



FORTY YEARS AFTER 242: A “CANONICAL” TEXT IN DISREPUTE?

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This essay examines the consequences of the near-canonical status acquired over the years by UN Security Council Resolution 242. After tracing the evolution of the vision of peace seen to flow from 242, the essay explores the various ways in which the resolution has been read. In particular, the interpretation of Israel (backed by the United States) is examined, along with the balance of power factor. The essay concludes by suggesting that clinging to 242 as “canonical” inhibits clear-sighted thinking on new approaches that take cognizance of the greatly altered circumstances.

UNITED NATIONS SECURITY COUNCIL RESOLUTION 242 has a select status in international law. Several factors—the frequency of its invocation, its durability over time, the reluctance of influential political actors to repudiate its authority, and the widely shared sense that its abandonment would be a major setback for prospects of finding a solution acceptable to the parties—have given 242 a diplomatic and legal prominence that sets it apart from other instruments of conflict resolution. There is no comparable Security Council resolution relating to an unresolved international conflict, a fact that underscores 242’s special significance. Because the resolution has sustained its authoritativeness over the years, it seems appropriate to regard 242 as belonging to a domain of formal instruments in world politics that are beyond most forms of partisan controversy, although their interpretation may be sharply contested and their implementation highly variable.

SECURITY COUNCIL RESOLUTION 242 AND CANONICAL TEXTS

Resolution 242 falls short of unconditionally qualifying as canonical (the jurisprudential category that includes the Nuremberg Principles, the Universal Declaration of Human Rights, the Genocide Convention, and even the United Nations Charter) if only because its orbit of concern is a single historical

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conflict. The implication of such specificity is, presumably, that when the Israelis, Syrians, and Palestinians reach a settlement, 242 will likely disappear. Nonetheless, its decades-long persistence as the core normative consensus, and its repeated reaffirmation in almost all subsequent UN resolutions relating to the Arab-Israeli conflict, allows it to be treated as a weak version of a canonical text. Considering it as such for the purpose of argument can shed useful light on the resolution and its ramifications.

It should be emphasized that what makes a text canonical is not its substantive validity—even indisputably canonical texts must not be exempt from serious critical reflection—but rather its prominence and the general respect accorded to it from a variety of political standpoints. Moreover, as noted above, to be canonical even in the fullest sense (as with the UN Charter) is no guarantee of compliance. Canonical texts can be endorsed cynically, due to their generality and lack of enforceability, or interpreted and applied selectively to reflect the geopolitical realities of unequal power. For instance, Saddam Hussein was executed after a deeply flawed war-crimes trial that relied on a tradition of accountability of leaders explicitly linked to the Nuremberg precedent, while, *mutatis mutandis*, the issue of criminal accountability was not even raised in intergovernmental circles with reference to a clearly indictable George W. Bush.

Additionally, canonical texts are subject to wildly divergent good-faith interpretations by relevant governments and their supporters and detractors. Changing practical conditions affect prospects for implementation and can be deliberately constructed and manipulated for partisan advantage. Indeed, it is the gaps between the sanctified norms contained in canonical texts and their failure to control the behavior of governments and other international actors—especially the most powerful—that help explain why public opinion is so skeptical about the role of international law. This skepticism explains why international law experts have often been scorned, in the manner of Immanuel Kant, as “miserable consolers.” Such an epithet has never been more deserved than in relation to the neoconservative law specialists advising the Bush presidency since 9/11. It is also arguably applicable to those who contend, in the face of unambiguous textual language, that 242 is consistent with the permanent annexation of Palestinian territory seized in the 1967 war.

And yet, despite acute difficulties, canonical texts do serve an essential purpose in world politics: They frame public discourse on vital issues of public policy. In a crucial sense, the norms embedded in a canonical text are markers of reasonableness; any explicit rejection of such markers is widely interpreted as reliable evidence of political extremism or of irresponsible, politically irrelevant viewpoints. The normative order of world politics—a composite of law, morality, and religious ethics—is established in large part by the cumulative impact of canonical texts. This normative structure does exert an influence, though this influence is generally subordinate to the geopolitical order, which is itself based on global hierarchy and unequal power relations.

CHANGING REALITIES, CHANGING ASSUMPTIONS

One of the most remarkable features of 242 is that it continues to be invoked as the only “acceptable” basis for settling the conflict, even as its parameters have substantially changed: Neither the broad outlines of the envisioned solution nor even the major parties to the conflict are the same today as they were when the resolution was unanimously passed by the Security Council on 22 November 1967. It is true that nowhere in 242 is a vision of peace between the parties concretely specified. The central undertakings on both sides are preliminary to an actual peace process: Israel under the resolution is obliged to withdraw from the territories occupied in the 1967 war, and the states in the region are obligated to end the conditions of belligerency and to accept the right of all states to live in peace within “secure and recognized boundaries free from threats of or acts of force.”

At the time that 242 was drafted, global diplomacy was operating under Westphalian logic, whereby only states were seen as members of the world community, and only governmental representatives could participate fully in diplomacy. Thus, although the Palestinians in the West Bank and Gaza Strip constituted the overwhelming majority of the inhabitants of the territories occupied by Israel in 1967 (the Golan Heights being rather sparsely populated and the Sinai Peninsula even more so), they were absent from the resolution except through reference to the “refugee problem.” The West Bank at the time was part of Jordan, and the Gaza Strip was administered by Egypt. Under the terms of 242, the lands from which Israel was to withdraw were, in principle, to be returned to the states from which they had been captured: Egypt, Jordan, and Syria. There was no mention in the resolution of the Palestinian people or Palestinian rights, and certainly none of a Palestinian state. In fact, the concept of Palestinian Arab statehood had been recognized by the UN General Assembly in November 1947, when it recommended the partition of Palestine into Arab and Jewish states, but because of Palestinian opposition to the principle of partition, the subject was long taboo in Palestinian circles.

The absence of the Palestinians as a major party to the conflict has been addressed in the years since. In November 1974, the Palestinian people’s “inalienable right to self-determination” was officially recognized in UN General Assembly Resolution 3236. The anomalies that stood in the way of Palestinian statehood—or at least claims—have likewise been resolved. Egypt had never intended to retain the Gaza Strip, and Jordan renounced its claims to the West Bank in 1988. Meanwhile, the Palestine Liberation Organization, created in 1964 as a body effectively controlled by the Arab regimes, became an authentically representative Palestinian body in 1969 and began its own political transformation after the October 1973 war. This process culminated in 1988 in what amounted to Palestinian recognition of the Israeli state, an acceptance made explicit and official in the Oslo agreement of 1993.

With these developments, the stage was set for converting 242 from a document seeking to restore the status quo before the 1967 war—which formally

involved no direct Palestinian role—into an instrument underpinning a peace process aimed at achieving a mutually accepted “two-state solution” that would emerge from Israel-Palestine negotiations. Such an outcome obviously does not derive directly from the language of 242, and certainly not from the political

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setting that existed in 1967. Indeed, the fact that a resolution that fails to make any reference to a Palestinian state or even to Palestinians has come to be understood as implicitly embodying the two-state consensus seems ironic. Its widespread acceptance as a fair solution has evolved over time and been made explicit in diplomatic affirmations by all parties. It is the main expression of an overlapping consensus endorsed by the political leaders of Israel, the Palestinian Authority, and the United States.

Security Council Resolution 242’s quasi-canonical status was enhanced by the unanimous passage of Security Council Resolution 338 in the wake of the October 1973 war. This resolution calls “upon all parties to start immediately after the cease-fire the implementation of Security Council Resolution 242 (1967) in all of its parts,” and “[d]ecides that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.” The resolution’s mention of “appropriate auspices” was understood at the time to be a reference to the United States and the Soviet Union and was intended to override the United Nations, again a notable reassertion of geopolitical primacy, showing deference to Israeli diplomatic demands. Despite the abstract display of unanimity in the resolution’s passage, again achieved in the midst of the cold war, 242 was not implemented in any of its parts, nor were negotiations initiated.

Still, 242 has been treated almost from its inception as an authoritative if not fully canonical text. Its authoritativeness—reaffirmed to this day as containing the ingredients of the only “realistic” solution acceptable to a broad spectrum of opinion on both sides—has served in a number of ways. By affirming 242, the more maximalist demands favored by militant minorities on both sides (the establishment of “Greater Israel” on the Israeli side; the destruction of Zionist Israel on the Arab side) were deliberately marginalized. Rejection of the two-state approach remains situated outside the domain of influential advocacy (although to a lesser extent than it was a few years ago). The consensus anchored in 242 has appeared to provide the peace process with a more or less agreed-upon structure, presupposing a Palestinian state but not challenging the territorial boundaries or the Zionist identity of pre-1967 Israel as a Jewish state.

Rather soon after 242’s passage, however, it began to seem obvious that this consensus was mainly rhetorical, hiding very different conceptions. This has remained the case as the envisioned ultimate outcome of 242 has shifted over time to that of a two-state solution. Moreover, developments on the ground have cast doubt on the attainability, and even the viability, of the current two-state

vision of territorial and political compromise. The extensive Israeli settlements and accompanying road network, as well as Israel's apparent refusal to reverse its de facto permanent incorporation of the whole of Jerusalem into its territory, are among the factors greatly complicating—if not rendering impossible—the establishment of a future Palestinian state acceptable to the majority of Palestinians and considered fair by impartial third parties. The fundamental changes in circumstances are one-sided in their impact, adversely affecting the Palestinians while seeming to enhance Israeli prospects. As a result, the kind of two-state solution envisioned as an eventual outcome of 242 in the 1970s and 1980s was more balanced than what has seemed negotiable in the late 1990s and the early years of the twenty-first century.

In this regard, 242's quasi-canonical status serves as a benchmark to evaluate the reasonableness of the diplomacy being pursued on both sides. Indeed, the turn against Israel in much of world public opinion stems not only from its refusal to implement the called-for withdrawal, but even to preserve the status quo presupposed by 242's agreed undertakings; Israel's actions in these regards have been seen as failing to show respect for the views of the world community. By embarking almost immediately after the June 1967 war on building settlements in the occupied territories; by moving to alter the demographic balance within Jerusalem itself, incorporating adjoining Palestinian villages into an expanded Jerusalem, building new settlements within the city limits, enacting various zoning laws and expelling Palestinian residents; and, since Oslo, by stepping up its settlement program and implementing an expensive network of settler-only roads in the West Bank, Israel has raised doubts as to whether it seeks a genuine solution of the sort that has evolved over time. These doubts have been deepened as a result of the construction of an illegal wall on occupied Palestinian territory and by other moves implying Israel's rejection of the sort of Palestinian state that could have been established if the territorial withdrawal called for in 242 had been implemented. In effect, the Israeli effort to create “facts on the ground” can be read in at least two ways: as an effort to redefine the vision of peace initially thought to flow from 242, or as an unreasonable set of moves that makes the implementation of 242 more difficult, if not impossible.

A characteristic of 242 that has not attracted sufficient commentary is its failure to call upon the parties to resolve their disputes in accordance with international law. The position taken by Israel (and backed generally, but not invariably, by the United States) has been that contested issues should be addressed through negotiations and that de facto realities must be taken into account as they develop. This kind of posture has great bearing on the Israeli settlements. From the perspective of international law, these settlements are flagrant violations of Article 49(6) of the Fourth Geneva Convention governing belligerent occupation and should be unconditionally removed without engaging in any bargaining. But Israeli diplomacy associated with its disengagement from Gaza in 2005 yielded a formal acknowledgement by the U.S. Government of Israel's right to retain its main settlement blocs in the West Bank. Such an

acknowledgement has great political weight, although in a legalist sense an agreement between Israel and the United States cannot diminish Palestinian legal rights, nor can it reconstitute any third-party assessment of a just solution of the conflict. Similarly, in light of the International Court of Justice (ICJ) Advisory Opinion on the Israeli security wall, if 242 were reinforced by an obligation to adhere to international law, Israel would have to dismantle the wall or relocate it to its side of the green line as a precondition to the implementation of 242.

The quasi-canonical status of 242 as an overall framework does not assure that its specific norms will be respected or substantially implemented. This failure to bring international law to bear explicitly in a conflict resolution situation almost guarantees that resulting arrangements will bear the imprint of geopolitical asymmetries. Such an observation is particularly true with respect to Israel and Palestine, where the inequalities associated with all dimensions of power are so pronounced. According relevance to international law would have had some equalizing effects on what could be reasonably expected to result from negotiations.¹ The exclusion of international law from the interpretative context, both with respect to 242 itself and the wider realities of relations between the parties, has gradually made the resolution appear to be less deserving of its canonical status. It has also made Palestinians and their supporters increasingly feel that 242 now serves primarily as a smokescreen for the conduct of a geopolitics that consistently ignores rights and duties under international law, an impression reinforced by Israel's continuing efforts to reshape the situation in occupied Palestine to its great advantage.

INTERPRETING "CANONICAL" NORMS IN 242

The substantive reality of a canonical text consists of its principal norms. This is particularly the case with respect to 242. A serious weakness in international law is the absence of authoritative, impartial, and effective interpreters of the meaning of norms. Even when such an authoritative and impartial interpretation can be obtained, as with the ICJ's determination that Israel's separation wall is unlawful and should be dismantled, the opposition of geopolitical forces is often sufficient to deprive the legal assessment of any prospect of effective implementation; the legal assessment by the United Nations' judicial arm has been safely ignored by Israel, without any hint of adverse consequences. Despite the relative clarity of language in 242 favorable to core Arab (and later Palestinian) claims, the geopolitical asymmetry has allowed Israel to strain the interpretations of these claims, thereby undermining the clarity and influence of what purport to be canonical norms.

These observations apply most centrally to the core norm relating to Israel's legal duty to withdraw. The language here would seem clear enough, calling for "[w]ithdrawal of Israel armed forces from territory occupied in the recent conflict." This clarity is reinforced by the assertion in the preamble of 242, "[e]mphasizing the inadmissibility of the acquisition of territory by war." The

Israeli nonimplementation of this canonical norm as applied to the aftermath of war in 1967 has never been treated as a serious challenge to the status of 242 or as a repudiation of a fundamental principle of international law prohibiting the acquisition of territory by force. Israel has been able to get away with its nonconforming behavior because it enjoys a protective geopolitical context.

It is true that a second norm contained in the first operative paragraph of 242, and coupled with the unconditional obligation to withdraw, affirms Israel's right "to live in peace within secure and recognized boundaries free from threats or acts of force." It further calls for the "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area." These assertions appear to be parallel unconditional obligations, but diplomatic practice does lend some persuasiveness to Israel's line of interpretation. Israel withdrew from the Sinai, also occupied in 1967, only after a negotiated agreement with Egypt. In that agreement, signed at Camp David in 1978, Egypt agreed to end its state of belligerency with Israel and establish normalized diplomatic relations. This being the case, it can be argued that the diplomatic follow-up to 242 shows that the two norms are interdependent, and that their implementation is not a call for separate and immediate implementation, but rather depends on diplomatic negotiation, which, if successful, results in implementation by both sides. In that sense, Israel and the United States have succeeded in making the implementation of the core norms in 242 nonautomatic and dependent on diplomacy, which again brings power differentials to the fore. An additional distorting feature is the rather incredible double role played by the United States: at once Israel's unconditional ally and the only actor permitted to act as third-party mediator. Nothing more vividly confirms the weakness of the Palestinian side than their acquiescence in such a framework of negotiations and conflict resolution. Given such a reality, how can one expect a fair and balanced peace process? The erosion of the potential mediating role of 242 as enacted in 1967 has become a metaphor for decades of Palestinian frustration and disappointment.

Israel has also mounted an interpretative or semantic challenge to the withdrawal norm, stressing that the language of withdrawal "from territories" deliberately excluded the definite article "the" prior to "territories." The Israeli line of argument legalistically insists that this formulation must be coupled not with the preambular insistence on the inadmissibility of acquisition of territory by force, but rather with the affirmation of a state's right "to live in peace within secure and recognized boundaries." Israel argues that the 1967 boundaries were insecure and must therefore be adjusted to ensure Israeli security. This interpretation has been unilaterally applied with "facts on the ground," especially the large so-called settlement blocs, which have come to be accepted as permanent despite their illegality. In this instance, Israel has cleverly relied on an extreme form of legalism to serve its narrow goal of imposing its understanding of 242 while successfully blocking the Palestinians' entirely appropriate reliance on international law more broadly to clarify the duties of the parties. Once again,

it is only the imbalance in power and influence that allows Israel to get away with such an inconsistent approach to the relevance of international law.

There are other canonical norms contained in 242, especially “the necessity” of “achieving a just settlement of the refugee problem.” By using the adjective “just” rather than “in accordance with international law,” 242 opted for ambiguity and flexibility. In effect, this made the refugee question subject to political maneuvering that ensured the decisive impact of power inequalities, which means in practice giving way to Israeli policy priorities. To some degree (though symbolically and in vain), this geopolitical disadvantage has been challenged by a series of General Assembly initiatives (especially UNGA Res. 194) that supported the Arab position on refugees. This gap between legal expectations and political realities bears witness to the unbridgeable chasm separating Palestinian rights under international law from Palestinian subordination to geopolitical imperatives. Nowhere does the specifically Jewish character of the Israeli state as established in 1948 bear more directly and cruelly on the fate

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of the Palestinian people than with respect to the uncompromising approach taken by Israel toward Palestinian refugees. And nowhere is the support given to Israel’s avoidance of the general requirements of international law more apparent than in the acceptance of its denial of any right of return to Palestinian refugees, including those who fled or were expelled in 1948, even as it maintains an unrestricted right of return of global scope for all Jews. In this sense, by failing to describe Palestinian rights more explicitly, 242 has in its own way contributed to the long ordeal of the Palestinian people.

The canonical norms contained in 242 frame popular and diplomatic discourse to such an extent that geopolitical actors take great pains to show that their preferred positions do not depart from its guidelines. At the same time, the expectations for compliance with the spirit, much less the letter, of canonical norms have been shattered by the thinly disguised unwillingness of Israel to adhere to the preambular affirmation of the nonacquisition of territory by force. Such unwillingness has produced a prolonged occupation of the West Bank and Gaza (the latter persisting despite the 2005 “disengagement,” which was essentially a redeployment of Israeli military forces) that discloses no signs of ending in the foreseeable future, notwithstanding periodic flickers of interest in re-embarking upon a peace process. It is possible that a Palestinian partner in negotiations acceptable to the Israeli government, as is arguably the case currently with Mahmud Abbas, would agree to a Palestinian “state” that involves far more substantial territorial concessions than could be embraced by any reasonable understanding of the sort of minor boundary adjustments envisaged by 242 for the sake of Israeli border security. Even if this departure from Palestinian hopes were to be accepted by Palestinian officials, it is highly unlikely that such a “solution” would end the conflict, as it would likely be repudiated by the overwhelming majority of Palestinians.

RESOLUTION 242 AFTER FORTY YEARS

UNSC Resolution 242 was conceived with high expectations, given the unanimity that underpinned its formulation in the midst of the cold war. Had it been implemented soon after its adoption, a far more constructive relationship might have emerged between the two peoples. As the years passed, however, the adverse consequences of its non-implementation have worsened the situation of the Palestinians. Israel's refusal to withdraw from Palestinian territory, coupled with the settlements phenomenon, seemed to indicate an intention to make some features of the occupation irreversible. This understanding of the situation contributed to an increasing pessimism surrounding the quest for a peaceful solution to the conflict in accord with the contours of 242. The whole of occupied Palestine covers less than 22 percent of Mandate Palestine, which seems like a minimum territorial threshold for a solution acceptable to most Palestinians. It needs to be remembered, and has not been stressed enough by Palestinian leaders, that 242 incorporates this incredible concession with respect to the allocation of the land comprising historic Palestine.

In this respect, the continued invocation of 242 appears to be diverting attention from what originally had seemed a basis for a viable peace process leading to a fully sovereign Palestinian state comprising the West Bank and Gaza Strip, with a balanced solution for joint administration of Jerusalem, the treatment of Palestinian refugees, and a series of other issues of lasting concern to both sides. The extent of the settlement archipelago within occupied Palestine, the transformed status of Jerusalem, the separation barrier, and Israel's unwillingness to give ground on the refugee issue, all suggest that it is disingenuous to pretend that the sort of two-state solution read into 242 is still attainable. Yet even as this reality becomes increasingly obvious, Israeli and U.S. officials have been asserting their acceptance of a Palestinian state. No mention is made of the altered circumstances that engender deep skepticism as to what might be intended by way of a Palestinian state. Realistically, what has been recently offered to the Palestinians is a Bantustan state with few ingredients of political independence, territorial integrity, and sovereign rights. In exchange, Palestinians would be required to renounce any further claims against the political status quo.

Against such a background, it is questionable whether, on this fortieth anniversary of UNSC 242's adoption, the resolution retains much benefit for the Palestinians either by way of pointing to a solution or providing the UN with benchmarks to assess the behavior of the parties. As argued, geopolitics and Israel's creation of facts on the ground have cast doubts on whether a two-state solution can still be the basis of a sustainable peace or a reasonable outcome of the Palestinian struggle for national self-determination.

Nevertheless, for the foreseeable future 242 is likely to retain its qualified canonical status for the reasons described above. Because of this status, there is a reluctance to repudiate it, especially on the Palestinian side, as such a measure would be treated by the media and hostile governments as definitive evidence

of Palestinian unwillingness to pursue a peaceful solution along the lines prescribed by the international community. This in turn would lend credibility to Israel's claim that it has no partner for peace and is therefore justified in its unilateral moves to formalize annexation of Palestinian territory. For many Palestinians, casting aside 242 would eliminate the last vestige of international protection of their basic entitlement to self-determination.

The question that lingers is whether such a partial canonical status interferes with the introduction of an altered discourse on the Israel/Palestine conflict, especially a willingness to consider a one-state secular democracy an acceptable way forward, at least for the Palestinians. So far, any challenge to the image of a two-state solution has been successfully marginalized even when put forward by as influential a commentator as Edward Said.

For these reasons, 242 remains a qualified canonical text, but it possesses questionable relevance to widely shared, morally and politically legitimate Palestinian aspirations. It remains abstractly authoritative for Israel and the United States, as both governments are content with a two-state solution that incorporates most of the "facts on the ground" and are deeply opposed to any serious consideration of alternatives that challenge the validity of an Israeli Jewish state. As the discussion above suggests, this fortieth anniversary of 242 should certainly be observed, but not in a spirit of celebration.

There is, then, a dilemma facing the Palestinians. Their repudiation of 242 would have a variety of negative consequences and be criticized as disruptive by some within the international community. But continued Palestinian invocation of 242 creates the false impression that a satisfactory end to their long struggle for self-determination can still be reached through a two-state solution. Given this additional burden on the Palestinians, what seems most beneficial at this junction is to combine critical scrutiny of 242 with a willingness to consider alternatives, especially proposals of a confederated single state.²

One possible compromise might be to retain respect for 242 while questioning its continuing claim to even qualified canonical status. What would be repudiated would be the special aura of untouchability associated with canonical texts. What would not be repudiated would be 242's place as a historically significant expression of Security Council attitudes that may or may not provide guidelines for conflict resolution given the passage of time and the altered conditions on the ground. What is needed at this point is a critical examination of this hallowed text. If continuing deference in 242 seems desirable, it should be made with eyes wide open.

NOTES

1. For elaboration of this argument, see Richard Falk, "International Law and the Peace Process," *Hastings International and Comparative Law Review* 28, no. 3 (2005), pp. 331-48.

2. For a powerful treatment of such options, see Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Ann Arbor: University of Michigan Press, 2005).