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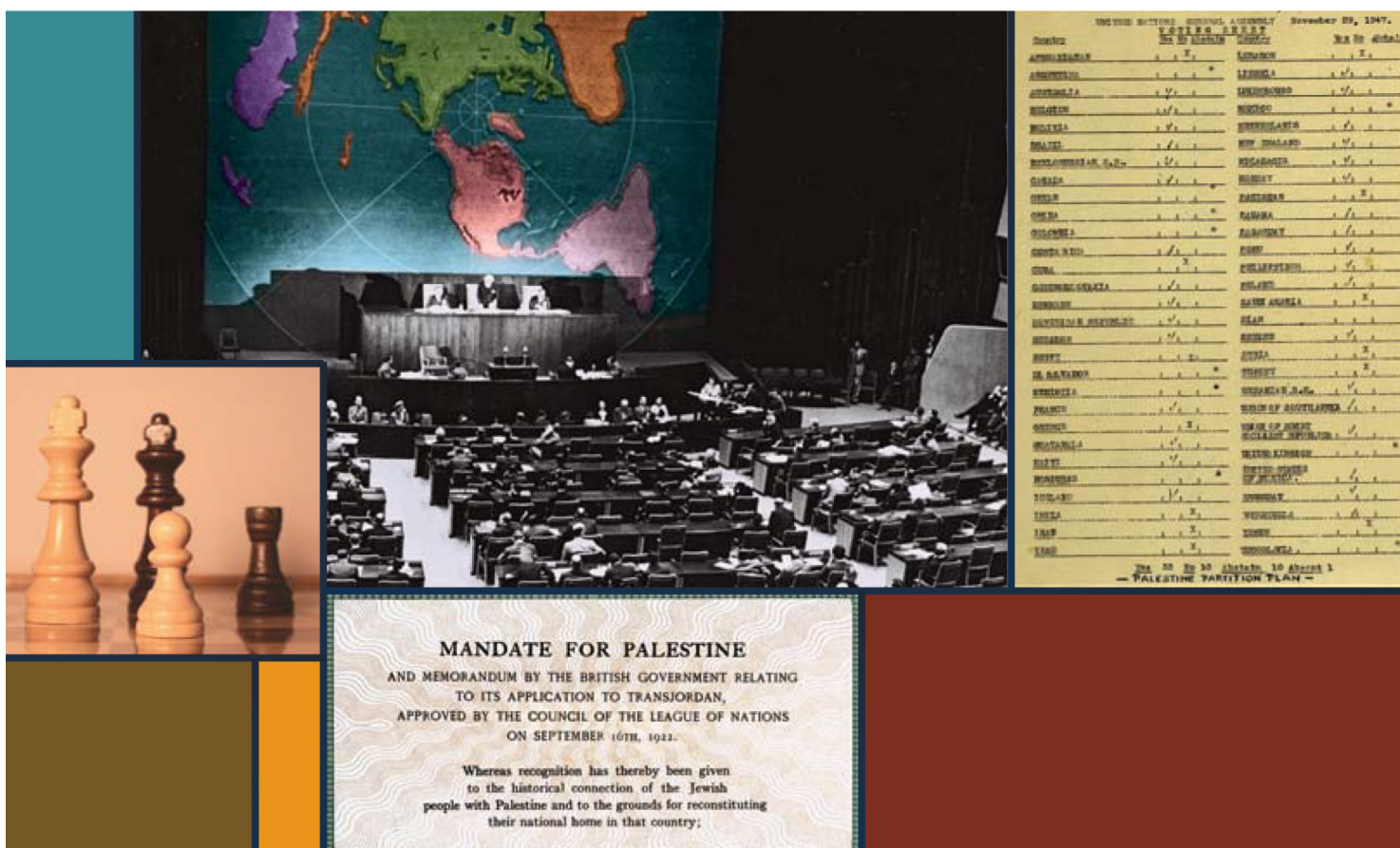
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ISRAEL'S RIGHTS as a Nation-State in International Diplomacy

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THE VIOLATION OF ISRAEL'S RIGHT TO SOVEREIGN EQUALITY IN THE UNITED NATIONS

Alan Baker

INTRODUCTION

It is assumed, and even goes without saying, that as a nation-state within the framework of international diplomacy, Israel enjoys the most elementary and basic right of all states: to be regarded and accepted, and to conduct itself vis-à-vis other states **on the basis of full equality**.

The concept of statehood implies that an entity exercises the requisite components of orderly governance of its population, responsibility for its actions, capability to enter into and implement its obligations vis-à-vis other entities, and those other qualities that render it a viable member of international society.

As such, statehood inherently implies commonality with a wider framework of parallel sovereign entities that carry the same or similar capabilities and qualities, so as to function as an international community. Thus, implicit in the concept of statehood is the characteristic of interrelationships with like entities on an equal basis, without which statehood as such would be purely introvert and relate only to the inner framework of relationships between the government and the population.

While theoretically such assumptions may be both correct and logical, in practice they are not applied to Israel in several contexts within the international community.

The intergovernmental framework in which this situation is typified is the United Nations, which practices a blatant and open policy of discrimination against Israel that is clearly *ultra vires* the very Charter that guides the UN's functioning.

Similarly, but to a lesser degree, the International Red Cross movement has, for over sixty years since the establishment of the state of Israel, avoided acceptance of Israel as a fully-fledged member of the movement, despite the operation by Israel of a well-organized medical and humanitarian assistance organ, under the emblem of the Red Shield of David.

SOVEREIGN EQUALITY IN INTERNATIONAL LAW

The very concept of sovereign equality is rooted in the emergence of the state as an entity that interrelates with other states. It emerged with the 1648 Peace of Westphalia, which put an end to a series of conflicts between Europe's Catholic and Protestant monarchs in the early seventeenth century. This document legitimized the right of sovereigns to govern their people free from outside interference.

During the initial drafting of the Charter of the United Nations, the expert in jurisprudence Hans Kelsen, in an article in the 1944 *Yale Law Journal*, makes reference to the Moscow Declaration of October 1943 in which the governments of the United States, the United Kingdom, the Soviet Union, and China jointly declared that they recognized "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of sovereign equality of all peace-loving States and open to membership by all such States, large and small for the maintenance of international peace and security."¹ Kelsen goes on to analyze the connection between the two concepts as follows:

The term "sovereign equality" used in the Four Power Declaration probably means sovereignty *and* equality; two generally recognized characteristics of States as subjects of international law; for to speak of "sovereign equality" is justified only insofar as both qualities are considered to be connected with each other. Frequently the equality of states is explained as a consequence of or as implied by their sovereignty.

Being subjects of international law, member states in the international community are, by definition, equal to each other. Sir Robert Jennings, former president of the International Court of Justice, notes that:

This equality is not equality of power, territory or economy: States are, by their nature, unequal as regards their territorial, financial, military and other characteristics. Rather, this equality is as members of the international community, whatever the differences between States. Thus sovereign equality refers to the legal equality of States, as opposed to the political equality, and is often described as "juridical equality" i.e., equality before the law; in the case of States, international law.²

Sovereign equality is a fundamental component of the 1945 UN Charter. The principle of equality is set down in the introductory paragraph, which states: “We the peoples of the United Nations determined...to reaffirm faith...in the equal rights...of nations large and small.”³

The principle itself is incorporated in Article 2, according to which:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.⁴

This principle was given added clarification and weight by the UN General Assembly in the 1970 “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,”⁵ a document intended to clarify the provisions of the UN Charter for implementation purposes. In its twelfth preambular paragraph the declaration reaffirmed:

Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations,

In detailing the principle of sovereign equality, the declaration stated as follows:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are judicially equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

SOVEREIGN EQUALITY AND ISRAEL'S RIGHTS

But theory and practice pull apart. Most theorists acknowledge the fact that sovereign equality is not a principle that actually characterizes the *modus operandi* of the UN.

...the view that States are fundamentally equal appears to be mostly theoretical; they are not truly equal under the UN Charter system.⁶

This is especially evident in Israel's case where the assumptions inherent in sovereign equality – judicial equality, equality of voting, equality in participation in all UN activities and processes, and equality in membership in all fora – break down and leave Israel isolated and discriminated-against.

THE REGIONAL GROUP SYSTEM

The root-cause of Israel's isolation in the United Nations is the regional group system, ostensibly intended as a means of instituting a system of “equitable geographical representation” within the organization, which, while not formally dictated by the terms of the UN Charter, nevertheless has become an essential component in the working structure of the organization.⁷

The abovementioned Sir Robert Jennings refers to the regional group system as follows:⁸

The regional group system has become the central mechanism for the representation and participation of UN Members in the UN system. Membership of a regional group is the only way full participation in the work of the UN system can be ensured.

On the issue of selection of candidates for positions in UN organs or bodies, he goes on to state:⁹

In those UN bodies where regional group voting has been formalized...membership of a regional group is the only way a state can have its candidate put forward for a position...

In summary, a state that is not a regional group member can never be elected to a UN body which formally or informally has adopted the regional group system for distribution of elected places...

Even where the distribution of elected places has not been established according to a fixed formula, if distribution of elected places is to take place according to “equitable geographical distribution,” this is to be interpreted by members as meaning that elected places should be distributed according to the regional group system. In such a case, regional groups consult amongst themselves over the distribution of positions and then consult [internally]...to agree upon which of their members are to be “nominated”...¹⁰

The geographical groups ostensibly encompassing all UN member states are the Western European and Others Group (WEOG), the Asian Group, the African Group, the Eastern European Group, and the Latin America and Caribbean Group (GRULAC). This system places the entire process of elections to organs and committees throughout the UN system, as well as consultations on virtually all issues on the agenda, under the exclusive jurisdiction of the regional groups.

Since Israel is excluded from its geographical regional group – the Asian Group (by vote of the Arab and Muslim members of that group) – and is not accepted as a full member in the Western European and Others Group, and does not enjoy any other special or *ex-officio* position in the United Nations, Israel is, to all intents and purposes, denied its Charter-guaranteed equality.

CONSEQUENCES OF ISRAEL'S EXCLUSION

In such a situation Israel can never put up its candidacy for membership of the Security Council, the Economic and Social Council, or the other major UN organs such as the International Court of Justice, it is denied any chance of having its jurists chosen as candidates for the major juridical institutions, tribunals, and courts within the UN system, and it cannot participate in consultations between states, organized within the regional group system, to determine positions and voting on issues, resolutions, and other matters.

A particularly sad and frustrating, yet typical example of this boycott of Israel's candidates is the case of the late Prof. Shabtai Rosenne, generally considered to have been the world's greatest expert on the International Court of Justice, the laws of international treaties, and the law of the sea. Prof. Rosenne was nominated at different periods to be a judge on the International Court of Justice, and later to be a judge on the International Tribunal on the Law of the Sea. However, due to the fact that Rosenne, an Israeli, was not supported by any regional group, his election failed.

This case of clear discrimination against Israel was, for several years, raised annually by both Prof. Rosenne and Ambassador Alan Baker, respectively, Israel's representatives to the Sixth (Legal) Committee of the General Assembly, under the agenda item entitled "Report of the Special Committee on the Charter of the United Nations and on Strengthening of the Role of the Organization." Referring to a working paper that had been discussed in the Special Committee, on the improvement of cooperation between the United Nations and regional organizations, Israel's representative (Alan Baker) stated the following on October 20, 1992:

89. Before determining viable regional procedures for dealing with crises through regional organizations, the Special Committee might wish to consider such questions as universality and equality within regional organizations, given that those principles are basic components of the United Nations Charter and would have to be more or less applicable with respect to the regional organizations concerned. The United Nations is a universal intergovernmental organization, and an equal opportunity must be given to all Members to participate fully in its activities. Regional organizations that could potentially function in cooperation with the United Nations pursuant to the principle

enunciated in Article 52 of the Charter, according to which their activities should be “consistent with the Purposes and Principles of the United Nations,” must also seek to involve all the States in the geographical Region in question. Regional activities directed towards the settlement of local disputes, the establishment of regional security mechanisms or the establishment of information networks could only be pursued when all the countries of a region were regarded as fully accepted and equal parties to them. His delegation trusted that the element of universality and equality within regional organizations would be considered in revised versions of the working paper and in their consideration by the Special Committee with a view to placing the elements of the working paper within the framework envisaged in Chapter VIII of the Charter.

91. The principles of the sovereign equality of States and the universality of the United Nations had not yet been fully implemented within the United Nations system as a whole. Israel, which had been confined to membership of a regional group composed of a single State, had repeatedly deplored the imbalance in the organs of the General Assembly and other bodies of the United Nations system. Elections were inevitably a function of political considerations, and regional groupings were *clearly* identified. In the context of giving reality to the Secretary-General’s observations in his report, “An agenda for peace,” regarding “democracy within the family of the United Nations” and the need for “the fullest consultation, participation and engagement of all States, large and small, in the work of the Organization” (A/47/277-S/24111, para. 82), it would perhaps be advisable for the Special Committee to consider giving substance to the principles of the sovereign equality of States and the universality of the United Nations by examining alternative systems of representation in organs and bodies which would better ensure the realization of those principles.¹¹

Some years later, in a speech on March 25, 1998, addressing Israel’s exclusion from the regional group system, the UN Secretary-General admitted:

one way to write that new chapter [in Israeli-UN relations] would be to rectify an anomaly: Israel’s position as the only Member State that is not a Member of one of the regional groups, which means it has no chance of being elected to serve on main organs such as the Security Council or Economic and Social Council. We must uphold the principle of equality among all UN member states.

He reiterated this view a year later, on May 12, 1999, stating:

Israel could do much more for the United Nations were it not for a significant obstacle: its status as the only Member State that is not a member of a regional group, which is the basis of participation in many United Nations bodies and activities.¹²

In his detailed legal opinion regarding the “Exclusion of Israel from the United Nations Regional Group System” dated November 4, 1999, Sir Robert Jennings analyzed in detail the nature of the

Countries eligible to sit on the United Nations Security Council:

Algeria
Argentina
Australia
Austria
Belgium
Bolivia
Brazil
Canada
Chad
China
Colombia
Congo
Cuba
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
France
Germany
Ghana
Greece
Guatemala
Honduras
Hungary
India
Indonesia
Iraq
Italy
Japan
Jordan
Kenya
Kuwait
Laos
Lebanon
Liberia
Lithuania
Luxembourg
Madagascar
Malawi
Malaysia
Maldives
Mali
Mauritania
Mauritius
Mexico
Morocco
Mozambique
Myanmar
Netherlands
New Zealand
Nicaragua
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Poland
Portugal
Romania
Russia
Senegal
Sierra Leone
Singapore
South Africa
South Korea
Spain
Sri Lanka
Sweden
Switzerland
Tanzania
Thailand
Togo
Tunisia
Turkey
Uganda
Ukraine
United Kingdom
United States
Uruguay
Zambia

Morocco
Mozambique
Myanmar
Netherlands
New Zealand
Nicaragua
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Poland
Portugal
Romania
Russia
Senegal
Sierra Leone
Singapore
South Africa
South Korea
Spain
Sri Lanka
Sweden
Switzerland
Tanzania
Thailand
Togo
Tunisia
Turkey
Uganda
Ukraine
United Kingdom
United States
Uruguay
Zambia

Countries not eligible to sit on the United Nations Security Council:

Israel

Believe it or not, Israel is the only one of the 185 member countries ineligible to serve on the United Nations Security Council, the key deliberative group of the world body. Even Iraq is eligible. So is Iran. And so, too, are Cuba, Libya, North Korea, Sudan and Syria.

Why is it that these seven nations, all cited by the U.S. State Department as sponsors of terrorism, are eligible to serve in rotating terms on the Security Council, yet Israel, a democratic nation and member of the UN since 1949, is not?

To be eligible for election, a country must belong to a regional group. Every UN member state—from the smallest to the largest—is included in one of the five regional groups. By geography, Israel should be part of the Asian bloc, but such countries as Iran and Saudi Arabia have dominated its entry for decades.

But only Israel among all UN members is denied the right to belong to any regional group. As a temporary measure, Israel has sought acceptance in the Western European and Others Group (WEOG), which includes not only the

corporates of Western Europe but also the United States and other Western countries.

The UN Secretary General, Kofi Annan, on March 26, 1998, called for an end to this injustice to Israel and "the normalization of Israel's status within the United Nations." Moreover, several countries, including the U.S., Australia, Canada and Norway, have expressed support for Israeli admission to WEOG, but the 15-member European Union refuses to act.

Thus, without membership in a regional group, Israel can never be elected to serve a term on the Security Council or, for that matter, to the other most important bodies of the UN system, such as the Economic and Social Council, the World Court and the Commission on Human Rights.

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The American Jewish Committee

Full-page advertisement of the American Jewish Committee in the New York Times illustrating the fact that only Israel was not eligible to sit on the UN Security Council in 1998 (New York Times)

breach of the UN Charter by the UN itself in enabling the continued and ongoing exclusion of Israel from the enjoyment of its right to sovereign equality:

Exclusion of one member from an essential part of the workings of an international organization in which all other members are entitled to participate is a crude breach of the rule on non-discrimination. Discriminatory exclusion of a UN member from the regional group system therefore places the United Nations in breach of Article 2.1¹³

The actual situation for the State of Israel...is that its rights as a Member of the United Nations to participate in the work of the United Nations are largely nullified by its exclusion from membership of a regional group. In practical terms it is simply denied participation in any (indeed most) of the activities, functions, and offices in which all other Members do participate and are able by generally accepted means to exercise influence and power, to nominate for appointments including appointments or elections to UN agencies and organs. This hobbled and undignified position in which the State of Israel uniquely finds itself is without doubt morally shocking; but it is also manifestly unlawful and constitutes a breach of both the letter and the spirit of the Charter of the United Nations.¹⁴

Israel's continuing exclusion from the regional group system is both unlawful and strikes at the roots of the principles on which the United Nations exists. The remedy for the illegality is clear: Israel's admission to full participation in one of the regional groups. I venture to suggest that Israel's exclusion should no longer be tolerated; and that it is now an issue of primary importance for the Organization itself to see that it be remedied. So long as it continues, the Organization is itself in breach of its own Charter.¹⁵

Despite these very serious and ominous words from a former president of the UN's main judicial organ – the International Court of Justice – himself a world-renowned international lawyer, nothing was done by the UN to remedy this breach of the UN Charter by the organization itself.

Had there been established a monitoring or supervisory body above the UN, empowered to review actions by the organization in light of the Charter requirements and to declare UN actions and resolutions *ultra vires* the Charter, there is no doubt that the discrimination against Israel in denying its sovereign equality would have been remedied long ago.

LATER DEVELOPMENTS

Efforts have been made over the years to improve Israel's situation, even by means of a compromise step of seeking admission to another geographical group. A limited element of success was achieved in May 2000, when Israel became a "temporary" member of the Western European and Others Group (WEOG) in New York. WEOG is unique in that geography is not the sole defining factor, and WEOG members include states from North America, Western Europe, the Pacific region, and Asia. Israel's "temporary" membership was limited chiefly to participation in consultations rather than nominating candidates for election to main UN bodies (although election to the lower bodies was envisaged), and it was conditioned on a formal commitment by Israel to continue to seek acceptance into its own geographic group – the Asian Group.

As such it remains highly unlikely that Israel will ever be elected to such major UN organs as the Security Council, ECOSOC, or the International Court of Justice. Furthermore, the positive yet limited implications of Israel's temporary admission into WEOG in New York notwithstanding, Israel remains excluded from the regional group system outside New York. As such, Israel can



Ambassador Richard Holbrooke, U.S. Permanent Representative to the UN in 1999, sought to obtain for Israel the right of sovereign equality in the UN system, including the right to be elected to the UN Security Council. (AP Photo/Thierry Charlier)

neither participate in Western group consultations and meetings in the UN bodies outside New York, nor can it nominate candidates to UN positions in UN bodies where elections for those bodies are not organized by the New York regional group system.

A slight improvement occurred recently, in January 2010, when a group of non-EU democracies within the UN Human Rights Council (Japan, the United States, Canada, Australia, and New Zealand, collectively called JUSCANZ) admitted Israel into membership of their group, in light of Israel's being considered by them a "likeminded" state.¹⁶

IS THERE A REMEDY FOR THE EXCLUSION OF ISRAEL?

In light of this situation that has existed since the very commencement of Israel's membership of the United Nations, and despite best efforts by Israel's representatives and others, the blatant discrimination against one member state, in clear contravention of the UN Charter, has not changed. The question remains how, if at all, this situation might be remedied.

Since the regional group system was never formalized or articulated within the UN Charter, but rather developed informally outside the Charter's confines, so theoretically, any change in the system could be achieved without the need for amending the Charter, a Herculean task that would be virtually impossible to achieve.

Such a change could be achieved, as hoped-for by Israel over the years, within the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, whose mandate clearly could cover the need to correct inconsistencies between the Charter principles and the performance of the organization. Logically, it would require replacing the discriminative and defective regional group system with a simpler system of an all-embracing roster of the member states, which would be called upon to serve on the various UN bodies in turn. However, such an option would require an extensive consensus among members of the Special Committee and the Sixth (Legal) Committee, which would be called upon to confirm any such recommendation by the Special Committee.

Another possibility might be to establish an ad hoc committee to review the implementation of sovereign equality, and recommend practical changes in UN procedures with a view to assuring full observance of the Charter principles. Such recommendations would then be adopted by resolution or decision of the General Assembly.



Shabtai Rosenne (center) together with Abba Eban (left) and Reuven Shiloah, 1949 (Israel National Photo Collection/ Pinn Hans)

Finally, the reference above to the lack, in the UN context, of any superior monitoring body, an ombudsman, or some type of “Council of Wise Persons,” composed of former Secretaries-General, senior ICJ and other judges, and prominent experts, who would review UN actions and resolutions and determine their validity and compliance with the Charter principles, is particularly relevant in the present situation. Some consideration might be given to establishing such a body, which could restore to the organization an element of credibility and realism that seems to be missing.

As stressed by Jennings in his 1999 opinion over eleven years ago, this situation must be remedied, and Israel given its right to full equality. But this can only be achieved if likeminded member states of the United Nations act in a concerted manner to bring about the necessary change.

NOTES

1. *The Principle of Sovereign Equality of States as a Basis for International Organization* at 207. 53 Yale Law Journal, March 1944.
2. Sir Robert Jennings, *Opinion Regarding the Exclusion of Israel from the United Nations Regional Group System*, November 1999, at 19. For a detailed analysis of the concept of sovereign equality in international law see Brierly, *The Law of Nations*, 4th ed. (1949) at 117; Dickenson, *The Equality of States in International Law* (1920) at 334-5; H. Kelsen, *General Theory of Law and the State* (1945) at 253-4; Oppenheim's *International Law*, 9th ed. (1992) at 340; H. Weinschel, *The Doctrine of Equality of States and its Recent Modifications*, 45(3) AJIL (1951) at 438.
3. UN Charter Preamble, 6 June 1945.
4. Charter of the United Nations, 1945.
5. UNGA Resolution 2625 (XXV), 24 October 1970.
6. Snigdha Nahar, *Sovereign Equality in International Law*, <http://www.globalpolitician.com/print.asp?id=4351>.
7. For a full analysis of the UN regional group system see Hudson Institute, New York, "Inter-governmental groups and alliances operating within the UN system" <http://www.eyeontheun.org/view.asp?p=55&l=11>.
8. Sir Robert Jennings, *Opinion Regarding the Exclusion of Israel from the United Nations Regional Group System*, 4 November 1999, para. 2.1.
9. Id. para. 2.2.
10. Id. para. 2.3.
11. Statement by Alan Baker A/C.6/47/SR.17 paras. 89, 92, at pp. 22-3.
12. Id. para. 5.5.
13. Jennings, id. para. 3.16.
14. Id. para. 4 of the summary by Jennings of his opinion.
15. Id. para. 13 of the summary by Jennings of his opinion.
16. <http://www.israel-un.org/israel-and-the-un/israel-at-the-un> and <http://www.ajc.org/site/apps/nlnet/content2.aspx?c=iJT12PHKoG&b=849241&ct=7872849>. Israel's admission to this group came about despite protracted opposition by New Zealand.

ABOUT THE AUTHOR



Ambassador Alan Baker, director of the Institute for Contemporary Affairs at the Jerusalem Center for Public Affairs, is one of Israel's leading international law experts. He served as the legal adviser and deputy director-general of the Israel Foreign Ministry from 1996 to 2004, followed by four years (2004-2008) as Israel's ambassador to Canada.

In addition to his membership of the Israel Bar, Ambassador Baker is a member of the International Law Association, the International Institute of Humanitarian Law, and the International Association of Jewish Lawyers and Jurists, and serves as a member of Israel's panel of arbitrators at the Permanent Court of Arbitration (The Hague). He is a partner in the Tel Aviv law firm Moshe, Bloomfield, Kobo, Baker & Co.