF ISRAEL (Apr. 24, 2017, 3:56 am), <https://www.timesofisrael.com/un-chief-vows-to-stand-up-against-anti-israel-bias-anti-semitism>; Press release, *Secretary-General Urges Human Rights Activists to ‘Fill Leadership Vacuum’, Hold World Leaders to Account, in Address to International Day Event*, UNITED NATIONS, (Dec. 8, 2006), <https://www.un.org/press/en/2006/sgsm10788.doc.htm>; Press release, *Secretary-General urges Human Rights Council to Take Responsibilities Seriously, Stresses Importance of Considering all Violations Equally*, UNITED NATIONS, (June, 20 2007) <https://www.un.org/press/en/2007/sgsm11053.doc.htm>.

¹⁰¹ U.S. permanent representatives to the UN have also critiqued UN bias against Israel; e.g. Allen Cone, *Nikki Haley in farewell talk: UN ‘hopelessly biased’ against Israel*, UPI, (Dec. 19, 2018:12.14am) https://www.upi.com/Top_News/World-News/2018/12/19/Nikki-Haley-in-farewell-talk-UN-hopelessly-biased-against-Israel/8191545193039.

Empire,¹⁰² and loss of German home territories¹⁰³ and of German colonial territories to other trustees.¹⁰⁴ In World War II, defeated Axis countries lost territory to Allied Forces: Japan lost Pacific islands (South Sakalin and the Kuriles to the Soviet Union, and other Pacific islands to the USA) and colonial Manchukuo to China,¹⁰⁵ while Germany lost more sovereign land in Europe (Galicia and Danzig to Poland, and Konigsburg to the Soviet Union). Similarly, the Netherlands, Greece and Yugoslavia acquired territory from Germany and Italy.¹⁰⁶

As pointed out by Kontorovich, the International Law Commission in 1950 endorsed the legality of conquest of territory, unless by aggression or in violation of the UN Charter.¹⁰⁷ At the time, South Korea acquired control of territory north of its prior border at the 38th parallel with North Korea. This was the law still in 1967 when Israel conquered the Golan Heights in a defensive war.¹⁰⁸ Since then, some scholars have asserted that recently emerged international law prohibits the acquisition of territory in an armed conflict altogether, even if

¹⁰² The Austro-Hungarian Empire collapsed and the Ottomans made territorial concessions under Treaty of Lausanne; see NORMAN DAVIES, *EUROPE: A HISTORY* 932, 937 (Pimlico, 1997).

¹⁰³ E.g. Imperial Germany ceded Alsace to France, and Schleswig to Denmark; see: NORMAN DAVIES, *EUROPE: A HISTORY* 909, 931 (Pimlico, 1997).

¹⁰⁴ E.g. South West (Namibia) to South Africa and East Africa to Britain and Papua New Guinea to Australia.

¹⁰⁵ JONATHAN FENBY, *MODERN CHINA - THE FALL AND RISE OF A GREAT POWER, 1850 TO THE PRESENT* 327 (HarperCollins, 2008).

¹⁰⁶ Mor observes that 'In 1947, peace treaties were concluded that took away land from Finland, Hungary, Romania, and Bulgaria while, in the same year, Italy made concessions to France on the Alps and transferred islands previously in its possession to Albania and Greece. In 1954, Italy was forced to accept the partition of Istria with Yugoslavia precipitating an exodus of nearly a quarter million ethnic Italians from the ceded territory. These changes were only finalized in a treaty in 1975, and the much more dramatic territorial changes in Germany were only finally ratified in treaties in 1990.' (Shany Mor, *The Golan Heights and the Depths of Hypocrisy*, TABLET MAGAZINE, (Apr. 3, 2019), <https://www.tabletmag.com/jewish-life-and-religion/294347/a-history-of-silence>).

¹⁰⁷ Kontorovich, *supra* note 83, at 141-3.

¹⁰⁸ Kontorovich also observes that, where international law has not set a restraining rule, the principle of *non liquet* applies, meaning that 'States remain free to act'; citing *S.S. Lotus (France v Turkey)* Judgement (1927) PCIJ Series A no. 10, ICGJ 248 (PCIJ 1927) Sept. 7, 1927; see Eugene Kontorovich, *International Law and the Recognition of Israeli Sovereignty in the Golan Heights*, Prepared Written Testimony before the United States House of Representatives Committee on Oversight, Subcommittee on National Security 17 July 2018, in House Of Representatives Subcommittee on National Security of the Committee on Oversight and Government Reform *A New Horizon in U.S.-Israel Relations: From An American Embassy In Jerusalem To Potential Recognition Of Israeli Sovereignty Over The Golan Heights* Hearing Before the 115th Congress, Second Session, July, 17 2018, Serial Number 115-97, 32, at 33 <https://oversight.house.gov/legislation/hearings/a-new-horizon-in-us-israel-relations-from-an-american-embassy-in-jerusalem-to>.

conducted in self-defence. This proposition is dubious and seems crafted to apply exclusively to Arab territories lost to Israel in 1967. For example, Korman suggested that the United States position in 1982 indicated the legal impossibility of acquisition of territory even by defensive by force, however, the evidence used was based on her interpretation of now defunct United States attitude to the Golan Heights.¹⁰⁹ An indefeasible Syrian right to the Golan Heights, despite three aggressive wars and repeated lesser assaults on Israel, grants an aggressor rewards for illegal acts and is implausible because it is plainly wrong – legally, politically and morally.¹¹⁰

Eleventh, a lawful ‘situation of necessity’ legitimates actions that might otherwise, *in arguendo*, be considered unlawful. The International Law Commission has recognized a ‘situation of necessity’ as applying where the prima facie unlawful action is ‘(a) ... the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or the international community as a whole’.¹¹¹ In effect, Israeli control of the Golan Heights is a military necessity for the long-term future, due to the lowlands vulnerability to hostility from Syria. There is a clear military case, with no practical argument

¹⁰⁹ SHARON KORMAN, *THE RIGHT OF CONQUEST THE ACQUISITION OF TERRITORY BY FORCE IN THE 21ST CENTURY* 243, 262-3 (Clarendon Press, 1996). Similar lack of temporal relevance arises in current analysis by Eliav Lieblich, *The Golan Heights and the Perils of “Defensive Annexation”*, JUST SECURITY (Apr. 4, 2019), <https://www.justsecurity.org/63491/the-golan-heights-and-the-perils-of-defensive-annexation>.

¹¹⁰ This is an application of the legal principle *ex injuria non-oritur*, i.e. no legal right emerges for benefit of a wrong; see Stephen M Schwebel, ‘What Weight to Conquest?’ in STEPHEN M SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL* 523 (Cambridge University Press, 1994) (originally published as an editorial comment, see Stephen M Schwebel, *What Weight to Conquest?* 64 AM J INT LAW 344, 346-7 (1970).

¹¹¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION article 25.1 (2001) http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; see also Roman Boed, *State of necessity as a justification for internationally wrongful conduct* 3 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 1 (2000); Attila Tanzi, *Necessity, State of*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2013).

against it, of the necessity for Israeli control of the Golan Heights, at the very least including the slopes and ridges that overlook those Israeli communities below them.

Finally, and in conclusion, an Israeli *de jure* annexation of the Golan Heights would be lawful in the cumulative circumstances described above. It would cure the illegality under the laws of military occupation of the *Golan Heights Law* as the military occupation would formally terminate upon annexation transferring sovereignty over the Golan Heights to civil government in Israel.

United States Recognition of Israeli Sovereignty and the Responses

The White House recognized the Golan as under Israeli sovereign territory when President Donald Trump issued an Executive Directive on 25 March 2019.¹¹² The formal recognition was presaged by a Twitter announcement @realDonaldTrump, four days earlier.¹¹³ A curious aspect of this recognition is that Israel itself has denied that it has formally annexed the Golan Heights or claimed sovereignty.

¹¹² The full text reads as follows:

RECOGNIZING THE GOLAN HEIGHTS AS PART OF THE STATE OF ISRAEL BY THE PRESIDENT OF THE UNITED STATES OF AMERICA - A PROCLAMATION

The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats. Based on these unique circumstances, it is therefore appropriate to recognize Israeli sovereignty over the Golan Heights.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim that, the United States recognizes that the Golan Heights are part of the State of Israel.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of March, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third. DONALD J. TRUMP. Proclamation No. 06199, 84 F.R. 11875 (Mar. 25, 2019).

¹¹³ @realDonaldTrump (Donald J. Trump) (Twitter, Mar. 21, 2019, 9:50am AEST)

<https://twitter.com/realdonaldtrump/status/1108772952814899200?lang=en>. 'After 52 years it is time for the United States to fully recognize Israel's Sovereignty over the Golan Heights, which is of critical strategic and security importance to the State of Israel and Regional Stability!'

Foreign policy drives the making of decisions to recognize the legitimacy of a foreign State, a foreign government or a foreign territory. Recognition is a foreign policy instrument with legal impacts that include formalizing international legal status and legitimating exercises of foreign governmental authority.¹¹⁴ As the executive arm of government conducts foreign relations, so recognition is an instrument exercised usually by the executive arm. The White House recognition of Israeli sovereignty thus implemented its foreign policy in the Middle East.

The proclamation of recognition of Israeli sovereignty was consistent with existing United States policy for almost a half century. The policy of the Gerald Ford administration, as expressed in a letter to Israeli Prime Minister Yitzhak Rabin on 1 September 1975 was that ‘a peace agreement must assure Israel's security from attack from the Golan Heights’ and that the USA ‘will give great weight to Israel's position that any peace agreement with Syria must be predicated on Israel remaining on the Golan Heights’.¹¹⁵ Another letter of assurance was written during the HW Bush administration, by Secretary of State James Baker to Israeli Prime Minister Yitzhak Shamir in the lead up to the 1991 Madrid peace conference. It

¹¹⁴ Recognition of a State as such is usually considered either a declaratory or constitutive factor in its status as a State; see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 26 (Oxford University Press, 2nd ed, 2006). Recognition of an area as part of a State's territory legitimates its exercise of jurisdiction in that area, with implications under trade agreements for tariffs and rules of origin for products of that territory. E.g. a recent Canadian Federal Court decision (under appeal at this time of writing) has found that wines produced in the Golan Heights are not products of Israel, see *Kattenburg v Canada (Attorney-General)* 2019 FC 1003 (July 29, 2019), <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/419068/index.do>; see also Guy Harpaz, *The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law* 38 J WORLD TRADE 1049, 1049-1058 (2004).

¹¹⁵ ‘... The U.S. will support the position that an overall settlement with Syria in the framework of a peace agreement must assure Israel's security from attack from the Golan Heights. The U.S. further supports the position that a just and lasting peace, which remains our objective, must be acceptable to both sides. The U.S. has not developed a final position on the borders. Should it do so it will give great weight to Israel's position that any peace agreement with Syria must be predicated on Israel remaining on the Golan Heights. My view in this regard was stated in our conversation of September 13, 1974...’ Gerald Ford letter to Yitzhak Rabin (Sept. 1, 1975), <https://virtuallibrary.org/president-ford-letter-to-israeli-prime-minister-rabin-september-1975>.

confirmed the commitment made in the Ford letter concerning the Golan Heights.¹¹⁶ In 1996 also, during the Bill Clinton administration, the Ford letter was reconfirmed by letter from Secretary of State Warren Christopher to Prime Minister Benjamin Netanyahu on 19 September 1996.¹¹⁷ As noted by Dore Gold, these letters were a standing statement of United States policy.¹¹⁸

The formal recognition by the White House of Israeli sovereignty in the Golan Heights was condemned, however, by European Union countries, Russia, Iran and Syria.¹¹⁹ Russia and Iran are heavily engaged Syrian military allies in the Syrian civil war and have clear Syrian interests, but the objections of the European Union member countries appears driven by their foreign policy doctrine. There were no condemnatory resolutions against the move passed in the UNGA. This quietude stands in contrast to fierce condemnation in December 2017 of the White House recognition of Jerusalem as the capital of Israel.¹²⁰ We might conclude from this contrast that recognition of Israeli sovereignty over the Golan Heights was regarded as unobjectionable by most Arab countries and therefore the United Nations.

¹¹⁶ ‘...as you express a special concern about the Golan Heights. In this context the United States continues to stand behind the assurances given by Pres Ford to Prime Minister Rabin on September 1, 1975’; see ‘U.S. letter of assurance to Israel, 1991’ quoted in TERJE ROD LARSON, NUR LAIQ AND FABRICE AIDAN (eds), *THE SEARCH FOR PEACE IN THE ARAB-ISRAELI CONFLICT A COMPILATION OF DOCUMENTS AND ANALYSIS* 438-40 (Oxford University Press, 2014).

¹¹⁷ Gold, *supra* note 19.

¹¹⁸ *Id.*

¹¹⁹ ‘The position of the European Union as regards the status of the Golan Heights has not changed. In line with the international law and UN Security Council resolutions 242 and 497, the European Union does not recognize Israeli sovereignty over the occupied Golan Heights.’ Council of the European Union, ‘Declaration by the High Representative on behalf of the EU on the Golan Heights’ (Press Release, Mar. 27, 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/03/27/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-golan-heights>; United Nations, ‘Security Council Members Regret Decision by United States to Recognize Israel’s Sovereignty over Occupied Syrian Golan’ (Media Release, SC/1373, Mar. 27, 2019), <https://www.un.org/press/en/2019/sc13753.doc.htm>.

¹²⁰ In contrast, the UN General Assembly condemned recognition by the USA of Jerusalem as the capital of Israel. See *Status of Jerusalem*, GA Res ES-10/L.22, UN Doc A/RES/ES-10/L.22 (Dec. 21, 2017).

Wider Recognition of Israeli Sovereignty over the Golan Heights

Should other countries follow the USA to recognize Israel's *de jure* sovereignty over the Golan Heights? Principles of international law set out notionally universal rules applicable to all countries. However, international legal debates would not occur if there were not conflicting opinions over indeterminate international laws. The legal analysis above concludes that recognition is a legally sound course through this international thicket and that the case for the legitimacy of Israeli annexation of the Golan Heights is persuasive. This conclusion is applicable generally for all countries.

Security and ethical considerations might vary for every country according to the unique situation of each. Nevertheless, security and ethical factors for or against recognition of Israeli sovereignty in the Golan Heights are argued here also to be mostly determined by common factors shared by all countries. This is the case because Israeli sovereignty over the Golan Heights would promote security stability more broadly in the Middle East, as suggested below.

Considering security, we might ask whether continuing Israeli control of the Golan Heights will increase or decrease the likelihood of war with Syria, and whether such war would be more severe or less than in the past? The history shows that Syria initiated war with Israel three times during the 21 years it controlled the Golan Heights and is since embroiled in a decade of civil war, and that there has been no war there during the 52 years that Israel has controlled it. Presumably, there is less likelihood of war with the Golan Heights continuing under Israeli control. If Syria now controlled the Golan Heights, the volatility of its civil war would greatly increase the likelihood of its violence having spilled over into war with Israel. Further, if Syria were to control the Golan and initiate a war against Israel, the mutually destructive impact of military technology would likely be far greater today, especially given the likely involvement

of Hezbollah, the Iranian Revolutionary Guard Corps, and other entrenched Iranian-controlled militias regionally. Their opposition to the existence of Israel increases the probability of a war that would engulf also Lebanon, Iraq and Iran. Thus, global security is very clearly protected by continuation of Israeli control.

On evaluation of ethics in international relations, Syria has a weak case. It launched aggressive wars, allegedly commits massive war crimes against its own citizens, is a politically unstable military dictatorship, propped up by foreign hegemons (Iran and Russia), and dominated internally by extremist militias. Syria resists negotiations to make peace and has facilitated the entrenchment of foreign militias for future assaults on Israel. The Golan Heights refugee population in 1967 was resettled. The Golan Druze population does not claim independent sovereignty and is gradually inclining toward Israeli citizenship within a democratic polity. The historical Jewish presence in the Golan Heights and the superseding circumstances of Jewish population there today and the benign nature of the current administration form a powerful ethical case for ongoing Israeli control. Transfer of the military vantage and water resources of the Golan Heights to Syria can be argued only within a framework that maintains as its moral imperative the destruction of Israel.

Geopolitical alliances and relationships are particular to each country. The political considerations for and against recognition of Israeli sovereignty over the Golan Heights are for each country's foreign minister to decide. However, some general observations are universally relevant. In relation to political considerations, a minister of foreign affairs would likely weigh the risks of political retaliation for departure from the country's voting record in the UN if the country has usually voted with anti-Israel resolutions. However, the lack of significant Arab protest against the recognition of Israeli sovereignty by the Trump White House suggests that

the risk is currently not high. – As Syria is aligned with Iran (which is Persian and Shiite) against its Sunni Arab population, it is in current disfavour in the Sunni Arab world. Nevertheless, the counterargument can be made that discreet inaction by the minister of foreign affairs on the question of recognition would maintain the ambiguous status quo in the short term, which has its political attractions: it forestalls regional war, maintains Israeli control, shelters within the ‘safe space’ of UN consensus and avoids potential political protest. Nevertheless, as the 50 years of ongoing ambiguity around the legality of Israeli control contributes to instability in the longer term and is impossible to maintain indefinitely. A far-sighted political analysis suggests that inaction is increasingly dangerous in the current volatile Syrian situation and that the moment is right to ripe to stabilize and concretize Israeli control.

In relation to economic and trade considerations, recognition of Israeli sovereignty might carry risks of boycotts. The relative size and importance of national trade with Syria as compared to trade with Israel would need to be evaluated.¹²¹ Syria is a minor economy and its current Iranian and Russian allies provide little foreign development aid. Wider retaliatory trade actions by Syrian-allied circles of predominantly Arab, Muslim or European countries might also be a concern for smaller countries recognizing Israeli sovereignty over the Golan Heights. The gravity of this risk depends upon the size of the national economy and the relative severity of exposure to possible retaliatory action,¹²² although some small and disengaged economies

¹²¹ Syria’s annual GDP (by purchasing power parity) is declining and was estimated in 2015 to have been USD \$50.28 billion. See Central Intelligence Agency, *The World Factbook: Syria*, CENTRAL INTELLIGENCE AGENCY (Oct. 7, 2019), <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>. In contrast, Israel’s annual GDP in 2015 was 6-fold higher and is growing: USD \$295.3 billion, see Central Intelligence Agency, *The World Fact Book: Israel*, CENTRAL INTELLIGENCE AGENCY, (Oct. 7, 2019) <https://www.cia.gov/library/publications/the-world-factbook/geos/is.html>.

¹²² For example, Australia was threatened with cancellation of a free trade deal with Indonesia when it recognized West Jerusalem as Israel’s capital. See James Massolla & Kaaruni Rompies, *Australia-Indonesia free trade deal safe and now but Malaysia and criticism swift*, THE SYDNEY MORNING HERALD, (Oct. 17, 2018, 6:26pm), <https://www.smh.com.au/world/asia/australia-indonesia-free-trade-deal-safe-for-now-20181017-p50a6z.html>. Brazil’s stated intention in 2019 to recognize Jerusalem as the capital of Israel came under effective Arab economic pressure to abort recognition: see Dan Williams, *Brazil opens trade mission in Jerusalem, short of full*

might not be impacted.¹²³ Nevertheless, it seems unlikely that retaliation would be imposed by Arab League member countries in light of Syria's current suspension from the Arab League.¹²⁴ Trade with and aid from the European Union is unlikely to be affected because recognition of Israeli territorial sovereignty over the Golan Heights is not a direct or central concern in European bilateral relationships.¹²⁵ In contrast, global trade destabilization and energy price inflation (especially impacting East Asian and European oil importing countries) would inevitably be triggered by intense regional wars that would follow from renewed Syrian control over the Golan Heights and armed attacks on Israel from there.

It is historically unique that defensively captured territory remains in a legal impasse, more than half a century after the aggressor lost three wars, even more remarkably, in circumstances where the three wars were launched from that very strategically important territory. As acknowledged above, this legal impasse maintains Israeli control, which is conducive to peace. Nevertheless, regional instability and Syrian hostility are exacerbated by the ongoing legal ambiguity. Current ethical, trade and economic considerations, which are common to most countries vis-à-vis Syria, suggest that this is an opportune moment for wider recognition of Israeli sovereignty.

embassy move, REUTERS, (31 Mar. 31, 2019, 7:59pm), <https://www.reuters.com/article/us-israel-brazil/brazil-opens-israel-trade-mission-in-jerusalem-short-of-full-embassy-move-idUSKCN1RC097>.

¹²³ E.g. Pacific small island countries vote against the consensus in the UN General Assembly, and Nauru has recently recognized Jerusalem as the capital of Israel. *Palestinians condemn Honduras, Nauru moves on Jerusalem status*, AL JAZEERA, (Aug. 30, 2019), <https://www.aljazeera.com/news/2019/08/palestinians-condemn-honduras-nauru-moves-jerusalem-status-190829161042058.html>.

¹²⁴ Syrian membership in the Arab League has been suspended since 2011. Ben Hubbard, *The Golan Heights Was Once an Arab Rallying Cry. Not Anymore*, THE NEW YORK TIMES, (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/world/middleeast/golan-heights-israel-syria.html>; Seth Frantzman, *Does the Middle East care about Trump's Golan announcement?*, THE JERUSALEM POST, (Mar. 21, 2019, 23:33), <https://www.jpost.com/Israel-News/Does-the-Middle-East-care-about-Trumps-Golan-announcement-584223>.

¹²⁵ Tova Lazarov & Omri Nahmias *All 28 EU states reject Israeli sovereignty over the Golan Heights*, THE JERUSALEM POST, (Mar. 31, 2019, 4.19am), <https://www.jpost.com/Breaking-News/EU-We-do-not-recognize-Israelis-sovereignty-over-the-Golan-Heights-584859>. There were also Syrian, Iranian and Russian objections.

Conclusion

The Golan Heights supply a reliable portion of regionally shared water and are of great military significance. In a region torn by violent strife, they offer either a defence bastion or an attack vantage. During the half-century under Israeli control, the Golan Heights have remained peaceful. In contrast, Syria instigated three wars and intermittently shelled Israel in the 20th century and its civil war is spilling into cross-border hostilities through the second decade of the 21st century.

Under international laws of armed conflict, continuing Israeli occupation of the Golan Heights is lawful. However, the Israeli 1981 *Golan Heights Law* replacing Syrian law is not. It is part of a process of Israeli *de facto* annexation of the Golan Heights that is occurring by gradual steps. The legal status of the western Golan Heights under the international laws of armed conflict is uncertain. To resolve the legal ambiguity that Israel itself has contributed to, formal annexation of the Golan Heights could cure the illegality of the *Golan Heights Law*, transitioning to *de jure* Israeli sovereign title.

The legal case for recognizing the legality of Israeli annexation of the Golan Heights is strong. The relevant United Nations resolutions do not explicitly require transfer of the Golan Heights to Syria and are recommendatory. Their extrinsic legal effects do not in themselves establish new binding international laws peculiar to the Golan Heights. More fundamentally, the Golan Heights were occupied in defensive wars and principles of international law do not penalize self-defence. Indeed, recent history demonstrates that legal ceding of territory by defeated aggressors remains the norm. Israeli control is a situation of legal necessity that promotes regional security. Most western Golan Heights inhabitants do not aspire to live

under Syrian sovereignty. Facts on the ground have changed over the past half century. Simply put, Syrian sovereignty there has effectively been superseded.

In deciding whether to recognize Israeli *de jure* sovereignty over the Golan Heights, the global security and ethical and legal considerations are essentially common for all countries. Economic or political retaliation risks are particular to each country's situation, and might be points of vulnerability. However, the risks of economic or political retaliation are negligible. In conclusion, legal recognition of Israeli sovereignty in the Golan Heights promotes regional peace and security, is preferable for the local population, is opportune and is consistent with prevailing international law.