**Arab Israeli Conflict-summary**

This is my summary for this course. In case of mistakes, I'd be glad you'll notify me.

Good luck to everyone!

\*Whenever he talked in Hebrew, I wrote in Hebrew too.

\*English is not my native language therefore there might be grammar and spelling mistakes. So, I'm sorry in advance.

**introduction**

Multiple choice questions exam. In English (of course). חומר פתוח 30-40 questions.

**Main topics:**

1. Territorial sovereignty and the borders of Israel
2. Occupied territories and settlements
3. Terrorist organizations and law of terrorism

There are things which we have to cover but only partially have interest to us. We'll use parts of public international law which are relevant to our topic.

It's very Important to know the history in order to understand international law.

\*There are debates about the history. He'll tell us his pov.

**International Law**

Overview

Public international law is the law of states, not individuals. It's not really a law but more like contracts. It's about consent, things states agreed upon. Customary law is the most important kind law but it's also frustrating because sometimes it's unclear. The international law is also very obstructed and this is why sometimes it's detached from reality. Customary law is the rules a state follows because the law requires it- Opinio Juris. The belief of a state that they have to do these rules. It's possible for a state to disagree like in treaty law. In treaty law, it's assumed a state doesn't agree unless they redefied the treaty. In customary law we assume the state is part of it unless the state objects. If it disagrees and persistent over time, it's not bound to it because also customary law is bound to consent.

Article 38(1) of Statute of international court of justice:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

It's sort of a definition. It doesn't tell us what international law is but what rules of law the court has to use to result a dispute. It helps guide discussions on how to find customary law.

a is about treaties. It doesn't say treaties the states agreed upon but the rules in the treaties they agreed on. It's possible for a state to agree to some of the rules in treaty but not all of them and that's why we should look rule by rule.

b talks about the costume law. It gives **both ingredients**:

1. practice
2. opinio juris

c isn't really an international law. It's in cases where the court finds there is no law. **E.g.:** **Lotus** case. A ship called the Lotus the French boarded and there was a dispute about whether the French had authority to do so. The permanent court of arbitration ruled that the French had authority because of a simple rule in international law- **the legality principle of international law** (עקרון החוקיות) which determined that **states can do whatever they want as long there is no law forbidden them from doing these things.** When there is no law to apply, states can do whatever they want. Article 38 says that if there's a dispute the court needs to resolve, even there's no law, it can use general principles from other legal systems to resolve this dispute. They don't make them a law. No decision of the ICJ is presidential, meaning they don't bind the court in other disputes.

\*a comment of mine to whoever's reading this- I am afraid he referred to a different case. According to what I read in summaries of other courses and online, Lotus case was a French ship (Lotus) which clashed into a Turkish ship in international water next to Greece. In this accident, number of Turkish people died and therefore Turkey arrested the captain of the Lotus for causing death by negligence. France argued that there is a costume that grant the flagship the exclusive authority to judge the captain meaning, Turkey had no authority to arrest him. The court didn't accept this claim. The decision is as written above.

d tries to give us a way to figure out the law. It's important for custom law because it's difficult to know what it is and this paragraph tries to help us understand. We can't really rely on those academic books/articles because they write what they want the law to be, not necessarily what they really think the law is. They write in order to influence the ICJ. **E.g.**: the book "principles and public international law" by Ian Brownlie (1932-2010). He knew a lot of international law but not everything he wrote was actually international law. Lots of his writing are his opinions on what the law should be and then wrote them as they are in fact international law in order to influence.

The international law as we know it is European. It was invented in the 17th century by a group of people the most famous of whom was the Dutch lawyer- Hugo Grotius (1583-1645). He wrote what many consider as the first real written work about international law known as "Ivre Belli Ac Pacis" – the law of war and peace. He pretty much made-up law that didn't exist. He tried to find a way to express what European kings and princes did in the legal language. He talked about international law as we understand it today- the law of states/sovereigns. It is the law European Christian (civilized) kings need to follow. He didn't think he created them; he just took the natural/common law (the bible, the roman history and European history).

This basic concept of what international law is, continued until much later. Oppenheim (1858-1919) in his book "International Law: A Treatise" from 1912 asks a question: can non-Christians European states be part of international law? His answer is no because they're so different culturally and cannot understand it. He brings Turkey and japan as exception. Why? Turkey has concurred large parts in Europe and ruled it for a long time and defeated European countries. Japan defeated Russia too and that's why it's also an exception. What Oppenheim said then, no one will say today. Why? The "non civilized" country accepted the old rules of international law. The meaning of war has changed.

There's a part in international law which is completely utopian. **E.g.:** Kellogg-Briand Pact 1928. It's a treaty between the US and other powers providing (such as Russia, Germany, the UK, Japan, Poland and more) for the Renunciation of war as an instrument of national policy. Meaning, those country agree not to go to war. In reality it seems more like a hope for the future, not something they really thought will happen.

Kellogg, who helped negotiate the treaty, when he got his noble peace prize in 1929 seemed to know that this treaty won't end wars. He thinks that it might help for this long difficult process. There are a lot of studies about this part of international law. In the article "Do Human Rights Treaties Make a Difference?" from 2001, Hathaway (1972-present) concluded the answer is no. Even quite the opposite. She said it might be because before a state signs, there is more political pressure to respect human rights, but after that, people assume things are getting better and apply less pressure.

There were more studies about it and they concluded that those treaties are utopians.

Basis

There are **two different things** a country means when it signs a treaty:

1. Inter Partes- the rules among the states that are signed.
2. Erga Omnes- an obligation to everyone in the world.

Why do South Africa think they can sue Israel in the ICJ for genocide? After all, Israel hasn't done anything in South Africa and South Africa has nothing to do in Gaza. How do they have the legal right to sue Israel? Because they say the genocide convention is Erga Omnes. Meaning, it's an obligation towards the world and therefore South Africa can sue and so do other countries.

Another term has to do with interpreting treaties. There are **two main sources** in international law:

1. treaties
2. custom

over the 100 years, there was an effort to summarise customary rules into treaties. When we read a rule, we need to ask if it's a costume law or something new. **E.g.**: the first protocol of Geneva convention. Israel isn't part of this protocol. Does it have to obey? It depends. If it accurately described the costume law, then it has to. Not because it's the protocol, but because it's costume. But if it's not, then it isn't obligated.

There are also general previsions of law such as: "Lex specialis derogat generali"- the specific rule overrules the general rule; "lex posterior derogat priori"- the later rule overrules the earlier rule; "ex turpi causa non oritur actio"- cannot get a legal action/right out of a wrongdoing. Those are things we know already. They are not universally followed except one- "pacta sunt servanda"- states are supposed to follow they obligations. This is international law.

**types of laws**:

1. Law of sovereignty- there are **different kinds**:
   1. **Territorial sovereignty.** The most relevant for us. The international rules which tell us which state has the right to rule territory. Who owns it. Sovern not as property, but as ruling.
   2. **Sovereign personality**. Grotius talked about kings, not countries, but his general talk was about sovereigns. There are rules that tell us if it's a state or not.
   3. **Internal sovereignty**. It's not lack of sovereignty, but the factual ability to rule. It's not our main issue.
2. Laws of war- there are **two main types**:
   1. **Jus ad Bellum**. When you're allowed to go to war. The laws before fighting.
   2. **Jus in Bellum**. The laws while fighting. How to conduct combat.

Another kind is the law of belligerent occupation (תפיסה לוחמתית).

1. Human rights law- there are many treaties about it. We won't talk much about it because they're pretty much utopian. there are general ones (ICCPR etc.), protected groups ones (women, children etc.) and specific ones (refugees, torture, genocide etc.).
2. Specialized law- rules like trade law and the law of the sea. More likely we won't reach it.
3. Institutions- such as the UN, the ICC and the ICJ. they supposed to follow the law but they obviously effect it.

**The law of sovereignty**

Status of territorial sovereignty

In theory, everywhere is the world should be either a sovereign territory of some state or "terra nullius"- nobody's territory. In reality there are mixed territories. Not only areas we have disputed in but also there are possibilities where one state has territorial sovereignty while another has internal sovereignty.

**E.g.**: Lease (Guantanamo Bay). A territory in Cuba. Internal sovereignty is by the US even though Cuba has territorial sovereignty. How? They had an agreement for "rent". The US doesn't pay for it and this area is belong to the US forever. It's not an actual lease.

How the law looks at territorial disputes?

**Two ways:**

1. Modes of acquisition- Oppenheim mentions it. If you want to figure out who has sovereignty, you look at "modes of acquisition". How one requires sovereignty and how one loses sovereignty. How? We look at the change of title. We go back in time and go event by event and see how it changes. He gives **5 different methods:** 
   1. **Accretion** (התווספות). A concept from roman law. The tradition meaning is that are some physical changes on earth that will change territorial sovereignty. **E.g**.: a river between two states. Rivers move over time. Some changes are slow and some are sudden. Slow physical changes, change the borders. They're called changes by accretion. If the change is sudden, the border stays as it was before. It won't change. Is it important to us? Not really. There weren't any big changes like that.
   2. **Prescription** (התיישנות). If a state possesses a territory for a long time, this territory belongs to it. **E.g**.: the Golan. Israel possesses it for a long time. It is possible to claim for sovereignty by prescription. In the Anglo-American law there is "adverse possession" (חזקה נוגדת). If a country possesses a territory for a long time, even if it didn't belong to it, it has territory sovereignty. This doctrine isn't popular. There is a dispute about it. Other say you had to possess it before.
   3. **Cession** (העברה). Transfer territory. A state has the right to give terrotory to other state. **E.g**.: Alaska was Russian. A man paid money to Russia (a lot) and bought it. The problem is that most things that are described as cessions aren't really cessions. Usually, it's a less powerful state that got beaten by a stronger state and sign an agreement in which they declare they agree to give the powerful state their territory. It happened with the US and Mexico. In our case, there is absolutely no chance an Arab country will agree to sign this kind of agreement with Israel.
   4. **Occupation** (חזקה/תפיסה). Taking possession. Not to confuse with "belligerent occupation". Only a territory without a sovereignty. If an area isn't own by any state so the first country to take a hold of it, becomes the sovereign. nowadays it's very controversial There is no such thing as a territory without a population there. In the past, when the international law was only for Christian European countries, and the people in the areas had no sovereignty, according to this international law, it was relevant. These days, people would never say that the other countries, which aren't Christian European, don't count. Even if some state will find a new island which has around 2,000 people, which were entirely detached from the rest of the world. People would might argue that the native population has the right for self-determination. It might block a state from acquiring the territory.

**\***The right for self-determination is particularly important for arguments about occupation and unfortunately, it's very vague and has no good definition in international law.

* 1. **Conquest.** It's the most controversial now. This was the most popular way in the past. Even at the time of Oppenheim. In order to get sovereignty by conquest, you had to also annex it- to establish the state's rule over it and also do things that will show the state wants this territory. But this was in the old days. Does the rule of conquest continue to exist today? After 1945 and the amendment of the UN charter there were number of international lawyers that claimed that it's Impossible to get territorial sovereignty by illegal conquest. And since the UN charter most wars are illegal and it's illegal to go to war in order to challenge the sovereign integrity of a state, the way of conquest can't exist today. In a way it relays on "ex turpi causa non oritur actio". It's not actually said in the charter but people's conclusions. Although, there are some types of wars which are still lawful such as self-defence and some say it's possible to see conquest there is fine but it's hard to find people that argue that.

1. Standard methods- nowadays, courts won't go through Oppenheim analysis. They look at the present and go backward. Who possesses what. Then they'll look at this possession and check if the possession is really proof of title.

There are **two rules**:

* 1. **Effectivites**. A continental version of prescription. If I see that a country is effectively possess a territory for a long period of time, I'd assume it's a sovereign. We need to see how long they possess it and if they did possess it properly. It has to be possessed as a sovereign is possessed.
  2. **Uti possidetis juris.** The most popular way. The law of he who holds by right. New states acquire territorial sovereignty of everything within the lines of the administrative unit that presided it (the colony, the mandate. whatever). **E.g.:** Burundi and Rwanda. They were used to be a single mandate – Ruanda-Urundi – held by Belgium. the mandatory power decided to devide it into two districts. Eventually the countries became independent but they never actually signed a treaty establishing the boundaries. They started arguing and the court said the boundary is wherever the boundary used to be between the districts. The countries inherited the lines of the administrative district that used to be there.

**Other rules of sovereignty**:

1. Legal determinations- there are **different rules:**
   1. **Adjudication**. Countries go to court. There is no appeal for adjudication even if there was a mistake. Those are the boundaries. **E.g.**: Israel and Egypt. There was a coast near Eilat and the court ruled in favor of Egypt.
   2. **Root of title and chain of title**. The moment everyone agree about a sovereignty of a state.
   3. **State succession**. A state which you can say is a successor of an old state. The successor will inherit the borders of the old state.
   4. **Relativity of title**. "Jus tertii". Courts don't take into account other countries that might be affected. **E.g.**: China, India and Pakistan. India and Pakistan went to court. China didn't and that's why their right is irrelevant.
   5. **Acquiesence**. "Estoppel". We apply the rule that existed at the time it happened. **E.g**.: A territory which was a Saudi sovereign territory but today is controlled by Yemen. There's no formal agreement and it's possible for the Yemeni to argue sovereignty on this land by acquiensence. Yemen exercise actual control, it has possession. Saudi treats the territory as it's Yemeni and Yemen govern the territory on the assumption the Saudi has given in. It doesn't happen a lot
   6. **Intertemporal rule**. If you have to evaluate the legal importance of any legal event, you judge it according to the rules which applies at the time and not according to rules that were applied later. **E.g.**: conquest. In the past it was a good way to get territorial sovereignty. Today people don't think so. We won't apply this on a country who did it 200 years ago when it was ok.
2. Abandonment- happens more frequently. A state decides it's not interested in a title in a territory. We need the state not to have an interest and show it (by doing an act). **E.g.:** Jordan gave up on the west bank in 1988 and after that, if they had a claim to sovereignty, it no longer has it.

Self-determination

It's a doctrine developed in the 20th century and it's hard to figure out how exactly it interacts with the rules of territorial sovereignty The UN charter states people have the right for self-determination. But it doesn't define it, in what circumstances people have it or what it includes. It's not clear what it gives. There are cases where it was carried out in special arrangements like in mandates but in this case, there's already an expulsive recognition in the people's right to self-determination and then there are special rules. When people talk about this right, they talk about the right of people in a certain territory. It's not clear exactly. Maybe it's a right to rule themselves or maybe it's a right to participate in an existing state. Some claim this right is the right to bargain, to negotiate on how the territory and people will be govern.

Sovereignty personalities

In order to be a state, traditionally, there are 4 conditions. Article 1 of Montevideo Convention on the Rights and Duties of States describe the costume law pretty good. It's a good convention because it gives a good definition.

**The qualifications:**

1. Permanent population- Antarctica cannot be a country for example.
2. Defined territory- some say that it means that it's not only that there's control/ sovereignty over some territory, it must also not have any border disputes. When Israel applied into the UN, some Arab countries claimed that they don't agree about its boundaries and therefore there is not defined. The UN eventually accepted Israel because the prevailing opinion was that it has to be some core.
3. Government- that exercise its control on the population and territory.
4. Capacity to enter into relations with the other states- other states needs to interact with this entity as it's a state. And the entity must hold itself to the world as it's a state.

**E.g.:** the Gaza strip under Hamas. They have permanent population (although some say that they're considered refuges). There is a territory and we know where it is. Some claim that they still don't have because they don’t have sovereignty over it. Is there a government? Pretty much yes- Hamas. They fail in the last condition- relations with other countries as a state. They don't claim there's a state of Gaza.

Some say we should add another condition- recognition by other countries. It's known as the dispute between those who believe in constitutive recognition and those who believe in declaratory recognition. Declaratory says recognising a state is that you see something, not creating something. Maybe the recognition is connected to the 4th condition. Constitutive- there's no state until other recognise it. What counts as recognition? Some say the UN has to recognise it.

Is Taiwan an independent state? No. why? Some say it does not have a territory. They claim all china its territory. It's not Taiwan but who's the legitimate government of China? Some say that it's not because they don't declare themselves as a state. Not really popular.

Some people say that the whole approach of meeting with the conditions is wrong and all that's important is recognition. Who claim it the most? The Palestinians. The state of Palestine might not be a state by Montevideo but there are 130+ countries that recognise (although most do it for political reasons).

\*what happen if you lose one? Do you stop being a state? Probably yes but it takes time. **E.g.:** Iraq took over Kuwait for about a year. They didn't stop being a country in this year. It was a short time.

**Chain of Title (1917-1947)**

We'll go back to the root title and then go over a series of events which we'll judges them by the rules we've seen. Many of the events are not actually legally important.

The Ottoman Empire

There's no lawyer that denies The Ottoman Empire had a sovereignty and according to the chain of title, it does not matter what happened before that (legally).

The Ottomon empire got into number of wars over the years. In the beginning over the 20th century, it was clear it's getting weaker and when WW1 broke, the British and the French decided that there will be no more Ottoman empire and that they'll take the territory. During WW1, **two things happened**:

1. The Ottoman Empire lost- lost the territory because they lost the war and Britain took the lands.
2. France and Britain had negotiations about the land.

Britain conquered the land of Israel in 1917. The British started, very early to see how they'll break apart the Ottoman Empire. They sent Lawrence, a British officer, to negotiate with the Arabs (people from the Arabian Peninsula). Who are they? The Hijaz. An area in the western coast of the Arabian Peninsula. It was the most important part. In the Hijaz there was governor, Hussein. Lawrence made relations with him and thought they made an agreement they'll agree to join them fight the Ottomans and they'll give them independence state. In order to make the negotiation officials, he passed them to a British governor in Egypt- McMahon. It wasn't clear if they reached an agreement, but the letters they exchanged were important for later. If we'll look at letters 6 and 7, we'll see the British agreed to give independent state not just in the Arabian Peninsula bur elsewhere in the middle east except the area in the west of four cities (Damascus, Homs, Aleppo and Hama) because they are not completely Arabic. 20 years later the Arabs claimed that this proved that the whole middle east what meant to be theirs except Lebanon. McMahon then said they meant the whole line, till the red sea. But it's not really relevant. It was a political plan for the after the war and after the war, nothing happened and no one had a sovereignty. Britain and France in the Sykes Picot agreement decided to **divide the territories to 5**:

1. Blue zone- ruled directly by the French.
2. A zone- local government that will be under French influence/control.
3. B zone- local government that will be under British influence/control.
4. Red zone- ruled directly by the British
5. International zone- govern by France, Britain, Russia and other countries. Israel was part of it.

Also, this plan is irrelevant because it was political and wasn't used.

Another negotiation was between Britain and the Zionists. It was a letter written by lord Balfour, from 2.11.1917. It's a political promise, not legally binding. The British had no sovereignty, the Zionists weren't a state, they didn't plan on giving sovereignty.

After WW1 Britain could've had sovereignty on these areas by conquest. They instead just had plans and arrangements. When the Russians left the war, Britain and France came to the US. They had different ideas. They wanted to make something new. They made the new system of mandates. It's some version of all the other agreements. When the British came to Israel, they established a military government. After the war, in the peace convention in Versailles in 1919, they tried to determine the post war arrangements. Faisal, Hussein's son went there with Weizmann. They met and reached an agreement. They brought the idea of two states- Arab and Jewish- where the Jewish one will be in the area called Palestine. Faisal added that he'll do it only if he'll get all he wanted from the British (he didn't) This agreement meant nothing because there was not sovereignty. But at least they had an idea. The problem of the control was that the Arabs had an agreement with Britain, not France. Britain took Palestine and Syria. Hussein sent Faisal to Syria and became a king. The Syrians wanted a state but then Britain withdraw and France took control of the area, sending Faisal away. He wrote a letter to the British there he said they'll keep the agreement with the Jews only if they'll give them back Syria. Britain of course didn't do it because they made a promise to the French.

The mandate

Britain conquered the area but not by conquest. There's a change in possession but not in territory sovereignty. The Mandate system was an invention created by the US (Wilson) where France and Britain will still have their colonies but pretend to go with what he wanted- establish the right of self-determination. The right for self-determination was only a political thing at that time. Their idea was that people should govern themselves. Wilson had the thought was that people needs to have their own state and if they don’t, it causes wars. The colonies have different people in them. It was a general vague idea.

He had all those ideas (largely because he was academic historian) but Britain and the France ignored them. They came up with the idea of mandate. It's like a trust.

In article 22 of the Covenant of the League of Nations from 1919 they explain that mandates are in colonies that were used to be German and Ottoman. They use the concept of trust (נאמנות). In order to have a trust you need to have a trustee, a beneficiary and a settler. Trustee that control in order to benefit the beneficiary. Settler is the one who puts the object into the trust. The League of Nations (the winning states) decides about it, meaning they're the settler. The beneficiary are the populations. The trustees are France and Britain. 90% of the mandates were by Britain or France.

The covenant describes **3 types of mandates**:

1. Almost states- the middle east. Syria, Palestine and Iraq
2. Somewhat like a colony- central Africa
3. Annexed- south west Africa and south pacific islands

The covenant doesn't tell us what are the mandates, who are the trustees, who are the beneficiary or the rules of the mandates.

There are **two ways** to find out about the mandates:

1. The member of the League of Nations makes a decision and let the rest know
2. The League of Nation decides by itself.

In the case of Syria, Palestine and Iraq, the decision was made by members. In 1920, after the Versailles treaty (which talked more about Germany and not the ottoman empire) was signed, they met in Sam Remo, Italy. In the San Remo resolution, they talked more about how to divide the Ottoman Empire. They decide on 3 mandates and select Britain to be the trustee. They added the Balfour agreement to it. They made it important legally because it became one of the terms. The League of Nation didn’t talk about sovereignty. Under the rules we've seen, Turkey still had territorial sovereignty. The Treaty of Serves from August 1920 was an agreement with the Ottoman Empire (Turkey) where the Ottoman Empire agrees to give up sovereignty on these territories. There was a detailed reference to the sovereignty. It doesn't say the boundaries but it says Palestine is given to the Jews. The thing is that there was a revolution in Turkey because of the treaty (mainly because of Greece). The resolution in San Remo didn’t took into account the chance this revolution to happen.

In June 1920, after the decision in San Remo, even before Britain got the sovereignty, they changed the control from military one to a mandate. Herbert Samuel wrote a note to the general saying he received the authority. The boundaries were disputed and decided upon much later. The territory at the start was much bigger than what was decided later. the British could've drawn the line between Iraq and Palestine wherever they want and they decided to give more of the dessert to Palestine. Most of the people in Jordan live in the west part of the country. The other side is pretty much desolated. They still had a fight with Hussein, Faisal and his brothers. Faisal wanted to be king of Syria but this area belonged to France. The British decided to make two mandates so Faisal will be king of Iraq and Palestine will be divided into 2- Jewish part and another part which will be given to Abdallah, Faisal's brother. They propose it to the League of Nations in 1922 and it was approved. They also included what they promised to the Jews. Throughout the articles of this approval, it seems like the beneficiary of Palestine are the Jewish people. Most of the mandate they talk about the Jews.

They also adjusted local law in Palestine. Article 25 was after the deal with Abdallah and it says that the British won't apply the Balfour declaration on Transjordan. The Palestine order of council states that it doesn't apply upon the east of the Jordan river.

What does it mean to territorial sovereignty? It's unclear for **2 reasons:**

1. What a mandate supposed to do with sovereignty. It talks about trust.
2. Theoretically it's still under Turkish sovereignty and when they do lose in Lausanne Treaty from 1923, we don't know to who it belongs now.

If we look at the map, the mandate of Palestine had borders with 3 different countries. The French mandate in the north (Syrian mandate). In the east, Iraq in a mandate of the British and a border with Saudi Arabia which borders the part of Jordan. In the south, there was a border with Egypt, which was in control of Britain before the Ottoman Empire collapsed. The borders weren't clear because they were never set before. So

They tried to set the northern border. They set **two different boundaries**:

1. The Franco British convention (1920)- they took a bit from France and added to Palestine a small portion of the Golan Heights. They also gave France part of northern Israel.
2. Agreement between his majesty's government and the French government (1923)- A new agreements. The lines slightly changed. A portion of the Golan heights went back to Syria and northern Israel back to Palestine.

Some people argue that Article 5 of the Palestine mandate stated that the borders cannot be change so the 1923 agreement shouldn't count and that the Franco-British should. But it doesn't make any difference.

There is not much that was written about the sovereign status of mandated territory. There's a book called "Mandates Under the League of Nations" from 1930 by Quincy Wright (1890-1970) which argue what might be the sovereign status of the mandates and he gives some theories. Maybe it's suspended, maybe there's no sovereign. Maybe the mandatory power has it or the League of Nations. Maybe even the beneficiaries themselves. There is no answer because it has no legal consequences.

The mandate in Iraq wasn't really a mandate because it became a country quite immediately. The mandate in Syria was until WW2. France surrendered to the German and created the Vichy- a Nazi allied regime. The Syrians didn't follow the Vichy rule and claimed for independence. After ww2, France wanted to take control back but the Syrians refused and after a year, they gave them independence.

In the Transjordan part, there were no Jews and didn't have a lot of people in general. It had a clear ruler which the British wanted to put in- Abdallah. In 1946 in the Anglo-Transjordan Treaty, Britain gave them independence. The trans-Jordanians applied for membership in the UN but they were rejected. But it's fairly clear they weren't a part of the mandate.

The British had a problem with the rest Palestine mandate. Jews wanted a Jewish state while the Arabs didn't want it to be a Jewish state. The British didn't want to give the Jews a state but after WW2 they knew they have to do something. In 1947 Britain asked the UN for a solution and they put out the United Nations Special Committee in Palestine (UNSCOP). They made a recommendation to divide the rest of the mandate of Palestine into 2 states with international part. They created a certain map, the general assembly took this map, change it a bit and brought it to a vote. In 29.11.1947 they adopted resolution 181 (תוכנית החלוקה). The boundaries weren't realistic in a case of war. The Arabs had 3 parts (+Jaffa), Jews had 3 and Jerusalem was international. They also thought there will be united economy. The Jews were very fond of it because they saw it as a chance for a Jewish state. They didn't care about the details. The Arabs also saw only this- the creation of a Jewish state- and opposed it. The general assembly recommended the British this plan. They don't say they actually adopt it. They saw it as a peace plan. In reality, it was nothing more.

Mandates were created after WW1 and were over seen by the League of Nations. The League of Nations died after WW2 because it was useless. Then the United Nations was created in 1945. So, what do they do with the mandates? After all, they were supposed to ne over seen by the League of Nations. Chapter 12 of the UN charter created a new system- international trusteeships.

This chapter states that any territory that a trusteeship is appropriate, can be made into a trusteeship by an agreement between the trustee and the UN. So what happens with existing Mandates? It can turn into a trusteeship by an agreement but it doesn't have to be. Mandates don’t change by the creation of the new system.

There were only **two mandates** that stayed as mandates:

1. Palestine
2. South-west Africa (Namibia)

The UN charter establish **two important institutes**:

1. The General Assembly- body which has representatives from every state member of the UN. They have the right to recommend things.
2. The Security Council- 15 members which only 5 of them are permanent (and are stated by the UN charter- The US, Britain, the Soviet Union, France and China). The Council has the actual power. It can go to war, order sanctions etc.

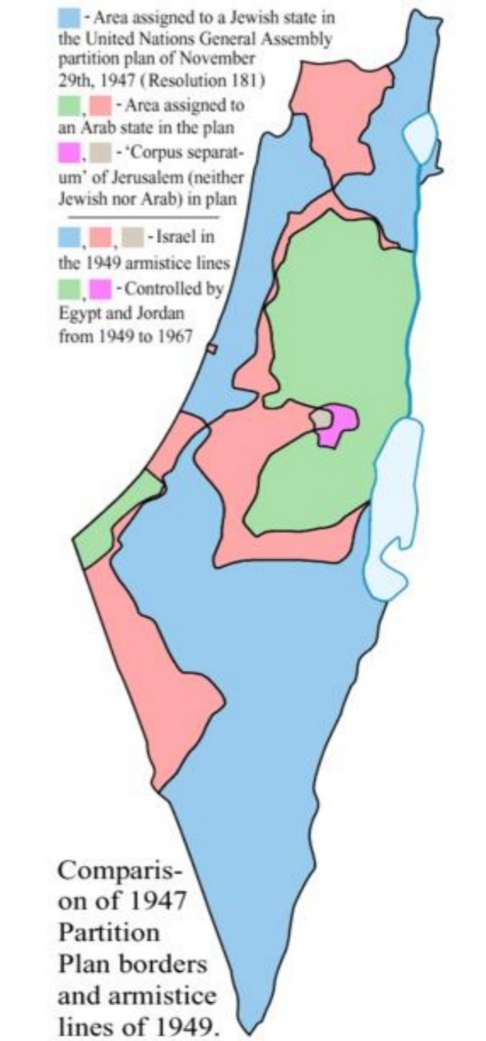
Some claim that the General Assembly has another power- to oversee the mandates and make decisions regarding it. Even if they had the power, it didn't use it. In resolution 181 they only recommended.

South west Africa kept the mandate going for quite a while. It was a type c mandate- should be treated as though they were annexed but they're not. South Africa decided they'll annexed south-west Africa so it declared it's part of South Africa. Any new state in Africa opposed it. There's a series of ruling of the ICJ. Some were advisory opinions (such as 1950 & 1955) and some were actual disputes.

The ICJ is the UN court and has been established by the UN charter. It has jurisdiction to hear disputes only between states and to give advisory opinions if were asked by the general assembly. An advisory opinion is not binding. But even though, it's still considered as an important opinion on international law. The court in 1971 tried to figure out whether South Africa can legally decide to terminate the mandate and annex South-West Africa. The court said no. It was pretty obvious that outcome will be against South Africa. They say that because the mandate is a trust, it can't be annexed (unless the beneficiaries agree) and the ultimate resolution of it should take into account the desires of the beneficiaries. The Mandate created a binding doctrine of self-determination. The court doesn't say who has the sovereignty.

We'll go back to the mandate of Palestine. Britain decided not to accept the General Assembly's recommendation in resolution 181. The resolution called for a committee to be sent to help implement it but the British sent them back. The Arabs definitely didn't want to implement it and it was the beginning of the Independence War. The only people who wanted to implement it were the Jews they didn't intend on doing it alone. It was a recommendation which died and that's why it's hard to argue it has legal relevance but we'll see some people think it does.

1947-1967

 The British announced they terminate the mandate and withdrew on 15.5.1948. Israel declared independence a day before. The war already stared on November. On may 15th the Arab countries announced that they're invading Palestine in order to rescue the Arabic inhabitants but it was also a lie because there were already Iraqi and Jordanian and Egyptian forces even before the termination of the mandate. The war lasted around a year, then there was a truce and then they start negotiate ceasefire agreements.

The were **two phases** of the fighting:

1. The Yishuv trying to give a chance to the 181 Resolution to be implemented.
2. When it was clear it's not going to happen

On may of 1948, Israel had a small part of the territory that was supposed to be the Jewish state. The only difference was that Israel tried to maintain a line to Jerusalem because it was clear there won't be an international area there. Their fighting expended from the lines in the resolution and Israel ended up taking a much larger portion of territory than the proposed Jewish state but less than the whole mandate.

Jordan took the area we know today as the West Bank and Egypt took the are we know today as the Gaza Strip. If we think the resolution is important or we think the amount of territory conquered by Israel, Egypt and Jordan is important, then all those changes make a difference. Bell thinks none of those things make a difference.

The boundaries in the ceasefire agreements weren't the boundaries of territorial sovereignty but what actually was controlled. Israel Jordan and Egypt didn't agree that they’re for territorial sovereignty. The agreements actually specifically said that they don't establish territorial sovereignty. **E.g.:** article XI of Israel-Egypt Armistice Agreement (1949); article V of Israel-Syria Armistice Agreement (1949).

For some of those areas, there were pre-existing international boundaries. The boundary between Israel and Egypt was the old boundary between the Ottoman Empire and Egypt and then between the mandate and Egypt. There was some basis. In the north, there was also a boundary- the mandate of Palestine and the mandate of Syria-Lebanon. The boundaries with the Gaza Strip and the West Bank were lines created by the war. Transjordan became an international boundary in 1946 when it became independence but there was no boundary agreement there either. There's no clear boundary with Transjordan.

Only the fighting between Israel and Lebanon ended up with Israel pretty much on the international boundary. If we look at their Armistice agreement, it says in article V that it's possible to use the international boundary. Thing is, it also says that in article II that the line used in the agreement isn't a boundary line. They're using the international line because it's convenient. It doesn't tell us anything about territorial sovereignty. Everybody agrees on that.

\*Pretty much all the arguments about the territorial sovereignty of Israel focus on these events (the mandate, its termination, resolution 181, the war and the ceasefire agreements). It's important to see the different events and then interpret them legally.

After the war, even though it was controlled by Egypt, no one claimed the Gaza Strip is Egyptian. The West Bank however, Transjordan did claim is Transjordanian. Why? They said that Transjordan is the best representative of the Palestinian Arabs and because the local Arab leaders in the West Bank, voted to become part of Jordan. So Jordan takes administrative steps to make it one country so it creates 2 districts (Samaria and Judea) and gives them Jordanian citizenship. Basically they annexed the area.

\*the term "the West Bank" was actually not used until 1967.

What did Israel do? In the Israeli law there's direct reference to the resolution. In article 11 of The Law and Administration Ordinance (פקודת סדרי השלטון והמשפט), the first law that was adopted by the constitutional temporary assembly, it says that we apply the law of the mandate and make some adjustments. It sounds like Israel continuing from the territory of the mandate, not the Jewish state that was proposed by the UN. In the Area of Jurisdiction and Power Ordinance (פקודת שטח השיפוט והסמכויות), talks about the law applied on areas that are being taking over during the war. The Law and Administration Ordinance says that the mandate's law continues everywhere in Israel except as there will changes. What happened if Israel conquers an area after that. On the one hand, we might say that it already was Israeli law. But it creates problems because Israel wasn't in control at that time. On the other hand, that the law is Israeli law not immediately but the moment Israel takes it over. The second option the Area of Jurisdiction and Power Ordinance chooses. The law of Israel applies only from the moment it's under Israeli control. Does it imply that Israel doesn't claim territorial sovereignty beyond the areas that are acttually controlled by the army? Not sure. It's odd.

James Crawford (1948-2021) summarized number of opinions in his article "Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States".

\*a comment of mine- he said it's from his book "the Creation of states in International Law" but I'm afraid it's from a book called "The Reality of International Law: Essays in Honour of Ian Brownlie".

He argues about territorial sovereignty and brings all the possibilities he could think of on who has sovereignty over what. Bell thinks it's more of a political thing because he excludes things that obviously should be there.

He begins with the traditional Arab arguments

**The arguments**:

1. Invalid mandate- this is a view that consistently taken by supporters of the Palestinians Arabs. They go back at article 22 of the Covenant of the League of Nations, it says that the people that are protected by the mandate are the people of the territory, not anyone else. The Palestinian mandate makes its beneficiary the Jewish people which aren't the majority of residents in Palestine. They claim it's an illegal mandate. How can the League of Nations approve a mandate making the Jews the beneficiary of a territory, which according to article 22, is supposed to be for the benefit of the majority population of the area. So, it's more like that the terms of the mandate were illegal.

Even if he's right, and the terms were illegal, resolution 181 was illegal and there's a violation of the right to self-determination, what does it tell us about territorial sovereignty? He doesn't tell us much beyond it. The tradition Arab position based on this is that Israel isn't a state. Who has? Unclear but not Israel because it's not real and has no right to exist. It's not a fully flashed out arguments.

1. "Terra Nullius"- assuming the mandate was valid but was terminated when the British abandoned Palestine. Maybe the territory becomes "Terra Nullius"- territory with no sovereign and everyone can grab whatever they want. If that's the case, it's a justification for the attack of the Arab nations. If it is, what it means about territorial sovereignty? Israel has territorial sovereignty on pre- 1967 Israel only, Jordan has sovereignty on the West Bank and the Gaza Strip has no sovereignty (because Egypt didn't take sovereignty and no one else did). So, it's pretty much the green line.
2. Resolution 181 #1- the resolution of the General Assembly established boundaries. This was the view of the Soviet Union and the UN secretary general. It's not most people's view because it's unclear from where the General Assembly gets this authority to make a binding arrangement like that. If that's the case, the state of Israel had sovereignty only on areas that are for the Jewish state and nothing else. And the rest of the areas are unclear because there's no Arab state. So what's their sovereignty status? We don't know.
3. Resolution 181 #2 – an alternative argument. Not binding but "constituted a valid legal authorization to the parties concerned to take steps to achieve the purpose of the resolution". Bell doesn't see how it's different from the previous argument.
4. Two Mandates- he sees it as an important vital right that people who have it, can prevent states from acquiring sovereignty in certain territories. It has a support from the case of Namibia. The ICJ argued that South Africa cannot get sovereignty there because the people in Namibia have the right to self-determination. It's not weird way to understand mandates. This day most people agree that a state cannot get sovereignty over mandatory territory without the agreement of the beneficiaries with the right to self-determination. Is it generally true? It doesn't really matter for our case. He argues that maybe the way to understand the resolution is that it divided what left of the mandate into two mandates. If it's true, Israel has only the right to get territory of Jewish Palestine while in the other Mandate, the Arab Palestine, has a veto over what supposed to be the Arab state.

It's an odd argument because the resolution doesn't say it and it's not what actually happened.

1. Leaving the Mandate #1- Maybe Israel left the mandate. The mandate continued existing to all of Palestine except the parts where Israel left the mandate. Israel succeeded in leaving, establishing a country and having sovereignty on the parts it took. **E.g.:** Yugoslavia. There was a war and it was splitted into different states. When Croatia was created, it left Yugoslavia. It didn't see itself as the continuation of Yugoslavia. Serbia, on the other hand, saw itself as the successor; The Soviet Union. Russia saw itself as the successor while Kazakhstan saw itself as leaving it. Crawford argues that maybe Israel left the mandate. Bell thinks it's strange because there's nothing in their action that suggests they thought they're leaving the mandate. But even if they left, what are the boundaries? Whatever they took within the ceasefire territory. But why? Israel declared independence and "left" the mandate in may 1948. The ceasefire was more than a year later. Why would they tell us what Israel took?
2. Leaving the mandate #2- Israel left but never had the right to leave so it never existed. It brings us back to the traditional arguments.

He brings so many arguments but doesn't talk about a main one which he uses in his whole book. The best way to see it is from an ICJ case- Burkina Faso vs. Mali (1986). They bring the doctrine "Uti possidetis juris" which says that a new state inherits the boundary of the old administrative unit. If we use it here, it's very clear that Israel has territorial sovereignty over the entire mandate the moment they declared independence and it makes no difference what they ended up controlling. The way it works is that it looks at the boundaries as they were on the ground on not what was authorized. It doesn't matter what the boundary was in theory (like in 1923 or resolution 181). If that’s the rule, Israel gets everything. With this outcome, it makes sense why he didn't write it (he wasn't much of a fan). If he did write about it, he might've said that he doesn't like the application in this case because it violates the right to self-determination of the Palestinian Arabs. Thing is "Uti possidetis juris" is stronger than this right. Its job is to stop wars and set clear lines.

There are **two arguments** he doesn't mention (and Bell thinks they're dumb):

1. sovereignty of the Jews- Howard Grief (1940-2013) brought it in his book "The legal foundation and Borders of Israel under International Law". In a mandate, territorial sovereignty goes to the beneficiary people so when the mandate was created, the Jewish people, who were the beneficiary, got territorial sovereignty and never gave it up and the state of Israel is not entitled to give it up. He doesn't say how they're supposed to make decisions regarding the territory because it's a concept that doesn't exist in international law because territorial sovereignty belongs to states and not to people.
2. sovereignty of the Arabs- Henry Cattan (1906-1992) in his book "To Whom Does Palestine Belong?" makes the same arguments but for the Arabs. He says that when the mandate was created, it gave territorial sovereignty to the beneficiary. Who's that? He claims it's the Arabs because it was illegal to make the Jews the beneficiary as they were the minority, and therefore, only the Arabs has this right. They have sovereignty since the creation of the mandate.

A small summary- the possible boundaries of Israel:

1. none – no territorial sovereignty over anything
2. mandatory boundaries ("Uti possidetis juris")
3. partition boundaries (181 effectively created separate mandates)
4. armistice boundaries (181+ cession/acquiesence, etc. or Uti possidetis – cession/ acquiesence, etc. or terra nullius + occupation)

Bell likes the second arguments. The most popular is the 4th (meaning, the green line).

Another possible argument that was sort of made by Shabtai Rosenne (1917-2010). He said that the ceasefire lines should be viewed as agreed upon boundaries. Why? They said no changes by war, but only by peaceful means. Meaning, only real permanent boundary where on the other side you have territorial sovereignty. Therefore, the ceasefire lines create international acknowledgment that Israel has territorial sovereignty up to the green line and no further. Bell thinks his argument might be the reason many Israeli academics assume that the green line is a boundary.

If we say Israel got sovereignty on less than the whole mandate, what does it say about the rest of the territory?

**Possibilities**:

1. Jordan and the West Bank- might be the most difficult. It's unclear if Jordan actually had a good claim over the West Bank. Maybe they got sovereignty because of "terra nullius" and they occupied it. If a state takes possession of a territory without territorial sovereignty, the possession itself can make it the sovereign if it meant that with this possession they'll have sovereignty. What if it was Israeli territory? Then it's based on conquest. But then we have a problem. Since 1945 it's claimed that conquest is never a good ground for territorial sovereignty or that it's possible if the war was legal but Jordan acted illegally.
2. Egypt and Gaza- Egypt never claimed sovereignty over Gaza so there are **three possibilities**:
   1. Israeli by "Uti possidetis juris"
   2. No one's by "terra nullius"
   3. Mandate. If it's a mandate, it means it cannot be annexed by those who aren't the beneficiary. So, it's either Israel or Palestinians (depends on the argument).
3. Syria and the DMZ- the border with Syria didn't quite follow the international boundary. It mostly did but there was a large area that was made demilitarized on the Israeli side (meaning the line on the Israeli side was well into the mandate). On part of the demilitarized area, Israel tried to assert control but the Syrians didn't recognise Israeli control so there were fights. The Syrians always claimed for territorial sovereignty in the demilitarized area. If we follow "Uti possidetis juris", it's clear it belongs to Israel. But if we claim Israel has sovereignty only on the areas it has control, it's unclear if Israel controls this demilitarized area. Do the Syrians have sovereignty? No, they didn't take possession and can't claim sovereignty by conquest.
4. Arab Palestine- do they have any territorial sovereignty? Even if you hold one of the positions that don't give Israel the whole territory, it still doesn't mean there's an Arab Palestine. there was a declaration of independence by Haj Amin al-Husseini's group (the British put him as the mufti of Jerusale, had connections with Hitler and became the leader Palestinians Arabs). The purpose of the declaration was to make the Arab League to reject Jordanian annexation, not to actually make a state. The Arabs wanted an independent state of all the mandate. No Jewish state and that Jordan won't take territory either.
5. Terra nullius (mandatory)- there's no sovereign. Ready to be taken. By who? The beneficiary.
6. Terra nullius (not mandatory)- no sovereignty and ready to be taken by everyone.

The six days war (1967)

Has anything changed since 1948-1949. Has anything changed as far as the territorial scope of the countries? There was diffidently a change in the amount of territory Israel controlled in 1967. Did it change its borders, is a different question. In 1967 the 6 days war occurred. The build up to the war is also something we should ask regarding its legal questions. The main issue that interests us now is- Could Israel legitimately claim the war was an act of self-defence? Because after all, Israel was the first to attack in this war. The troubles started with shooting in the borders with Syria. They shot at Israeli farmers in the demilitarized area. Israel shot back. There was a fight between Israeli jets and Syrian jets and Israel shot 6 Syrian fighters near Damascus. At some point, the soviets told the Syrians that there are secret Israeli plans to invade and everyone started preparing to war. The Egyptian told UN forces to move their troops from Sinai to the Israeli side. The UN secretary general decided that the best thing is to give an ultimatum to Egypt that either they'll drop their demands or they'll remove their forces. Egypt didn't drop so the UN forces were removed and Egypt sent troops to the border. Egypt also shut down Straits of Tiran. At that point it was clear that if Egypt won't back down there will be a war and Egypt didn't back down so Israel called for reserve duty recruiting and there were 3 weeks of tension until Israel attacked.

Israel always claimed it was self-defence and gave **two reasons**:

1. Shutting down the Straits of Tiran, blockading the Israeli ships by Egypt and placing troops in places they shouldn't be, made Egypt the first to start the war.
2. It was an anticipatory self-defense. There was a threat from Egypt and Israel had a right as a matter of self-defense to strike first. We'll have to answer if there's even such thing.

Israel conquered the Sinai and the Gaza Strip from Egypt, the West Bank from Jordan and the Golan highest from Syria. Did it change any boundary? It depends on what we think the boundaries were before. When the war ended there were new areas and it applied its law only to one of them- the parts in Jerusalem they took from Jordan (east Jerusalem). Israel changed the boundaries of the city Jerusalem after 1967. On east. They added a new section to the Law and Administration Ordinance (חוק שיפוט המנהל)-

section 11B: application of law

"The law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order"

Israel gave the government the right to apply Israeli law to any area within the mandatory territory. It wasn’t really necessary. There was already a legal tool to apply law. The change in law happened on the same day of other changes of law which were designed to apply the Israeli law on east Jerusalem. The same day Israel passed a change to the Municipalities Ordinance (פקודת העיריות) that established that boundries of any city could be change by the minister of interior to include areas that which section 11B of the Law and Administration Ordinance applied (section 8A). Meaning, only on Jerusalem. By that, they applied the Israeli law on east Jerusalem and changed the Borders of Jerusalem. The only change from the Israeli pov is that it applied its law of east Jerusalem.

Israel took the West bank and Gaza Strip that were parts of the mandatory territory but the large part Israel took wasn’t. Sinai and the Golan highest weren't part of the mandate. Israel didn't have sovereignty on those areas before the war.

There were also changes in the armistice agreements, they were not changed and weren't replaced. There were no new armistice agreements at all. The Security Council came up with a proposal in November- Resolution 242.

It was adopted under chapter 6 of the UN charter (and not 7). It didn't declare itself to be binding. It was a recommendation to a peace agreement. It first states a few principles they thought are respected by everyone and then calls for a peace agreement that will include several things. It implies that until this peace agreements, each side will continue holding which territory it has so in a way it gives new ceasefire lines. In the Israeli pov it was a pretty good resolution.

It also said that in those peace agreements, Israel should withdraw from territories occupied in the 6 days war and there should be a termination of all states of war. Also, there's a recognition that every state has the right in the area to live in peace and secure recognised boundaries.

According to the Arabs, it meant that any peace agreement should include Israeli withdrawal from all territory it captured in 1967. Israeli didn't see it that way.

The important thing is that this resolution didn't say that it has to happen immediately, it just called for a peace agreement that will include elements of withdrawals to secure and recognise boundaries.

It also said that in these peace agreements there should be freedom of navigation, demilitarized zones and a "just settlement of the refugees' problem". It said nothing about Palestinians or a Palestinian state.

There are **two parts** that potentially affect our understanding where the boundaries are.

1. The resolution calls for withdrawals and maybe that means that we should assume Israel has no/limited right to those territories.
2. If we look at the principles, they pretty much claim that's improper to inquire territory by war. It's probably the first time they say it. It's made as an assumption and it's still just a recommendation. It doesn't really have any legal effect.

Did 1967 changed the boundaries in any way? Maybe. If we think Israel in 1948-1949 acquired territorial sovereignty only up to the ceasefire lines, then in 1967 when Israel applied its law on east Jerusalem for example, maybe we should look at it as Israel attempting or actually acquiring sovereignty on east Jerusalem. There were **2 possible arguments**:

1. Maybe Israel required sovereignty by conquest even if some people think it's no longer possible, because it was self-defense.
2. Made by Yehuda Blum (1931- present) in his article "The Missing Reversioner". He claimed that the way to think of it is that when Israel required possession, it had legal possession of all those areas while Egypt and Jordan didn't have legal possession before 1967. They had not legal right to conquer those areas. So, because Israel had legal possession and Jordan and Egypt didn't and no other country could claim for a right, by possessing it, Israel had better right from any country in the world and by that, Israel became the sovereign.

At the end of 1967, Israel controlled territories that for one of them- east Jerusalem- might have change sovereignty. But it's not clear. There were two territories everyone agreed Israel had no sovereignty over them- the Golan Heights and Sinai. It was govern by the military administration but it changed nothing.

1973 war- Yom Kippur war

It didn't change the boundaries much. There was a slight change in the Golan heights but the bigger change was in Sinai. In this war, Egypt and Syria attacked first. Egypt conquered a fair amount of territory east to the canal which they held onto until the end of the war. Israel, instead of pushing back, they went around. They crossed to the west and conquered new parts of Egypt. The war stopped and they started argue where the ceasefire lines should be. On the Syrian side, Syria conquered a large part of the Golan heights at the beginning of the war. Israel managed to hold them and then counter-attacked and conquered all the part they lost and additional territory. In 1973 there was an effort to reach ceasefire agreements. The Security Council adopted Resolution 338 (under chapter 6) where it called to try implement resolution 242. The US pushed Israel, Syria and Egypt to reach ceasefire agreements before peace.

With Syria, they drew several line by which they established a new ceasefire line. It replaced the one from 1949 and it was a lot to the east, all the Golan Heights was territory possessed by Israel. People who think the ceasefire lines are important, should note that those lines moved. Does it change the boundaries? Bell thinks not but some do.

The ceasefire with Egypt was pretty much the same. Israel agreed to give part of the Sinai but it also said that it's just a line and don't effect anything else. There's another agreement in 1975. They moved the lines again and said that the line means nothing regarding the boundary and that eventually there will be a permanent peace agreement that will replace everything.

So only the ceasefire lines with Syria are important. Functionally it's the boundary. And it's unclear why people who think ceasefire lines are important for borders, tend to not consider this one.

1979 peace with Egypt

In 1977 Begin was elected and he had secret contact with Sadat of Egypt about a peace agreement. It didn't involve the US but eventually they wanted them in. Jimmy Carter, the president of the US, invited them to meet in the US in Camp David . the US took a very active rule in the mediation to the point they suggested the agreement and pushed both sides to agree. The agreements reflected the fact Carter, was interested in turning the peace into something bigger. He wanted it to be a middle east peace. He wanted the, to reach **two agreements**:

1. Framework for the conclusion of a peace treaty between Egypt and Israel
2. The framework for peace in the Middle East

Only the Egypt-Israel framework eventually turned into a peace treaty.

The Egypt-Israel framework said something simple. Both sides agree that the boundary was the international recognized border between Egypt and the Mandate of Palestine. After the peace agreements, Egypt will exercise sovereignty on the territory up until the recognized border and that Israel will withdrawal from the Sinai. They're assuming that's the boundary. In the actual peace agreements, this is exactly what they say (article II). But they add one thing-there's an issue in the Gaza Strip but they say nothing about it. So there's an assumption of "Uti possidetis juris" but it doesn't resolve everything.

The framework for a peace in the Middle East, didn't go anywhere but there were negotiations between Israel, the US and Egypt to reach a broader agreement for several years after but when the first Lebanon war broke out in, the Egyptians quit the talks. There was only the framework. It said that Israel should try to reach agreement with the other countries and it bring a proposal regarding the West Bank and Gaza. According to this Proposal, the West Bank and Gaza will become autonomist and self-governing. There will be two periods. In the first Israel will withdraw and there will be self-governance as a result of elections (Palestinian authority) and in the second period the authority will negotiate with Israel, Egypt and Jordan for a more permanent agreement. This part was copied. Does this mean something about boundaries? No. And this framework eventually did nothing. If Israel had any claims about the Sinai, they gave up with the Camp David agreement.

We need to understand that the agreement tells us where the boundary as much as Israel and Egypt concern. It doesn't bind anyone else.

Taba Arbitration (1980)

How do we know where the boundary actually is according to "Uti possidetis juris"? it was never actually mapped out between the Mandate and Egypt. The last boundary marking in this area was between under British controlled Egypt and the Ottoman Empire. The Mandate inherited the border between them so we can use this old boundary to figure out where the boundary is. But there is a dispute about a small area to the west of Eilat. The company "Sonesta" built a hotel in this area. They claimed it's an Israeli territory while Egypt claimed it was their territory. According the Camp David agreement, if there was a dispute, it should be resolved by an arbitration. A panel was put together and they had to choose one of the sides, no in between. Israel gave a map and Egypt gave a map. The closest thing they had to a map for the old days wasn't written but markers in the desert. In 1912, when they set the boundaries, they put rock pillars in the sand. Things move in the sand so some moved and some were destroyed but they found some. Probably both maps were wrong and the line was actually in the middle. But according to the arbitration's rule they could bring another solution so they decided the line is according to the Egyptian map. Therefore, Taba was part of Egypt. Israel was disappointed and claimed it's unlikely they'll ever sign an agreement for arbitrated boundaries.

Basic Law: Jerusalem (1980)

In 1980, the Basic Law: Jerusalem (חוק יסוד: ירושלים בירת ישראל) has passed. Bell claims it's not important but some people do think it's important. It basically said that the united Jerusalem is the capital of Israel. The law wasn't meant to change anything on the ground. Jerusalem was the capital since 1949. It didn't even change the boundaries. This already happened in 1967. So what did the law change? Nothing really. It's more of a declaration. Maybe if someone thought that Israel had a right to engage in annexation as a resolute defensive conquest in 1967 and had no sovereignty until 1967, and if someone thinks that Israel didn't intend to annex it with the laws of 1967, then maybe it's possible to argue that this Basic Law is an intention to annex. Bell thinks it's a stupid argument. He thinks this law in meaningless.

The Golan Heights law (1981)

In 1981, Israel passed the Golan Heights law.

Section one: application of law

"The Law, jurisdiction and administration of the state shall apply to the Golan Heights, as described in the Appendix."

This is the second time we see this phrase in the law. We saw it in section 11B of the Law and Administration Ordinance. Why didn't Israel issue a decree and instead used a legislation? Maybe Begin thought it's more persuasive. But Bell thinks it's because Eretz Israel is according to the territory of the mandate. The Golan heights wasn't part of the mandate and therefore they couldn't use 11B. also they couldn't use "Uti possidetis juris" for it. Did the law effect the sovereignty? Maybe it's an act of annexation. In order for it to be effective, we need **two additional things**:

1. Intention to annex
2. Legal justification to annex.

Was there an intention? No. Begin at the time said that. The only reason they applied to Israeli law was so the residents have a clear legal system. But also, there's no good legal justification. The only thing we can think of is defensive conquest. But most people don’t think it's a good ground and there's no official position that it's valid.

Several years later (almost 20) Israel passed a law regarding the Golan Heights where it says that if there's any place where Israel applied the law of administration, then Israel cannot cancel the application without a referendum. The law of 1999 didn't take force immediately. It says that the requirement for referendum will only apply after there will be a new Basic Law: referendums (section 4). Does this change things? Maybe. By that time, it's hard to argue Israel has no intend to annex the Golan Heights. Most Israelis by the mid 90s thought that the Golan Heights were annexed. Does this make a difference? Not clear. We still don't have legal justification.

The Basic Law: Referendum passed so the 1999 law took effect. It's applied only on two territories- east Jerusalem and the Golan Heights.

In 2019 the US announced they recognise Israel sovereignty over the Golan Heights. So of course, the Israeli government said we have sovereignty. Does that make a difference? If you think Israel could acquire sovereignty by defensive conquest, we already saw the act and the intend years ago. But by 2019, you can make a different argument- one way to have sovereignty is by prescription (התיישנות). If a state has possession for a long time, then you acquire sovereignty. How long is a long time? We can't really tell. Do we start counting from 1967 or 1973? but possession is holding the title a way a sovereign does. When did Israel start doing that? Not until 1991. So, by 2019 it's 38 years of possession. Is it long enough? Maybe.

The Jordanian disengagement (1984-1988)

In 80s there were two elections that ended up in some sort of a tie so Israel formed a unity government. in 1984 Peres and Shamir agreed Peres will be PM first and 2 years later Shamir will be. When Peres was PM he negotiated with Jordan, Shamir didn't like it do he did everything behind his back. He had an agreement but Shamir didn't let him. Jordan started looking in different direction- the Palestinians. They developed the idea in the later 80s, to put pressure on Israel by declaring a Palestinian state. Not that they want, but that it already exists. So, in 1988, the Palestinians issued a declaration of independence. The national Palestinian national council (connected with PLO) issued a document saying that now there was a Palestinian state. Jordan had to go with this approach. Before the declaration, there was still criticism on Jordan for still claiming sovereignty on the West Bank but they knew they won't get it so they had to agree for their declaration so they announced they're giving up the West Bank. Jordan already gave up the West Bank because they didn't have possession since 1967. So, what does it mean? **Two things** Jordan did:

1. Announcement that the West Bank is no longer Jordanian territory
2. An administrative change. In 1948, they divided the territory of the country to 7 areas where 2 of the, are in the West Bank. In 1988 they cancelled two districts.

Does it make a difference? In international law there's a thing called an abandonment- a state claim for sovereignty territory but it can give it up. How? It works like annexation but in reverse. Meaning, acting like the state gave up on the sovereignty with the intend to give up sovereignty. It's clear that Jordan abandoned this territory. Does it make a difference? Only for those who think Jordan had a good claim for sovereignty. If you don't think so, it's meaningless.

The Palestinian declaration of independence (1988)

The Palestinians declared independence in 1988, one of the things they wanted was to have some kind of a UN recognition. It 1988 the General Assembly passed the resolution 43/177 that said that because the Palestinians declared independence, they decide that they'll start using the term Palestine meaning the PLO. They don't recognise it as a state. Over time, series of resolution, the General Assembly gave Palestinians rights as if there's a state. But this is all after they decided that the meaning of the word "Palestine" is the PLO. The Palestinians tried at one point to join the ICC. They wanted to show that they're recognised by the General Assembly as an observer state in the UN. They drafted the resolution 67/19 and the General Assembly adopted it. It means that after 2012 there are **two ways** in which the General Assembly can use the term "Palestine":

1. Nonmember, observer state
2. The PLO

It depends on the context. But it's pretty clear that there's sort of a recognition in a state of Palestine. Does it change something? Bell thinks not. In order to have a state, you need to have territory, government, permanent population and the capacity to carry on foreign relations. Some say you also need recognition. If you think they have all the 4 conditions and only missing the 5th, then it's important. Bell thinks they don’t have all the basic 4. They don't have territory that's govern by Palestinian government as the highest ruler. They said that themselves- they claim that all the territories are occupied by Israel and they're the one who govern. So, they don't have territory and no government.

Israel-Jordan peace treaty (1994)

Israel reached a peace agreement with Jordan in 1994. It worked in the same way the Egyptian one did. It also gave a formula for boundaries. Article 3 stated that the boundary "is delimited with reference to the boundary definition under the Mandate as is shown in Annex I on the mapping materials"… The boundary… is the permanent, secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967."

It's similar to the Egyptian one because of the understanding Israel's boundaries was set by "Uti possidetis juris"- the boundaries of the mandates. It's not the way it's phrased. Why did they do it? Taba. They didn't want to go into arguments. Not going by the markers on the sand but according to the map. Another thing that's similar was that they don't refer to the West Bank by its name (like with the Gaza Strip in the Egyptian one). They say territories that Israel got in 1967.

In the same article they bring the rule of Accretion (התווספות). The boundary change with the river in small changes. They adopt that.

There are **two special arrangements**:

1. North- Naharayim
2. South- Zofar

In both, it's about areas had control over until the peace treaty and that Israeli farmers didn't want to give up possession. They reached a bargain that Israel agrees that Jordan has sovereignty and Jordan agrees that the Israeli can still work the land (that their private ownerships will be respected). There will be 25 years period with special security arrangements. There were negotiations to renew it in 2019 but the Jordanians said no.

Oslo Accords 1993-2000

כל ההליך של אוסלו היה תולדה של פסגת שלום לאחר מלחמת המפרץ הראשונה ב-1991. ארה"ב רצתה לגייס מדינות מהעולם הערבי. ארה"ב הכריחה את ישראל לבוא וישראל הסכימה רק בתנאי שהפסגה לא תהיה מחייבת. הפסגה הייתה מורכבת משני מסלולי מו"מ. מסלול אחד עם לבנון, סוריה ירדן וישראל. ומסלול שני ישראל יחד עם כל העולם הערבי. ארה"ב הבטיחה שתהיה משלחת פלסטינית, שלא תהיה עצמאית, אלא חלק מהמשלחת הירדנית. במשלחת לא יהיו אנשי אש"פ ולא ממזרח ירושלים. בפועל היה רק אדם אחד ששיקר למרות שהיה איש פת"ח.

אשף זעם ושלח בתגובה משלחת של אנשי פת"ח. כל אחד דיבר בפסגה הזו. הסורים לא רצו להמשיך ונשארה רק נציגות ירדן עם שתי המשלחות שלה. הן עברו לוושיגטון. היה ברור שהירדנים רוצים להגיע להסכם שלום. הפלסטינאים לא רצו להגיע להסכם. בערך שנה הם רק היו בשיחות מסדרון רק בגלל שהם רצו שישראל תשים דגל פלסטין על השולחן. כך התחיל המו"מ. במקביל היו בחירות ורבין עלה לשלטון. הוא רצה להגיע להסכמים. ובשלב מסוים הוא אימץ יוזמה של סגן שר החוץ-יוסי ביילין ("הפודל של שמעון פרס") מו"מ ישיר עם אשף. רבין לא היה מעוניין בהסכם עם אשף הוא רצה להעביר את זה דרך המשלחת בוושינגטון. כדי לראות אם הם רציניים הוא אמר שהוא ימשיך בישיבות רק אם הפלסטינים יסכימו להיכנס לחדר הישיבות. ובאמת זה קרה. לאחר מספר חודשים הגיעו להסכם. זה היה רק מסגרת להסכם והיה אמור להיות במספר שלבים. הכוונה הייתה שההסכם יצא כאילו היה הסכם בין המשלחת הפלסטינית בוושינגטון לבין ישראל ללא מעורבות עם אשף וכך היה מנוסח ההסכם בהתחלה. היו מספר תנאים שאחד מהם שאשף חייב לפעול למניעת טרור. לא יצא הסכם רשמי אלא שורה של מכתבים בין ערפאת לרבין ובין ערפאת לנורבגיה. ערפאת לא היה מוכן להבטיח שלא יהיה טרור ולכן הוא כתב לשר החוץ הנורווגי שבעת חתימת ההסכם באוסלו, אשף יתנגד לאלימות וטרור. בעוד לרבין כתב שהוא יכיר במדינת ישראל ובזכותה לחיות בשלום. וכן שכל הנושאים שצריכים להגיע להכרעה, יוכרעו במו"מ. בגלל זה, רבין טען שהוא מכיר באשף כנציג העם הפלסטיני. ימים ספורים לאחר המכתבים האלה, נפגשו לחתימת ההסכם הראשון. יש שורה ארוכה של הסכמים אבל שניים בהם היו עיקריים. הסכם המסגרת זה היה הסכם אוסלו א- ההסכם עליו חתמו ב-93 בוושינגטון. השם הרשמי זה "הצהרה העקרונות" הוא קבע הסדרים זמניים שיעמדו בתוקף רק עד הסכם ביניים. לעולם לא הגענו להסדר קבע. הצהרת העקרונות קבעה שתהיה נסיגה ישראלית חלקית מרצועת עזה ומיריחו. חלקית משום שישראלית לא ויתרה על התיישבות יהודית ביו"ש ובעזה. זה פתח פתח לכניסת כח מזויין שיהיה הגוף השולט המקומי.

בהסדר הביניים ישראל הסכימה לסגת מכל הערים הגדולות ביו"ש (ג'נין, רמאללה, טול כרם, שכם, בית לחם וחברון) ותוקם מועצה מחוקקת פלסטינית. שאר שטחי יו"ש יועברו לשטחים צבאיים והתיישבות יהודית וחלק להתיישבות פלסטינית. זה בעצם מתן אוטונומיה. היו הרבה מאוד חילוקי דעות. **דוגמא**: יריחו. ישראל אמרו רק העיר בעוד אשף אמרו כל המחוז. מה זה המחוז? כל הבקעה. בסופו של דבר הגיעו להסכם ולמפות. ביום החתימה ערפאת טען שהוא לא מסכים ויצא מהבמה. הגיעו להסכמה על מספר סמכויות שהרשות תקבל (כמו חינוך ובריאות). וכך הגיעו למו"מ להסדר הביניים. הסדר הביניים היה הרבה יותר שנוי במחלוקת בישראל בגלל פיגועים שהיו. ונתינת השטחים שהיו הרבה יותר קרובים למרכז. רבין איבד את השלטון והוא "שיחד" מספר ח"כ ממפלגת צומת שיסכימו לחתום על ההסכם. לאחר מכן רבין נרצח והיה גל של פיגועים (אוטובוסי התופת). פרס צנח ונתניהו ניצח ברוב זעום. כאשר ביבי נכנס היה לחץ מארה"ב כבד להמשיך. ב-95 ישראל לא נסוגה מחברון למרות ההסכם. במשך שנה עוד היו מו"מ על הוצאת ישראל מחברון. כל ההסכם היה פרוטוקול נוסף בעניין חברון. היה לחץ מצד ארה"ב לעוד נסיגות. ממשל נתניהו נפלה, ברק נכנס. הוא רצה להגיע לכמה הסכמים מהירים והוא עשה את ההסכם על המעבר הבטוח. נכנסו למו"מ מאוחר להסדר הקבע. הכל התפוצץ בעוד גל של פיגועים.

מה היה באוסלו? הצהרת העקרונות קבעה שבעצם רוצים לתת אוטונומיה לפלסטינים והסדר ביניים, לא מדינה. אמרו שהרשות החדשה תקבל סמכויות אבל רק אותן שיקבעו בהסכם. המטרה היא שבכל מקרה סמכויות אלה יהיו מוגבלות, שכן לא יגעו בנושאים של הסדר הקבע. בס' 4 קובעים ששני הצדדים רואים את יו"ש ואת רצועת עזה כיחידה טריטוריאלית אחת.

ההסכם קבע שהרשות תקיים משטרה חזקה וישראל תהיה אחראית על בטחון חוץ ועל ישראליים. לא כתוב על נסיגה ישראלית, אלא שישימו את הישראליים במקומות חדשים.

הסדר הביניים היה מפורט יותר. אין הרבה דברים שונים. לא הבטיחו שום דבר בהסדר הקבע.

חילקו את הסמכויות כך שחילקו את כל שטחי יו"ש ורצועת עזה לשטחי A,B,C. לרשות יש סמכות בכל השטחים, סמכויות קטנות אישיות. לא בכל השטח היו סמכויות שהיו קשורים לשטח (זה רק A,B). מה זה אומר? רק סמכויות בנייה. בשטחי C כל סמכות טריטוריאלית היא של ישראליים. ההבדל בין A ל-B הוא בהסדרי ביטחון. צה"ל לא היה צריך להיכנס לאזורי A, שם המשטרה הפלסטינית הייתה צריכה להיות עם אוטונומיה. בשטח B זה היה בעצם גם צה"ל וגם המשטרה. פעולות בהתאמה.

מו"מ על הסדרי הקבע היה צריך להתחיל ב-96 ולהסתיים ב-99. ס' 31(6) לא ניתן לטעון שצד כלשהו איבד זכויות או טענות. וכן אף צד לא ישנה את המצב ביו"ש ובעזה עד הסדר הקבע.

מה המשמעות המשפטית של החלוקה לטענות של ריבונות? המרצה טוען שלא צריכה להיות השפעה שכן ההסכם הוא "מבלי לפגוע בזכויות הצדדים".

Hebron was supposed to be in territory A. Thing is, there were Jews in Hebron. They divided Hebron into two zone- one with Jews and other without. In the area with the Jews, the Arabs had limited territorial rights. The Land Planning (תכנון ובנייה) was only with the agreement with Israel in the Jewish area. In both areas, there were security restrictions on the Palestinian police and there was some sort of operation freedom for IDF. They came up with two different names:

1. H1- without Jews. Like area A but with less Palestinian security rights
2. H2- with Jews. Was something between A and C.

What is the importance of Oslo? Agreements did nothing to change territorial rights. They stated no rights will get hurt.

**Few reasons:**

1. State- if the Palestinians establish a state, what the borders would be? Areas A and B (maybe also H1 and H2). Why? Because there's an administrative boundary in the Oslo agreement. Also, the accords declared the Gaza Strip and the West Bank on territorial unit and if they declare a state on ant part of it, they'd have a state all over it because of "Uti possidetis juris".
2. Self-determination- the agreement recognises the PLO as the representative of the Palestinians people. It sounds like Israel recognises the right of self-determination of the Palestinians and that the PLO is their inclusive representative. The very least this right gives the right to demand good faith in negotiations.

The withdrawal from Gaza (2005)

It was not negotiated. It was an idea originally proposed by Amram Mitzna (1945-2003) who was running as the head of the Labor party to Ariel Sharon who ridiculed the idea as idiotic and then a year later thought it's a good idea. He announced in a conference that he'll carry out a withdrawal, but because it's a change in policy, he brought it to vote. They made a referendum of the Likud voters and the suggestion got declined (around 60% voted against it). Sharon ignored it and decided to continue. It wasn't an agreement with the Palestinians so it difficult to describe what the legal meaning of it. In the resolution it's not clear what they want to do. They say they'll end the Israeli presence and later say that the responsibility will transfer to the Palestinian authority and the military government will end. Does it mean Israel gave up any other authority? Not clear. They say nothing about sovereignty. Maybe it's an abandonment (like what happened with the Jordanians) but it's unclear. After the withdrawal, the IDF issued a declaration that the forces left the Gaza Strip and transferred control to the Palestinian council. Nothing else. No abandonment of claims, no cancelation of sovereignty, no recognition of someone else's sovereignty.

There are **2 theories**:

1. The theory of Yehuda Blum- we've talked about it before. In the case of Judea and Samaria and particularly Jerusalem, he said that assuming Israel never acquired sovereignty over Judea, Samaria and east Jerusalem in 1948, in 1967 Israel acquired sovereignty. Why? In 1967 Israel acquired lawful control where Jordan never had lawful control. There's no other state that had any possible territorial claims beside those two. Israel has possession and it's lawful while Jordan has no possession and even when they had, it wasn't lawful, Israel has the better claim. It's not exactly sovereignty but it's the closest thing.
2. The theory of Victor Kattan- in his article "Jordan and Palestine: Union (1950) and Secession (1988)" he claims that we should see Jordan as a somewhat agent of the Palestinians. In 1948 Jordan helped create what would've been an independent Palestinian state except the Palestinians exercise their right to self-determination to join Jordan. The mandatory Arabs had right to self-determination and they gave Jordan the power. So, Jordan was at the same time a Palestinian state and wasn't a Palestinians state. Jordan had lawful title of the West Bank and east Jerusalem because it was the realization of the Palestinian right to self-determination. In 1988, the Palestinians became an independent state in the West Bank and east Jerusalem. This argument doesn’t work for the Gaza Strip.

**Legal issues raising questions of sovereignty**

There are different possibilities for the boundaries of Israel and its sovereignty.

What difference do they make? We'll talk about a few situations that they could make a difference. We have a legal dispute and we need to decide about territorial sovereignty to understand the rest of it.

The ICJ

International Court of Justice. The UN court in Hague. There used to be a court called the permanent court of arbitration and it became the ICJ when the UN was established. The Judges are selected by the General Assembly and it has limited jurisdiction. It can rule on a case between states. Only states. In order to issue a ruling, it has to have jurisdiction over the states. The ICJ can also give an advisory opinion. It's mainly asked by the General Assembly.

**Ways for jurisdiction**:

1. Agreement of states- it's a letter saying they always agree to the give jurisdiction of the court. Most countries don't have this kind of agreement (like Israel, the US etc.)
2. Ad-hoc consent- the state agrees to the jurisdiction in a particularly case
3. Treaties/conventions- treaties that has a section saying disputes related to the treaty will be resolved by the ICJ. (like the genocide convention)

The PLO issued an application to the ICJ against the US about the relocation of their embassy to Jerusalem. The US doesn't have a general agreement to the court and it doesn't recognise a state of Palestine. The PLO claimed they're a state (they gave a letter to the Secretary General saying that) the court accepted it only for the purposes of this case. The court gave dates for both states to respond. They both didn't respond. The court didn't dismiss the case so it might come back. Also, the US withdraw from the treaty because of this.

The case itself was because PLO claimed that the Vienna Convention on diplomatic relations, has a clause which says that disputes about the application of this convention, go before the ICJ. Article 3 of the convention says that a diplomatic mission is supposed to represent the sending state in the receiving state and protect in the receiving state the interest of the sending state. Because it's "in the receiving state", PLO claimed that an embassy can only be in the territory of a receiving state. It's a wrong interpretation of the convention but it's not the main issue. PLO claim Jerusalem isn't part of Israel's territory and therefore, the US cannot move their embassy there. They bring a number of sources for it that basically talk about **two arguments**:

1. Resolution 181- The boundaries of Israel were set by the partition resolution. It suggested dividing the mandate into 8 pieces which one of them is Jerusalem as a international trust territory (and then after 10 years there should be a referendum) the PLO said that because it was supposed to ne a trust territory it was not part of Israel territory. They don’t explain why it can be part today. They then bring GA resolution 303 that says that they still see Jerusalem as an international are. On the same day, Ben Gurion transferred the Knesset to Jerusalem and stated Jerusalem was always Israel's capitol. Then
2. Israel's authority- There is a series of resolutions (of the General Assembly and the Security Council) that tell Israel they can't exercise authority in Jerusalem. They say that after 1967, Israel annexed east Jerusalem to west Jerusalem and the General Assembly and the Security Council said this change is invalid. Therefore, we're supposed to learn for that that Israel has no sovereignty on Jerusalem or at least east Jerusalem. They bring several resolutions after 1967, like those from 1980 who were very critical and there's one from 2016.

The court set an order to file and neither of them filed. It's still pending.

In the background there's one ruling the court issued once on the issue of Israel and there are 2 more that the court will issue in the future. One is the South Africa case on genocide and the other is the advisory opinion about the "legal consequences of Israel illegal occupation of the West Bank, east Jerusalem and Gaza Strip". There court will most certainly rule that Israel illegally occupies those area.

In the advisory on the wall (גדר ההפרדה), from 2004 called "The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" they concluded that Israel violated international law by building it. One of the things they had to do was to figure out if the laws of belligerence occupation apply and to do that, they bring a brief chain of title. They start with the Ottoman empire, then move to the mandate and its end, the ceasefire lines, the 6 days war, resolution 242, the unification of Jerusalem and Security council rejection of unification, the Jordan peace treaty, the Oslo Accords and then they get to their conclusion from paragraph 78. It's like "question begging"- repeating the question as if it's an answer. They say that the laws of belligerence occupation apply because it's an occupied territory. But that's not the answer because the question is if it's occupied territory. But that's their analysis.

Occupation

There's no prevision of any treaty that give a comprehensive definition of when laws of belligerence occupation apply. There's no definition of what it means to be occupied territory. Bell gives **3 elements**:

1. Effective control- Someone has to have control on somebody else's territory. It's unclear what it means to have control. Does Israel control the Gaza Strip? It's customary to think that you can get control at the end of the war but not during the war. While you're fighting over the territory, you can't have control. There are many cases that developed from the situation in Yugoslavia, especially in the first war in 90s.

**Democratic Republic of the Congo vs. Uganda** (2005)

The legal question- Does Uganda defy the law of war, including the law of belligerence occupation in Congo?

The ICJ- there were Ugandan troops in Congo but it doesn't mean there was an occupation in Congo. **It's not enough to say that there are troops in the territory for belligerence occupation**. You have to see if particular parts of the territory were placed under the Ugandan army's authority.

We have those arguments in our conflict. There are arguments about whether Israel belligerently occupying the Gaza Strip after it withdraw. They say that in the Oslo Accords, it's said that the West Bank and the Gaza Strip should be considered one territorial unit, so, if Israel belligerently occupying the West Bank, then necessarily, they occupying the Gaza Strip. It's not a valid argument because that's not the way we decide what the territory is in occupation. There are conditions for it and it has nothing to do with boundaries.

Another big treaty that's relevant to us is the Fourth Geneva convention from 1949. It talks about protecting civilians during war and it has general provisions in the beginning. Like the Hague conventions, the Geneva conventions don't talk specifically on belligerence occupation but generally on the law of war. Only section 3 talks about belligerence occupation.

The treaty in article 2 says that are many conditions in which the treaty applies, some has to do with belligerence occupation but most don't. There are some previsions that are applying in peace time, some are applying in case of war/armed conflict and some are applied on cases of occupation (even if it meets with no armed resistance). It tells us when occupation rule applies. Occupation can be applied completely or only on part of the territory. We can assume it talks about authority. It tells us that the territory must belong to a High Contracting Parties- states that are part of the 4th Geneva Conventions. It also tells us that there could be an occupation even where the state of war is not recognised by one of them.

Article 6 tells us that the parts in the convention that are applied on occupation, stop applying one year after the general closed the military operation. The occupation continues for as long as the power exercises the function of a government in this territory.

There's an assumption that there has to be military operation and what we're interested in is that the occupier exercises the function of government.

**PROSECUROR vs. Naletilic ("TUTA") & Martinovic ("STELA")**

Background- in the international criminal tribunal for the former Yugoslavia. One of the bigger cases that were brought. The tribunal was a special court that was put together after the first war in Yugoslavia in the 90s. This is when Yugoslavia split apart, Croatia declared its independence right after Bosnia-Herzegovina did too. There was a war between Serbia and Croatia partially over territory controlled by Croatia and partially over territory controlled by Serbia and partially on territory controlled by Bosnia-Herzegovina. It was mostly a fight between Serbians and Croatians but also Bosnians (Muslims) fought. It was claimed that the Serbians and, to lesser degree, the Croatians committed war crimes and the tribunal was established to decide who, if anyone, committed war crimes. It was quite similar to the ICC.

The legal question- did Serbia/Croatia violated the laws of occupation?

The ICTY- the tribunal first had to decide if the territory was occupied. How do we do that? The main dispute has to do with effective control. Sometimes they used the term "effective control" and sometime the used "authority". There's no "yes-no" rule. They give **5 guidelines** (article 217):

* 1. **The occupying power substitutes its own authority for that of the occupied authorities** which have been rendered incapable of functioning.
  2. **The enemy's forces have surrendered or withdrawn**. Battle areas may not be considered as occupied territory but sporadic local resistance even if successful does not affect the reality of occupation.
  3. The occupying power **has sufficient force present, or the capacity to send troops within a reasonable time** to make the authority of the occupying power felt.
  4. A **temporary administration** over the territory
  5. The occupying power has **issued and enforced directions to the civilian population**.

Using those guidelines, does Israel today belligerently occupy any part of the Gaza Strip? It's hard to say they do but we can always argue. There are no enforced directions. There are general directions but they're no enforced (telling them that if they want to live, they should go to the south, isn't really enforced. We don't force them to leave). We don't have a military administration there. Israel had military governments before but it's not there. It's also fairly clear that the enemy forces in Gaza have not been destroyed/withdrawn/surrendered. Furthermore, there's still Hamas police in places, meaning their authority can still function publicly and the IDF has to fight their way in and can't really send troops in a reasonable time.

When does the war turn into an occupation? It's fairly clear that's only when the battles are done. Israel, according to these guidelines, has no effective control (but people still argue it).

1. Belligerence- It has to be belligerent control. In the Hague Regulations it's assumed "belligerence" is something that comes with war. In the 4th Geneva Convention, they describe it more broadly- it can happen even if the occupation meets with no armed resistance. **E.g.**: The Germans are on Netherlands' borders and they tell them to surrender and they do. If the Dutch surrender, they do it because of war and it doesn't make a difference they didn't shoot at all. What's the opposite? Control that is voluntary. If someone is there by permission it's not belligerence. The case of Iraq presents it pretty well. In the second Golf war, the US took control over Iraq and set up a military administration. Everyone agreed it had a belligerence occupation over Iraq. A new government was elected in 2004 and made an agreement that the US will stay and keep its military ruling. They still have an effective control but it's no longer belligerent. The US brought it to the Security Council and they congratulated them. It's generally understood that if there is a peace treaty, even if there is a military control, it's not belligerent occupation. We can't really say nowadays that it's occupation that resulted after someone declared war. So, it has to have the elements of war and non-consent.

Yoram Dinstein (1936-2024) had an article which talks about belligerent occupation that ends with a peace treaty. He claimed that when Israel signed the peace treaty with Egypt, it's clear the Gaza Strip can no longer be occupied because there's no belligerent occupation after the end of the war. It's only occupation that results from the war.

1. Enemy territory- The hardest one to figure out .Article II of the 4th Geneva Convention refer to it as "territory of a High Contracting Party". Section 3 of the 4th Hague Convention from 1907, brings two general rules and specific ones. It doesn't tell what the relationships are between the occupier and the territory it just assumes it's the territory of the enemy. What does it mean? Are we looking for sovereign territory? It was raised in 1967. Is Israel a belligerent occupier of the West Bank? Israel said no because it wasn't their territory. Jordan didn't have sovereignty, they held it illegally as a result of a military aggression.

In 1967 Israel also captured the Sinai Peninsula, an Egyptian territory. In 1973 Egypt attacked and also held part of the east of the canal. Would it be right to say that Egypt belligerently occupied the east bank of the canal? No one asks that because this area belongs to them to begin with. So, what we mean in territory of the hostile army? Territory that belongs to the other side. If it belongs to us, it's not enemy territory so it's not belligerently occupying. We might mean it's sovereign territory of the enemy. The east canal wasn't under Israel's sovereign territory.

Another possibility is that it's a territory under the control of the hostile state before the war, no matter if it was under their sovereignty. **E.g.**: There was an arbitration after one of the war between Ethiopia and Eritrea. It was about a Ethiopian territory that Eritrea captured and then Ethiopia took it back. They had to decide which of them has sovereignty and whether the laws of belligerence occupation apply in Ethiopian ruling on the territory. One ruling said it was Ethiopian territory and one ruling said it belligerent occupied by Ethiopia. When we read the decision it seems like they suggest it doesn't matter who has sovereignty

The more general conception of thinking is that we're talking about sovereignty and not who held it before.

On some of these things we have answers but on most we don't. You have to have all 3 in order for it to be considered occupation.

There is also a "fourth" elements saying that only countries can occupy. We need to understand that when we see a military administration it doesn't necessarily mean it's belligerence occupation.

The organization- "The International Committee of the Red Cross" made a report of an expert meeting called "Occupation and Other Forms of Administration of Foreign Territory". In this report they discuss some of the questions we're interested in. they start with the question- what are the conditions for the law of occupation to begin applying. They describe it as an effective control over a foreign territory. They bring their own **3 elements**:

1. Presence of foreign forces (similar to enemy's territory)

2. Exercise of authority over the occupied territory (similar to effective control)

1. Non consensual nature of belligerence

Is there a belligerent occupation in the Golan Heights?

If we think it's military government, so the answer is no. But it's not belligerent occupation. Does Israel have effective control? Yes. Is Israel present there as a result of belligerence? Probably yes. Maybe we can argue the ceasefire agreement from 1974 is a consent from the Syrians. Is it enemy's territory? It was Syrians. Maybe nowadays it belongs to Israel as a result of prescription. But if not, it's still Syrian. It's possible to think of the Golan Heights as under belligerent occupation.

On the Gaza strip on the other hand, there is no good argument for an Israeli belligerent occupation there. Since 2005, Israel lacked effective control. Even before that, there's a question if there is belligerent occupation. Going back to 1967, no belligerent occupation because it's not Egyptian territory but unlawful aggression.

Then we get to the West Bank. Does Israel has effective control? Probably yes but we can argue on it. There was a claim during the Oslo process that Israel lack effective control because of the Palestinian authority. Thing is, Israel can still operate and send soldiers quickly. There are some elements of effective control. Is there a state of belligerence? No. there is a peace treaty with Jordan. What about enemy's territory? it's not Jordanian territory. Jordan held it by unlawful aggression. We need all 3 but Israel lacks at least belligerence therefore it's not actually a belligerent occupation. It doesn't mean that Israel can't use occupation rules.

We'll go back to the Advisory Opinion of The ICJ regarding the Wall. They do a chain of title (paragraphs 70-77) and in the conclusion they say that the West Bank is occupied by Israel but they don't explain how they got to it.

Dinstein wrote the book- "The International Law of Belligerent Occupationw". There is a gap between how he sees other belligerent occupations and the situation in Israel. If there's a territorial gap between what's occupied and what's isn't, then the territorial gap makes the not occupied territory not occupied. **E.g**.: in WW2, Germany occupied Denmark. Greenland is Danish territory but of course there's a territorial gap (the sea/ocean). This gap makes Greenland not occupied.

He says that the Gaza strip is belligerently occupied by Israel. How? He says that undeniably Israel does belligerent occupation in the west bank. The Gaza strip is part of this territory and therefore Israel occupies it too. It's quite weird, comparing it to the other cases he talked about. It's not the legal analysis. Another claim is that Israel has an effective control because the Gaza strip is subject to some form of siege by air and sea and Israel supplies fuel and electricity. But what does it have with an effective control? We've seen the guidelines and he suggests looking at it in a different way.

Another claim is that Israel claims the right to self-defense in the Gaza strip and therefore they say they can use force whenever necessary. Does it have anything to do with belligerent occupation? Not at all.

His analysis is inconsistence with other legal analysis. And it's a weird chapter he wrote.

\*In 1967, Israel claimed that it's not belligerent occupation but they'll apply military government and observe the rules of belligerent occupation as far as they give humanitarian protection on a voluntary basis and the court used it. After some years, Barak decided to write that since 1967 the West Bank is belligerent occupied. He didn't really give a reason for the change.

In the Geneva conventions the laws of belligerent occupation are targeted only at protecting certain civilians. In a conflict- the other side's civilians. In occupation- anybody who's under the control of the occupying power who's not a citizen of the occupier. The convention then says that only when both sides are part of the convention, then it's applied. Can Palestinians claim they're protected by the convention if they're not nationals of a state which is party to the convention? They claim they joined the convention in 1988 after they declared independence. The ICRC rejected them. They claim to rejoin 10 years ago when they're voted as a non-member observer of the General Assembly and only then the ICRC accepted them. Assuming they only joined in the mid 2010s, then Palestinians are not protected because there wasn't an occupation that started them.

What are the rules? Section 3 is about occupied territory. A little reminder- in article 6 it's said that it's only apply during the first year after the war. But there are certain paragraphs that still apply even after. (relevant to us: 47, 49, 51, 52, 53, 59, 61-77)

Article 56 talks about public health and hygiene. The was an argument by the Human Rights Watch that was raised during COVID. Does Israel have to provide vaccines to Palestinians in the West Bank. Assuming the West Bank is belligerent occupied and that this article does require giving vaccines, the answer is No. the convention says one year since general close of military operations. When did they close? Maybe 1967 but definitely not after 1994. So, this article does not apply.

The list of rules in the Hague Convention is smaller (articles 44-56) and they're more property oriented.

Settlements

The argument that is made is from the law of belligerent occupation. Most consider them illegal. Article 49(6) of the 4th Geneva Convention states that:

"The occupying power shell not deport or transfer parts of its own civilian population into the territories it occupies"

The 4th Geneva convention and Rome Statue don't use the term "settlements". It's used in the media as it has a legal meaning (which it doesn't). article 49 continues to apply according to article 6.

If we assume there is belligerent occupation, what does this article mean?

**Theories**:

1. Voluntary movement of citizens- any movement.

2. Incentivized movement of citizens- like paying people to move there. Does Israel incentivized people to move there? The argument is that yes because there are tax benefits. But it's not really different than other places that get tax benefits. Another argument is that yes because Israel provided roads and police. But Israel does it literally everywhere.

-used more on Israel

3. Forcible movement if citizens- any time there's forcible movement. The rest of the article 49 talks about it.

4. For genocide/ethnic cleansing- incentivized/forcible movement of citizens in context of larger policy of genocide/ethnic cleansing. Bell thinks it's the best interpretation of the decision of the major war criminals in the Nuremberg tribunal.

Article 49(6) talks about movement, not living. So, if it's wrong to move there, it doesn't mean it's wrong to live there. There's no reason to think that.

When the Rome Statue was drafted, the Arabs tried to change the definition so it will be clear that whatever Israel is doing is Illegal. So, they added that it's a war crime to transfer parts of occupying power's civilian population to the territory they occupy but they added the term "directly or indirectly". Bell doesn't think it's Legally important.

There's also a document called "Elements of Crimes" that is used by the court to determine if there was a violation. In the description of article 8(2)(b)(viii), which talks about transfer, it's said that the term "transfer" needs to be interpreted according to the relevant prevision of international humanitarian law. So directly and indirectly shouldn't change the meaning of transfer.

There were a lot of belligerently occupied territories in history**. E.g.**: Northern Cyprus, Western Sahara, Crimea, Badme etc.

Eugene Kontorovich (1975-present) in his study "Unsettled: A Global Study of Settlements in Occupied Territories" talked about belligerently occupied territories that were held for over 6 months and that border territory of the occupied state (surprisingly, he didn't talk about Israel). He found that in every single case of belligerent occupation, the civilian population of the occupying power, is encouraged and sometime forced to move to the occupied territory. **E.g.**: Western Sahara who's belligerently occupied by Morocco. It builds houses there specifically for Moroccans and let them live there. No one talks about those things. No one tells the Moroccans or the Turks that it's wrong.

There's a project of the ICRC to try to summaries the costume international law that has to do with law of war. They claim it's controversial but they try to explain and divide to rules. Rule 130 is called "Transfer of own Civilian Population into Occupied Territory." There's a long list of condemnations of Israel. There's only one case that it sites (which isn't related to Israel) of a state being judged from transferring civilian population- Nuremberg Trials. The Nazis had a program of Germanizing those territories. What does it mean? The population had to be divided up to **3 groups**:

1. Germans- which has full rights

2. Mixed population- Partially German by descent but weren't exactly Germans. They were allowed to become Germans. They were sent to re-education camps to learn proper German pride.

3. Not Germans in any way- they were divided into **two groups**:

* 1. races that had to be exterminated (like the Jews)
  2. inferior races that didn't not have to be exterminated but they had to be slaves

when the German Germanized the area, it means that most of the population was gone. But they had to have people there so they sent "good Germans" so the area will be functioning until the Mixed Population will finish their re-education. That's the context in which they transferred. We would call it genocide and ethnic cleansing. Therefore, the natural reading to it is to capture this judgment.

There is a section in the Advisory Opinion of the ICJ from 2004 that talked about it. It's quite small and says that Israel has a policy of conducting settlements and therefore transferring people to this area. The court indicates un their "analysis" number of resolutions of the Security Council (446 from 1979, 452 from 1979 and 465 from 1980) They say it's illegal according to the Geneva Convention without really explaining.

Resolution 2334 of the Security Council from 2016 that also talks about the settlements. It is:

"Condemning all measures aimed at altering the demographic, composition, character and status of the Palestinian territory occupied since 1967… including… the construction and expansion of settlements…Reaffirms that the establishment by Israel of settlements in the Palestinian territory… has no legal validity and constitutes a flagrant violation under international law… Reiterates its demands that Israel immediately and completely cease all settlement activities…".

It's a firm statement but it doesn't tell us exactly where the violations are coming from but we can assume it's an interpretation of article 49(6).

Article 49(6) doesn't talk about "settlement". It talks about transferring civilian population to the territory. What does "settlement" even mean? 10 years ago, the UN Human Rights Council established a fact-finding mission on Israeli settlements in the occupied Palestinians territory. They published a report where they also condemned Israeli practices. The important part is in the beginning, when they define what's a settlement. They understand it as anything relates to Israeli residential community including non-physical processes. What does that mean non-physical processes? Tax benefits, approving zoning plan, even having a discussion. It can be anything that relates to the maintenance of Israeli residential communities. It's a broad definition and it's deliberate. The problem is that article 49(6) talks only about transfer. Most people living in this area nowadays were born there so it's hard to say they transferred.

There are **3 arguments,** 2 benefits Israel and the other the opposite:

1. Right for settlement- An argument that was made by Eugene Rostow (1913-2002) in 1990. He said that even if there is a problem in voluntary transfer, according to article 49(6), it's irrelevant because the right of the Jewish people to settle has never been terminated for the West Bank. He refers to article 6 of the Palestine Mandate that says the Jews has a right to go and live in the land. It also says that the British required to encourage closed settlements by the Jews on the land. This right belongs to the Jewish people, not any state, and therefore it's protected by article 80 of the UN Charter. There's a right for the Jewish people for settlement and this right, cannot be eliminated.
2. Returning- A letter by Theodor Meron (1930-present). He discusses an argument (not his). There's a difference for places where Jews lived and were expelled in 48' (like Gush Etzion, Hebron etc.). In those places, we might say it's a return and not transferring,
3. The Oslo accords- The only obligation regarding them is that their status will be discussed in the final talks. In the min time, the Palestinian Authority has no jurisdiction over subjects of the final status talks. It's hard to say there's any argument here regarding the legality of settlements. There's an argument that says that if we look in article 31(7) of the interim agreements, neither side shall initiate any state that might change the status of the West Bank and the Gaza Strip. Allowing Jews or engaging in settlement activity, change the status. Therefore, it violates the Oslo Accord. Bell says that it's a strange argument because settlements are mentioned in the Accords as something which is a final statues issue rather than something that changes the statues.

At least in one other context, there's been legal ruling on settlers themselves. There're famous cases about Turkish settlers in Northern Cyprus. The court ruled that whatever Turkey did was illegal but the settlers themselves have property rights that can't be dispossessed,

The ICC

The ICC has limited jurisdiction. It has examining in the past 9 years the "situation in Palestine". The preliminary examination reports showed us that it was more on conduct of Israel and not Palestinians. The existing process has to do with alleged crimes that were committed on the territory of the state of Palestine. What is the ICC jurisdiction? Why is it relevant? The ICC has different power and jurisdiction. The ICC is a criminal court, meaning it's against individuals. Alongside of the court there's the Office of the Prosecutor (OTP). There is no any punishment personal at all. It was established by the Rome Statue. It brings **conditions** for jurisdiction:

1. Has to be a crime that was defined by the statue (articles 5-8 talks about Genocide, Crimes Against Humanity, War Crimes and Aggression)
2. Temporal jurisdiction (article 11). Only on states that are part of the statue and only later than 2002. If a state becomes a party after 2002, the court can only exercise its jurisdiction on crimes that happened after the state joined unless the state says it's retroactive to 2002
3. In order for a party to be charged, the accused needs to be part of a state party or it was in the territory of a state party (articles 12-13). The security council can bring a case to them even if none of those alternatives are fulfilled.

In the case of Israel, Israel isn't a party to the Rome statue. So, the ICC needs to get the security council reference. Or, to recognise another state in those areas, that isn't Israel, that is a party.

The OTP is the only factor that can bring chargers and in order for him to investigate, he needs to get a permission. In preliminary examinations there has to be reports every year by the prosecutor about what he's doing.

There are more limits on jurisdiction in article 17- Complementarity (a-c) and Gravity (d). Gravity is not defined. It's generally understood that it means that the acts concerned are truly horrible. One way to examine it is by looking at the number of casualties. **E.g.**: Comoros claimed that its ship was attacked by Israel (the Marmara). It was one ship in a group of ships that tried to break the Gaza blockade in 2010. The Mavi Marmara was registered as a Comoros ship and according to the laws of sea, if a ship is registered as a specific state, it's territory of that state. So, Comoros claimed that Israel committed crimes on the territory of Comoros. Comoros is a state party and therefore, the court has jurisdiction. They closed the case because the alleged crimes aren't of sufficient gravity to justify further actions by the court. In consider gravity, the context is relevant. So gravity used to be a more important limit that it's today. Complementarity is secondary to state's jurisdiction. If an alleged crime has already been investigated/persecuted by a state, then the court has no jurisdiction to hear it again. Unless the state is unwilling or unable to do so.

In 2009, the Minister of Justice in the Palestinian Authority submitted a letter in which they recognise the jurisdiction of the ICC since 2002 (they try to go on retroactive). The Minister of Justice claimed he's representing all the people in a state called Palestine. It was fairly clear there's no state of Palestine. So, the OTP started making hearings if he should accept it. It took several years and in 2012 he published a letter saying that he doesn't believe the ICC has jurisdiction because Palestine is not a state. He says that it's possible to become a party even if the state isn't necessarily a state by international law. The OTP said that they'll accept if the Secretory General sees an entity as a state. Palestine isn't a participating state, it only observes.

They tried again. They told the court they're joining and they asked the Secretory General. Thing is they told the court it will be from 2014 while they told the Secretory General in 2015.

In 2020, the prosecutor- Fatou Bensouda (1961-present)- said she wants to open a regular investigation on the "territory of Palestine". She wasn't clear about the jurisdiction so she wanted to get an advice from the pre-trial chamber. She also was about to leave and left it to her successor.

She brought **2 reasons** why Palestine is a state:

1. Resolution 67/19 of the General Assembly- Palestine is a none participating observing state, therefore it's still a state.
2. Self-determination- Palestine don't have the legal ingredients of a state (they don't have a government) but the Palestinian people has the right to self-determination. So, either a state or people with this right can join the statue.

Assuming there's a state, the territory is determined by the view of the international community and not territorial sovereignty. The court will follow the lines before 1967 ass the boundaries of the state of Palestine. The pre-trail rules 2-1 to accept her position.

An argument that arose was that the position of Palestinians on territory is inconsistent between the ICJ and the ICC. In the ICJ they said the boundaries of Israel are set by resolution 181, while in the ICC they're using the green line. On one hand, resolution 181 is more generous to the Arabs but on the other hand, if they would count, they'd also lack jurisdiction on Jerusalem and all "Corpus Separatum". There's a clash. The court claim they're consistent without giving a reason.

Another argument is that Israel has sovereignty of the whole territory because of "Uti possidetis juris" The court said that it doesn't apply because it depends on a clear boundary limitation prior to independence and there was no boundary limitation between Israel and Palestine.

The ICC in 2020 decided that it had jurisdiction on crimes committed in those territories (the West Bank, Gaza Strip and East Jerusalem).

Annexation

There are **two claims** about any Israeli attempt to exercise sovereignty:

1. The 4th Geneva- Israel is violated article 47 of the 4th Geneva Convention. Some say that annexation is possible but even if there is an annexation, protected people keep their rights. Other say that annexation is unlawful.

**Monteiro vs. State of GOA**

Background-GOA is a former Portuguese territory (part of India now). At that time, in 1968, Indians invaded GOA and took it over. They announced it's part of India forever and annexed it. The Secretory General said it's lawless and against international law. India didn't withdraw and countries recognised its sovereignty there and eventually Portugal did too. Monteiro was Portuguese citizen in GOA and claimed he has protected rights there. India didn't agree because it's part of India and not an occupied territory under the 4th Geneva convention.

The supreme court- **It ruled that there is no occupation in GOA and Monteiro is no longer entitled to the protections because article 47 is only if there's an occupation**. The difference determined by the kind of annexation. There's real annexation which is lawful, which ends the occupation and there is pre-mature annexation. Meaning it's too early to declare an annexation because there are still fights going on and then the annexation doesn't count.

1. Aggression- crimes against peace. It was created in the statue created Nuremberg tribunals. There are **two kinds of laws of war**:
   1. **Jus ad Bellum.** The law of going to war.
   2. **Jus in Bellum**. Activity in the war itself.

Aggression is "Jus ad Bellum". It has roots in the just war theory (Christian theology especially from Augustine). A just war has to have a just cause, legitimate authority and right intention. It was the general way to understand "Jus ad Bellum" until the 20th century. In the 20th century there was a series of attempts to change the law. The first big attempt was in 1919 at the end of WW1, the winning countries formed the League of Nations. According to the Charter, all wars are matter of the League of Nations to take care of. The next attempt was in 1928. The US and France reached a treaty- Kellogg-Brian Pact- renouncing war (didn't work out). The third attempt was in 1945 by the UN Charter.

In the UN charter, they forbid to go to war but there are **exceptions**:

1. Non-international use of force
2. Self-defense (individual or collective)
3. Security Council authorization

There were two attempts by the General Assembly to describe what would be acts of aggression. Resolution 2625from 1970 attempts to flash out further rules of "Jus ad Bellum". It had some influence. It says that occupation is unlawful but only if the force was used contrary to the Charter. Resolution 3314 from 1974 tries to go beyond it and gives a list of acts of aggression. Article 3(a) says that annexation itself can be an act of aggression if it's by use of force of a territory of another state. The Rome Statue also has crime of aggression. it defines it and also gives a list of crimes. this list has limits on its jurisdiction. There's a later date for this in the ICC. There's has to be a separated declaration that accept the jurisdiction of the court on crimes of aggression.

What's the end result? The Palestinians didn't accept the crime of aggression. can they claim that annexation is a crime of aggression? They'd argue that yes.

Refugees

The general rules are from the 1951 Refugees Convention. It gives several protections to those who are considered refugees. How? By giving rights to them in other countries. **E.g.**: a refugee from South Sudan who goes to Norway. Norway will have to give him civil rights. Also, they have to surrender. If they enter illegally and don't surrender, only then they can be punished. A country can expel refugees only in certain grounds- national security and public order (such as criminal activity). In addition, a country can't take them back to a country that is dangerous to them.

Who's a refugee? Article 1 gives a long definition. The first kind of refugee is under old rule. If you're a refugee from the arrangements from the 20s and 30s, you're still a refugee. Most of them are probably dead by now. The main definition is a general one- the well-founded fear of being persecuted on the grounds of race, religion, nationality or politics. It's not fear of dying of starvation or illness. They are specific reasons that can drive you away. Article 1(c) says the status is not forever. If you go back, you're not a refugee, if you acquire new citizenship, you're not a refugee anymore. So, it's either if the circumstances have changed or you're not scared anymore. Article 1(f) says that criminals don't get to be refugees.

Article 1.D states that if they're being treated by a UN's agency, they're not considered refugees under this convention. What agency is there either than the UN high commissioner for refugees? There is one- the United Nation Relief and Works Agency or as we know it- UNRWA

So, what does article 1.D mean? There was a war in Syria and people fled from there to Jordan. Some were Palestinians and some weren't. the UN commissioner didn't accept the Palestinians because they're not considered refugees under the Convention. The Palestinians refugees aren't really refugees. They're something else. UNRWA calls them "Palestine Refugees". It supposed to be only those who lost their homes between 1946-1948, meaning they're supposed to be quite old. But then they say that descendants of those refugees are allegeable for legislation. They don't distinguish between them. There are 5 million people written as Palestine refugees even though most aren't even actual Palestine refugees.

What are their rights? They have no rights under the Refugee Convention (because of article D). UNRWA claims they have different set of rights from article 11 of Resolution 194 from 1948. So, they have a right to return but it doesn't bind any state (because it's a General Assembly resolution). Also, even if it grants rights, who can get them? Only refugees, there's no reason to think about their descendants.

The formulation of 194 has been repeated and expended upon in later General Assembly's resolutions. Resolution 3236 from 1974 states that the right to return to their homes is inalienable. They have no right to give it up.

Is there any other source for claims of rights that they might make? The International Covenant on Civil and Political Rights from 1976. There are many international human rights treaties and this is one of them. Most of them are aspirational. They just set a goal but don't necessarily make legal obligations (we can see it in the Covenant of Economic, Social and Culture Rights). The CCPR is the closest one to actually describe rules.

Article 2 tells us who it applies on- people in the territory and under the jurisdiction of the state. **E.g.**: people in Northern Cyprus who want to claim rights under the CCPR against Cyprus. It's in the territory but under the control of Turkey. So, the treaty isn't applied on them. Some don't like it and therefore claim that we need to read these conditions as alternating conditions- people who are in the territory of a state or under jurisdiction of a state. So, in their opinion, in the case of Northern Cyprus, it's possible to claim rights under the CCPR from Cyprus or Turkey.

Even though it gives rules, it doesn't have an enforcement power. The states are responsible to enforce and send reports. But it does nothing because most countries (except Israel) claim everything is great.

Article 4 talks about times of emergencies. The Covenant allows the states to derogate from the rights (except specific ones in articles 6-8, 11, 15, 16 and 18) if they're in a state of public emergency. A state is required to notify the other state parties which particular previsions are subject to the derogation.

The Palestinians claim that their right to return is in this covenant.

There are **two claims** they make:

1. Article 12- the right of movement within the territory, leave the country and no one shall be arbitrarily deprived of the right to enter. They say that they have the right to consider Israel as their country and therefore, they have the right to enter it. It's doesn't really say that there's a right to enter but says that you can't be arbitrarily deprived from entering. Even if there is a right to return, we're going back to article 2- they're not in the territory of Israel and not under its jurisdiction.

2. Article 17- "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" They claim that depriving the right to return, hurts the right to "home". Bell thinks home is the house where you live not the house where your grandfather lived or even your great-grandfather. And even if it means that, it doesn't say you can't have any interferences. It says only arbitrary or unlawful ones. Also, the right to return doesn't exercise in a right of home, to property. It exercises the right for immigration.

Bell thinks they don't really rely on those arguments. They don't rely on the CCPR. They generally rely on Resolution 194

**Jus in Bello**

Part of the laws of war. It's also called IHL (international humanitarian laws) and LOAC (laws of armed conflict). The set of rules of how one act in combat. These laws don't care how the war started. Contrast to what the Red Cross claims, The Martens Clause does not say that JIB "strives to humanize war". The Martens Clause was introduced in the Hague Conventions. We can see JIB in many ancient coulters but modern JIB is based on two things:

1. Chivalry- Rules from the Middle Ages. It was more of rules of nobility for being a gentleman. It wasn't really law but social rules knights had to follow. But they had to follow it or they would dishonour their name.
2. Real law- Rules of JIB that were created as international law. They were written in the 17th centaury for European Christians so they didn't apply on uncivilized people and women. In the 19th centaury countries started creating rules in treaties or legal codes like the Lieber Code that regulated rules of combat in the Civil War in the US. The first big set of treaties were the Hague Conventions from 1899. They're very influential even though they're only for European Christians countries (except Turkey/the Ottoman Empire and Japan). The idea was writing a large set of rules knowing they won't be able to cover everything. What they didn't wrote, wasn't canceled. The "Martens Clause" was added in order to say that. There are still rules that exist even if they aren't written in the conventions.

The law of JIB comes from the Christians European countries. Thomas Aquinas (1225-1274) tried in his book "Summa Theologica" to bring complete Christians moral puzzles. He phrased it in questions. **E.g.**: Is it right or wrong to steal food for your baby? It has bad effect and good effect. Question 64 talked about murder and there he developed a theory called "the theory of double effect". The morality of an action that has a good effect and a bad effect.

He brings **four conditions**:

1. Goodness of act- the act cannot be intrinsically evil. Has to be not evil. Killing can be good or bad so it's ok. Stealing can be good or bad so it's ok. Maybe torture is intrinsically evil.

2. Intend the good result- the direct intend is good. If someone steals food for his baby, his direct intend is to do good.

3. Good effect must be direct- you steal for the baby, that's the direct result. You don’t do it to teach a lesson.

4. The good must outweigh the bad- feeding a baby is more important than protecting the food from being stolen.

He's not trying to give a specific answer. It's a philosophical theory.

The second and forth conditions are in JIB. Killing the right people and not the wrong ones. Military targets vs civilians' targets. Also, it's expected that it would be proportional to the military need. Those rules were already used in the 18th centaury. They apply, not because they were in a treaty but because the states followed them.

Distinction

Aim for the good not the bad. Kill the right people and destroy the right objects even if you know that the result will be partially death of the wrong people and the destruction of the wrong objects. Right people- combatants. Right objects- military targets. The first additional protocol of the Geneva convention has a part which describes existing customary law and part that changes the law. Israel and the US didn't join because they didn't want to be part of the changes.

Article 48 defines the rule. It didn't change. The rule of distinction. People understand that the rules for objects and the rules for people are not the same rules. They're slightly different. The general understanding was that there are **two ways** to become a combat:

1. Member of organised armed forces- even if they're not doing anything at the moment, they're combatant. There are exceptions like doctors.

2. Fight- you see the enemy right in front of you so you take your rifle, find a position and start shooting. You're combatant because of your actions.

What about terrorist organizations? Are the people who are part of them combatants? The obvious answer is yes. According to the law of war, there are some privileges that most combatants get that terrorist organizations don't. **E.g.**: prisoner of war. If you're an illegal combatant, you have very limited rights as a prisoner (pretty much only not to be tortured).

The protocol says that you can target lawful combatants and civilians who at that time fighting. There's no unlawful combatant in this protocol. They're considered civilians except the moment they're actually fighting.

The 3rd Geneva Convention talks about prisoners of war and in Article 4(A) it's stated which people are entitled to the status of prisoner of war. It's mostly lawful combatants. Articles 4(A)(4) and 4(A)(5) talk about the kind of civilians that if they're captured, they're entitled the status of prisoner of war. We're looking at Articles 4(A)(1)-(3), (6). They tell us what kind of combatants are entitled to the status of prisoner of war. By that, we can learn who are the lawful combatants. The lawful combatants according to the articles:

1. Article (1)- member of the armed forces of a party in the conflict.

2. Article (2)- member of militias or volunteer corps that fulfils **4 conditions**:

1. Being commanded by a person responsible for his subordinates
2. Having a fixed distinctive sign recognizable at a distance
3. Carrying arms openly
4. Conducting operations according to the laws of war

This would be the category for members of Hamas. Are they lawful combatants? They don't belong to a state (It would be interesting if we talked about the Palestinian Authority). We need to follow the conditions. There's a command structure. The second condition is unclear. Hezbollah has uniforms but Hamas don't really. Do they carry arms openly? We can argue about it, Bell thinks it's no. In the fourth condition the answer is very clear that they don't. Therefore, members of Hamas aren't entitled of the status of war prisoners if they're captured. They're unlawful combatants

1. Article (3)- Regular armed force of a government/authority isn't recognised by the Detaining Power.
2. Article (6)- Inhabitants of non-occupied territory who spontaneously take up arms to resist the invading forces. It's a small category. Can we put Hamas here? No. they're organised into regular armed units and again, they don't respect the law of war

So, they're not lawful combat and have no privileges. But Protocol 1 sees them as civilians who you can target only when they're taking part of the fighting (not necessarily actually shooting).

What about objects?

Military objects, according to Article 52(2), are those who by their nature, location, purpose or use make an effective contribution to military action and its destruction offers a definite military advantage. Even if it's not used that way at that time. **E.g.:** School that's being used to store missiles. Is it a military object? Yes because of its use

The Red Cross put up a list of military objects.

Proportionality

Article 51 of the first Protocol says than an attack would be disproportional if it expected to cause incidental loss of civilian life, injury to civilians, damage to civilians which would be excessive in relation to the military advantage anticipated. We need to weigh the good and the bad. Military advantage vs killing wrong people and destroying the wrong things. But it's about something that is really disproportioned. Also, you have to look at the expectations. What would likely happen. Mistakes don't mean disproportions.

There are some rules in Protocol 1 about Precautions. They're not customary. The US war manual discusses the Protocol and tells what the US thinks is customary and what's not (it's important because they didn't sign it).

ס' 51 לפרוטוקול 1 לאמנות ז'נבה מגדיר. ההגדרה מבחינתנו היא שיקוף של הדין המנהגי (שכן ישראל אינה חברה לפרוטוקול). בכל מקרה, אין מי שלא רואה בכך דין מנהגי. הס' קובע שהתקפה המיועדת לתקוף את הדברים הנכונים (התקפה שעומדת בכלל של ההבחנה) היא גם חוקית על אף הפגיעה האגבית הצפויה באנשים/אובייקטיבים מוגנים כל עוד הפגיעה האגבית הצפויה לא צפויה להיות מוגזמת ביחס ליתרון הצבאי הצפוי. מה זה מוגזם? אין קביעה. אין איזה מבחן או מדד. מקובל לחשוב שזה דבר בעיניי המפקד הצבאי הסביר. פגיעה שהיא מוגזמת תיחשב לא חוקית אם היא לא מידתית. היו ניסיונות בצה"ל לכמת את זה כך שיוכלו לקבל החלטות בצורה אחידה וצפויה אבל זה לא קל.

מה ניתן לעשות מראש כדי לא לפגוע במידתיות? יש פרשנות של מידתיות שזה כלל של פרוצדורות לנקוט בהם לפני ההתקפה. לראות מי יהיה שם, מי לא, לבחון אמצעים שונים כך שאם יש דרכים שונות להגיע לאותו יתרון צבאי ודרך אחת פוגעת יותר ואחת פחות במטרות מוגנות בדרך אגבית, צריך לבחור בדרך שפגיעתה פחותה.

יש מעט מאוד פסיקה בעולם שמתמודדת בשאלה של מידתיות כך שקשה לדעת מהו בדיוק המנהג. אחד הדברים הבודדים שנוגע לעניין זה הוא דו"ח שהגיש התובע לטריבונל המיוחד ליוגוסלביה (ה-ICTY). אחד הדברים שקרו לפני שהתחילו את התיקים, הייתה דרישה להעמיד את נאט"ו על הפצצות שהם עשו על סרביה במהלך המלחמה. שאלו על מקרים ספציפיים וכן שאלה כללית- זה שההפצצות האוויריות פגעו באופן אגבי והמטוסים טסו גבוה כדי להגן על הטייסים והמטוסים, האם מדובר באמצעי הפוגע יותר באזרחים ולכן אסור? התובע קבע שלא ניתן להגיד על סמך זה בלבד שיש פגיעה במידתיות שכן ההגנה על כוחות נאט"ו זה צורך צבאי שכשר ולכן דבר שמסכן אותם יותר ודבר שמסכן אותם פחות זה לא אותו אמצעי ולכן ניתן לבחור בדרך שמגנה יותר על הטייסים על אף הפגיעה הגדולה יותר שצפויה למטרות מוגנות. אז נכנסו לתוך המקרים הספציפיים. אחת הדוגמא היא התקפה על תחנת שידור סרבית שעל פי תיאורו, הפציצו תחנה זו כאשר ידעו שיהיו אזרחים שם. המטרה הייתה תחנת השידור עצמה. הצליחו להשבית את תחנת השידור למספר שעות והרגו 10-17 אנשים. התובע אמר שלהרוג 10-17 אזרחים כדי להשבית את התחנה לכמה שעות לא נראה מוגזם ביחס לצורך הצבאי ולכן זה עומד בכלל של מידתיות. זה נותן מדד מסוים למה זה אומר מידתי. הכללים הם שונים בדיני לחימה אם זה סכסוך בינלאומי לבין סכסוך מדיני. יש יותר דינים באמנות על סכסוכים בין מדינות. רוב הדין המנהגי מדבר על מלחמות בין מדינות. לחימה בתוך מדינה ולחימה של מדינה מול ארגון לא מדיני, זה לא היה נחשב מלחמה אמיתית. בגלל זה, יש הרבה מאוד אמנות על לחימה בין לאומית ומעט מאוד על לחימה לא בין לאומית. הדבר הבולט היחיד כמעט הנוגע ללחימה לא בינלאומית זה ס' 3 שמדבר על סכסוך מזוין שאינו בעל אופי בינלאומי. הוא אומר שיש כללים שונים (אין לעשות דברים זוועתיים כמו לקיחת בני ערובה, עינויים) אבל מקובל לחשוב שעל פי המנהג, בין אם זה בין לאומי ובין אם לא, הכללים של הבחנה ומידתיות עדיין חלים. אז זה לא כזה משנה מספר האמנות שיש. אבל זה כן עולה הרבה בעניין הסכסוך הישראלי- ערבי משום שאין בצד השני מדינה. חיזבאללה עוד חוצה גבול בין לאומי, עם חמאס זה לא. יש שאלה האם זה בין לאומי או לא ואיזה דין יחול אבל לצורכי הבחנה ומידתיות זה לא משנה. יש השואלים למה יש להתייחס לחובה המשפטית של היחידה הלא מדינית? בדר"כ הדינים הבינלאומיים זה כללים על מדינות, לא על יחידים. האם זה אומר שלוחמים של ארגוני טרור לא כפופים לדיני הלחימה? האם הם לא צריכים לכבד את הדין? אין תשובה מנומקת אבל יש דעה רחבה. רואים את זה בביה"ד המיוחד לסיירה ליאון. האם קבוצות מורדים ביצעו פשעי מלחמה. הסנגורים טענו שהם יחידים ולא פועלים בשם מדינה ולכן הם לא חייבים לכבד את הדין. פס"ד קובע שהם כן חייבים. כל צד ללחימה, לא משנה אם מדינה או לא, חייב לכבד את דיני הלחימה. משום שזה מן המפורסמות. כולם יודעים את הדינים על הלחימה ולכן אין סיבה להרחיב.

כללים נוספים

יש כללים נוספים שלא נדבר עליהם. הבחנה ומידתיות זה על התוקף. על הצד המגן למשל יש איסור להשתמש במגנים אנושיים. זה כתוב בס' 51 לאמנת ז'נבה הרביעית וכן בס' 51 לפרוטוקול 1 לאמנה. בכל מקרה, מבינים שאין להשתמש באזרחיים כמגנים למטרות צבאיות.

כלל נוסף שיש הוא perfidy- מעילה. כלומר, סוג מסוים של שקר שהוא רע מאוד. ס' 37 לפרוטוקול 1 קובע שאין לפגוע באויב בשימוש במעל אבל תחבולות לחימה הן בסדר. מה ההבדל? מעל זה דבר שגורם לאויב להיות בטוח שהוא מוגן/חייב לכבד את ההגנה ואז אח"כ למעול בביטחון הזה כדי לתקוף. **דוגמאות**: אדם שמשתמש בדגל לבן כאשר כוונתו אח"כ לבגוד בסמל ולתקוף; אדם המשתמש בסמל האו"ם או גוף נייטרלי אחר ואז לתקוף.

בגבעון חלפון אינה עונה יש סצנה שהם בסיני. אחד הולך לאיבוד ומוצא עצמו בשבי המצרי. החברים רוצים להציל אותו אז הם לוקחים ג'יפ, צובעים בלבן ואז שמים את הסמל של האו"ם רק בתור-UM. הם טוענים שהם אנשי או"ם ואז לוקחים את החבר ומצילים אותו. הם מנצלים את הסמל אבל לא תוקפים, אין מעילה. ולכן כשאנו מדברים על תחבולות מלחמה, זה די דומה. תחבולות מלחמה זה לגרום לאויב לפעול בצורה לא חכמה אבל לא גורמת להם להרגיש בטוחים ואז פוגעים בכך.

אי ודאות על עובדות

רוב הדברים שרבים עליהם בתקשורת אינם דברים באמת של הדין אלא על העובדות. יש כל מיני מאמצים של ארגוני הטרור ליצור תמונות ורושם שדברים מסוימים קורים בדרך מסוימת ולכן אין הרבה דברים לריב עליהם מבחינה משפטית. במלחמת לבנון השניה היה מאמר של ה-CNN שמתאר מה ראה בסיור כשהיה בלבנון. לקחו אותו אנשים שקשורים לחיזבאללה באזור בשליטת חיזבאללה (לא רצה להגיד שהם חלק מהארגון). הוא אומר שהם אמרו לו להגיד שיש הרבה הרוגים ופצועים בצורה כזו שהם כבר ממציאים. לקחו עיתונאים ואמרו להם לראיין נהגי אמבולנסים. יצרו להם תמונות כאילו הם נוסעים עם הצ'קאלקה.

היה אדם אחר שראה שיש תמונות שהראו הרס ואז באמצע יש צעצוע של ילד (כדי להבין שהקורבנות הם ילדים). היו הרבה מאוד תמונות.

הדין הבינלאומי על טרור

בדר"כ כאשר חושבים על ארגוני הטרור, חושבים במונחים של דיני לחימה אבל יש גם דיני טרור בינלאומיים. מהם? ענף של המשפט הפלילי הבינלאומי. עקרונית זה מוזר שיש בכל משב"ל פלילי. המשב"ל אמור להיות למדינות, לא ליחידים. אז מה זה? אם קובעים באמנה שיש דבר שנחשב כפשע, בלי מנגנון אכיפה, מדינות שנכנסות לאמנה, מתחייבות להכניס לדין העונשי שלהן ואז לאכוף בתוך המדינה. המשב"ל הפלילי מגדיר סוגים מסוימים של עבירות והם יטופלו במדינות. יש גם עבירות פליליות על טרור. יש אמנות ספציפיות כמו לקיחת בני ערובה ויש גם **שתי אמנות מרכזיות כלליות**:

1. האמנה למימון טרור- מייצר פשע של מימון טרור. מה זה אומר טרור בכלל? **שתי דרכים**:

א. יש רשימה של אמנות המדברות על מעשים ספציפיים שיחשבו כפעולות טרור כמו חטיפת מטוס, תקיפת נציג דיפלומטי, חטיפת אנשים, תקיפות מבנים ימיים וספינות וכו'

ב. מעשה המיועד לפגיעה/הריגה כלפי אדם אחר שאינו נוטל תפקיד פעיל בלחימה במצב של סכסוך מזוין כאשר מטרת המעשה זה להפחיד אוכלוסייה שלמה או להכריח מדינה/ארגון בינלאומי לעשות או להימנע ממעשה.

זה לא רק האדם המממן, אלא גם אדם המארגן אחרים לעשות את זה או תורם לקבוצה שמבצעת זאת כאשר יש להם מטרה משותפת ויודעים שהארגון הולך לבצע את הדבר הזה.

ס' 6 אומר שכל מיני הצדקות אידיאולוגיות לא משכנעות.

ס' 4 מחייב מדינות להכניס את זה לדין העונשי שלהן.

בערך 180 מדינות הצטרפו. מי לא? מדינות מוסלמיות ערביות.

1. הפצצות טרוריסטיות- יש אמנה על כך. זה לא קשור לאזרחים. הפצצה של מקום ציבורי, מתקן של המדינה, מערכת של תחב"צ או תשתית. מי שמפציץ במטרה לפגוע פגיעה קשה או לגרום מוות או הרס רב את אחת המטרות האלה, עובר על האמנה. זה גם מרחיב למי שלא בעצמו מבצע אלא מארגן הכל. כמובן, גם שם יש חובה על המדינות החברות להכניס לדין שלהן. ס' 3 מדבר על טרור בינלאומי- כל מעשה טרור אלא אם כן, כל העבירה התבצעה בתוך שטחי המדינה עצמה. גם הקורבנות וגם הפושעים הם אזרחי אותה מדינה, תפסו את הפושע באותה המדינה, ואין לאף מדינה אחרת סמכות. הצדקות אידיאולוגיות לא תופסות.

ס' 19 אומר שארגוני לחימה של מדינה, לא כפופים לאמנה כי חל עליהם דין הלחימה.

בערך 165 מדינות חברות באמנה זו.

בנוסף לאמנות אלה יש מספר החלטות של המועבי"ט. תיאורטית הן מחייבות כי הן תחת פרק 7. הן מחייבות ביצועית לא משפטית. יש הבדל במשפט המנהלי בין החלטות שיפוטיות ותחיקתיות לבין החלטות ביצועיות ולמועבי"ט דרך פרק זה, יש חיוב ביצועי. החלטה 1373 נשמעת תחיקתית ולא ביצועית. האם היא בהכרח מחייבת תחיקתית ולא רק ביצועית? לא ברור. ההחלטה אומרת שיש חובה משפטית על מדינות לא לעשות טרור, לאסור מימון, להימנע .... למנוע קליטה של אנשים שתומכים, עשו טרור או אפילו הגנו על טרוריסטים. זה רחב מאוד. הוא לא מגדיר מה זה טרור אבל בס' 3 קוראים להצטרף לאמנה למימון טרור אז יש רמז למה זה טרור. רמז נוסף הוא בהחלטה .... שקורא להילחם בטרור, לפעול נגד טרור, למנוע מקלט וכו'. הם "נזכרו" שפשעים נגד אזרחים שהם מבוצעים במטרה לגרימת פחד באוכלוסייה הכללית או קבוצה מסוימת של אנשים, או לגרום למדינה לעשות/להימנע ממעשה מסוים. זה דרך לרמוז שיש הגדרה על אף שאין הגדרה. הם לא רוצים שזה ישמע יותר מדי תחיקתי כי אין להם סמכות.

האם יש משהו בדין המנהגי נגד מעשי טרור?

יש פס"ד אחד של הטריבונל המיוחד בלבנון. היו צריכים להחליט איזה דין יחילו על הנאשמים. רצו לדעת אם ניתן להאשים אותם על פשעי טרור. ביהמ"ש קבע שכן מכח המשב"ל המנהגי. מה זה? לדעתם יש פשע של טרור במשב"ל המנהגי. נכון שאין הגדרה אחת באמנות השונות אבל בכל זאת, יש מספיק אמנות והחלטות של האו"ם ונוהג של מדינות שיש פשע כזה של טרור שיש לו **3 מרכיבים**:

1. ביצוע של מעשה פלילי (כמו רצח, חטיפה וכו')
2. כוונה פלילית של גרימת פחד בתוך האוכלוסייה או מעין סחיטה של רשות לאומית/בינלאומית לעשות/להימנע ממעשה
3. אלמנט בינלאומי כלשהו

יש גם אמנות אזוריות כמו האמנה הערבית נגד טרור. היא מגדירה טרור בצורה רחבה יותר. הדבר המוזר באמנה זו שהיא אומרת שבניגוד לכל האמנות האחרות, מקבלים הצדקות אידיאולוגיות. התנגדות לכיבוש זר לא תיחשב לטרור.

האם ארגוני טרור יכולים לבצע רצח עם?

האמנה לרצח עם בס' 2 מגדירה רצח עם. צריך כוונה פלילית- להשמיד כולה או חלקית קבוצה לאומית/גזעית/אתנית ככך. **דוגמא**: היה מנהיג מטורף בקמבודיה, קומוניסט קיצוני שרצה להילחם נגד האינטלקטואליות. מה זה אינטלקטואל? אדם שקורא, אדם שיש לו משקפיים. הוא הרג מיליונים. האם זה רצח עם? לא. הוא הרג קמבודים כאינטלקטואלים. רצח המוני כנגד קבוצה שלא מוגדרת בסעיף, זה לא רצח עם גם אם זה הריגת מיליונים. המעשה הפלילי הוא קטן ולכן לא נחוץ בהרג המוני כדי שזה ייחשב רצח עם. עם יש כוונה להשמיד את הקבוצה ככך והוא עושה אחד ממעשים אלה (הרג, חבלה חמורה, כולל נפשית) אז זה רצח עם. רצח עם זה לא בהכרח רצח המוני. גם רצח אחד יכול להיחשב. רצח עם נחשב גם כהעברה בכח של ילדים מקבוצה אחת לקבוצה אחרת, כנקיטת אמצעים למניעת ילודה בתוך הקבוצה וכיצירת תנאי חיים המיועדים להשמדה פיזית של הקבוצה (כאן יש דרישה של כוונה כפולה).

למי אמורה להיות אחריות פלילית? לא רק מי שמבצע, אלא גם מי שתורם, מי שמנסה, מי שמשתף פעולה ומי שמסית.

מה חובת המדינה? למנוע ולהעניש. זה דבר שנוי במחלוקת כי הגיעו טענות סרק לביה"ד בהאג והוא קבע שחייבים למנוע ולהעניש אבל ביה"ד עצמו לא יחייב מדינה למנוע ולהעניש לגבי רצח עם זר.

מה זה הסתה? יש פסיקה במיוחד במקרה של רואנדה. העמידו לדין גם אנשים שהסיתו באופן עקיף לרצח העם.