

PREGNANT WOMEN'S ACCESS TO HEALTH CARE IN THE OCCUPIED
PALESTINIAN TERRITORY: APPLICATION UNDER THE ROME STATUTE OF
THE INTERNATIONAL CRIMINAL COURT

By

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Submitted to the

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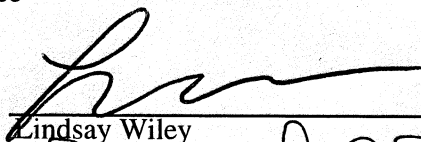
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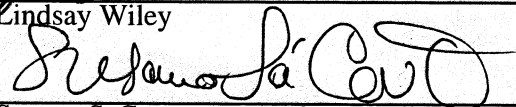
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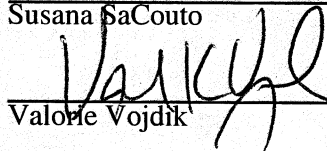
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PREVIEW

I Dedicate This Work To The Women Who Never Forget,
But Are Always Forgotten

PREVIEW

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TERRITORY: APPLICATION UNDER THE ROME STATUTE OF THE INTERNATIONAL
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ABSTRACT

Israel's occupation regime and subsequent closure apparatus in Palestine manifests in numerous ways. In a span of seven years, Israeli military authorities delayed pregnant Palestinian women at checkpoints at an annual rate of ten percent, resulting in sixty-nine cases of birth en route to hospitals, with thirty-five infant and five maternal deaths. This dissertation tracks the historical development of childbirth and maternity health care services in Palestine, and discusses the effect of the Palestinian political context on the health of pregnant women. It goes on to establish that as a result of Israeli closure policies, restrictions placed on pregnant women's access to health care constitutes a war crime of outrage upon personal dignity, as defined by Article 8(2)(b)xxi of the Rome Statute of the International Criminal Court. While a number of births and deaths have been documented, many others have gone unnoticed. Existing reports fail to note any prior or post-traumatic stress disorders faced by pregnant Palestinian women as a result of this commonly occurring humiliating and degrading treatment. Moreover, national and international laws still remain unclear on the consequences and penalties of such acts. Between 2005 and 2009, the United Nations Commission on Human Rights issued several resolutions addressing the issue of Palestinian pregnant women giving birth at Israeli checkpoints. The United Nation's concern regarding this issue is an indicator of the gravity of this problem. However, no legal recourse has been employed to attain justice for the women whose dignity has been violated or for the infants they lost. Given the inactivity of Israeli and Palestinian national judicial systems, this dissertation provides an international framework for adjudicating Israeli restrictions placed on the movement of pregnant Palestinian women.

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OVERVIEW

“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. For the purpose of this Statute, ‘war crimes’ means: Serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law [including]...: Committing *outrages upon personal dignity*, in particular humiliating and degrading treatment.”

Rome Statute of the International Court, Article 8 (2)(b)(xxi)

“I was in pain and felt I was going to give birth there and then; I told [my husband,] Daoud, who translated what I said to the soldiers, but they did not let us pass. I was lying on the ground in the dust, and *I crawled behind a concrete block by the checkpoint to have some privacy and gave birth there, in the dust, like an animal. I held the baby in my arms and she moved a little, but after a few minutes, she died in my arms.*”

Rula Ashtiya, August 2003, Beit Furik, occupied West Bank

The International Criminal Court describes itself as a court of last resort, adjudicating the most egregious violations of international law. In the case of the Occupied Palestinian Territory, which has been under forty-seven years of military occupation, Palestinians are subject to the occupying power’s military judiciary and the restricted jurisdiction of a local authority when it comes to any means of legal redress. The human consequences of Israeli policies in the occupied Palestinian territory are ever present, and often the most destructive examples of military conflict are the focus of human rights and legal scholars. However, as the Rome Statute reminds, a war crime encompasses more than the use of illegal weapons against civilians or torture of prisoners, but also among many things, “outrages upon personal dignity.”¹

¹ Rome Statute of the International Criminal Court, art. 8, Jul. 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) [hereinafter Rome Statute].

Since the occupation of the Palestinian territory in 1967, a very limited understanding of the International Humanitarian Law and Human Rights Law paradigms has dominated the discourse on Palestine. Recently there has been a shift in the paradigms used by and for Palestinians, with non-governmental organizations and Palestinian scholars increasingly examining legal frameworks that had not been previously explored by scholars in the Palestinian context, including apartheid, population transfer, and colonialism.² On January 2015, the State of Palestine ratified the Rome Statute of the International Criminal Court, offering a tribunal for adjudicating these rights.

Much of the scholarly work written on Palestine's declaration to the International Criminal Court (ICC) has examined whether Palestine meets the statutory requirement of a state for the purposes of the Rome Statute of the ICC.³ Some scholars have examined particular crimes committed in the Palestinian context, mostly crimes committed by the Israeli Army in Gaza such as killing of civilians and destruction of personal property, as well as the issue of

² Civic Coalition for Palestinian Rights in Jerusalem & Birzeit University Institute of Law, *Advocating for Palestinian Rights in Conformity with International Law Guidelines, An Outcome Document of the Conference "Options and Strategies for the Palestinian People in International Law"*, <http://lawcenter.birzeit.edu/iol/en/project/outputfile/6/986afcc6c9.pdf> (These guidelines offer an original approach to the Israeli regime over Palestine and the Palestinians through International legal notions. It proves that using the concept of occupation alone is insufficient for the situation at hand, and rather argues that the Israeli regime should be situated within the paradigms of (settler) colonialism, population transfer (ethnic cleansing) and apartheid); John Dugard & John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, 24 *EUR. J. INT'L L.* 867 (2013) (examining the emerging "interest in the international legal prohibition of apartheid as a potentially appropriate lens through which to view the situation of the Palestinians").

³ See ERROL MENDES, *STATEHOOD AND PALESTINE FOR THE PURPOSE OF ARTICLE 12(3) OF THE ICC STATUTE: A CONTRARY PERSPECTIVE* (2010), available at <http://www.icc-cpi.int/NR/ronlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFOR THEPURPOS.pdf>; but see Ambassador Dore Gold & Diana Morrison, *Discussion on Whether the Declaration Lodged by the Palestinian Authority Meets Statutory Requirements: Historical and Diplomatic Considerations*, presented at the International Criminal Court NGO Roundtable Oct. 19-20, 2010, <http://www.icc-cpi.int/NR/ronlyres/553F5F08-2A84-43E9-8197-6211B5636FEA/282527/DoreGold1.pdf>; Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 *J. INT'L CRIM. JUST.* 329 (2010).

Israeli settlements in the West Bank.⁴ Most these scholarly discussions regarding the possibility of ICC jurisdiction over crimes committed in the Palestinian territory have not specifically addressed crimes against Palestinian women.

This dissertation provides a framework for adjudicating restrictions placed on the Palestinian population's movement by the Israeli government, in particular, the restrictions on pregnant Palestinian women seeking access to health care. It argues that Israel's restrictions on pregnant women's access to health care in the Palestinian territory satisfies the requirements of an outrage upon personal dignity according to Article 8(2)(b)(xxi) of the Rome Statute. This dissertation aims to further the current discussion on alternative legal structures and mechanisms available to assert the Palestinian population's rights.⁵ It also intends to put the crimes committed against women at the forefront of the discussion on crimes committed in the Palestinian conflict. In the current political and legal discussions within the Palestinian leadership and civil society on crimes within the jurisdiction of the International Criminal Court, there has been little to no mention regarding crimes committed against Palestinian women in particular.

The Information Health Centre of the Palestinian Ministry of Health documented 69 cases of Palestinian pregnant women giving birth at Israeli checkpoints from 2000 to 2006, resulting in the death of 35 newborns and 5 mothers.⁶ The numbers of childbirth at checkpoints

⁴ Conference, George Mason University's Middle East Studies Program, New Century College (NCC), and the Trans-Arab Research Institute, Operation Protective Edge: Legal and Political Implications of ICC Prosecution, (Oct. 20, 2014), <http://www.statishour.com/operation-protective-edge--the-icc.html> [hereinafter Operation Protective Edge Conference] (hosting Noura Erikat, Margaret deGuzman, Kevin Jon Heller, George Bisharat, David Luban, who "explored the relevant legal questions under international criminal law as well as the political issues related to ICC accession by Palestine"); AL MAJDAL, Spring-Summer 2012 (shedding light on various examples of population transfer in the Palestinian context, while offering an understanding on prosecution and impunity for the crime of population transfer).

⁵ Operation Protective Edge Conference, *supra* note 4.

⁶ U.N. General Assembly, Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Issue of Palestinian Pregnant Women Giving Birth at Israeli Checkpoints, delivered to the General*

have decreased after 2006 due to coping mechanisms implemented by the women themselves, the Palestinian Authority and the United Nations to defy long waits on checkpoints and fear of complications. However, these coping mechanisms create other layers of complexities to the Palestinian population in general and to the women in particular, such as family separation and transfer and forced displacement of population to other areas, further contributing to the core issue of the Palestinian refugee problem and Israeli land grabbing and confiscation.

At a time when the Palestinian Authority has ratified the Rome Statute of the International Criminal Court, the discussion on the crime of population transfer and Israeli settlements is at the forefront of the cases examined in the situation of Palestine.

Shedding a light on the clear crime of Population transfer is of great importance to the Palestinian conflict as to prove the colonial and settler nature of the Israeli occupation. The role of Palestinian women in relocating to other areas in fear of complications during labor is indirectly contributing to population transfer of the Palestinian population from their lands, leaving large amounts of land unprotected from Israeli land grabs and confiscation. Hence, leaving this crime unaddressed not only disregards Palestinian pregnant women's physical, psychological, and emotional rights and dignity, but also feeds indirectly into the crime of population transfer and Israeli confiscation of Palestinian land.

Assembly, U.N. Doc. A/HRC/13/68 ¶ 5 (Jan. 21, 2010) [hereinafter *Report on the Issue of Palestinian Pregnant Women Giving Birth at Israeli Checkpoints*]; see also U.N. General Assembly, *Report of the Special Rapporteur of the Commission on Human rights on the Situation of Human rights in the Palestinian Territories Occupied by Israel since 1967*, ¶43, transmitted by note of the Secretary-General, U.N. Doc. A/60/271 (Aug. 18, 2005) (prepared by John Dugard) [hereinafter *Report of the Special Rapporteur on the Situation of Human rights in the Palestinian Territories*].

Furthermore, this dissertation acknowledges the importance of developing legal understanding of gendered crimes in conflict beyond only sexual violence crimes.⁷ The Office of the Prosecutor of the ICC defines gender-based crimes as, “those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.”⁸ Although, the ICC Policy paper recognizes gender-related aspects of certain crimes, it does not discuss crimes committed solely against women that are not of sexual nature. However, it does state that other crimes such as “torture, mutilation, persecution, inhuman acts, and outrages upon personal dignity, may also have a sexual and/or gender element.”⁹ This dissertation adjudicates “outrages upon personal dignity” as a gendered crime.

Chapter I of this dissertation presents the political history of Palestine, exploring the development of restrictions on movement imposed by the Israeli government on Palestinians in the West Bank. This section also generally provides the groundwork for adjudicating Israel’s use of physical and administrative obstacles restricting pregnant women’s access to health care in the occupied Palestinian territory.

⁷ For a history on the prosecution of sexual violence crimes, see Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 *Georgetown L. J.* 2557 (2001); and see Andrea R. Phelps, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 *WM. & MARY J. WOMEN & L.* 49 (2006); and see Diane Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 *AM. U. J. GENDER SOC. POL’Y & L.* 431 (2009).

⁸ International Criminal Court, Policy Paper on Sexual and Gender-Based Crimes 3 (June 2014), <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter ICC Policy Paper on Sexual and Gender-Based Crimes].

⁹ *Id.*, at ¶ 18.

Chapter II follows with a description of the development of health services in the West Bank since the 1920s, particularly as they relate to childbirth and maternity care. This chapter illustrates the change in birthing practices in the West Bank, and describes the effect of Israeli physical barriers on childbirth and birthing behaviors in Palestine between 1996 and 2009.

Chapter III then assesses the material jurisdiction of the ICC over the alleged crime of outrages upon personal dignity according to Article 8(2)(b)(xxi) of the Rome Statute and argues that Israeli soldiers violated the dignity of the pregnant women by restricting their access to health care.

Chapter IV argues that the ICC has territorial and temporal jurisdiction over the crime in question. Questions pertaining to Palestinian statehood, the impact of occupation on the delegation of territorial jurisdiction to the ICC, and the ability of the ICC to exercise jurisdiction retroactively over outrages upon personal dignity committed before the State was established are examined in this section.

Finally, Chapter V argues that the issue of restricting pregnant Palestinian women's access to health care is admissible at the ICC. It explores both elements of admissibility—complementarity and gravity—and applies them to the Palestinian context in relation to the question at hand.

CHAPTER 1

PALESTINIAN-ISRAELI CONFLICT: BACKGROUND & CONTEXT

Introduction

By presenting the political history of Palestine,¹⁰ this chapter lays the groundwork for the dissertation that Israel's use of physical and administrative obstacles restricting pregnant women's access to health care in the occupied Palestinian territory constitutes a war crime upon personal dignity of Palestinian women within the meaning of Article 8 of the Rome Statute.

The problem of Palestinian women giving birth in unsafe conditions because of Israeli-imposed physical barriers is consequence not only of the Israeli occupation of Palestinian lands since 1967, but is also of the larger conflict between Zionist ideology and Palestinian autonomy before the creation of the Israeli State in 1948. Hence, it is helpful to provide information on how history has shaped both the Zionist and Palestinian positions regarding the territory of historical Palestine and each side's ideology. The historical background presented in this chapter explains how restrictions on movement have become Israel's primary tool for controlling Palestinians, resulting in restricting access to health care, including for pregnant women. Subsequent chapters will utilize the factual information provided in this chapter to assess whether restricting pregnant women's access to health care is an outrage upon personal dignity within the meaning of Article 8 of the International Criminal Court Statute (the "Rome Statute").

This chapter will begin with a brief description of the events prior to the creation of the Israeli state in 1948, which led to the current Israeli closure regime and occupation. Then, this chapter will discuss the occupation of the West Bank and Gaza Strip since the 1967 War, up to the peace agreements signed between the Government of Israel and the Palestinian

¹⁰ See WOLF DIETER HÜTTEROTH & KAMAL ABDULFATTAH, HISTORICAL GEOGRAPHY OF PALESTINE, TRANSJORDAN AND SOUTHERN SYRIA IN THE LATE 16TH CENTURY (1977); HENRY CATTAN, THE PALESTINE QUESTION (1988).

representatives in 1993. The next section will examine the movement restrictions imposed by the Government of Israel on Palestinians in the West Bank of the Occupied Palestinian Territory¹¹ after the peace accords and the Palestinian uprising in 2000. Finally, the last section will briefly discuss Palestine's declaration to the International Criminal Court (ICC) in 2009 and its subsequent bid for recognition as an independent state and full member of the United Nations. The conclusion of this chapter, with a discussion of Palestine's current status with regard to the ICC, lays the groundwork for Chapter IV's discussion of the jurisdiction of the ICC over crimes committed in Palestine.

This chapter is based on the work of Palestinian historians, such as Nur Masalha and Walid Khalidi as well as Israeli historians, such as Ilan Pappé, Benny Morris, Tom Segev, and Avi Shleim who are also known as the "revisionists" or "new historians".¹² The term "New Historians" was coined by Morris in reference to himself and other Israeli historians who revisited Israel's history and offered a narrative critical of the one traditionally claimed by Israeli researchers and politicians.¹³ Morris points to two developments that led to emergence Israel's "New History." The first was that Israel's Archive Law allowed researchers access to declassified official Israeli Government documents, minutes, and memoranda thirty years after their creation. The second development is related to the background of the New Historians. The

¹¹ The term "Occupied Palestinian Territory" refers to the Palestinian lands occupied by Israel in 1967, which are the West Bank, including East Jerusalem, and the Gaza Strip. See *Occupied Palestinian Territory Homepage*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/en/countries/menaregion/pages/psindex.aspx> (last visited Apr. 2, 2015).

¹² BENNY MORRIS, *The New Historiography: Israel Confronts its Past*. In MAKING ISRAEL 14-5 (Benny Morris, ed. 2007) (naming BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949 (1988), ILAN PAPPE, BRITAIN AND THE ARAB ISRAELI CONFLICT, 1947-51 (1994), AVI SHLAIM'S COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT AND THE PARTITION OF PALESTINE (1988) and SIMHA FLAPAN'S THE BIRTH OF ISRAEL: MYTHS AND REALITIES (1983) as the 4 main books that discuss the new history of Israel).

¹³ See also E.T. Ottman, *A Question of Historiography: The "New Historians" of Israel*, 7 RITSUMEIKAN ANN. REV. INT'L STUD. 55 (2008); but see Anita Shapira, *The Past is Not a Foreign Country: The Failure of Israel's 'New Historians' to Explain War and Peace*, THE NEW REPUBLIC, Nov. 29, 1999, at 27; EFRAIM KARSH, FABRICATING ISRAELI HISTORY: THE "NEW HISTORIANS" (2d rev. ed. 2000) (criticizing the 'New Historians').

New Historians were born around 1948, unlike their predecessors who lived through the 1948 War and witnessed the birth of the State of Israel, who according to Morris, were “unable to separate their lives from this historical event.”¹⁴ The previous generation of historians denied the claim that Israel expelled Palestinians from their lands in 1948, claiming that the Palestinians left due to orders by Arab countries.¹⁵ Based on declassified Israeli documents, the new Historians eloquently refute the traditional Israeli story, providing critical and balanced historiography. Benny Morris argues that the older historians “offered a simplistic and consciously pro-Israeli interpretation of the past, and they deliberately avoided mentioning anything that would reflect badly on Israel.”¹⁶

Palestinians and Zionism: Pre-1948

In the late nineteenth century, the concept of Zionism¹⁷ emerged in an attempt to answer what came to be known as the “Jewish problem.” Avi Shlaim explains that the Jewish problem arose from the increase of anti-Semitism in Europe, the rise of nationalism, and the difficulties Jews faced assimilating into European society.¹⁸ A political solution to the Jewish problem was formulated officially during the First Zionist Congress in Basel called for by Theodor Herzl in 1897.¹⁹ The congress introduced and adopted political Zionism in order to resolve the Jewish

¹⁴ See MORRIS, *supra* note 13; ITAMAR RABINOVICH & JEHUDA REINHARZ, *ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS, PRE-1948 TO THE PRESENT* 414 (2008); and see Gordon W. Rudd, *The Israeli Revisionist Historians and the Arab-Israeli Conflict--Part One: From the Founding of Zionism to the 1967 War*, 67 J. MIL. HIST. 1263 (2003).

¹⁵ Shabtai Teveth, *The Palestine Arab Refugee Problem and Its Origins: Review Article*, 26 MIDDLE E. STUD. 214 (1990).

¹⁶ Benny Morris, *The New Historiography: Israel Confronts its Past*, 3 TIKKUN 19, 20 (1988).

¹⁷ Austrian Jewish writer Nathan Birnbaum first introduced the term “Zionism” in 1885. Zion refers to a hill in Jerusalem and is a biblical name for Jerusalem. *See id.*

¹⁸ See AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB CONFLICT* 2 (2000); *see also* NORMAN G. FINKELSTEIN, *IMAGE AND REALITY OF THE ISRAEL-PALESTINE CONFLICT* 7-8 (2003).

¹⁹ See SHLAIM, *supra* note 18; BENNY MORRIS, *1948: A HISTORY OF THE FIRST ARAB-ISRAELI WAR* 4-5 (2008). For more information on Theodor Herzl, *see Theodor (Binyamin Ze'ev) Herzl*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/biography/Herzl.html> (last visited Nov. 1, 2014).

problem by establishing a Jewish majority in a land of their own.²⁰ Jewish leaders considered two lands: Argentina and Palestine.²¹ Eventually, Palestine was selected for its historical and religious significance to the Jewish people.²² In this scheme, Jewish leaders saw no place for the native Palestinian Arab majority inhabiting Palestine at that time.²³ The slogan that represented the Zionist movement at this stage, coined by prominent anglo-Jewish writer Israel Zangwill, was that Palestine is “a land without a people for a people without a land.”²⁴ In reality, numbers indicate that in 1881, Palestine was inhabited by approximately 450,000 Arabs (90% of whom were Muslim, while the rest were Christian) and about 25,000 Jews.²⁵ The number of Jewish residents in Palestine began increasing in 1882 through a series of Zionist immigration waves and rose dramatically after the Jewish Holocaust in Europe during World War II.

Politically, the land of Palestine was under Ottoman rule from the year 1516 until 1918 when the Governments of the United Kingdom and France signed the Sykes-Picot agreement dividing the Middle East into separate areas under British and French colonial control.²⁶ Palestine was placed under British mandate,²⁷ which is a form of trusteeship described in Article 22 of the Covenant of the League of Nations. The Covenant states that “territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern

²⁰ See NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF “TRANSFER” IN ZIONIST POLITICAL THOUGHT, 1882-1948* 5 (1992); MORRIS, *supra* note 19, at 5; SHLAIM, *supra* note 18, at 3; FINKELSTEIN, *supra* note 18, at 8-9.

²¹ THEODOR HERZL, *THE JEWISH STATE* 95-96 (1896).

²² *Id.*; and see MASALHA, *supra* note 20, at 5; MORRIS, *supra* note 19, at 5; FINKELSTEIN, *supra* note 18, at 8-9; SHLAIM, *supra* note 18, at 3.

²³ See SHLAIM, *supra* note 18, at 12-17; EDWARD W. SAID, *THE QUESTION OF PALESTINE* 9-19 (1992); FINKELSTEIN, *supra* note 18, at 21-50; MASALHA, *supra* note 20, at 3-14; MORRIS, *supra* note 19, at 2-9.

²⁴ See MASALHA, *supra* note 20, at 3.

²⁵ See MORRIS, *supra* note 19, at 2; ALTERNATIVE TOURISM GROUP, *PALESTINE AND THE PALESTINIANS: GUIDEBOOK 31* (2008) [hereinafter *ATG GUIDEBOOK*].

²⁶ See *The Sykes-Picot Agreement, Fr.-U.K.*, entered into force May 16, 1916, 221 C.T.S. 323, available at http://avalon.law.yale.edu/20th_century/sykes.asp.

²⁷ See *Mandate for Palestine and Memorandum by the British Government Relating to its Application to Trans-Jordan, Approved by the Council of the League of Nations on September 16th, 1922*, League of Nations Doc. C.629.M.314.1922.VI (1922).

world...should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility... until such time as they are able to stand alone.”²⁸ In November 1917, the United Kingdom’s Foreign Secretary Arthur Balfour sent a letter to the leader of the British Jewish community “giving” Palestine to the Jewish people to establish their homeland.²⁹ Subsequently, Jewish immigration to Palestine steadily increased, and Jewish leaders initiated discussions on transferring Palestinian Arabs outside of Palestine.³⁰ Clashes between Palestinians and Jews in Palestine broke out, making it harder for the British to maintain control over the two populations. Progressively, the idea that once seemed impossible – transferring Palestinians outside Palestine to other Arab countries – gained mainstream Jewish support.

There were several attempts by Palestinians to protest and revolt against the British and Zionist acquisition of land, but with little impact on the British mandate government.³¹ The British were eventually faced with a vigorous challenge from the Jewish population of Palestine. Due to perceived weakness of the Palestinian people, Zionist leaders viewed Britain as the real obstacle to the creation of a Jewish State. Some Jewish terrorist organizations, such as the

²⁸ See League of Nations Covenant art. 22.

²⁹ The Balfour Declaration, Nov. 2, 1917, *reprinted in* Report of the United Nations Special Committee on Palestine, vol. 2, U.N. Doc. A/364/ADD.1, Annex 19 [hereinafter the Balfour Declaration] (stating “[h]is Majesty’s government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”); *and see* JONATHAN SCHNEER, THE BALFOUR DECLARATION: THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 342 (2011).

³⁰ For a full account on the concept of “Transfer” in Zionist political thought, *see* MASALHA, *supra* note 20, at 5.

³¹ *See* TED SWEDENBURG, MEMORIES OF REVOLT: THE 1936-1939 REBELLION AND THE PALESTINIAN NATIONAL PAST (2003); ABDEL WAHAB AHMED ABDEL RAHMAN, BRITISH POLICY TOWARDS THE ARAB REVOLT IN PALESTINE, 1936-1939 (1971); GHASSAN KANAFANI, THE 1936-1939 REVOLT IN PALESTINE (English trans., New York: Committee For a Democratic Palestine, 1982), *available at* <http://www.newjerseysolidarity.org/resources/kanafani/kanafani4.html#contents> (last visted Nov. 1, 2014); Ted Swedenburg, *The Role of the Palestinian Peasantry in the Great Revolt in Islam, Politics, and Social Movements*, in ISLAM, POLITICS AND SOCIAL MOVEMENTS 169 (Edmund Burke, Ira Marvin Lapidus, eds., 1988).

National Military Organization, “Irgun,” and Freedom Fighters for Israel, “Stren Ganag,” attacked British headquarters, police stations, and banks.³² Britain, failing to mediate a solution between the Palestinian and Jewish populations in Palestine referred the situation in Palestine to the United Nations.³³ On May 14, 1947 the United Nations established The United Nations Special Committee on Palestine (UNSCOP) to meet with leaders from both sides. UNSCOP conducted several briefings and visited Palestine, other Arab countries, and Jewish Holocaust survivors’ camps.³⁴ Eventually the committee reached a decision. On November 29, 1947 the UN General Assembly (UNGA) passed Resolution 181 approving a partition plan and splitting Palestine into two states, a Jewish state and a Palestinian Arab one.³⁵ Although, in 1947, the Jewish population made up only about a third of the population in Palestine,³⁶ UN Resolution 181 proposed a partition plan awarding 55% of the Palestinian territory to the Jewish State, with 42% allocated to the Arab Palestinian state. The remaining territory, comprising Jerusalem and Bethlehem, was designated as an international region.³⁷ Arab states voted against the partition plan viewing it as unjust to the indigenous Palestinian majority. As a result, war broke out.

The War of 1948: Israeli Independence and Palestinian Catastrophe

Hostilities broke out between the Jewish and Palestinian residents of Palestine after the adoption of UN Resolution 181 in December 1947, resulting in deaths on both sides and the

³² See MORRIS, *supra* note 19, at 29–31; SHLAIM, *supra* note 18, at 24-5; ILAN PAPPÉ, *THE ETHNIC CLEANSING OF PALESTINE* 25 (2007).

³³ See SHLAIM, *supra* note 18, at 24; MORRIS, *supra* note 19, at 30, 37.

³⁴ ILAN PAPPÉ, *THE MAKING OF THE ARAB-ISRAELI CONFLICT, 1947-51* 17–32 (1992).

³⁵ See *Future Government of Palestine*, G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947) [hereinafter G.A. Res. 181 (II)] (establishing the future government of Palestine).

³⁶ See VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAEL* 141 (2009) (“608,230 Jews out of a total population of 1,972,560”); Henry Cattán, *Recollections on the United Nations Resolution to Partition Palestine*, 4 *THE PALESTINE Y.B. INT’L L.* 260, 263 (1987).

³⁷ See MORRIS, *supra* note 19, at 63; ATG GUIDEBOOK, *supra* note 25, at 34; PAPPÉ, *supra* note 34, at 35; SAMIH K. FARSOON & NASEER ARURI, *PALESTINE AND THE PALESTINIANS* 72–75 (1998); CATHY HARTLEY & PAUL COSSALI, *SURVEY OF ARAB-ISRAELI RELATIONS* 52-3 (2004); G.A. Res. 181 (II), *supra* note 35; *see generally* MASALHA, *supra* note 20.

expulsion of huge numbers of Palestinians from their land.³⁸ The conflict was an unequal one—Palestinians lacked proper military training and weapons while the Jewish population in Palestine possessed the strongest armed military in the region. In March 1948, the Haganah, a Jewish paramilitary organization that operated in Palestine from 1920 to 1948,³⁹ gained control of the areas of the new Jewish State and expelled Palestinian Arabs within those areas.⁴⁰ Plan Dalet (“Plan D”) resulted in damage to Palestinian Arab communities and expulsion of large numbers of Palestinians.⁴¹ Several scholars, including the Israeli New Historians, argue that Plan D contributed to the development of the transfer strategy implemented by the Government of Israel resulting in the expulsion of Palestinians from their lands.⁴² On the other hand, older Israeli historians and politicians argue that Plan D was simply defensive in nature, in that Israel was ensuring control over the territory assigned to the Jews by the UN Partition Plan Resolution 181, and protecting the Jewish territory from any future Arab invasion.⁴³ The official Israeli argument justified Israeli practices and policies against Palestinians in the name of Israel’s security, i.e. protecting the Jewish population of Israel. Later, Israel’s security argument became the basis for movement restrictions imposed on the Palestinians.

On the eve of May 14, 1948 David Ben-Gurion,⁴⁴ the primary founder and first Prime

³⁸ See PAPPÉ, *supra* note 34; see MARK A. TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT (1994); SHLAIM, *supra* note 18, at 3; MORRIS, *supra* note 19, at 4–5; see MASALHA, *supra* note 20, at 5.

³⁹ See *Lexicon of Zionism*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Sept. 22, 2003), available at <http://www.mfa.gov.il/mfa/aboutisrael/history/pages/lexicon%20of%20zionism.aspx#H> (explaining Haganah); Ricky-Dale Calhoun, *Arming David: The Haganah’s Illegal Arms Procurement Network in the United States 1945-49*, 36 J. PALESTINE STUD. 22 (2007).

⁴⁰ See Walid Khalidi, *Plan Dalet Revisited: Master Plan for the Conquest of Palestine*, 18 J. PALESTINE STUD. 3 (1988).

⁴¹ See *id.* at 8; PAPPÉ, *supra* note 34, at 86-126.

⁴² See SHLAIM, *supra* note 18, at 31.

⁴³ See DAVID TAL, WAR IN PALESTINE, 1948: STRATEGY AND DIPLOMACY 87 (2004); see also YOAV GELBER, PALESTINE, 1948: WAR, ESCAPE AND THE EMERGENCE OF THE PALESTINIAN REFUGEE PROBLEM 303-06 (2001).

⁴⁴ SHABTAI TEVETH, BEN-GURION AND THE PALESTINIAN ARABS: FROM PEACE TO WAR (1985); Shay Hazkani, *Catastrophic Thinking: Did Ben-Gurion Try to Rewrite History?*, HAARETZ, May 16, 2013, available at <http://www.haaretz.com/weekend/magazine/catastrophic-thinking-did-ben-gurion-try-to-rewrite-history.premium->

Minister, announced the birth of the State of Israel, marking a new phase in the Palestinian-Israeli conflict. Subsequently, the armies of Egypt, Trans-Jordan, Syria, Lebanon, and Iraq intervened, sending troops to assist the Palestinians in fighting the newly established Israeli state, beginning the 1948 War.⁴⁵ In spite of this assistance, the number of Arab troops did not match the strength of the Israeli forces. Moreover, King Abdullah of Trans-Jordan was cautious in fully assisting the Palestinians, as he had hoped to annex the Arab parts of Palestine while the Jewish state remained intact.⁴⁶ The war resulted in the expulsion of more than 700,000 Palestinians from their lands;⁴⁷ they became refugees throughout the Arab world. Israel decisively won the war, conquering 70% of the land of Palestine (and thus far exceeding the initial grant to Israel under the UN Partition Plan). The newly established Israeli state had a population of 716,000 Jews and 92,000 Palestinians.⁴⁸ After the war, King Abdullah of Trans-Jordan annexed the West Bank area of Palestine while the southern part of the Gaza Strip was placed under Egyptian military administration.⁴⁹ Today, Israel celebrates the 1948 War as the War of Independence, while the war is considered by Palestinians as *al-Nakba* or “the catastrophe,” marking hundreds of thousands of deaths and expulsions.⁵⁰ Later in 1964, the

1.524308; *Zionist Leaders: David Ben-Gurion 1886-1973*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/aboutisrael/history/pages/zionist%20leaders-%20david%20ben-gurion.aspx>.

⁴⁵ See SHLAIM, *supra* note 18, at 28–53; MORRIS, *supra* note 19, at 180–263.

⁴⁶ See SHLAIM, *supra* note 18, at 30–40; MORRIS, *supra* note 19, at 189–192.

⁴⁷ See U.N. General Assembly, Conciliation Commission for Palestine, Final Report of the United Nations Economic Survey Mission for the Middle East, delivered to the Security Council and the General Assembly 21, U.N. Doc. A/AC.25/6/Part.1 (Dec. 28, 1949); U.N. General Assembly, Conciliation Commission for Palestine, General Progress Report and Supplementary Report of the United Nations Conciliation Commission for Palestine, covering the Period from 11 December 1949 to 23 October 1950, delivered to the Security Council and the General Assembly, G.A. Res. 1367, U.N. GAOR, 5th Sess., Supp. No. 18, U.N. Doc. A/1367/Rev (Oct. 23, 1950); *see also* MASALHA, *supra* note 20, at 175; SHLAIM, *supra* note 18, at 31; ATG GUIDEBOOK, *supra* note 25, at 35; HARTLEY & COSSALI, *supra* note 37, at 53; MORRIS, *supra* note 19, at 407.

⁴⁸ See Steven Rousso-Schindler, *Israeli and Palestinian National Narratives: National and Individual Constructions, Social Suffering Narratives, and Everyday Performances xi* (June 29, 2007) (Ph.D. Dissertation, University of Southern California) (on file with University of Southern California Libraries).

⁴⁹ See ATG GUIDEBOOK, *supra* note 25, at 36; SHLAIM, *supra* note 18, at 66.

⁵⁰ See SHLAIM, *supra* note 18, at 28; ATG GUIDEBOOK, *supra* note 25, at 34–5.

Palestinian Liberation Organization (“PLO”) was established as the sole legitimate representative of Palestinians everywhere; the PLO would play an essential role in the future of the Palestinian people in the years to come.⁵¹

1967 War: Occupying the West Bank and Gaza Strip

On June 5, 1967, Israel launched a surprise attack on Egypt, Jordan, and Syria. The opinions on why Israel launched the attack vary, with some describing it as a war of aggression by Israel to capture territory, and some characterizing it as a defensive response to a planned Egyptian attack.⁵² Other scholars maintain that it was an unplanned, uncontrolled war resulting from a sliding crisis.⁵³

In the Six Days War, also known as the 1967 War, Israel conquered the Golan Heights from Syria, the West Bank and East Jerusalem from Jordan, and the Gaza Strip and Sinai Peninsula from Egypt.⁵⁴ A military government was established for these areas, which promulgated military orders applicable to the residents of the occupied territories. The UN Security Council issued Resolution 242 requiring the “withdrawal of Israel armed forces from territories occupied in the recent conflict” and stated the “inadmissibility of the acquisition of territory by war.”⁵⁵ In spite of the UN resolution, Israel refuses to this day to end the occupation

⁵¹ See Rashid Hamid, *What is the PLO?*, 4 PALESTINE STUD., no. 4, 1975, at 90; *Department of International Relations*, PALESTINIAN LIBERATION ORGANIZATION, <http://www.dair.plo.ps/beta/V1/index.php?placeId=102> (last visited Nov. 1, 2014).

⁵² See CATTAN, *supra* note 3, at 100–110; MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002); JOHN QUIGLEY, *THE SIX-DAY WAR AND ISRAELI SELF-DEFENSE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR* (2013); AMI GLUSKA, *THE ISRAELI MILITARY AND THE ORIGINS OF THE 1967 WAR: GOVERNMENT, ARMED FORCES AND DEFENCE POLICY 1963–67* (2007).

⁵³ AVI SHLAIM & WILLIAM ROGER LOUIS, *THE 1967 ARAB-ISRAELI WAR: ORIGINS AND CONSEQUENCES* 5–8 (2012).

⁵⁴ See SHLAIM, *supra* note 18, at 241-64; ATG GUIDEBOOK, *supra* note 25, at 38-9 (2008); HARTLEY & COSSALI, *supra* note 37, at 57-8; *see also* TOM SEGEV, *1967: ISRAEL, THE WAR, AND THE YEAR THAT TRANSFORMED THE MIDDLE EAST* (2007) (discussing whether the strike by the Government of Israel was defensive and preemptive); TESSLER, *supra* note 38, at 378-98; Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria* 3 ISR. L. REV. 279, 294-95 (1968).

⁵⁵ See S.C. Res. 242, U.N. Doc. 242 S/RES/242 (Nov. 22, 1967).

of the West Bank and Gaza Strip or to dismantle their illegal outposts and settlements.

Israel placed the West Bank and Gaza Strip under the control of the Israeli military government, and annexed East Jerusalem to the Israeli state. The Commander of the Israeli Defense Forces (“IDF”) in the West Bank Region issued Proclamation No. 1 stating that, “[t]he Israel Defense Forces have today entered the area and taken control and responsibility for maintenance of public order and safety.”⁵⁶ Moreover, Proclamation No. 2 granted the military commander full legislative, executive, and judicial authority over the West Bank and its residents.⁵⁷ The Israeli military government managed and administered all public services related for the Palestinian population, including health and education. After the 1967 War, Israel issued Military Order No. 5 for the West Bank and Military Order No. 144 for the Gaza Strip,⁵⁸ declaring both closed military zones. Accordingly, entry of residents of the Occupied Palestinian Territory into Israel was restricted. However, in 1972, the military government issued “a general exit permit” allowing Palestinians access between the West Bank and Gaza Strip and into Israel without the need for individual permits, but banning them from staying overnight without a special permit.⁵⁹ In 1981, Israel established the Civil Administration under the Coordinator of Government Activities in the Territories (COGAT), a unit in the Israeli Defense Force Army, to

⁵⁶ See Military Order No. 1, *Security Provisions Order (West Bank)* (1967) (Isr.).

⁵⁷ See Military Order No. 2 Concerning Quarantine (June 7, 1967) (Isr.); and see Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT’L REV. RED CROSS 401 (2007).

⁵⁸ See Military Order No. 5 in the West Bank (1972) (Isr.) (Arabic Translations on file with Birzeit University); Military Order No. 144 in Gaza Strip (1967) (Isr.) (Arabic translations on file with Birzeit University); See Candy Wittome, *The Right to Unite: The Family Reunification Question in the Occupied Palestinian Territories: Law and Practice* (Al-Haq Occasional Paper no. 8 1990), in 6 PALESTINE Y.B. OF INT’L L. 235, 238 (Anis Kassam, ed., 1991).

⁵⁹ See Military Order No. 5 (Amended) in the West Bank (1972) (Isr.) (Arabic translations on file with Birzeit University). See Asem Khalil, IMPACT OF ISRAELI MILITARY ORDER NO.1650 ON PALESTINIANS’ RIGHTS TO LEGALLY RESIDE IN THEIR OWN COUNTRY 10 (CARIM Analytic and Synthetic Notes 2010/46, 2010), available at <http://hdl.handle.net/1814/14401>.