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**INTERNATIONAL COURT OF JUSTICE**

**LEGAL CONSEQUENCES ARISING FROM THE POLICIES  
AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY,  
INCLUDING EAST JERUSALEM**

**(REQUEST FOR AN ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE  
ORGANISATION OF ISLAMIC COOPERATION**

**July 2023**

*[Translation by the Registry]*

## INTRODUCTION

1. In accordance with the possibilities open to it under the proceedings initiated before the International Court of Justice, the Organisation of Islamic Cooperation has the honour to present here its observations on the request for an advisory opinion submitted to the International Court of Justice by the General Assembly of the United Nations on 20 December 2022 concerning the consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.

2. The request made by the General Assembly concerns the following two-fold question:

“(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?”<sup>1</sup>

3. By way of introduction, and with a view to illuminating the spirit in which it is submitting its observations, the Organisation of Islamic Cooperation would recall that it is currently composed of 57 member States, bound by a Charter dating from 4 March 1972<sup>2</sup>. Palestine, which is recognized as a State by all members of the Organisation, is itself a full member. Over and above the general aim of strengthening solidarity and co-operation between member States, the Charter specifically includes among its objectives: “[t]o support and empower the Palestinian people to exercise their right to self-determination and establish their sovereign State with Al-Quds Al-Sharif as its capital, while safeguarding its historic and Islamic character as well as the Holy places therein”<sup>3</sup>. It is therefore hardly surprising that the Organisation of Islamic Cooperation is particularly mindful of and profoundly concerned by the deterioration in the situation of the Palestinian people, who have been denied their fundamental rights since 1948, and by the growing violence affecting the region.

4. From the inception of the Zionist movement, its leaders held ambitions to create a Jewish State in Palestine, ambitions underpinned by the idea of re-establishing the Kingdom of David as it was imagined in the Jewish memory. Those ambitions involved a vague territorial claim conceived without any thought for the Arab people that has been present in the territory for centuries. Jewish immigration to Palestine, which for a long time had been limited, was encouraged by support from Great Britain. It increased under the British Mandate and, as a result of the Nazi persecution of the Jewish people, had become large-scale by the end of the Second World War. That is how the idea of partition into a State of Israel and a State of Palestine, living side by side, took hold. It could only take place at the expense of the right of the Palestinian people to self-determination in the whole of the colonized territory.

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<sup>1</sup> United Nations General Assembly resolution 77/247, 30 Dec. 2022 (Ann. 1).

<sup>2</sup> All information about the Organisation can be found on its website: <http://www.oic-oci.org>.

<sup>3</sup> Charter of the Islamic Conference, adopted on 4 March 1992 and amended in 2008, Art. [I], para. 8 (Ann. 2).

5. The Arab people of Palestine initially rejected partition, representing as it does a dismemberment of its historical territory. The Jewish population, for its part, which was immediately established as the State of Israel, would return governments professing an increasingly firm intention not to accept the territorial compromise proposed by the United Nations and to appropriate instead the entirety of Mandatory Palestine. That approach would inevitably result in repeated violations of all the fundamental norms of international law: the right of peoples to self-determination and their right to territorial integrity; the prohibition of the use of force; the non-recognition of territories acquired by force; respect for humanitarian law in the event of military occupation of a foreign territory, in particular the prohibition of transfers of the population of the occupying Power to the occupied territory; in short, all the norms relating to human rights.

6. Those repeated and increasing violations have been the subject of multiple reports and expressions of condemnation and are today fully documented. In 2003, concerned by the potentially grave consequences on the situation of Palestine of the security barrier being built by Israel in order to encircle the West Bank and create enclaves within it, the United Nations General Assembly requested the Court to render an advisory opinion on the matter. The Opinion delivered by the Court on 9 July 2004 found that the structure was illegal under international law and that Israel had an obligation to dismantle it and make reparation for all the consequences thereof<sup>4</sup>. Thus far, however, Israel has not complied with the Court's findings in any respect and has continued the planned extension of the separation wall notwithstanding the finding that it is illegal.

7. In keeping with its disregard of the Court's findings, Israel has continued to implement and extend the practices and policies denounced at that time. Territories have been annexed, the military occupation of Palestine has continued and the policy of settlement, openly encouraged by successive Israeli governments, has led to large Jewish settlements throughout the West Bank. The settlements are developing thanks to support by the State and the involvement of its army. This has resulted in the territorial fragmentation of Palestine, the segregation and control of the Palestinian population, very serious violations of human rights and of humanitarian law in case of armed conflict applicable in the Occupied Palestinian Territory, the dispossession of land and property belonging to Palestinians and denial of their economic and social rights.

“Since its establishment in 1948, Israel has pursued a policy of establishing and maintaining a Jewish demographic hegemony and maximizing its control over land to benefit Jewish Israelis while restricting the rights of Palestinians and preventing Palestinian refugees from returning to their homes.”<sup>5</sup>

8. The full gravity of the situation was highlighted by the United Nations General Assembly in the resolution seising the Court in these advisory proceedings. The General Assembly expresses:

“grave concern about the continuing systematic violation of the human rights of the Palestinian people by Israel, the occupying Power, including that arising from the excessive use of force and military operations causing death and injury to Palestinian civilians, including children, women and non-violent, peaceful demonstrators, as well as journalists, medical personnel and humanitarian personnel; the arbitrary imprisonment and detention of Palestinians, some of whom have been imprisoned for decades; the use of collective punishment; the closure of areas; the confiscation of land; the establishment and expansion of settlements; the construction of a wall in the

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<sup>4</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136 *et seq.*

<sup>5</sup> Amnesty International, *Israel's Apartheid Against Palestinians, Cruel System of Domination and Crime Against Humanity*, Report of February 2022, p. 7 (Ann. 3).

Occupied Palestinian Territory in departure from the Armistice Line of 1949; the destruction of property and infrastructure; the forced displacement of civilians, including attempts at forced transfers of Bedouin communities; and all other actions by it designed to change the legal status, geographical nature and demographic composition of the Occupied Palestinian Territory, including East Jerusalem”<sup>6</sup>.

9. Yet these are not human rights violations such as other peoples may have the misfortune to experience. The plan promoted by the State of Israel is a more serious matter of impeding and ultimately frustrating the realization of the Palestinians’ fundamental right to self-determination. The Court condemned that intention in its 2004 Opinion: “The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.”<sup>7</sup> Since that time, Israel’s policy has intensified, bringing dire consequences and eroding any possibility of creating a Palestinian State.

10. Contrary to its obligations under the Charter of the United Nations and the International Bill of Human Rights, Israel has consolidated its desire to Judaize the country. This Judaization of the State of Israel is happening and is in violation of Article 2 of the Universal Declaration of Human Rights, which provides: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” When it came into being, however, Israel acknowledged itself to be a secular State. But that national project has been gradually changed. Today that State presents itself as a religious State, and only people professing the Jewish faith enjoy all the rights recognized by the State, to the detriment of non-Jewish people who therefore suffer discrimination. This shift reached its climax with the Israel — the Nation-State of the Jewish People law of 19 July 2018, adopted by the Knesset as one of the country’s basic laws<sup>8</sup>. And the groups in power make no secret of their wish to extend the State of Israel to considerable portions of the West Bank.

11. In this context, the question of Jerusalem has become a major issue. The plan for a religious State presupposes at the same time strengthening the State’s hold on the whole of the City of Jerusalem in order to empty it of its Arab inhabitants and turn it into the reunified capital of Israel and the centre of the Jewish faith. This Judaization of Jerusalem is taking place in gross violation of the rights of the Palestinians over the city and the need to respect the religious freedoms of religions other than that which has become the State religion of the Jewish State, amid grave indifference to the relevant provisions of international law.

12. All those policies, including both the measures intended to deprive the Palestinian people of its right to self-determination and those to appropriate the City of Jerusalem, have been implemented for several decades through increasingly violent policies in which the Israeli army plays a central role. They are placing peace in the region in grave peril.

13. Believing that only a full and fair settlement of the Palestinian question in all its aspects can restore peace, the Organisation of Islamic Cooperation hopes that the new Advisory Opinion requested of the Court will help produce a precise legal characterization of all aspects of the situation and thereby result in the United Nations and all the Member States taking the necessary measures to

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<sup>6</sup> See Ann. 1.

<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para 155.

<sup>8</sup> Basic-Law: Israel — The Nation-State of the Jewish People, adopted by the Knesset on 19 July 2018 (Ann. 4).

end the violations of fundamental rules of international law and pave the way for a just settlement of the conflict. That is why it is taking the opportunity it has been given to participate in these proceedings by means of this Written Statement.

14. The observations submitted here to the Court by the Organisation of Islamic Cooperation relate to the following points:

- the question of the Court's jurisdiction to render the opinion requested in this case and the admissibility of the request for an opinion (I);
- the context in which the situation submitted for Court's consideration has developed (II);
- the law to be applied in responding to the questions put to the Court (III);
- Israel's repeated violation of the right to self-determination of the Palestinian people and the means systematically used to impede realization of that right (IV);
- the annexation and settlement of Jerusalem in disregard of the rights of Palestinians to make it their capital (V);
- how the policies and practices of Israel affect the legal status of the occupation and the legal consequences that arise for all States and the United Nations from that status (VI).

## I. JURISDICTION AND ADMISSIBILITY

15. This matter has been brought before the Court under Article 96 of the United Nations Charter, paragraph 1 of which provides: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” It is nevertheless necessary to verify that the General Assembly has not exceeded the competence conferred on it by the Charter in putting a question to the Court. It should therefore be noted that, under Article 10 of the Charter, the General Assembly may discuss any questions or matters within the scope of the Charter and, under Article 11, any questions relating to the maintenance of international peace and security. Peace has indeed long been under serious threat in Palestine and is even more so with the recent hardening of Israeli policy in that respect. The United Nations has therefore repeatedly expressed its concern in that regard. The Security Council thus stated in 2016 that the policy in question was “a major obstacle to the achievement of . . . a just, lasting and comprehensive peace”<sup>9</sup>. As early as 1980, the General Assembly found that Israeli policies constituted “a serious obstruction to achieving a comprehensive, just and lasting peace”<sup>10</sup>. The request for an advisory opinion transmitted to the Court on 20 December 2022 in relation to the situation of Palestine is one expression of that concern. It falls within the scope of the tasks incumbent upon the General Assembly.

16. Transmission of the request must however comply with the distribution of competences between the Security Council and the General Assembly as laid out in Article 12, paragraph 1: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.” The Court examined this issue in detail in its 2004 Opinion. It construed Article 12 in line with the contemporary interpretation, which now establishes, first, that the General Assembly may examine questions that remain on the agenda of the Security Council where the Security Council is no longer adopting resolutions on the matter and, second, that both organs may deal with the same matter at the same time, since each does so from a different angle. It thus held that “the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter” and that “by submitting that request the General Assembly did not exceed its competence”<sup>11</sup>. That finding applies in exactly the same way to the present request for an opinion.

17. It is also necessary to verify that the advisory proceedings do in fact concern a legal question. In the present case, the way the question is framed is itself sufficient to confirm its legal character. The Court is requested to clarify the “legal” consequences of the policies and practices of Israel in Palestine. Paragraph 18 of the resolution containing the request for an opinion moreover specifies that the Court is asked to render that opinion

“considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004”.

The proceedings have therefore been brought under that body of international law. The question posed is a legal one and the reply must be based on law.

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<sup>9</sup> Security Council, resolution 2334 of 23 December 2016, para. 1.

<sup>10</sup> General Assembly, resolution 476 of 30 June 1980, para. 3, and resolution 478, para. 4, of [20 August] 1980.

<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 1[50], para. 2[8].

18. Israel will doubtless contend that the situation has political aspects. We should recall the Court's position on that point:

“Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law”<sup>12</sup>.

19. The legal character of the question posed in this request for an opinion is borne out by the fact that the Court is not being requested to rule on a hypothetical phenomenon — the “possible” conduct of various States as in the case referred to above. Here we are dealing with a very real factual situation for which a specific State assumes responsibility: the violation by force of the fundamental rights of a people to its existence, to self-determination and to respect vis-à-vis that people for all the provisions of international law, including human rights law and international humanitarian law. The legality of the situation at issue must therefore be assessed in light of the international obligations incumbent upon the State responsible for that situation.

20. One further point remains to be examined as regards the Court's jurisdiction to rule on the request for an opinion that has been submitted to it. Are we faced with a dispute in which the advisory function is being diverted from its purpose and wrongly used as a substitute for a contentious function that cannot be exercised in the absence of consent by the parties concerned? The Court has clarified this question on a number of previous occasions. It has seen fit to exercise its advisory role when faced with a dispute, whether between States or between a State and an international organization: “Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.”<sup>13</sup>

21. The actual existence of a dispute between States, which would fall within the compass of contentious proceedings, is not the same thing as the need for the plenary organ of the United Nations, charged with ensuring international peace and security, to obtain legal clarifications that may be of use to it when adopting a position on a question within its competence in that field. It is indisputable here that the United Nations General Assembly, faced with the Palestinian question, might find it necessary to obtain clarification on the legal aspects of the situation.

22. Whether or not there is a specific dispute involved in the request for an advisory opinion is irrelevant. The purpose of the advisory function is to give legal advice to the organs and institutions requesting it. And it is indeed advice of this nature that the General Assembly is seeking in its resolution of 20 December 2022. The precise identification of the rules in force governing a specific situation at a given moment, how those rules interact and their relationship with general principles, and how they should be applied in practice together are all the necessary conditions for the establishment of international public order, which is itself the foundation for peace. International public order has been seriously undermined by the situation which has developed in Palestine since 1947. The General Assembly has appealed to the authority of the Court for an assessment of the legal aspects of that situation. Armed with the Court's replies, it will be in a better position to consider how to help bring an end to the serious disorder that is rendering the prospects for peace in Palestine ever more remote.

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<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13.

<sup>13</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34.



23. We would add, as further confirmation that there is nothing to prevent the Court from ruling on the request for an opinion submitted to it, that advisory proceedings are independent of whether or not a State has accepted the Court's jurisdiction:

“The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. ... As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them.”<sup>14</sup>

And also:

“[N]o State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an ‘organ of the United Nations’, represents its participation in the activities of the Organization, and, in principle, should not be refused.”<sup>15</sup>

24. We are confident that the Court will find that the texts governing its jurisdiction to render advisory opinions allow it to respond to the request addressed to it. This is a reflection of its position within the United Nations system, where it is under a duty to contribute in this way to the smooth operation of the Organization as a whole. There would have to be compelling reasons to induce it to refuse. There are, on the contrary, a great many positive reasons why the Court should agree to enlighten the General Assembly, together with all the Member States and other intergovernmental organizations, on the legal aspects of a situation which gives particular cause for concern.

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<sup>14</sup> *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 188, para. 31.

<sup>15</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.

## II. THE CONTEXT IN WHICH THE SITUATION SUBMITTED FOR THE COURT'S CONSIDERATION HAS DEVELOPED

25. The situation that the Court must examine in order to reply to the questions put by the United Nations General Assembly is that prevailing in the Palestinian territory occupied by Israel since 1967. Though the timescale of the situation is clearly defined, it is the outcome of changes that have taken place over a long period, one which has lasted a century. It can be understood and characterized in legal terms only in light of all the events that preceded it. What is referred to as the Israeli-Palestinian conflict has its origins in the nineteenth century when the Zionist project came into being. That project, as it came to fruition with the creation of the State of Israel, collided head on with the advance of the Palestinian people towards decolonization and has hindered it to the point where it is today increasingly improbable.

26. Accordingly, in order to grasp the rationale of the State of Israel from its beginnings in the Zionist project up to its occupation of the whole of the Palestinian territory, we shall first recapitulate the events of an initial period, the period before the 1967 occupation (A), before examining the various phases that have marked the period of occupation *stricto sensu* of the Palestinian territory (B).

### A. Events before the Israeli occupation of the Palestinian territory

27. The military occupation of the whole of Palestine by Israel in 1967 was the logical culmination of a process for which the following distinct earlier phases had paved the way:

- the pre-Mandate period (1);
- the British Mandate from 1922 to 1947 (2);
- intervention by the United Nations in the form of resolution 181 (1947) and what followed (3);
- the Arab-Israeli war of 1948-1949 and its territorial and human consequences (4).

#### 1. The pre-Mandate period

28. The region in which today's Palestine is located formed part of the Arab provinces that were for four centuries under the yoke of the Ottoman Empire<sup>16</sup>. Modern Palestine came about in the 1860s and 1870s and was divided into three administrative units, with Acre, Nablus and Jerusalem as their respective administrative capitals. Jerusalem, however, formed a separate *sanjak* subject to a specific tax régime as a result of the presence of the Holy Places and the resulting pilgrimages. Europe's interest in Palestine began in the nineteenth century, in particular through the expansion of the religious missions of various countries and archaeological sites associated with biblical studies.

29. Zionism, which takes its name from Mount Zion, one of the hills of Jerusalem, emerged in the nineteenth century as a nationalism in search of a State. Jewish people were at that time (as they still are) scattered over a very large number of States on every continent. Some of them emigrated to Palestine fleeing the persecution they faced in various countries: Spain as a result of the Inquisition in the fifteenth century; Poland as a result of the massacres in the seventeenth; Russia as a result of

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<sup>16</sup> See Elias Sanbar, *Les Palestiniens dans le siècle*, Découvertes, Paris, Gallimard, 1994.

the pogroms in the nineteenth; and France in the grip of the Dreyfus affair at the end of the nineteenth century.

30. Back then this was a religious Zionism, with no political manifesto or ambitions to dominate Palestine. At the end of the nineteenth century, religious Zionism came to exist in tandem with a political Zionism based on the writings of Théodor Herzl who at that time developed a theory of a State of the Jews as the best way to combat anti-Semitism and situated it in Palestine<sup>17</sup>. The World Zionist Organization emerged in 1897, advocating the establishment of a Jewish State in Palestine. The resonance that the project encountered in messianic Protestant circles then brought support from the British Government and a favourable reception in the United States. Portrayed by Théodor Herzl himself as a “colonial” programme, its aim was the conquest of land and a policy of populating that land with emigrants arriving as settlers.

31. During the First World War, a close associate of the founder of Zionism, Israel Zangwill, explained in the British press: “If the 600,000 Arabs of Palestine could be expropriated with compensation, or if they could be induced to emigrate to Arabia, since they move readily, it would solve Zionism’s greatest difficulty”<sup>18</sup>. The strand of Zionism founded by Zangwill (the Jewish Territorial Organization) also envisaged destinations other than Palestine for the reunification of Jewish people.

32. Zionism was therefore to sit well with Great Britain’s interests in the Middle East and its strategic interest in protecting the Suez canal, a vital line of communication with its possessions in Asia. These circumstances led to the British Government engaging in doublespeak, the dire consequences of which have been unfolding ever since.

33. Support for the Zionist project led Lord Balfour, the English Foreign Minister, to make a declaration on 2 November 1917, in a letter to the Vice-President of the body representing Jewish people in England. Its key passage reads as follows:

“His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of the object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country”<sup>19</sup>.

34. That declaration related to territory over which, at the time its Minister was writing, Great Britain held no legal title giving it powers of disposal. Nor did the declaration concern international law in any way, since it was addressed to an ordinary British citizen, a private individual. Breaking apart a community in which Christians, Muslims and Jews had until then lived peacefully, it described the people who were the main occupants of that land (at the time Arabs represented 91 per cent of the population) as “non-Jewish communities in Palestine” and specified that their civil and religious rights should not be prejudiced, while making no mention of their political rights.

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<sup>17</sup> Théodor Herzl, *Der Judenstaat*, 1896; [Théodor Herzl and Claude Klein,] *L’État des Juifs suivi de “Essai sur le sionisme: de l’État des Juifs à l’État d’Israël”*, Paris, La Découverte, 1990.

<sup>18</sup> Quoted by Alain Gresh, *Israël-Palestine, vérité sur un conflit*, Paris, Fayard, 2002, p. 91 [Translation by the Registry].

<sup>19</sup> “The Balfour Declaration”, letter from Arthur James Balfour, United Kingdom Foreign Minister, to Lord Rothschild, 2 November 1917.

35. The promise made to the Zionist movement to establish a national home for the Jewish people in Palestine was sufficiently ambiguous to hint at something that would be the germ of a future State, while not being sufficiently clear that it fully illuminated the purpose behind the creation of that State. The ambiguity was deliberate. It was intended to mask the nationalist intentions.

36. However, alongside this — and this is where Britain was playing both sides — England was seeking the support of the Arabs in eliminating the Ottoman Empire. It would thus promise the Sharif of Mecca, Hussein ibn Ali, the creation of a greater Arab State in return for his help. This is clearly apparent from the correspondence between Sir Henry McMahon, the British High Commissioner in Cairo, and Hussein between July 1915 and February 1916. In that correspondence, Sir Henry confirmed that: “Great Britain [was] prepared to recognize and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca”<sup>20</sup>.

37. The British would interpret that correspondence as not including Palestine in the greater Arab State that had been promised independence. However, the British press subsequently published extracts of a secret memorandum drawn up by the Political Intelligence Department of the Foreign Office for the British delegations to the Paris Peace Conference, which confirmed the undertaking by His Majesty’s Government to recognize the independence of the whole of Palestine<sup>21</sup>.

38. Militarily, a first British offensive to gain a foothold against the Turkish in Palestine initially ended in Gaza in March 1917, in a heavy defeat<sup>22</sup>. After victory against the Turkish forces, however, General Allenby occupied Gaza and Haifa in October 1917 and entered Jerusalem on 11 December 1917, on foot out of respect for the Holy Places. He established British military authority in Jerusalem. The concerns of Arab leaders, who were aware of the existence of the Balfour Declaration, became increasingly apparent in the course of 1918. An Anglo-French joint communiqué of 7 November 1918 was intended to allay those concerns. It contains a statement that those Powers’ object was in fact: “the complete and definitive emancipation of the [Arab] peoples . . . and the establishment of national governments and administrations deriving their authority from the initiative and free choice of the indigenous populations”<sup>23</sup>.

39. However, when the Peace Conference opened on 18 January 1919, Great Britain, forgetting the letters exchanged between its representative and Sharif Hussein ibn Ali and the Anglo-French position stated two months previously, succeeded in having the Balfour Declaration included in the Palestine question.

40. Disturbances broke out at the start of 1920, evidence of fierce reactions among the Palestinians. Despite the increasingly widespread revolt, the interests of the Zionist movement and those of Great Britain converged to the extent that on 25 April 1920 the San Remo Conference

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<sup>20</sup> Letter No. 4. Translation of a letter from McMahon to Husayn, 24 October 1915, The Hussein-McMahon Correspondence, Jewish Virtual Library, American-Israeli Cooperative Enterprise (Ann. 5).

<sup>21</sup> “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 7, quotations taken from *The Times of London* of 17 April 1974.

<sup>22</sup> Henry Laurens, *op. cit. [sic]*. This writer mentions two battles resulting in a total of 10,000 British casualties.

<sup>23</sup> The Anglo-French Declaration of 7 November 1918, 145 Parliamentary Debates H.C (5th Series) 36, 1921, in John Norton Moore, *The Arab-Israeli conflict, Vol. III, Documents*, Princeton University Press, 1974, p. 38 (Ann. 6).

appointed Great Britain as the Mandatory for Palestine. On 24 July 1922, the League of Nations confirmed Great Britain's Mandate for Palestine<sup>24</sup>. It incorporated the Balfour Declaration.

## **2. The period of the British Mandate (1922-1947)**

41. The Mandate conferred on Great Britain by the League of Nations is part of the Mandate system established in Article 22 of the Covenant of the League of Nations. Article 22, paragraph 4, applies specifically to the territories that previously belonged to the Ottoman Empire:

“Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”

42. In order to analyse the difficulties arising from the application of the Mandate, we shall describe first of all the ideological and political context in which the very idea of mandates emerged (*a*). We shall then recall how the territorial boundaries of the Mandate for Palestine were defined (*b*). Lastly, we shall show the increasing difficulties encountered by the London Government up to the time when it handed the Mandate back to the United Nations (*c*).

### **(a) *The ideological and political background to the creation of the League of Nations Mandates***

43. When the League of Nations was created, the Powers that had been victorious in the First World War were and would remain colonial Powers keen to share out among themselves the territories confiscated from the defeated. However, ideas were also emerging about the emancipation of dominated peoples. These were articulated notably by United States President Thomas W. Wilson in a speech to the United States Senate as early as 27 May 1916, and were repeated at the Paris Peace Conference: “The fundamental idea would be that the world was acting as trustee through a mandatory and would be in charge of the whole administration until the day when the true wishes of the inhabitants could be ascertained”<sup>25</sup>.

44. The famous Fourteen Points whereby the United States President laid down the conditions for his country to go to war on the side of the Allies included those which would govern the Mandate system<sup>26</sup>. President Wilson had summarized those points himself in a speech to Congress on 11 February 1918, stating that peoples and provinces should not be bartered about from sovereignty to sovereignty as if they were mere chattels, with the sole concern being the balance of power, and that every territorial settlement had to be made in the interest and for the benefit of the populations concerned<sup>27</sup>. That position would result in the principle of nationalities being applied to the colonial territories, planting the seed of the future right of peoples to self-determination.

45. The fact that the category A Mandate system took into consideration the wishes of the populations concerned meant that the mandatory did not become the new holder of sovereignty.

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<sup>24</sup> League of Nations, Mandate for Palestine, 12 August 1922, C.529 M. 314 (Ann. 7).

<sup>25</sup> Cited by Giovanni Distefano, in *Commentaire sur le Pacte de la Société des Nations*, Robert Kolb (ed.), Bruylant, Université de Genève, 2015, p. 844.

<sup>26</sup> *President Woodrow Wilson's 14 Points*, National Archives, Milestone Documents, United States of America.

<sup>27</sup> Giovanni Distefano, *op. cit.*, p. 844.

Although the mandatory exercised sovereign powers, sovereignty itself was now reserved to the countries under Mandate and could not under any circumstances be exercised by the mandatory<sup>28</sup>.

46. Running counter to that approach, the British proposed an Article 1 of the Mandate for Palestine drafted as follows: “His Britannic Majesty shall have the right to exercise as Mandatory all the powers inherent in the Government of a Sovereign State, save as they may be limited by the terms of the present mandate”<sup>29</sup>. Great Britain was therefore intending to treat the powers it would hold over the territory entrusted to it as sovereign powers. However, following opposition from other delegations, any reference to sovereignty was removed from Article 1 of the British Mandate. It refers merely to “full powers of legislation and of administration”.

47. The people of Palestine were not consulted on the grant of the Mandate to Great Britain, even though, with regard to the political communities concerned, the League of Nations Covenant provided that: “[t]he wishes of these communities must be a principal consideration in the selection of the Mandatory”. Furthermore, while most of the speakers at the Peace Conference welcomed the Mandate system, on 14 February [19]19 the delegate of the Kingdom of the Hedjaz, Mr Haidar, expressed a significant caveat:

“I only wish to say that the nations in whose name I speak intend to remain free to choose the Power whose advice they will ask. Their right to decide their fate in the future has been recognized in principle. Very well! But you will allow me to say, Gentlemen, that a secret agreement to dispose of these nations had been prepared about which they have not been consulted”<sup>30</sup>.

48. The “King-Crane” Commission, so named for its participants, sent after the Peace Conference held by the Allies, was informed of Arab opposition to the plans being drawn up on the Palestine dossier. For Palestine, the Commission thus recommended:

“serious modification of the extreme Zionist programme for Palestine of unlimited immigration of Jews, looking finally to making Palestine distinctly a Jewish State . . . so the wishes of Palestine’s population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine — nearly nine-tenths of the whole — are emphatically against the entire Zionist programme. The tables show that there was no one thing upon which the population of Palestine were more agreed than upon this. To subject a people so minded to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle . . . of the peoples’ rights.”<sup>31</sup>

49. The findings of that Commission were not taken into consideration and the Balfour project prevailed. The concerns of a number of British parliamentarians were expressed during debates on

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<sup>28</sup> See *infra*, para. 249.

<sup>29</sup> Giovanni Distefano, *op. cit.*, p. 897.

<sup>30</sup> *Ibid.*, p. 854.

<sup>31</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 2[8].

the Mandate for Palestine in the Houses of Parliament when Lord Sydenham responded to Lord Balfour as follows<sup>32</sup>:

“[T]he harm done by dumping down an alien population upon an Arab country — Arab all around in the hinterland — may never be remedied . . . what we have done is, by concessions, not to the Jewish people but to a Zionist extreme section, to start a running sore in the East, and no one can tell how far that sore will extend.”<sup>33</sup>

50. That sombre prediction began to come true during the period of the Mandate. And it had a very real effect at the time the A Mandates came to an end. The peoples administered under Mandate formally gained independence in the following years: Iraq obtained independence on 3 October 1944, Lebanon on 22 November 1943, Syria on 1 January 1944 and Jordan on 22 March 1946. Only Palestine was denied the right to independence.

51. The Mandate for Palestine allowed the Government of Great Britain to administer the country directly. However, it had to address two major problems: the territorial definition of Palestine, entailing the need to determine its precise boundaries; and how to administer the territory given that it was impossible to reconcile, on the one hand, respect for its populations and, on the other, application of the Balfour Declaration promoting the national home for the Jewish people promised to the Zionist movement.

**(b) *The territorial boundaries of Mandatory Palestine***

52. Devised with a view to unlimited Jewish immigration, the territorial ambitions of the World Zionist Organization extended far beyond what would ultimately become the territory of Mandatory Palestine. They spilled over into Syria, Lebanon, Transjordan and Egypt, thus:

“In the north, the northern and southern banks of the Litany River, as far north as latitude 33° 45'. Thence in a south-easterly direction to a point just south of the Damascus territory and close and west of the Hedjaz Railway.

— In the east, a line close to and west of the Hedjaz Railway.

— In the south, a line from a point in the neighbourhood of Akaba to El Arish.

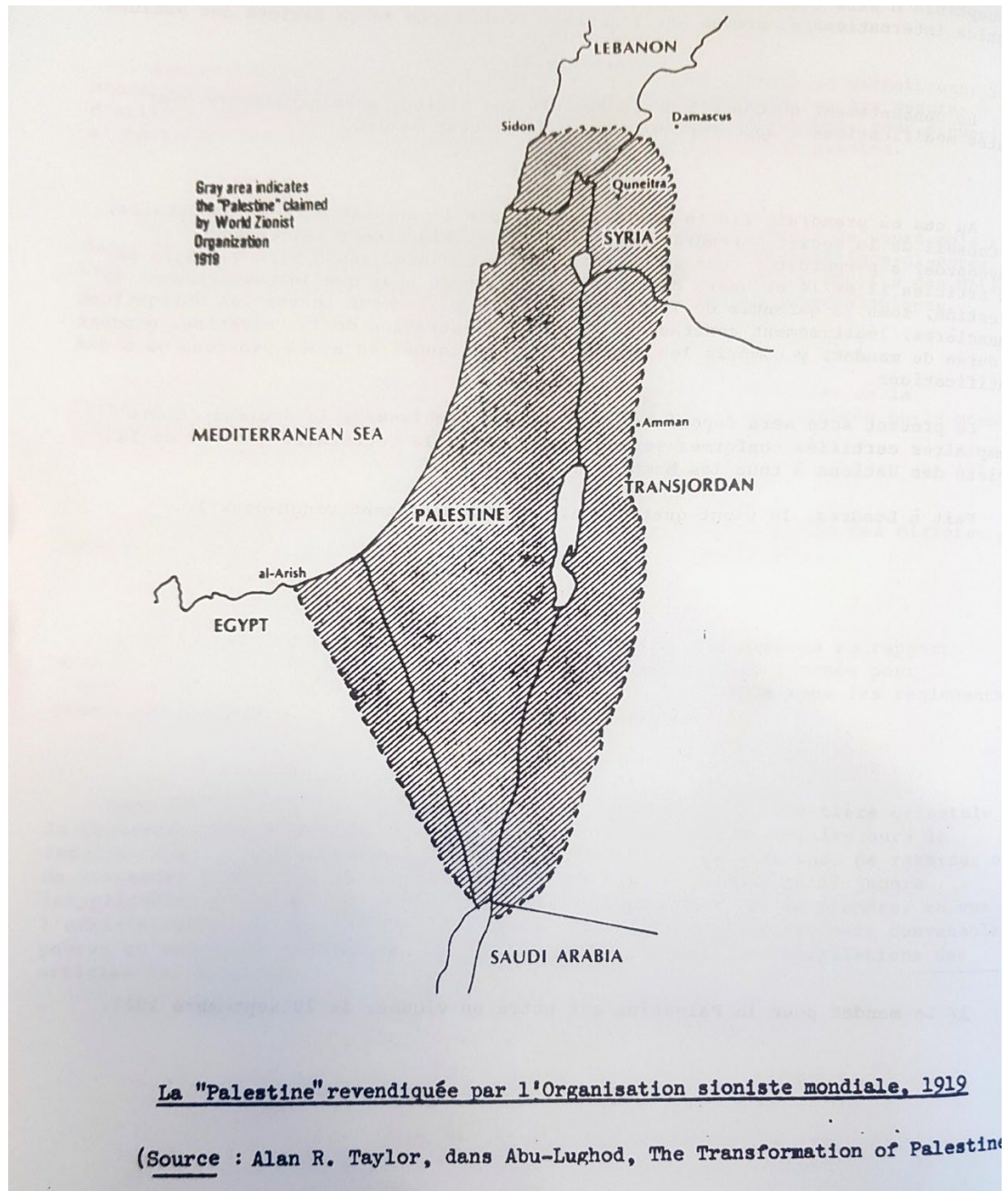
— In the west, the Mediterranean Sea.”<sup>34</sup>

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<sup>32</sup> The House of Lords voted to revoke the Balfour Declaration. However, the House of Commons and the British Government accepted the Mandate with the Declaration included.

<sup>33</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 3[2].

<sup>34</sup> *Ibid*, pp. 32-3[4].

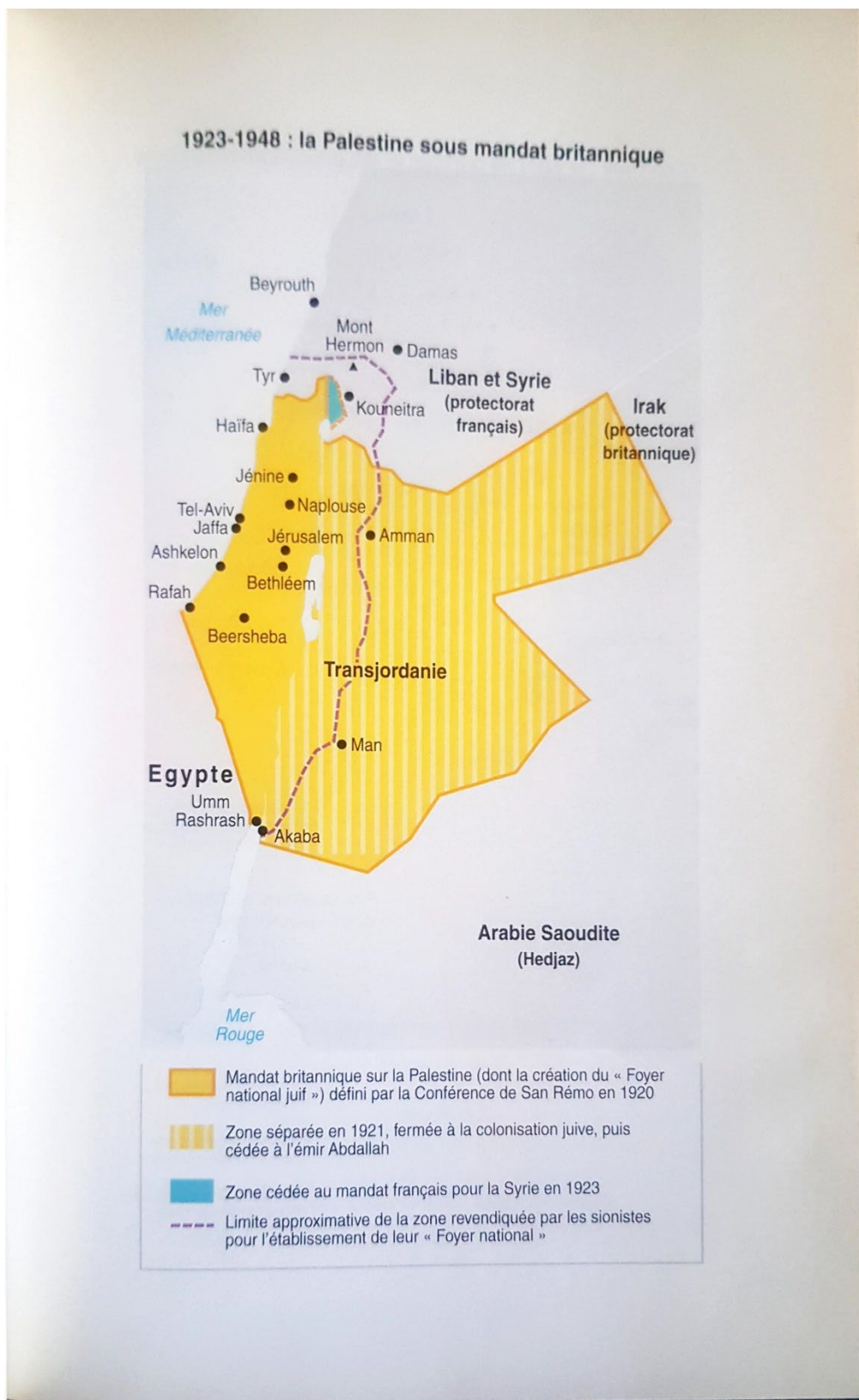


**Map No. 1.** The Palestine claimed by the World Zionist Organization, 1919, reproduced in "The Origins and Evolution of the Palestine Problem 1917-1988", a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 100.

La "Palestine" revendiquée par l'Organisation sioniste mondiale, 1919	The "Palestine" claimed by the World Zionist Organization, 1919
Source: Alan R. Taylor, dans Abu-Lughod, The Transformation of Palestine	Source: Alan R. Taylor, in Abu-Lughod, The Transformation of Palestine

53. The boundaries of Palestine as established at the time of the Mandate delimited a smaller territory:

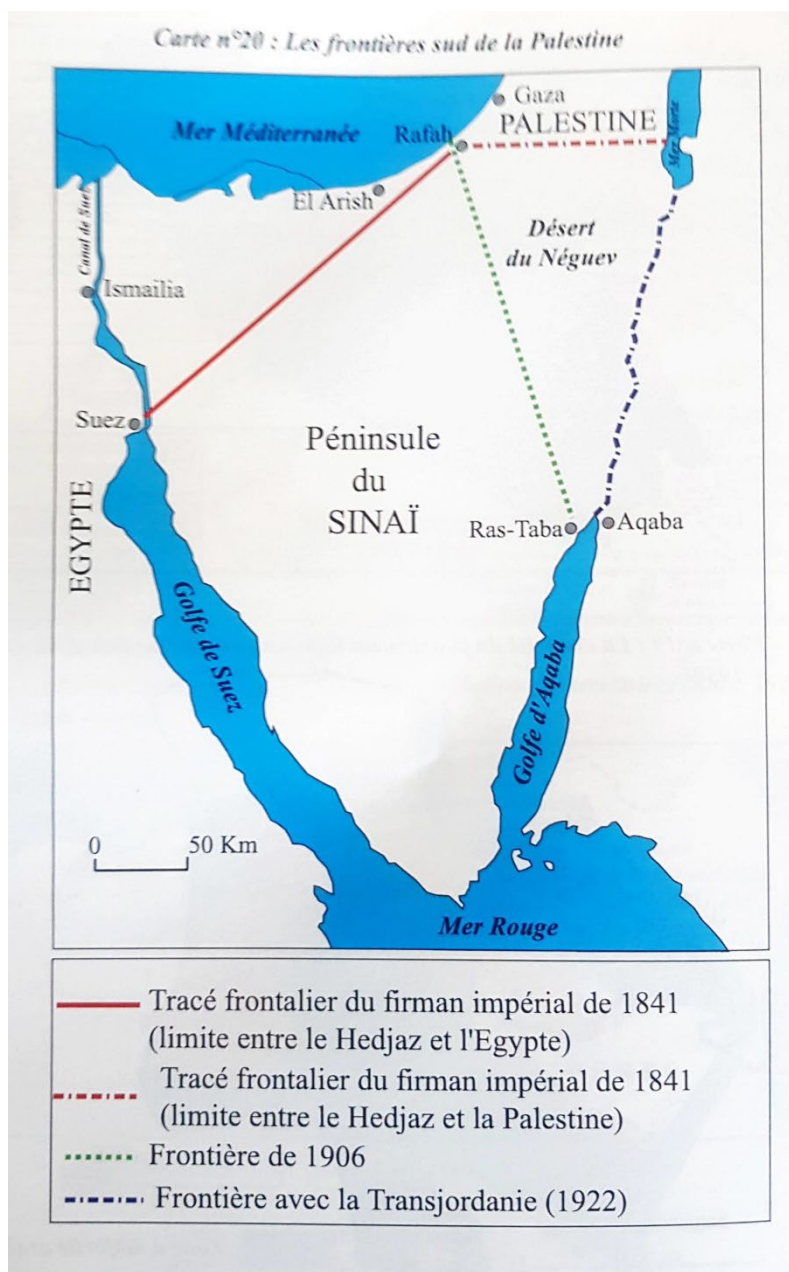




Map No. 2, Mandatory Palestine, taken from Alain Gresh, *Israël, Palestine, Vérités sur un conflit*, Fayard, Paris, 2002, middle section.

1923-1948: la Palestine sous mandat britannique	1923-1948: Palestine under British Mandate
Mer Méditerranée	Mediterranean Sea
Beyrouth	Beirut
Mont Hermon	Mount Hermon
Damas	Damascus
Liban et Syrie (protectorat français)	Lebanon and Syria (French protectorate)
Irak (protectorat britannique)	Iraq (British protectorate)
Jénine	Jenin
Naplouse	Nablus
Jérusalem	Jerusalem
Bethléem	Bethlehem
Transjordanie	Transjordan
Egypte	Egypt
Akaba	Aqaba
Arabie Saoudite (Hedjaz)	Saudi Arabia (Hedjaz)
Mer Rouge	Red Sea
Mandat britannique sur la Palestine (dont la création du « Foyer national juif ») défini par la Conférence de San Rémo en 1920	British Mandate for Palestine (including creation of the “Jewish National Home”) defined by the San Remo Conference in 1920
Zone séparée en 1921, fermée à la colonisation juive, puis cédée à l’émir Abdallah	Area split off in 1921, closed to Jewish settlement, then transferred to Emir Abdullah
Zone cédée au mandat français pour la Syrie en 1923	Area transferred to the French Mandate for Syria in 1923
Limite approximative de la zone revendiquée par les sionistes pour l’établissement de leur « Foyer national »	Approximate boundary of the area claimed by the Zionists for establishment of their “national home”

54. The southern boundary between the Ottoman Empire and Egypt had been determined by an exchange of Notes between Great Britain and the Ottoman Empire of 14 and 15 May 1906<sup>35</sup>. It began at Ras-Taba (10 miles south-west of Aqaba) and continued in a straight line until it reached Rafah:



Map No. 3, The southern boundary of the Mandate for Palestine. Jean-Paul Chagnollaud and Sid-Ahmed Souiah, *Les frontières au Moyen-Orient*, L’Harmattan, Paris, 2004, plate VIII.

<sup>35</sup> Exchange of Notes of 14 and 15 May 1906 between Turkey and Great Britain concerning the maintenance of the status quo in the Sinai Peninsular, in Heinrich Triepel, *Nouveau Recueil général de traités*, vol. V, Leipzig, Theodor Weicher, 1923, pp. 880-882 (Ann. 8).

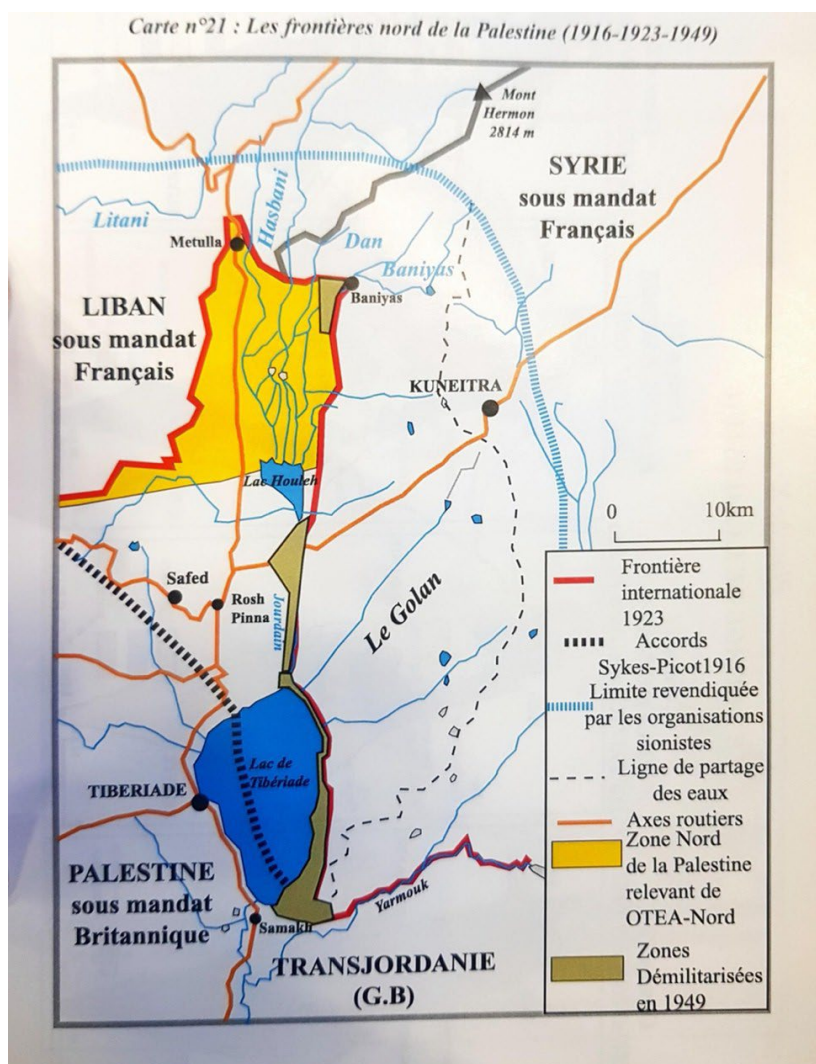
Carte n° 20: Les frontières sud de la Palestine	Map No. 20: The southern boundaries of Palestine
Mer Méditerranée	Mediterranean Sea
Mer Morte	Dead Sea
Désert du Néguev	Negev Desert
Péninsule du SINAÏ	Sinai Peninsula
Golfe d'Aqaba	Gulf of Aqaba
Golfe de Suez	Gulf of Suez
Egypte	Egypt
Mer Rouge	Red Sea
Canal de Suez	Suez Canal
Tracé frontalier du firman impérial de 1841 (limite entre le Hedjaz et l'Égypte)	Boundary line under the 1841 imperial firman (boundary between the Hedjaz and Egypt)
Tracé frontalier du firman impérial de 1841 (limite entre le Hedjaz et la Palestine)	Boundary line under the 1841 imperial firman (boundary between the Hedjaz and Palestine)
Frontière de 1906	1906 boundary
Frontière avec la Transjordanie (1922)	Boundary with Transjordan (1922)

55. The northern boundary was established by a convention with France because it involved establishing the delimitation between the French Mandates over Syria and Lebanon and the British Mandates over Palestine and Mesopotamia<sup>36</sup>. Doing so was not without difficulty because under the leadership of General Allenby the English had pushed further forward than had been agreed in the Sykes-Picot Agreements:

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<sup>36</sup> Convention between France and Great Britain of 23 December 1920 concerning the Mandates over Palestine, Mesopotamia, Syria and Lebanon, in Heinrich Triepel, *Nouveau Recueil général des traités*, vol. V, Leipzig, Librairie Theodor Weicher, 1923, pp. 582-586 (Ann. 9a).

Exchange of Notes between France and Great Britain of 7 March 1923 for the purpose of ratifying the report of the commission appointed to fix the route of the border between Lebanon and Syria, of the one part, and Palestine, of the other, from the Mediterranean to El Hammé, in Heinrich Triepel, *Nouveau Recueil général des traités*, vol. XVII, Leipzig, Librairie Theodor Weicher, 1927, pp. 208-215 (Ann. 9b).



Map No. 4, The northern boundary of Mandatory Palestine. Jean-Paul Chagnollaud and Sid-Ahmed Souiah, *Les frontières au Moyen-Orient*, L'Harmattan, Paris, 2004, plate IX.

Carte n° 21: Les frontières nord de la Palestine (1916-1923-1949)	Map No. 21: The northern boundaries of Palestine (1916-1923-1949)
Mont Hermon	Mount Hermon
SYRIE sous mandat Français	SYRIA under French Mandate
LIBAN sous mandat Français	LEBANON under French Mandate
Lac Houleh	Lake Hula
Jourdain	Jordan
Le Golan	The Golan
TIBERIADE	TIBERIUS
Lac de Tibériade	Lake Tiberius

PALESTINE sous mandat Britannique	PALESTINE under British Mandate
TRANSJORDANIE (G.B.)	TRANSJORDAN (G.B.)
Yarmouk	Yarmuk
Frontière internationale 1923	1923 international boundary
Accords Sykes-Picot 1916	Sykes-Picot Agreements 1916
Limite revendiquée par les organisations sionistes	Boundary claimed by the Zionist organizations
Ligne de partage des eaux	Watershed line
Axes routiers	Principal roads
Zone Nord de la Palestine relevant de OTEA-Nord	Northern area of Palestine forming part of OETA North
Zones démilitarisées en 1949	Areas demilitarized in 1949

For the Zionist movement the stakes were very high on account of water resources. The British in fact attempted to obtain even more, but the French would not give in to all their demands, thereby provoking the anger of the Zionists who put ever greater pressure on both the British and French<sup>37</sup>.

56. The eastern boundary, dividing Palestine from what was then called Transjordan, separated the two territories with the agreement of the British, who were reluctant to see the ambitions of the Zionist movement expand on both banks of the Jordan. Accordingly, notwithstanding the vehement protests of the latter, the boundary thus fixed followed the Jordan, crossed the Dead Sea at its midpoint and then ran alongside the Wadi Araba as far as the Gulf of Aqaba. It was approved by the Council of the League of Nations on 16 September 1922.

57. With the Mediterranean as its western boundary, Palestine was thus delimited and according to the emancipatory approach of the League of Nations should have become independent to the benefit of the Arab people, who represented the vast majority within those territorial boundaries. It was against this background that the long crisis that epitomized the British administration until 1947 emerged.

**(c) *Chaotic management of a Mandate epitomized by insurmountable ambiguities***

58. The British authorities were alerted to the true ambitions of the Zionist movement even before they started to administer the Mandate. Thus, in the wake of the Zionist Commission sent to Palestine in April 1918 and its proposals to the Foreign Office, Lord Curzon, the Foreign Secretary, wrote as follows to Balfour, commenting on the Commission's proposals:

“As for Weizmann and Palestine, I entertain no doubt that he is out for a Jewish Government, if not at the moment then in the near future . . . I feel tolerably sure therefor

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<sup>37</sup> See in that respect, Jean-Paul Chagnollaude and Sid-Ahmed Souiah, *op. cit.*, p. 89.

that while Weizmann may say one thing to you, or while you may mean one thing by a national home, he is out for something quite different. He contemplates a Jewish State, a Jewish nation, a subordinate population of Arabs, etc. ruled by Jews; the Jews in possession of the fat of the land, and directing the Administration. He is trying to effect this behind the screen and under the shelter of British trusteeship. I do not envy those who wield the latter, when they realize the pressure to which they are certain to be exposed.”<sup>38</sup>

59. Those Zionist ambitions found expression in a drive to settle Jewish people in Palestine, aimed at reaching a demographic tipping point at the expense of the Arab population; in a policy of systematically appropriating Arab land; and in preventing any possibility of protecting the rights of the Arab population and bringing it towards self-governing institutions, despite those obligations being affirmed in the Covenant of the League of Nations.

### **The surge in Jewish immigration to Palestine during the period of the Mandate**

60. In keeping with its support for the Balfour Declaration, at the beginning of the Mandate the Government of Great Britain was favourable to Jewish immigration at levels likely to tip the demographic balance of Palestine. However, as the result of mounting disturbances due to protests by the Arab population, the Mandatory made several ineffectual attempts to restrict that immigration.

61. The Churchill Memorandum of 1 July 1922 set out the British policy on the matter:

“The Balfour Declaration, reaffirmed by the Conference of the Principal Allied Powers at San Remo and again in the Treaty of Sèvres, is not susceptible of change . . . in order that this [Jewish] community should have the best prospect of free development and provide a full opportunity for the Jewish people to display its capacities, it is essential that it should know that it is in Palestine as of right and not on sufferance. That is the reason why it is necessary that the existence of a Jewish national home in Palestine should be internationally guaranteed, and that it should be formally recognized to rest upon ancient historic connection . . . For the fulfilment of this policy it is necessary that the Jewish community in Palestine should be able to increase its numbers by immigration. This immigration cannot be so great in volume as to exceed whatever may be the economic capacity of the country at the time to absorb new arrivals.”<sup>39</sup>

Upholding Zionist ideology, that Memorandum gave substance to the notion of Jewish “rights” over Palestine and justified them on the basis of “ancient historic connection”. In doing so it contradicted the emerging international law on the right of peoples to self-determination, which applied to peoples as they had been colonized with no reference to their, moreover largely undocumented, past history.

62. A British White Paper of 1922 reiterated the notion that immigration should be encouraged, albeit controlled according to Palestine’s capacities for economic absorption. Zionist circles nevertheless continued to press for unlimited immigration. In practice, immigration continued at a brisk pace until 1924-1926 but then fell appreciably:

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<sup>38</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 2[5].

<sup>39</sup> Churchill Memorandum, 1 July 1922, quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 3[9].

Année	Immigration enregistrée	
	Juifs	Non-juifs
1920 (septembre-octobre) .....	5 514	202
1921 .....	9 149	190
1922 .....	7 844	284
1923 .....	7 421	570
1924 .....	12 856	697
1925 .....	33 801	840
1926 .....	13 081	829
1927 .....	2 713	882
1928 .....	2 178	908
1929 .....	5 249	1 317

58/ Ibid., *Palestine Royal Commission Report* - Cmd. 5479 (1937), p. 279.

**Table No. 1**, Immigration into Palestine 1920-1929, Palestine Royal Commission Report, published in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 39.

Immigration en Palestine de 1920 à 1929	Immigration into Palestine 1920 to 1929
Immigration enregistrée	Recorded immigration
Année	Year
Juifs	Jewish immigrants
Non-juifs	Non-Jewish immigrants
(septembre-octobre)	(September-October)

Some 100,000 Jewish people nevertheless arrived in Palestine during that decade, thereby increasing their proportion in the population from 10 per cent to more than 17 per cent. Under pressure from the Zionist movement, British leaders fluctuated between regulating and encouraging the surge in Jewish settlement.

63. Jewish immigration resumed in the 1930s, especially after Hitler came to power in Germany. Many Jewish people preferred to flee to the United States or to elsewhere than Palestine, but ultimately it was, paradoxically, the Nazis who drove them to set off for Palestine. Through negotiations conducted by the Jewish Agency, the Nazis promised Jewish people who were prepared to emigrate to Palestine that they could transfer some of their capital to that country<sup>40</sup>. Jewish immigration would therefore resume rather intensely during the 1930s:

<sup>40</sup> See Henry Laurens, “Nouveaux regards sur la Palestine”, *Revue d'Études palestiniennes*, No. 104, 2004, p. 15.



Immigration en Palestine de 1930 à 1939 84/

1930 .....	4 944
1931 .....	4 075
1932 .....	9 553
1933 .....	30 327
1934 .....	42 359
1935 .....	61 854
1936 .....	29 727
1937 .....	10 536
1938 .....	12 868
1939 .....	16 405

84/ R.I.I.A., Great Britain and Palestine, p. 61.

**Table No. 2**, Immigration into Palestine 1930-1939. "The Origins and Evolution of the Palestine Problem 1917-1988", a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 44.

Immigration en Palestine de 1930 à 1939	Immigration into Palestine 1930 to 1939
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64. In 1930, seeking to assuage heightening tensions, the British Government published a new White Paper known as the Passfield White Paper after its author. It sought to be conciliatory towards the Arab population and announced its intention to reassert control over the issues of immigration and land transfers, which had thus far been left to the decisions of the Jewish Agency. However, in the face of very strong criticism from the Zionist Organization and its supporters, the Prime Minister of the London Government, Lord MacDonald, sent a letter to the President of the Zionist Organization in which he repudiated the Passfield White Paper and renounced any restriction on Jewish immigration and land transfers.

65. In his book *Trial and Error* (New York, Harper, 1949) Chaim Weizmann, President of the Zionist Organization, rejoiced that: "[i]t was under MacDonald's letter that Jewish immigration into

Palestine was permitted to reach figures like 40,000 for 1934 and [6]2,000 for 1935, figures undreamed of in 1930”<sup>41</sup>.

66. Great Britain tried again to limit Jewish immigration, by means of a new White Paper of 17 May 1939<sup>42</sup>. It read:

“Jewish immigration during the next five years will be at a rate which, if economic absorptive capacity permits, will bring the Jewish population up to approximately one third of the total population of the country. Taking into account the expected natural increase of the Arab and Jewish populations, and the number of illegal Jewish immigrants now in the country, this would allow of the admission, as from the beginning of April this year, of some 75,000 immigrants over the next five years . . . After the period of five years, no further Jewish immigration will be permitted unless the Arabs of Palestine are prepared to acquiesce in it.”<sup>43</sup>

67. The most extremist Zionists and the militias they had formed then carried out armed actions against the British. The Stern Group organized a series of attacks against English troops in Palestine. The Irgun in turn became engaged in terrorism. Jewish immigration would nevertheless continue all the more as the world was discovering the phenomenon that was the extermination of Jewish people by the Nazis. It would now be in the form of illegal immigration that was impossible for the British Mandatory to control. In 1944, Jewish people represented 32.6 per cent of the population of Palestine. Jewish migratory pressure was to continue in the following years.

#### **A policy of systematic appropriation of Arab land**

68. Encouraging Jewish people to emigrate to Palestine presupposed that the new immigrants would have access to land ownership. To promote the rapid advance of Zionism, property transfers favourable to the Yishuv (the name given to the body of Jewish settlers as a whole before Israel came into being) had been organized even before the British Mandate. Under the auspices of the Jewish Agency, a number of organizations financed by the Jewish National Fund had launched schemes for the systematic purchase of land for settlers. Those land purchases supported both private agriculture and collective structures, whether co-operative (moshavim) or collectivist (kibbutzim).

69. As early as 1919, the King-Crane Commission expressed concern about the Zionist project to transform Palestine at the expense of the Arab populations by means of land ownership: “The fact came out repeatedly in the Commission’s conference with Jewish representatives, that the Zionists looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase”<sup>44</sup>.

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<sup>41</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 4[5].

<sup>42</sup> Government of Great Britain, White Paper: Palestine Statement of Policy, 23 May 1939. Full text. (Ann. 10).

<sup>43</sup> See Ann. 10, p. 14.

<sup>44</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. [40], citing, *The Political History of Palestine under the British Administration (Memorandum to the United Nations Special Committee on Palestine)*, British Government, Jerusalem, 1947, p. 3.

70. Jewish settlers were able to take advantage of the destabilization of Arab society caused by the boundaries established in 1920, which separated Palestine from Syria and Lebanon, and the effects it had on the land issue. Arab families that had settled in a number of those territories chose to group together and therefore sold their lands, which Jewish people bought up from absent owners<sup>45</sup>. In that way, between 1920 and 1929, the area of land owned by Jewish people doubled, increasing from approximately 2.5 per cent to 5 per cent of the total area of Palestine. That area increased by a further 50 per cent between 1929 and 1945:

*Croissance de la propriété juive enregistrée légalement, concessions de terres gouvernementales exclues*<sup>34</sup>

Années	Augmentation	Cumul	Années	Augmentation	Cumul
Jusqu'à 1922	22 530		1922	39 359	586 147
1883-1890	82 100	104 630	1923	17 493	603 640
1891-1900	113 540	218 170	1924	44 765	648 405
1901-1914	199 930	418 100	1925	176 124	824 529
1915-1920	37 760	454 860	1926	38 978	863 507
1920	1 143	456 003	1927	18 995	882 502
1921	90 785	546 788	1928	21 215	903 717
1929	64 517	968 234	1938	27 974	1 271 884
1930	19 366	987 600	1939	27 974	1 299 857
1931	18 586	1 006 186	1940	22 481	1 322 338
1932	18 893	1 025 079	1941	14 531	1 336 869
1933	36 992	1 062 071	1942	18 810	1 355 679
1934	62 115	1 124 186	1943	18 035	1 373 714
1935	72 905	1 197 091	1944	8 311	1 382 025
1936	18 145	1 215 237	1945	11 506	1 393 531
1937	29 367	1 244 604			

34. Kenneth Stein, *The Land Question in Palestine, 1917-1939*, The University of California Press, 1984, p. 226. Ces données viennent des institutions sionistes, elles diffèrent légèrement de celles des statisticiens du gouvernement mandataire, en particulier pour les dates de transfert.

**Table No. 3**, "Growth of legally registered Jewish property, excluding government land concessions", in Henry Laurens, *La question de Palestine, Tome deuxième, 1922-1947, Une mission sacrée de civilisation*, Paris, Fayard, 2002, pp. 133-134.

Croissance de la propriété juive enregistrée légalement, concessions de terres gouvernementales exclues			Growth in legally registered Jewish property, excluding government land concessions		
Années	Augmentation	Cumul	Year	Increase	Total
Ces données viennent des institutions sionistes, elles diffèrent légèrement de celles des			These data come from the Zionist institutions. They differ slightly from those of the		

<sup>45</sup> For a detailed analysis of land transfers, see Henry Laurens, *La question de Palestine, Tome deuxième, 1922-1947, Une mission sacrée de civilisation*, Paris, Fayard, 2002, pp. 143-149.

statisticiens du gouvernement mandataire, en particulier pour les dates de transfert	statisticians of the Mandate government, in particular as regards the transfer dates
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71. The land purchase policy conducted by the Zionist organizations was accompanied by race-based restrictions on the farming of land. Jewish people could not employ Arab labour or sell their property to Arab purchasers. Although contrary to the terms of the British Mandate (according to which Jewish immigration was not to prejudice the rights of the inhabitants of Palestine), those provisions were applied strictly by Jewish farmers.

72. In 1923, a commission chaired by Sir John Hope Simpson was charged with investigating questions of immigration and land transfers. Its report describes the terms on which Jewish people could purchase and farm land:

“Land is to be acquired as Jewish property and . . . the same shall be held as the inalienable property of the Jewish people . . . The Agency shall promote agricultural colonization based on Jewish labour . . . it shall be deemed to be a matter of principle that Jewish labour shall be employed . . .” (Constitution of the Jewish Agency).

And: “The lessee undertakes to execute all works connected with the cultivation of the holding only with Jewish labour. Failure to comply with this duty by the employment of non-Jewish labour shall render the lessee liable to the payment of compensation”. The lease also provides that “the holding shall never be held by any but a Jew” (Keren Kayemet draft lease)<sup>46</sup>.

73. The same commission noted that those measures were contrary to the very terms of the Mandate: “The principle of the persistent and deliberate boycott of Arab labour in the Zionist colonies is not only contrary to the provisions of [Article 6] of the Mandate, but it is in addition a constant and increasing source of danger to the country.”<sup>47</sup> The lack of any opposition from the Mandatory enabled the process to continue unimpeded.

### **The worsening political crisis, rising violence in Palestine and the withdrawal of the British Mandate**

74. At the end of the First World War, when the Allies were debating the fate of the territories that had been subject to the Ottoman Empire and the plan to establish a national home for the Jewish people in Palestine was emerging, the Arab population understood that its right to self-determination was jeopardized by the Balfour Declaration. The first demonstrations against that plan took place in April 1920. There were further demonstrations in May 1920, in particular in Jaffa.

75. The Western Wall had been the subject of tensions between Arab and Jewish people since the Zionist attempt to acquire it in 1918. In 1926, the Zionists were calling for the expropriation of buildings in the Maghrabi Quarter and certain practices of the Jewish celebrants aroused fears that they were going to appropriate the Wall. The British Government had to allay the concerns of the Arab population by confirming that it would uphold the status quo on the matter.

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<sup>46</sup> Quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 4[2].

<sup>47</sup> *Ibid.*, p. 4[3].

76. Violence erupted again in August 1929. It left 220 dead and 520 injured in Jerusalem. The British authorities had to call on outside military reinforcements in order to bring the situation under control.

77. At its session in Geneva from 6 to 26 November [19]29, the Permanent Mandates Commission was concerned at the disturbances in Palestine. Arab non-acceptance of the terms of the Mandate and calls for institutions of self-government placed the British in a very weak position. The Jewish Agency was worried that Palestine was perceived as overpopulated and that the unrest was being attributed to the fact that the land ownership policy favouring Jewish people had created a category of the Arab population with no access to land. It regarded Transjordan as a reserve of land and referred to the possibility of a “transfer” of part of the Arab population<sup>48</sup>.

78. The Arab population understood that the creation of a Jewish State at the expense of their access to independence was inevitable. Fresh violence directed against the mandatory Power broke out in 1933, in particular in Jerusalem and Jaffa.

79. A widespread uprising broke out in 1936. Successive strikes, attacks against both English and Jewish targets and acts of sabotage against roads, railways, telephone and telegraph lines and oil pipelines continued until 1939<sup>49</sup>. The Palestinian political parties, united in an Arab Higher Committee, called for the setting up of a national government. The British authorities responded with severe repression, enlisting 20,000 members of the Jewish population in an auxiliary police force against the rebels and placing the whole of Palestine under military control. The human cost was nevertheless very high, with a toll of 3,717 casualties for 1938<sup>50</sup>.

80. The Royal Commission set up subsequently, known as the Peel Commission, noted the fundamental contradiction that had undermined the Mandate for Palestine. It recognized that a policy of attempting to implement the terms of the Mandate by force “[led] nowhere”. “The establishment of a single self-governing Palestine will remain just as impracticable as it is now. It is not easy to pursue the dark path of repression without seeing daylight at the end of it.”<sup>51</sup>

81. In 1937 (as the rebellion raged), the British Government published a new White Paper advocating the solution of partition, the last chance for a peaceful solution. The proposal was rejected by both the peoples concerned. The Arab people stood by the right of the Palestinians to full independence in the whole of Palestine. The Congress of the Zionist Organization, held in Zurich in August 1937, opposed the proposition, its majority remaining in favour of a Jewish State in all the territory of Palestine. The positions were fundamentally irreconcilable.

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<sup>48</sup> Henry Laurens, *La question de Palestine, Tome deuxième, 1922-1947, Une mission sacrée de civilisation*, Paris, Fayard, 2002, p. 199.

<sup>49</sup> *La question de Palestine*, New York, United Nations, 1979, p. 13.

<sup>50</sup> “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 51, based on [*Great Britain and Palestine*, Royal Institute of International Affairs (R.I.I.A., Chatham House)], London, 1946, pp. 116-118.

<sup>51</sup> Palestine Royal Commission Report, British Government, 1937, pp. 41-42, quoted in “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 55.

82. The repression intensified. Arab villages were searched and the houses of their inhabitants ransacked. Special night squads made up of British soldiers and Haganah volunteers murdered Arab political leaders<sup>52</sup>. The Irgun entered the vicious cycle of reprisals. Anti-British popular sentiment grew in the Arab countries.

83. The Government of Great Britain then embarked on various initiatives to resolve the situation in which it found itself, all of which were unsuccessful. It entrusted a technical commission with examining other partition formulas. However, a resurgence of violence forced it to recognize that this solution was impossible. The protagonists were then invited to round-table discussions in London which produced no result.

84. In the White Paper of May 1939 (by means of which, as has been seen, an overdue attempt was made to limit Jewish immigration into Palestine) the London Government put forward a novel proposal, one of a two-nation State in which power would be shared between both communities:

“The objective of His Majesty’s Government is the establishment within 10 years of an independent Palestine State in such treaty relations with the United Kingdom as will provide satisfactorily for the commercial and strategic requirements of both countries in the future. The proposal for the establishment of the independent State would involve consultation with the Council of the League of Nations with a view to the termination of the Mandate.

The independent State should be one in which Arabs and Jews share government in such a way as to ensure that the essential interests of each community are safeguarded.”<sup>53</sup>

That proposal was no more palatable than the others to either party, Jewish or Arab.

85. With the start of the Second World War and the Nazi policy aimed at exterminating the Jewish population of Europe, illegal Jewish immigration increased. Extremist Jewish groups emerged and on 22 July 1946 an attack on the King David Hotel, headquarters of the British authorities, left some one hundred dead. On 18 February 1947, having reached a total impasse, Great Britain announced:

“we have decided that we are unable to accept the scheme put forward either by the Arabs or by the Jews, or to impose ourselves a solution of our own. We have, therefore, reached the conclusion that the only course now open to us is to submit the problem to the judgement of the United Nations”<sup>54</sup>.

### **3. Intervention by the United Nations, resolution 181 (1947) and what followed**

86. In February 1947, when the British Government renounced its obligations as Mandatory for Palestine, the United Nations inherited one of the most incendiary issues of the post-war period. With the situation on the ground more serious every day, a special session of the United Nations General Assembly examined questions concerning “the future government of Palestine”. The Arab delegations requested that the agenda include an item entitled “[t]he termination of the mandate over

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<sup>52</sup> Henry Laurens, *op. cit.*, p. 390.

<sup>53</sup> See Ann. 10, p. 8.

<sup>54</sup> *La question de Palestine*, New York, United Nations, 1979, p. 17.

Palestine and the declaration of its independence". However, the General Assembly decided instead to hear the representatives of the Jewish Agency and the Arab Higher Committee.

87. A United Nations Special Committee on Palestine (UNSCOP) having been tasked with making recommendations on the future government of Palestine, it was necessary to determine its composition and objectives. The confrontational dynamic that had developed during the years of the British Mandate was now reproduced in the discussions.

88. The delegate of the Jewish Agency (a non-governmental organization that had been allowed to participate in the deliberations of the United Nations) insisted that Jewish immigration into Palestine should be unlimited. However, because the Agency linked the question of Jewish people in Europe and what was to become of them with the question of the future of Palestine, it was challenged by numerous delegations. The Syrian delegation recalled that the question of Palestine was entirely independent of that of the people suffering ill-treatment in Europe and seeking refuge elsewhere. The question of the fate of the Jewish people of Europe nevertheless remained at the heart of the Commission's concerns<sup>55</sup>. After carrying out investigations in Palestine, the Commission went to the refugee camps in Germany and Austria where it noted the refugees' immense desire to reach Palestine.

89. The Arab delegations, for their part, sought (unsuccessfully) to have a reference to the question of establishing "the independent democratic State of Palestine" included in UNSCOP's terms of reference. The Arab Higher Committee then refused to appear before UNSCOP when the Commission went to Palestine in mid-June 1947.

90. Faced with the dire situation left by the Mandate authorities, the Commission observed:

"With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the 'A' Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle."

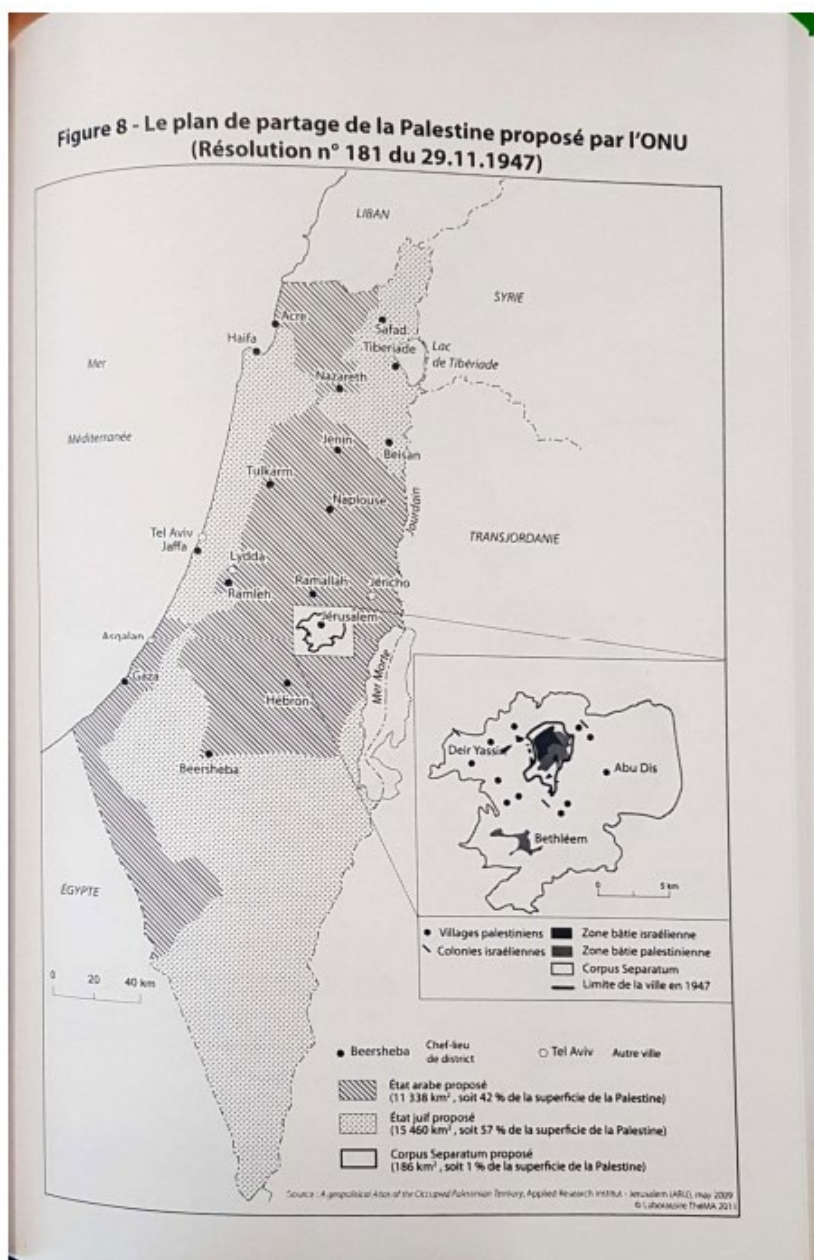
91. On the strength of that finding, UNSCOP was unanimous in recommending that the British Mandate should be brought to an end. Albeit hesitantly, the majority came round to the idea of partition. The next question discussed was whether the General Assembly had legal competence to partition Palestine. It was even proposed to seize the International Court of Justice on the matter but that proposal was rejected by one vote. That question therefore remained unanswered. During the debate in the General Assembly, the States opposed to partition asserted that it violated the right to self-determination by denying that right to the Palestinian people, and that it also infringed Article 6 of the Mandate which guaranteed that the rights and position of other, non-Jewish, sections of the population would not be prejudiced.

92. The proposal of the *ad hoc* Commission then needed to be the subject-matter of a General Assembly resolution requiring a two-thirds majority. That vote was the occasion for intense

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<sup>55</sup> *Official Records of the General Assembly, second session, Special Committee On Palestine, vol. I, 1947, pp. 54-55 (Ann. 11).*

negotiations and bargaining<sup>56</sup>. Resolution 181 (II) of 29 November 1947 was adopted by 33 votes to 13, with 10 abstentions<sup>57</sup>.



**Map No. 5**, Plan for the partition of Palestine proposed by the United Nations in *Quel État pour la Palestine?*, Raphaël Porteilla, Jacques Fontaine, Philippe Icard and André Larceneux (eds.), L'Harmattan, Paris, 2011, middle section, fig. 8.

Figure 8 - Le plan de partage de la Palestine proposé par L'ONU (Résolution N° 181 du 29.11.1947)	Figure 8 - Plan for the partition of Palestine proposed by the United Nations (resolution 181 of 29.11.1947)
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<sup>56</sup> For details of those negotiations and the pressure exerted on certain delegations, see Henry Laurens, *La question de Palestine, Tome deuxième, 1922-1947, Une mission sacrée de civilisation*, Paris, Fayard, 2002, pp. 600-603.

<sup>57</sup> United Nations General Assembly, resolution 181 (II) of 29 November 1947 (Ann. 12).



Mer Méditerranée	Mediterranean Sea
LIBAN	LEBANON
SYRIE	SYRIA
TRANSJORDANIE	TRANSJORDAN
ÉGYPTE	EGYPT
Jénine	Jenin
Naplouse	Nablus
Bethléem	Bethlehem
Tibériade	Tiberius
Lac de Tibériade	Lake Tiberius
Jourdain	Jordan
Mer Morte	Dead Sea
Villages palestiniens	Palestinian villages
Colonies israéliennes	Israeli settlements
Zone bâti israélienne	Israeli built-up area
Zone bâti palestinienne	Palestinian built-up area
Limite de la ville en 1947	Boundary of the city in 1947
Chef-lieu de district	District administrative centre
Autre ville	Other town or city
État arabe proposé (11 338 km <sup>2</sup> , soit 42% de la superficie de la Palestine)	Proposed Arab State (11,338 sq km, i.e. 42% of the area of Palestine)
État juif proposé (15 460 km <sup>2</sup> , soit 57% de la superficie de la Palestine)	Proposed Jewish State (15,460 sq km, i.e. 57% of the area of Palestine)
Corpus Separatum proposé (186 km <sup>2</sup> , soit 1% de la superficie de la Palestine)	Proposed <i>corpus separatum</i> (186 sq km, i.e. 1% of the area of Palestine)

93. By that resolution, the General Assembly recommended to the United Kingdom as mandatory Power for Palestine, and to all the other Member States of the United Nations, the adoption and implementation of a plan of partition with economic union. Palestine was to be divided into a Jewish State and an Arab State, with Jerusalem established as a *corpus separatum*. The Jewish State would cover 14,100 sq km and included eastern Galilee, the coastal strip from Acre to Isdud, and the Negev. The Arab State comprised 11,500 sq km and encompassed western Galilee, Samaria and the coastal strip in the Gaza region. The underlying rationale of the partition was that the Jewish

State should contain the largest possible number of Jewish people while the number of them remaining in the Arab State should be reduced to a minimum (some 10,000). In view of the demographic situation on the ground, however, a very large number of Palestinian Arabs would remain in the Jewish State (a figure put at 407,000)<sup>58</sup>.

94. Jerusalem was placed under a special international régime. Liberty of access was guaranteed to the Holy Places. The administration of the city, which included the city itself and a number of neighbouring villages and towns, was entrusted to the United Nations Trusteeship Council for 10 years. According to the terms of resolution 181:

“After the expiration of this period the whole scheme shall be subject to re-examination by the Trusteeship Council in the light of the experience acquired with its functioning. The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City.”

95. The United Kingdom was to withdraw by 1 August 1948, although it would make available to the Jewish State by 1 February 1948 an area including a seaport to facilitate “substantial immigration”.

96. The Security Council was asked to implement the plan of partition and the “inhabitants” of Palestine to take steps to put it into effect. Resolution 181 also included measures safeguarding minority rights.

97. The Arab States and several other States declared that they did not consider themselves bound by the General Assembly’s recommendation because it was contrary to the Charter itself. The Arab Higher Committee called for a general strike in protest against the proposal. The Zionist Organization, for its part, accepted the recommendation, seeing in it a means of moving towards its objective. In Palestine, however, Zionist paramilitary forces stepped up their actions against the waning mandatory Power. Losing all control, Great Britain set its withdrawal for 15 May 1948, several months before the date envisaged by the General Assembly.

98. As the British troops were organizing their withdrawal, the Zionist military forces increased their attacks against military installations and seized British weapons. They established control not only over the part of Palestine attributed to the Jewish State by resolution 181, but further afield.

99. The situation prevented the Security Council, which the General Assembly had explicitly requested to implement the plan of partition, from taking effective decisions. On 5 March 1948, in light of the evolving situation on the ground, resolution 42 resolved:

“to call on the permanent members of the Council to consult and to inform the Security Council regarding the situation with respect to Palestine and to make, as the result of such consultations, recommendations to it regarding the guidance and instructions which the Council might usefully give to the Palestine Commission with a view to implementing the resolution of the General Assembly. The Security Council requests

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<sup>58</sup> “The Origins and Evolution of the Palestine Problem 1917-1988”, a study prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People, New York, United Nations, 1990, p. 125.

the permanent members to report to it on the results of their consultations within ten days”<sup>59</sup>.

The terms used at the time illustrate how powerless the United Nations found itself.

100. On 14 May 1948 the last British forces were preparing to leave Palestine and the following day, 15 May, Israel declared its independence. Here was the embodiment of the whole of Zionist ideology. The coming into being of the State of Israel was seen as “the right of the Jewish people to national rebirth in its own country”<sup>60</sup>. The Arabs of Palestine who had been there for centuries were mentioned only as being indebted to Israel, since the Jewish people arriving as settlers in Palestine were described as “bringing the blessings of progress to all the country’s inhabitants”<sup>61</sup>. Violence then intensified on both sides. The first Arab-Israeli war was becoming inevitable.

#### **4. The 1948-1949 Arab-Israeli war and its consequences**

101. On 4 April 1948, as the British forces were withdrawing, the Haganah, which on 6 March had already called for a general mobilization, launched “Plan Dalet”, named after the code name for the strategy devised by the Haganah’s general staff for the conduct of operations to conquer the territory assigned to the Palestinian State<sup>62</sup>. The Haganah, the military wing of the Zionist movement that had incorporated other, now dissolved, partisan militias (the Irgun, the Stern and the Palmach), had 350,000 adult men, of whom 2,200 were in the Palmach shock battalions, plus the 9,500 members of the Gadna youth battalions<sup>63</sup>. They would carry out 13 offensives to conquer territory, opposed unsuccessfully by 2,000 to 3,000 Palestinian combatants. The openly stated aim was now to expel the maximum number of Palestinian Arabs, by force if necessary, not only from the areas proposed for the Jewish State but from certain parts that were reserved for an Arab State but coveted by Jewish Palestinians. A number of massacres (the best-known of which is the Deir Yasin massacre of 9 April 1948) therefore took place before the British withdrawal<sup>64</sup>.

102. Against that background, the day after Israel’s Declaration of Independence, the armies of six Arab States intervened in Palestine. Let us now take stock of the outcome of that armed intervention (a), measure its consequences on the ground for Arab Palestine (b), and analyse the powerlessness of the United Nations to ensure application of the principles of the Charter to the situation (c).

##### **(a) *Military operations between the Arab countries and Israel and their territorial consequences***

103. The crushing of the Palestinians in the last days of the Mandate and the seizure by the Jewish armies of large portions of the territory that the United Nations partition plan had reserved for the Palestinian State led to intervention by the Arab armies under a decision of the Political

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<sup>59</sup> United Nations Security Council, resolution 42 (1948) of 5 March 1948.

<sup>60</sup> Declaration of Independence [*sic*], 14 May 1948, translation, Provisional Government of Israel, *Official Gazette: Number 1*, p. 1 (Ann. 13).

<sup>61</sup> *Ibid.*, third para.

<sup>62</sup> Plan Dalet, 10 March 1948, translation, in “Plan Dalet: Master Plan for the Conquest of Palestine”, Walid Khalidi, *Journal of Palestine Studies*, 1988, Vol. 18, No. 1, p. 21 (Ann. 14).

<sup>63</sup> Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, Cambridge, Cambridge University Press, 1987, pp. 21-22.

<sup>64</sup> Jacques de Reynier (delegate for Palestine of the International Committee of the Red Cross), *1948 à Jérusalem*, Neuchâtel, Switzerland, Éditions de la Baconnière, pp. 69-78 (Ann. 15).

Committee of the League of Arab States, an organization founded in 1945. The intervention was announced to the Secretary-General of the United Nations in the following terms:

“The Governments of the Arab States hereby confirm at this stage the view that had been repeatedly declared by them on previous occasions, . . . the only fair and just solution to the problem of Palestine is the creation of United State of Palestine [*sic*] based upon the democratic principles which will enable all its inhabitants to enjoy equality before the law, and which would guarantee to all minorities the safeguards provided for in all democratic constitutional States affording at the same time full protection and free access to Holy places.”<sup>65</sup>

104. Fighting raged for several weeks. Although initially the Israeli forces appeared to be on the defensive their situation would improve fairly rapidly, reinforced by new immigrants and a flow of arms from both West and East thanks to an air bridge from the Czech base of Žatec<sup>66</sup>. In June 1948, the Security Council procured acceptance of a four-week truce, and then ordered a ceasefire on 15 July 1948<sup>67</sup>. In October, the Israeli army broke the ceasefire and attacked the Negev. On 16 November, the Security Council resolved that an armistice should be concluded in all sectors of Palestine. On 29 November 1948, Israel and Transjordan concluded a ceasefire in Jerusalem, approving the division of the city one year to the day after the United Nations had recommended it be internationalized<sup>68</sup>. By 24 January 1949, the West Bank and East Jerusalem were under the administration of Transjordan. Between November 1948 and March 1949, all the States concerned accepted the principle of the armistice. On 24 January 1949, Israel signed an agreement to suspend hostilities with Egypt, after an Israeli offensive in the Negev, and a further agreement with Transjordan on 11 March 1949, after a lightning offensive by the Israelis on the port of Eilat.

105. Armistice agreements would then be negotiated in Rhodes brokered by R. Bunche, the United Nations mediator. Agreements were signed with Egypt on 24 February 1949<sup>69</sup>, Lebanon on 23 March, Transjordan on 3 April and Syria on 20 July. Ratifying Israel's territorial gains, those agreements fixed demarcation lines that bore no relation to the borders envisaged by the partition plan. However, each agreement stated that its provisions would in no way prejudice the rights, claims and positions of either party in the ultimate peaceful settlement of the Palestine question.

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<sup>65</sup> Document published in Irène Errera-Hoehstetter, *Le conflit israélo-arabe*, PUF, 1974, p. 25.

<sup>66</sup> See Dominique Vidal, *Le péché originel d'Israël, L'expulsion des Palestiniens revisitée par les « nouveaux historiens » israéliens*, Paris, Les Éditions de l'Atelier, 2002, p. 59.

<sup>67</sup> Security Council resolution 54, 15 July 1948.

<sup>68</sup> See Dominique Vidal, *op. cit.*, p. 71.

<sup>69</sup> General Armistice Agreement between Egypt and Israel, 24 February 1949, *United Nations, Treaty Series, Vol. 42*, 1949, pp. 251-285 (Ann. 16).



Map No. 6. Territory annexed between 1947 and 1948, from Alain Gresh, *Israël, Palestine, Vérités sur un conflit*, Fayard, Paris, 2002, middle section.

1947-1949 : le plan de partage et les premières annexions	1947-1949: the partition plan and the first annexations
Liban	Lebanon
Syrie	Syria

Tibériade	Tiberius
Mer Méditerranée	Mediterranean Sea
Jénine	Jenin
Naplouse	Nablus
Jourdain	Jordan
Jéricho	Jericho
Bethléem	Bethlehem
Transjordanie	Transjordan
Égypte	Egypt
Mer Morte	Dead Sea
Désert du Néguev	Negev Desert
Frontières de la Palestine sous mandat Britannique entre 1922 et 1948	Boundaries of Palestine under British Mandate between 1922 and 1948
Plan de partage de l'ONU du 29 novembre 1947	United Nations plan of partition of 29 November 1947
Etat juif	Jewish State
Etat arabe	Arab State
Régime international particulier	Special international régime
Principaux massacres de Palestiniens	Principal massacres of Palestinians
Territoires conquis par Israël en 1948 et 1949	Territories conquered by Israel in 1948 and 1949
Frontières des armistices de février-juillet 1949	Boundaries under the armistices of February-July 1949

106. The territory controlled by Israel was now 77 per cent of the territory of Mandatory Palestine. The number of incidents on the demarcation lines increased, ultimately paralysing the Armistice Commissions. The Palestinians formed small armed groups to launch military operations against Israel from Syria, Jordan and Gaza. In 1959, a handful of Palestinian leaders founded Fatah in Kuwait. They established its military wing and launched an armed struggle on the night of 31 December 1964. However, the movement had only a few hundred members and suffered heavy losses in the raids carried out.

**(b) Consequences of the 1948 Arab-Israeli war in terms of population**

107. The military operations carried out by Israeli forces in 1948 went hand in hand with a desire to empty the territories of as many of their occupants as possible, a precondition for continuing and expanding Jewish immigration. That is how one should understand the massacres that took place even before the departure of the British forces. By sowing panic among the Arab populations, they were intended to make clear to the Palestinians that their only chance of survival was to leave.

108. For a long time the Zionist leaders, who had now become Israel's political leaders, took pains to conceal that aspect of their project, which was not only unconscionable in human terms but open to legal condemnation under international law, which was then beginning to assert itself. Unable to deny that between 700,000 and 900,000 Palestinians had fled their homes between the departure of the British on 15 May 1948 and the Armistices of 1949, they therefore strived, first, to downplay the number of those who had fled and, second, to allege that people were fleeing en masse as the result of calls by the Palestinian leaders who had advised them to leave, guaranteeing that they would be able to return once victory was won: "And we have explicit documents testifying that they left Palestine following instructions by the Arab leaders, with the Mufti at their head, under the assumption that the invasion of the Arab armies . . . would destroy the Jewish state and push all the Jews into the sea"<sup>70</sup>.

109. In the 1990s a new generation of Israeli historians, the "new historians" who had access to Israeli archives that had become available for consultation, led to advances in determining what actually happened<sup>71</sup>. This confirmed that there was a determined policy to expel the greatest possible number of Palestinians, not only from the part of Palestine intended to become the Jewish State under the partition resolution but further afield in parts of the territory intended to form an Arab State.

110. The exodus of the Arab population appears to have occurred in waves. The first, of around 70,000 people, between December 1947 and March 1948, was initially confined to urban Palestinians who feared widespread confrontation when the partition plan was announced. As the chaos increased, however, the flows swelled in the wake of Haganah raids, in Jerusalem in particular, and the atrocities committed by the Palmach in Qisarya. Josef Weitz, entrusted with organizing the Judaization of towns and villages, instigated the expulsions from specific localities.

111. The second wave, triggered at the time of the British departure in April-May 1948, was associated with implementation of "Plan Dalet", which David Ben Gourion presented to the general staff on 28 March<sup>72</sup>. It consisted of a Jewish offensive aided by the receipt of weapons and of funds raised in the United States and by a general mobilization of those aged between 18 and 25. Those factors meant that the Haganah now numbered six brigades. "[F]rom the beginning of April, there [were] clear traces of an expulsion policy on both national and local levels with respect to certain

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<sup>70</sup> Speech by Ben Gourion to the Knesset in 1961, quoted by Benny Morris, *1948 and After, Israel and the Palestinians*, Oxford, Clarendon Press, 1990, p. 30.

<sup>71</sup> Tom Segev, *1949, The first Israelis*, 1984 (Hebrew) [(English translation, Owl Books, 1998)]; Simha Flapan, *The birth of Israel: myths and realities*, New York, Pantheon Books, 1987; Benny Morris, *The birth of the Palestinian refugee problem, 1947-1949*, Cambridge, Cambridge University Press, 1987; Benny Morris, *1948 and after: Israel and the Palestinians*, Oxford, Clarendon Press, 1994; Benny Morris, *The birth of the Palestinian refugee problem revisited, 1947-1949*, Cambridge, Cambridge University Press, 2004; Benny Morris, *1948: a history of the first Arab-Israeli war*, New Haven (Conn.), Yale University Press, 2008; Avi Shlaim, *Collusion across the Jordan: King Abdullah, the Zionist Movement and the partition of Palestine*, 1988 (republished in 1990 under the title *The politics of partition*); Ilan Pappé, *The making of the Arab-Israeli conflict, 1947-1951*, I. B. Tauris, 1992; Ilan Pappé, *The ethnic cleansing of Palestine*, Oneworld Publications, 2007.

<sup>72</sup> See Ann. 14.

key strategic districts and localities”<sup>73</sup>. The exodus increased tenfold following news of the massacre at Deir Yasin on 9 April 1948. When the Haganah took Haifa, only between 3,000 and 4,000 out of its 70,000 Arab inhabitants would remain. The same thing occurred in Jaffa and elsewhere. “Plan D” was applied to the whole of Galilee, both its eastern and western sectors<sup>74</sup>.

112. The third wave of the Palestinian exodus began on 9 July. The intention of expelling the Arab population was now more explicit. Heavy bombing was driving the exodus and the orders were that this should be the case. Tsahal, the Israeli army, launched an offensive towards Jerusalem and took two towns in Arab territory, Lydda (where 250 civilians were massacred) and Ramleh. More than 60,000 Palestinians would be expelled from these towns on 12 and 13 July<sup>75</sup>. The Israeli army would then take Nazareth, a step towards the Judaization of Galilee. The flow of refugees was increased by the operations carried out by the Israeli forces from 18 July to 15 October 1948. In the region known as the Little Triangle, an Arab area between Nablus, Tulkarm and Jenin, aerial bombardments and atrocities forced the Arab inhabitants to leave, as observed by United Nations investigators: “when the attack ended . . . all the inhabitants of the three villages were forced to leave”<sup>76</sup>.

113. A fourth wave of expulsions of Arab populations began in the Negev where the population was pushed out towards Gaza. A massacre at al-Dawayima triggered panic among the population. When the fighting of October-November 1948 ended, the number of refugees in the Gaza Strip had risen from 100,000 to 230,000. At the same time, in the north, a three-day operation forced some 30,000 people to flee.

“On no front were across-the-board orders given to chase out the Arab populations. However, in October 1948 the brigade, battalion and company commanders were generally of the view that it was best that the Jewish State should have as few Arabs as possible . . . When expulsions occurred, they were generally at the initiative of local commanders. Added to this was the ‘atrocities factor’, which played a major role in prompting people to flee from various groups of Muslim villages in Galilee and from al-Dawayima in the south . . . Operations Hiram and Yoav together turned some 100,000 to 150,000 Arab residents into refugees.”<sup>77</sup>

114. Between November 1948 and July 1949, other expulsions would be the result of actions by the Israeli army to remove as much of the Arab population as possible from the border areas and to drive the Bedouin tribes out of the Negev. The Israeli Government tried to play down its responsibility in relation to the Palestinian refugees so as not to jeopardize its forthcoming application for Israel to be admitted to the United Nations. UNRWA put the number of Palestinian refugees in the wake of the 1948-1949 war at between 800,000 and 900,000.

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<sup>73</sup> Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, Cambridge, Cambridge University Press, 1987, p. 64.

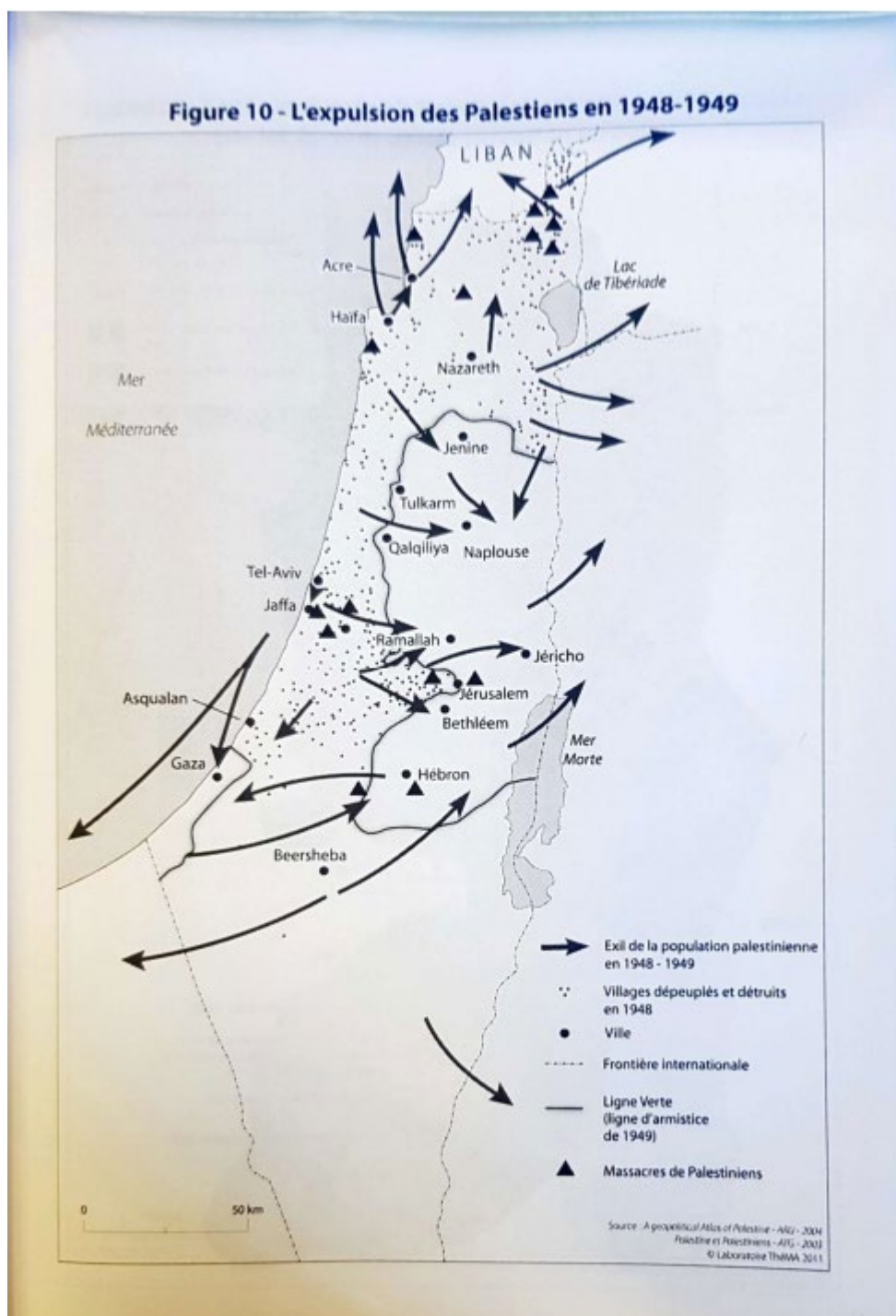
<sup>74</sup> See Ann. 14.

<sup>75</sup> See Nur Masalha, “Le concept de ‘transfert’ dans la doctrine et dans la pratique du mouvement sioniste”, in *Le droit au retour. Le problème des réfugiés palestiniens*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Actes Sud, Sindbad, 2002, p. 41.

<sup>76</sup> *Ibid.*, p. 214 [Translation by the Registry].

<sup>77</sup> *Ibid.*, pp. 235-236 [Translation by the Registry].





**Map No. 7**, Expulsion of Palestinians in the period 1948-1949, in *Quel État pour la Palestine?*, Raphaël Porteilla, Jacques Fontaine, Philippe Icard and André Larceneux (eds.), L'Harmattan, Paris, 2011, middle section, fig. 10.

Figure 10 - L'expulsion des Palestiens en 1948-1949	Figure 10 - Expulsion of Palestinians in the period 1948-1949
LIBAN	LEBANON
Lac de Tibériade	Lake Tiberius

Mer Méditerranée	Mediterranean Sea
Jenine	Jenin
Naplouse	Nablus
Jéricho	Jericho
Bethléem	Bethlehem
Mer Morte	Dead Sea
Hébron	Hebron
Asqalan	Ashkelon
Exil de la population palestinienne en 1948-1949	Palestinian population exiled 1948-1949
Villages dépeuplés et détruits en 1948	Villages depopulated and destroyed in 1948
Ville	Town or city
Frontière internationale	International boundary
Ligne Verte (ligne d'armistice de 1949)	Green Line (1949 Armistice Demarcation Line)
Massacres de Palestiniens	Massacres of Palestinians

115. The Zionists who were in charge in Palestine during the Mandate had accepted the partition plan recommended by the United Nations only as a phase in the future expansion of territory. Their project was also aimed at taking control of the areas of Jewish settlement and concentration outside the boundaries set for Israel in the partition resolution. That project, whose implementation had begun even before the British Mandate ended, became systematic from May-June 1948. Expansion of the territory assigned to Israel by the United Nations was at the very heart of the project.

116. In 1948 Israeli-dominated territory thus rose from the 56 per cent of Mandatory Palestine allotted to the Jewish State by the United Nations resolution, to 78 per cent. However, the policy of driving Palestinians out of their villages and their towns and cities was also motivated by a wish to appropriate their property. Ever since its creation, the Zionist movement had made clear that it was keen to take hold of Palestinian land. Israel was not content with acquiring political dominion over the territory it had conquered by force. Israeli leaders made no secret of having plans to seize territory and of seeking to expel the Arab inhabitants, by force if necessary, in order to take over Arab land and distribute ownership of it among Jewish settlers.

117. As director of the Land Department of the Jewish National Fund (JNF), the body responsible for purchasing the land necessary to advance the Zionist project, Josef Weitz would be its architect. In his diary, he set out candidly the link between the appropriation of land and the need to expel the Arab population:

“It must be clear that there is no room in the country for both peoples . . . If the Arabs leave it, the country will become wide and spacious for us . . . The only solution is a Land of Israel, at least a western Land of Israel, without Arabs. There is no room here for compromises . . . There is no way but to transfer the Arabs from here to the neighbouring countries, to transfer all of them, save perhaps for [the Arabs of] Bethlehem, Nazareth and old Jerusalem. Not one village must be left, not one tribe. The transfer must be directed at Iraq, Syria and even Transjordan. For this goal funds will be found . . . And only after this transfer will the country be able to absorb millions of our brothers and the Jewish problem will cease to exist. There is no other solution.”<sup>78</sup>

118. The Israeli Government passed an Emergency Absentee Property Law, enacted on 30 June 1948. It was implemented from 31 March 1950 and enabled the confiscation of 40 per cent of Palestinian land, that is to say, some 16 million dunums (1.6 million hectares). All Arab Palestinians who left their place of habitual residence between 29 November 1941 and 1 September 1948 were treated as absentees. Their property (houses, land, livestock and so forth) could be vested in the custodian of absentee property<sup>79</sup>.

119. Historians reported at the time:

“Abandoned Arab dwellings in towns have . . . not remained empty . . . The existence of these Arab houses — vacant and ready for occupation — has, to a large extent, solved the greatest immediate problem which faced the Israeli authorities in the absorption of immigrants. It also considerably relieved the financial burden of absorption.”<sup>80</sup>

The result of those confiscations was that Jewish settlers could be installed on the confiscated land, and the wealth appropriated at the same time would serve to finance that settlement.

### ***(c) Political evolution of the situation and powerlessness of the United Nations***

120. In resolution 181 the General Assembly, which had no decision-making powers, asked the Security Council to implement the territorial provisions outlined therein. However, the Arab refusal to acquiesce to a partition that was regarded as a large-scale violation of the rights of the Palestinian people, the situation of armed conflict in Palestine and Israel’s forcible territorial gains precluded any measure to implement the partition plan.

121. Count Bernadotte, appointed by the General Assembly of the United Nations to “[p]romote a peaceful adjustment of the future situation of Palestine”, was unable to arrange negotiations between the parties. He nevertheless achieved a temporary truce, during which he proposed another partition plan under which an Arab State would be composed of Transjordan plus the territories assigned to an Arab State by resolution 181 but with adjustments whereby the Negev would form part of the Arab State while Galilee would form part of Israel. Then, on 17 September 1948, Bernadotte was assassinated by the Stern Group, one of the Jewish terrorist organizations that had operated openly since the end of the Mandate.

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<sup>78</sup> Quoted by Benny Morris, *op. cit.*, p. 27.

<sup>79</sup> For the definition of “absentee” see Ussama Rafik Halabi, “La Direction des biens des absents en Israël”, in *Le droit au retour. Le problème des réfugiés palestiniens*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Actes Sud, Sindbab, 2002, pp. 263-282.

<sup>80</sup> Simha Flapan, *The Birth of Israel. Myths and Realities*, London and Sydney, Croom Helm, 1987, p. 107.

122. Ralph Bunche, appointed as acting mediator, was the architect of the Rhodes meetings that gave rise to the armistice agreements concluded with the various Arab countries in 1949. Those agreements did not prejudge the final settlement of the conflict. The question of the allocation of the territories from which the mandatory Power had withdrawn was therefore also unresolved. The region was in complete upheaval with the massive displacement of Palestinians. In response to this emergency, on 11 December 1948 the United Nations General Assembly adopted resolution 194 by which it created a Conciliation Commission for Palestine, called for the demilitarization and internationalization of Jerusalem and, first and foremost, resolved that exiled Palestinians had a right of return: “the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and . . . compensation should be paid for the property of those choosing not to return and for loss of or damage to property”<sup>81</sup>.

123. The Conciliation Commission was faced with the three problems generated by the chaotic withdrawal from the Mandate, followed by the 1948 Arab-Israeli war: the problem of territory, the problem of the future of Jerusalem and the refugee problem. It was not in a position to make progress on any of them. On the territorial question, Israel made clear its very resolute intention to keep the territories taken by force in 1948 and the Gaza region, leaving the West Bank under the administration of Jordan.

124. That was the context, the product of the balance of power, in which, on 29 November 1948, one year after the vote on the partition resolution, Israel applied for admission to the United Nations. The Security Council initially rejected the application. After Israel had given an assurance during the debates that it would respect the United Nations resolutions<sup>82</sup>, it was admitted to membership on 11 May 1949, specific reference being made to the undertaking given by that State to honour its obligations under the Charter unreservedly<sup>83</sup>.

125. Despite giving its word, Israel immediately applied its laws to the territories occupied in 1948, thereby formally endorsing their annexation by force. The same was the case for West Jerusalem, which was declared the capital of Israel in January 1950. For Israel there was nothing temporary about those measures even though there had been no international settlement of the situation.

126. In 1950, Jordan, which would not become a Member of the United Nations until 1955, declared the West Bank officially under its control, notwithstanding opposition from the other Arab States.

127. The situation then became blocked for nearly two decades. A United Nations Conciliation Commission was set up in January 1949. Its diplomatic efforts were unsuccessful. Its role was limited to administrative functions such as keeping lists of refugee assets and who owned them, blocked bank accounts and so forth.

128. The Palestinian people, split between those who stayed on Israeli territory as determined by resolution 181, those who remained in the Arab parts taken over by Israel in 1948 and all those who had fled, either to Gaza or to the West Bank (now under Jordanian administration) or to the

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<sup>81</sup> United Nations General Assembly, resolution 194 (III), 11 December 1948 (Ann. 17).

<sup>82</sup> “Declaration accepting obligations under the Charter [*sic*]”, from Israel’s Foreign Minister to the [United Nations] Secretary-General, 29 November 1948, United Nations, Security Council, S/1093 (Ann. 18).

<sup>83</sup> United Nations General Assembly, resolution 273 (III), 11 May 1949 (Ann. 19).

other side of the river Jordan or to other countries, were left with no political organization, and it took a number of years before the Palestine Liberation Organization would emerge in 1964 as a political movement to defend their rights. The Arab States that had voted against the partition plan in 1947 were now demanding, without success, that Israel withdraw to within the borders set for the Jewish State in that plan.

129. For many years the United Nations, grappling with the Cold War and the ongoing struggles for national liberation being waged by colonized peoples, had its attention focused elsewhere. The Suez War in 1956, although not directly related to the question of Palestine, nevertheless contributed to a crystallization of the antagonism between Israel and its Western allies on the one hand and the Arab countries on the other. The conflict that had been latent for years erupted as a military confrontation once again in 1967. That war would give rise to the military occupation of the territory of Palestine.

### **B. Israel's military occupation of the Palestinian territory and its consequences**

130. The facts that characterize the situation put before the Court by the General Assembly's questions, from 1967, can be broken down into three periods:

- the 1967 war and Israel's military occupation of the whole of Palestine, including Jerusalem (1);
- the first Intifada which began in 1987 and led to the Oslo Accords of 1995 (2);
- the failure of the Oslo process, attempts to build on it with the "Roadmap" and the continued deterioration of the situation (3).

#### **1. The 1967 war and Israel's military occupation of the whole of Palestine, including Jerusalem**

131. In 1967, the war known as the Six-Day War and the occupation of the whole of Palestine by the Israeli army signalled the beginning of a new period. It was characterized by the balance of military power (a); changes in the situation in terms of the control of territories and as the result of population movements (b); and the difficulties encountered by the United Nations in enforcing its decisions (c).

##### **(a) *The military operations of 1967, and those of 1973 and subsequent years***

132. Along with the setting up of the PLO came the opening of training camps for Palestinians. Between 1964 and 1966 various groups (the military wing of the PLO, the military wing of Fatah and the Palestinian wing of the Arab Nationalist Movement) carried out armed actions against Israel. Following an Israeli military action in the southern Hebron area on 13 November 1966, the Security Council observed that "this incident constituted a large-scale and carefully planned military action on the territory of Jordan by the armed forces of Israel". By that resolution it "censore[d]" Israel for that violation of the United Nations Charter and of the Armistice Agreement with Jordan<sup>84</sup>.

133. The armies of Syria and Egypt were put on alert. On 20 May 1967, all the Arab States declared mutual solidarity in the event of an attack on one of them. On 22 May 1967, Nasser announced the closure of the Tiran Strait, to which Israel responded that it would resort to force if

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<sup>84</sup> Security Council resolution 228 (1966) of 13 November 1966.

necessary in order to have it reopened. On 5 June 1967 Israel carried out a “preventive” offensive that later became known as the Six-Day War. In less than a week, Israel tripled the territory it held: Egypt lost the Gaza Strip and the Sinai Peninsular; the Golan Heights were taken from Syria; and Jordan lost the West Bank and East Jerusalem. More symbolic even than the Arab defeat was the taking of the Old City of Jerusalem on 7 June 1967.

“Less than a week after the takeover of East Jerusalem on 7 June 1967, the Maghrabi quarter, dating from the twelfth century and adjacent to the Western Wall and the Haram al-Sharif, and its little mosque (*zawiya*) had disappeared from the face of the earth. Israeli bulldozers arrived before dawn and encircled the quarter, giving the inhabitants three hours to vacate their homes . . . By the end of the month, on 28 June 1967 to be precise, the boundaries of the municipality of Jerusalem were arbitrarily extended from 6 to 73 sq km, at the expense of the territories of the occupied West Bank.”<sup>85</sup>

134. At the very start of the Israeli offensive, the Security Council adopted two ceasefire resolutions that proved ineffective<sup>86</sup>. On 22 November 1967, by resolution 242, the Security Council called for the withdrawal of Israeli armed forces from territories occupied in the recent conflict, respect for the right of each State in the region to live in peace within secure and recognized borders and a just settlement of the refugee problem<sup>87</sup>.

135. The 1967 war resulted in the whole of Mandatory Palestine being under Israeli military occupation. The Palestinian military organizations were reinforced from Jordan and Lebanon where they had established bases, and launched attacks, the most significant being that on Karameh in March 1968. Israel maintained that there could be no possible return to the 1967 borders, “even if a peace agreement is signed between Israel and the Arab States, the Israeli forces will never withdraw from Jerusalem, the Golan Heights, Gaza and Sharm el-Sheikh”<sup>88</sup>.

136. During the summer of 1973, the press was suggesting that Israel was resolutely looking to annex the occupied territories<sup>89</sup>. In an unexpected reversal in the Arab-Israeli conflict, already a quarter of a century old, on 6 October 1973 Egypt and Syria launched a war that would be known as the Yom Kippur War. Decided upon in the utmost secrecy although preceded by an agreement between Syria and Egypt concluded in Cairo on 12 September 1973<sup>90</sup>, it overturned the then well-established belief that Israel held military supremacy in the region. The aim of the war was both to

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<sup>85</sup> Walid Khalidi, “Pour une solution juste et viable de la question de Jérusalem”, in *Jérusalem, le sacré et le politique*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Sindbad Actes Sud, 2000, p. 336 [Translation by the Registry].

<sup>86</sup> Resolutions 234 of 7 June 1967 and 237 of 14 June 1967.

<sup>87</sup> United Nations Security Council, Resolution 242, 22 November 1967 (Ann. 20).

<sup>88</sup> Declaration of Golda Meir, Prime Minister of Israel: “Mme Meier affirme qu’Israël ne rendra pas tous les territoires occupés « même si un accord de paix est signé avec les pays arabes »” (“Golda Meir states that Israel will not return all the occupied territories ‘even if a peace agreement is signed with the Arab countries’”), *Le Monde*, 11 April 1972 (Ann. 21).

<sup>89</sup> Statements by General Dayan, “Israël conservera les territoires occupés où des localités juives auront été implantées” (“Israel to keep the occupied territories where Jewish localities have been established”), *Le Monde*, 23 August 1973 (Ann. 22).

<sup>90</sup> Éric Rouleau, “La guerre d’octobre ou la diplomatie du canon, I La chance de ne pas être cru” (“The October war and gunboat diplomacy, I. The good fortune not to be believed”), *Le Monde*, 24 November 1973 (Ann. 23a). Éric Rouleau, “La guerre d’octobre et la diplomatie du canon, II Les dédales de l’opération « BADR »” (“The October war and gunboat diplomacy, II. The intricacies of Operation Badr”), *Le Monde*, 26 November 1973 (Ann. 23b).

reconquer the territories occupied by Israel in Egypt and Syria and to restore the rights of the Palestinian people.

137. Israel was taken by surprise, having underestimated the capabilities of the Arab armies, which had gained strength since 1967. Nevertheless, after mobilizing its reservists, the Israeli army was able to consolidate and then advance its positions. On 22 October, the Security Council called on the parties to observe an immediate ceasefire and return to their previous positions, and resolved to set up an Emergency Force<sup>91</sup>. Despite deployment of that Force, the ceasefire was broken numerous times in the following months. Egypt's forces were disengaged in March 1974 and those of Syria in June.

**(b) *Consequences of the military operations in that period in terms of the control of territories and population movements***

138. In 1967, through the use of armed force, Israel occupied the whole of the West Bank, where it would pursue a policy of creating a fait accompli. The military operations had caused a new flow of refugees fleeing the fighting. Israel would also systematically establish settlements in places considered to be strategic. That occupation and its subsequent continuation was achieved in 1967 at the expense of the Palestinian people of the West Bank, which had been under the administration of Jordan since 1950. The Jewish State also occupied the Gaza Strip, to the detriment of the Palestinian people of that part of the territory, which had been under Egyptian administration.

139. As Golda Meir had predicted, the Security Council's injunction in resolution 242 of 22 November 1967 regarding Israel's withdrawal from the occupied territories was not put into effect, which remains the case today in respect of the West Bank<sup>92</sup>.

140. Almost 439,000 people now became new refugees, nearly half of whom were experiencing their second exile, as they had already been forced to flee by the 1948 war. Of these, 200,000 were transferred on the orders of the Israeli governor of the West Bank, Chaim Hertzog, who was to become Israel's President from 1983 to 1993. He has himself acknowledged that he organized the departure of those Palestinians to Jordan, in a statement of 8 November 1991 reproduced by Agence France-Presse<sup>93</sup>.

141. In the early years, Israel's policy towards the Palestinian population under occupation was relatively liberal. It hardened progressively, as Israel proved willing to disregard its obligations under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (even though Israel had been a signatory thereto since 8 December 1949 and had ratified it on 17 December 1951). Israel also disregarded the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (even though Israel had been a signatory thereto since 14 May 1954 and had ratified it on 3 October 1957).

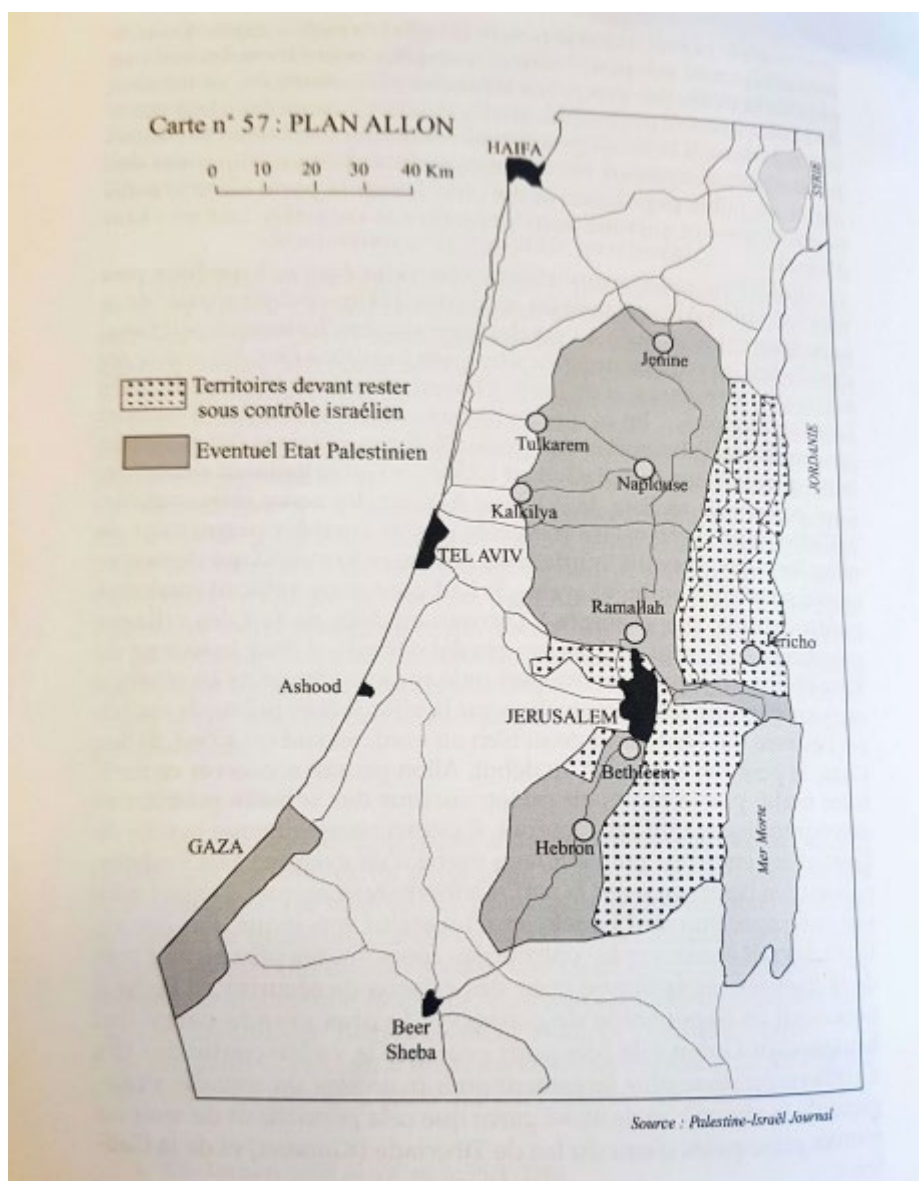
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<sup>91</sup> Resolutions 338 of 22 October 1973, 339 of 23 October 1973 and 340 of 25 October 1973.

<sup>92</sup> See below, para. 184, in respect of Gaza, which Israel left in 2003 but has been kept under a blockade by the Israeli army.

<sup>93</sup> Statement by Chaim Hertzog, President of Israel, "Le Président Herzog reconnaît avoir organisé le départ de 200 000 Palestiniens en 1967" ("President Herzog acknowledges organizing the departure of 200,000 Palestinians in 1967"), *Le Monde*, 10-11 November 1991 (Ann. 24).

142. The other limb of Israeli policy, which complemented its intention of expelling as many Palestinians as possible from the territories occupied by force, was the gradual establishment of as many Jewish settlers as possible in those territories. As early as the summer of 1967, the Israeli government drew up a settlement plan, named the Allon Plan.



**Map No. 8**, The Allon Plan, in *Les frontières au Moyen-Orient*, Jean-Paul Chagnollaud and Sid-Ahmed Souiah (eds.), L'Harmattan, Paris, 2004, p. 186.

Carte n° 57 : PLAN ALLON	Map No. 57: Allon Plan
Syrie	Syria
Jordanie	Jordan
Jénine	Jenin
Naplouse	Nablus



Kalkilya	Qalqiliya
Bethléem	Bethlehem
Mer Morte	Dead Sea
Territoires devant rester sous contrôle israélien	Territories to remain under Israeli control
Eventuel Etat Palestinien	Possible Palestinian State

The justification given for the plan was that the 1948 boundaries (corresponding to territory taken by force), in particular the eastern boundaries, were too close to the Mediterranean coast to afford Israel sufficient strategic depth.

143. In September 1973 the Labour Party adopted the “Galili document” on the policy to be pursued in the occupied territories. It envisaged general and systematic settlement. A political-religious form of Zionism emerged in the form of *Gush Emunim* (“Bloc of the Faithful”), which regarded the settlement of Jews on the land of Palestine as a religious duty. When Menachem Begin, the leader of Likud, succeeded Rabin in 1977 his political programme was based on the “Greater Israel” project, which involved continuing the settlements and land takeovers. The policy on “absentee” property applied to the Palestinians who had fled in 1948 was applied afresh to the refugees’ property.

144. Settlement in the West Bank and Gaza gathered pace. Settlements were sited so that they systematically broke up the areas heavily populated by Palestinians. In October 1978 the “Drobless Plan” was published under the political authority of Ariel Sharon, then Minister for Agriculture. This was a framework plan for expanding settlement in the West Bank. From 1981 the settler population in occupied territories increased from the 6,000 it was in 1977 to over 44,000 in 1984<sup>94</sup>. In 1990, a Shamir government granted tax benefits and exceptional loans and subsidies to Jewish settlements in Palestinian territory. In 1991, 13 per cent of the inhabitants of the occupied territories were Jewish settlers.

145. That ongoing settlement policy went hand in hand with various techniques for appropriating Palestinian land. Confiscating land and declaring it off-limits for military training, declaring an area to be public land, expropriating land for reasons of public interest or confiscating it on the pretext of establishing nature reserves were all among the means used at that time by the Israeli authorities. These Israeli enclaves in Palestinian territory were not covered by the legislation applied in the rest of Palestinian territory and were subject to Israeli law.

**(c) *Political evolution of the situation and the role of the United Nations up to the first Intifada in December 1987***

146. The policy of *fait accompli* implemented by Israel in the Occupied Palestinian Territory from 1967 had consequences first of all within the Palestinian population, both inside Palestine and in exile abroad, and afforded a platform for the Palestinian organizations throughout the region.

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<sup>94</sup> Figures taken from Jean-Paul Chagnollaud and Sid-Ahmed Souiah, *Les frontières au Moyen-Orient*, Paris, L’Harmattan, 2004, p. 199.

Those organizations nevertheless remained dependent on the States in the region in whose territory they were based.

147. By resolution 237 of 14 June 1967, the Security Council called on the Israeli Government to facilitate the return of the inhabitants who had fled from those areas since the outbreak of hostilities and recommended to the Governments concerned scrupulous respect for the humanitarian principles governing the treatment of prisoners of war and the protection of civilians in time of war, as set out in the Geneva Conventions of 12 August 1949<sup>95</sup>. Israel paid no heed.

148. Security Council resolution 242 of 22 November 1967 represented a clear stance on the part of the United Nations, all the more so because it was adopted unanimously<sup>96</sup>. Israel disregarded it, as it had the preceding resolutions. The insurmountable disagreement between the parties on the precondition that Israel had to withdraw from the occupied territories, a point on which the Israeli position remained inflexible, then led to a chaotic situation punctuated by outbursts of violence.

149. The General Assembly made pronouncements on the Palestinian question several times in the years following the Six-Day War. In resolution 2452 A, addressing the Government of Israel directly, it called upon it “to facilitate the return of those inhabitants who have fled”<sup>97</sup>. In 1968, it set up a special committee to investigate Israeli practices affecting human rights in the occupied territories. However, Israel denied that committee authorization to visit on-site. In 1969, the General Assembly affirmed the need for full respect for the inalienable rights of the people of Palestine<sup>98</sup>. In 1973, it stated its view on “the legitimacy of the peoples’ struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle”<sup>99</sup>. In 1974, the PLO was invited to take part as an observer in the proceedings of the General Assembly. In 1975, a Committee on the Exercise of the Inalienable Rights of the Palestinian People was set up and entrusted with putting in place a programme to implement those rights.

150. Challenging the Israeli settlement policy, in a resolution of 1979 the Security Council called on Israel to respect the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949. It called on Israel

“to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories”<sup>100</sup>.

In the same resolution the Security Council decided to create a commission to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem. That commission failed to secure the co-operation of the Israeli Government.

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<sup>95</sup> Security Council resolution 237 of 14 June 1967, footnote [86] above.

<sup>96</sup> See Ann. 20.

<sup>97</sup> United Nations General Assembly, resolution 2452 (XXIII) of 19 December 1968.

<sup>98</sup> United Nations General Assembly, resolution 2535 B(XIV) of 10 December 1969.

<sup>99</sup> United Nations General Assembly, resolution 3070 (XXVIII) of 30 November 1973.

<sup>100</sup> Security Council resolution 446 (1979) of 22 March 1979.

151. In March 1982, there were demonstrations in several towns in the West Bank following the removal of the mayor and dismantling of the municipal authorities of El Bireh by the Israeli occupation authorities. Despite that popular reaction, the Israeli authorities also removed the mayors of Nablus and Ramallah. Further protests by the Palestinian population led to intervention by the Israeli army.

152. In 1983, in response to the grave situation resulting from Israel's invasion of Lebanon, the Sabra and Shatila massacres and the creeping annexation of the West Bank, the General Assembly convened an International Conference on the Question of Palestine in Geneva from 29 August to 7 September 1983. It adopted a Declaration of guiding principles to be used as the basis for concerted international action aimed at settling the question of Palestine<sup>101</sup>.

153. In the following months and years the situation in Palestine deteriorated continuously. Israel persisted in its policy of the systematic Judaization of the Occupied Palestinian Territory. The Jewish State relied on emergency laws and regulations which it enforced by means of stepping up arrests, detaining many civilians or through administrative detention measures<sup>102</sup>. Despite the concerns of the international community and the hope that an International Conference would meet to discuss the matter, incidents worsened in 1987 leading to the first Intifada, which marked the beginning of a new period.

## **2. The first Intifada in 1987 and progress towards the Oslo Accords in 1995**

154. The Intifada or “uprising of the stones” began on 9 December 1987 and was to overturn the political assumptions concerning Palestine in every domain (a). The breadth of those upheavals paved the way for diplomatic steps that would lead to the outlining of a political settlement that was to crystallize several years later with the Oslo Accords (b).

### **(a) *The upheavals resulting from the first Intifada***

155. The movement was triggered by the death of four Palestinians in an accident involving a Palestinian shared taxi and an Israeli lorry in the Gaza Strip. Within a few days the flare-up had become widespread. Towns and cities, villages and refugee camps were affected by a spontaneous action which rapidly became organized. It revealed the imbalance of strength between the sides. Unarmed, and for the most part very young, demonstrators were attacking a highly equipped army, with stones. A “unified patriotic leadership of the Intifada” was created and published its first communiqué on 4 January 1988. The Palestinian population formed local committees that managed the various aspects of the uprising: mass demonstrations, strikes, boycotts of Israeli products, a refusal to pay Israeli taxes and various forms of civil disobedience. The committees also organized the community support that would enable the population to survive. Itzhak Rabin, the Defence Minister, declared a state of emergency in order to subdue the subversion by any means<sup>103</sup>. He ordered his soldiers to break the bones of the demonstrators, orders which were carried out to the letter. Images were broadcast by CBS.

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<sup>101</sup> United Nations General Assembly resolution of 13 December 1983, Document 38/58 C.

<sup>102</sup> United Nations General Assembly, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, 3 October 2022, A/77/501 (Ann. 25).

<sup>103</sup> Statement by Itzhak Rabin, Israel's Defence Minister, “Le gouvernement israélien a approuvé l'installation de colons dans un quartier arabe de Jérusalem” (“The Israeli Government has approved settlement in an Arab district of Jerusalem”), *Le Monde*, 10 December 1991 (Ann. 26).

156. The extent of the uprising can be explained by the situation that had been imposed on the Palestinians for many years: the confiscation of land, the appropriation of 70 per cent of water resources, the systematic advance of Jewish settlements, measures of harassment and repression and worsening unemployment (which at that time affected 60 per cent of the active population). “The Intifada, or uprising, was, initially, completely spontaneous. The Israeli policy of multiple pressures had reached a tipping point at which the fear of repression no longer outweighed despair at the future”<sup>104</sup>. The uprising now enjoyed political unity, which found expression at the Palestine National Council held in Algiers in April 1987.

157. The revolt was to unleash a wave of solidarity on the part of the Israeli Arab population, who observed a general strike from 21 December 1987. Although in Israel it strengthened the ultranationalist camp that favoured quashing the Intifada by force, in the more moderate sections of Israeli society it aroused a wish to reach a negotiated political solution. The Israeli elections of 1 November 1988 nevertheless signalled a hardening of attitude.

158. In parallel, however, the Palestine National Council that met in Algiers in November 1988 recognized Israel’s right to existence and security<sup>105</sup>. This peace offensive was going to smooth the path to a dialogue between the United States and the PLO, while the PLO offices in various European States were elevated to the status of delegations and dozens of countries recognized Palestine as a State. In a resolution of 15 December 1988 the United Nations General Assembly acknowledged the proclamation of Palestine and decided that the designation “Palestine” would be used thenceforth in the United Nations system<sup>106</sup>.

159. Long before the outbreak of the Intifada, since the end of the 1960s, contact had been established between Palestinian representatives and members of the Israeli Communist Party, Rakah. A peace plan by King Fahd of Saudi Arabia was doing the rounds in 1981, but Israel’s invasion of Lebanon turned attention elsewhere. In 1983 an International Conference on the Question of Palestine, long called for by the United Nations, finally opened in Geneva and fostered contact once again. Those relations were not held back by the “uprising of the stones” in the occupied territories.

160. During the United Nations General Assembly meeting in Geneva in December 1988, Yasser Arafat confirmed his recognition of the existence of Israel and renunciation of terrorism. In May, in Paris, he declared that the article of the Palestine National Charter calling for the destruction of Israel had lapsed. In the period 1990/91, the United States’ supremacy confirmed by the first Gulf War and the personal determination of James Baker would lead to the opening of an Israeli-Palestinian peace conference in Madrid on 30 October 1991. It brought together Israel, Syria, Egypt and Jordan. The Palestinian delegation was included as a “team” within the Jordanian delegation. The process that would lead to the Oslo Accords had begun.

#### **(b) *The outline of a political settlement and its crystallization in the Oslo Accords***

161. Following on from the Madrid Conference, negotiations began in Washington on 10 December 1991, aimed at implementing Security Council resolutions 242 and 338. Until 1993, talks were intensive and involved the Palestinians. Whereas the Government of Yitshak Shamir

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<sup>104</sup> Henry Laurens, *Le grand jeu, Orient arabe et rivalité internationale depuis 1945*, Paris, Armand Colin, 1991, p. 382 [*Translation by the Registry*].

<sup>105</sup> United Nations General Assembly and Security Council, Declaration of Independence of the State of Palestine, 18 November 1988, A/43/827 S/20278, Annex III, pp. 13-16 (Ann. 27).

<sup>106</sup> United Nations General Assembly, resolution 43/177 of 15 December 1988.

dragged out the talks while increasing repression in the territories, the arrival in office of the Labour Party in Israel facilitated a more constructive strategy and the opening of channels for negotiation. On 15 January 1993, Israel repealed the Law of 6 August 1986 prohibiting contact between Israel and the PLO.

162. That led to an interim peace agreement being signed in Washington on 13 September 1993 by Shimon Peres and Abu Mazen, followed by a handshake between Yitzhak Rabin and Yasser Arafat. The gesture illustrated simultaneous and mutual recognition by Israel and the representative of the Palestinian people. That mutual recognition was recorded in an exchange of letters, both dated 9 September 1993<sup>107</sup>.

163. For a transitional period of five years, an interim self-government authority would be set up which would then lead to the “permanent status” of the occupied territories<sup>108</sup>. That self-government authority would have full powers, with the exception of external security and foreign affairs. However, Israeli citizens present in Palestine were not subject to Palestinian authority and the roads affording access to Israeli settlements were placed under Israeli control. Democratic general elections were planned for July 1994 to appoint the Palestinian Council. The agreement provided that Israel would withdraw from the Jericho area and the Gaza Strip as soon as it was signed. Israel’s army would be redeployed outside populated areas in all the occupied territories no later than the eve of the elections. A Committee composed of Jordan, Egypt, Israel and the Palestinians would negotiate the detailed arrangements for the return of the Palestinians transferred to Arab countries in 1967 and the pace of that return. Negotiations on final status were expected to begin not later than the beginning of the third year of the transitional period.

164. Difficulties soon emerged when it proved impossible to adhere to the planned time-limits. This was particularly true of the provisions concerning the Jericho area and the Gaza Strip. The agreement on those two areas, envisaged for 12 December 1993, was not signed until 4 May 1994. A new interim agreement was nevertheless concluded a few months later on 28 September 1995 in Washington, regulating the self-government of the whole of the West Bank and Gaza<sup>109</sup>.

165. The new interim agreement regulated a transfer of truly significant powers to the new institutions of the West Bank and Gaza. The transfer was set out in a voluminous text (29 pages and 7 annexes comprising over 300 pages). The Parties reached agreement on interim measures but also stated their intention to negotiate a permanent agreement to take effect on 4 May 1999.

166. The powers of the Palestinian Council were conferred powers, with Israel retaining all powers not expressly transferred. Although the Palestinian Council did indeed have jurisdiction over the whole of the occupied territory, in reality the fact that the territory was divided into three areas with different characteristics considerably restricted its authority. Area A related to populated areas with no Israeli settlements. In this area the transfer of powers was planned for the first phase. In Area B, where there were Israeli interests, the transfer was phased over 18 months and although the complete withdrawal of Israeli forces was planned, exclusively Israeli or Palestinian, or sometimes joint, patrols could be envisaged. Lastly, in Area C, where Israel had established military installations

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<sup>107</sup> United Nations General Assembly and Security Council, Letters of mutual recognition between Israel and Palestine of 9 September 1993, 7 March 2001, A/55/823 S/2001/197, Annex 1, p[p]. 3-4 (Ann. 28).

<sup>108</sup> United Nations General Assembly and Security Council, Declaration of Principles on Interim Self-Government Arrangements, 11 October 1993, A/48/486 S/26560, Annex, p[p]. 4-8 (Ann. 29).

<sup>109</sup> United Nations General Assembly and Security Council, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995, 5 May 1997, A/51/889 S/1997/357, Annex, p[p]. 5-31 (Ann. 30).

or developed Jewish settlements, issues relating to those settlements and installations and also to boundaries, Jerusalem and refugees, remained within Israeli jurisdiction and would be negotiated as part of the permanent status. These were, it can be seen, the most sensitive issues and those on which genuine self-determination for the Palestinians depended.



**Map No. 9, *Le Monde diplomatique*, Jerusalem municipal archives, Urban Plans Section; Bet El civil administration, "arc-en-ciel" roadmap, 1994-1995; Yedioth Aharonot, 6 October 1995; official text of the Oslo I Accords.**

Ligne verte	Green Line
Limites de la municipalité de Jérusalem	Municipal boundaries of Jerusalem
Villages palestiniens	Palestinian villages
de moins de 3 000 habitants	with less than 3,000 inhabitants
de 3 000 à 6 000 habitants	with between 3,000 and 6,000 inhabitants
Autres centres urbains et quartiers palestiniens (plus de 6 000 habitants)	Other Palestinian urban centres and districts (more than 6,000 inhabitants)

Colonies israéliennes	Israeli settlements
faiblement peuplées	with few inhabitants
importantes	large
Extensions prévues	Planned extensions
Circulation	Movement
Voies d'accès aux colonies israéliennes (circulation réglementée pour les véhicules palestiniens, arrêts aux points de contrôle)	Access roads to Israeli settlements (movement regulated for Palestinian vehicles, stops at checkpoints)
Voies d'accès en projet ou en construction	Access roads planned or under construction
Routes palestiniennes (circulation libre)	Palestinian roads (unrestricted movement)
L'organisation territoriale après les accords	Territorial arrangements after the Accords
Autonomie palestinienne (Oslo I)	Palestinian self-government (Oslo I)
Zone A : Autonomie palestinienne (Oslo II)	Area A: Palestinian self-government (Oslo II)
Zone B : Territoires sous contrôle mixte (Oslo II). Cette zone comprend aussi la quasi-totalité des villages arabes situés géographiquement en zone C.	Area B: territories under joint control (Oslo II). This area also includes almost all the Arab villages located geographically in Area C.
Zone C : Territoires restant sous contrôle israélien (Oslo II)	Area C: territories remaining under Israeli control (Oslo II)
La zone de Jérusalem-Est annexée par Israël en 1967 (en blanc sur la carte) est exclue des accords intérimaires	The area of East Jerusalem annexed by Israel in 1967 (blank on the map) is excluded from the interim agreements
ISRAËL	ISRAEL
MER MÉDITERRANÉE	MEDITERRANEAN SEA
JÉNINE	JENIN
KALKILYA	QALQILIYA
NAPLOUSE	NABLUS
PONT DAMYA	DAMIYAH BRIDGE
JORDANIE	JORDAN
PONT ALLENBY	ALLENBY BRIDGE
JÉRICHO	JERICHO

JÉRUSALEM OUEST	WEST JERUSALEM
BETHLÉEM	BETHLEHEM
MER MORTE	DEAD SEA
HÉBRON	HEBRON
Limite administrative	Administrative boundary
Zone sous contrôle palestinien	Area under Palestinian control
Caveau des Patriarches	Cave of the Patriarchs
Zone sous contrôle israélien	Area under Israeli control
Ligne de partage de la ville (accord du 15 janvier 1997)	Line dividing the town (Agreement of 15 January 1997)

167. As in the first agreement of 1993, Palestinian personal jurisdiction did not extend to Israelis, in particular settlers living in occupied territory. Those people fell directly under the jurisdiction of Israel. Moreover, Israel kept control of the borders. In economic and financial matters, the Palestinian leaders had genuine authority. Israel nevertheless kept a tutelary power, since it could intervene at any time in those fields for “security” reasons.

168. Those complex territorial arrangements, negotiated in agreements which for the Palestinian people represented a step towards the self-government that was in their eyes a stage on the way to self-determination, together with the frequent closures imposed by the Israeli army, had the paradoxical effect that the population now felt that the situation had grown worse. This was the backdrop to the assassination of Yitzhak Rabin on [4] November 1995 by a Jewish extremist opposed to the Oslo Accords.

169. Elections for the first Palestinian Council took place on 20 January 1996, at the same time as the election of the President of the Palestinian Authority. They were won by the PLO and its main component, Fatah, and Yasser Arafat was elected President of the Palestinian Authority. The autonomy enjoyed by those new Palestinian institutions was closely monitored. The word “State” did not appear and there was no question of sovereignty. Their autonomy was tightly restricted and overseen under what amounted to veritable tutelage by the Jewish State.

170. The fragile progress in the Accords of 1993 and then 1995 presupposed a constructive dynamic. However, the Israeli elections of 29 May 1996, bringing to power a right-wing coalition under Likud led by Benjamin Netanyahu, caused a hardening on the Israeli side. Nearly two decades later all the signs are that the process embarked upon has been halted.

### **3. Failure of the Oslo process, attempts to revive it with the “Roadmap” and the ongoing deterioration of the situation in Palestine**

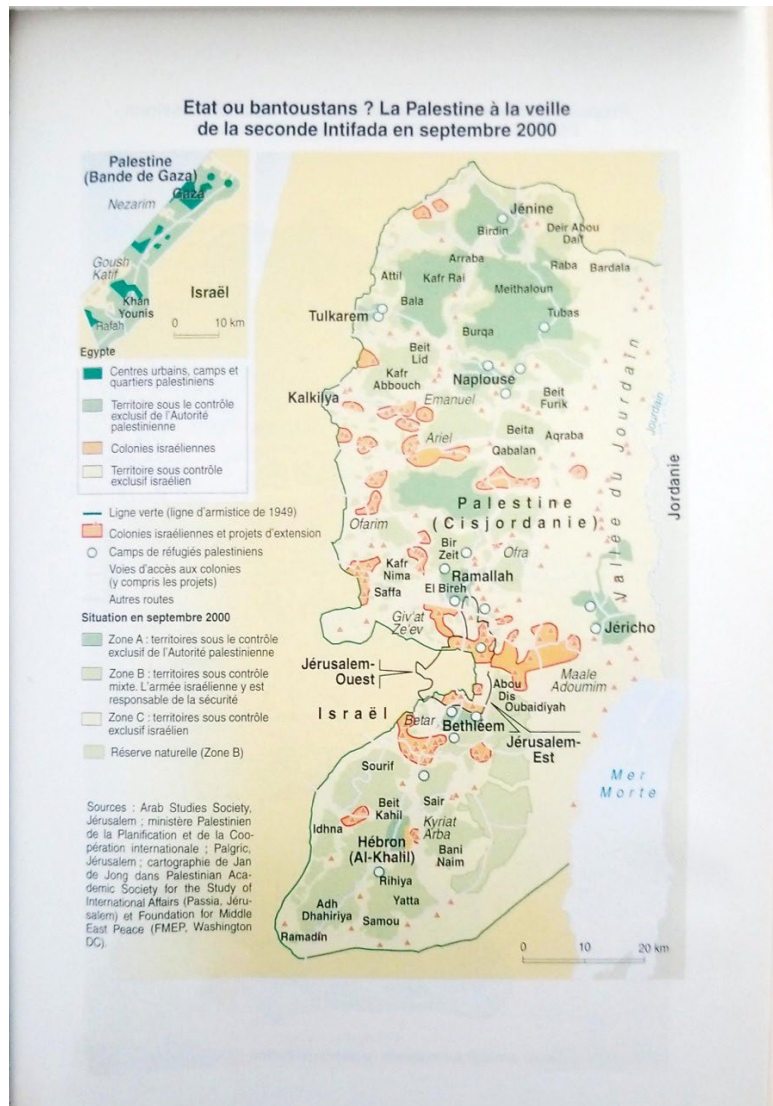
171. From 1995, contrary to what had been envisaged in the Accords of 1993 and then 1995, the drive for peace became blocked. The United States Government, careful of the image of its



foreign policy and anxious to be able to claim advances on the Palestine brief, gave impetus to various diplomatic meetings. Their outcomes would sometimes rekindle hope that a settlement was possible (a). However, Israel's continuing policy of settlement and repression has prevented any significant progress (b).

(a) *Unsuccessful diplomatic attempts*

172. From 1995, successive negotiations have endorsed the same result, that is to say, postponement of the undertakings given. Meetings in Hebron in 1997 and Wye River in October 1998 were the occasion for ritual reaffirmation of the shared wish to reach a permanent status, while any such status was deferred indefinitely, even though, from the very start of the negotiations, conclusion of a permanent agreement had been tabled for 1999<sup>110</sup>.



Map No. 10, Palestine on the eve of the second Intifada in September 2000, from Alain Gresh, *Israël, Palestine, Vérités sur un conflit*, Fayard, Paris, 2002, middle section.

<sup>110</sup> 1993 Declaration of Principles on Interim Self-Government Arrangements, Article V, para. 1 (Ann. 29).

Etat ou bantoustans? La Palestine à la veille de la seconde Intifada en septembre 2000	State or bantustans? Palestine on the eve of the second Intifada in September 2000
Bande de Gaza	Gaza Strip
Israël	Israel
Egypte	Egypt
Centres urbains, camps et quartiers palestiniens	Palestinian urban centres, camps and districts
Territoire sous le contrôle exclusif de l'Autorité palestinienne	Territory under the exclusive control of the Palestinian Authority
Colonies israéliennes	Israeli settlements
Territoire sous contrôle exclusif israélien	Territory under exclusive Israeli control
Ligne verte (ligne d'armistice de 1949)	Green Line (1949 Armistice Line)
Colonies israéliennes et projets d'extension	Israeli settlements and planned expansion
Camps de réfugiés palestiniens	Palestinian refugee camps
Voies d'accès aux colonies (y compris les projets)	Access roads to settlements (including planned roads)
Autres routes	Other roads
Situation en septembre 2000	Situation in September 2000
Zone A : territoires sous le contrôle exclusif de l'Autorité palestinienne	Area A: territories under the exclusive control of the Palestinian Authority
Zone B : territoires sous contrôle mixte. L'armée israélienne y est responsable de la sécurité	Area B: territories under joint control. The Israeli army is responsible for security in this area
Zone C : territoires restant sous contrôle exclusif israélien	Area C: territories under exclusive Israeli control
Réserve naturelle (Zone B)	Nature reserve (Area B)
Sources : Arab Studies Society, Jérusalem; ministère Palestinien de la Planification et de la Coopération internationale; Palgric, Jérusalem; cartographie de Jan de Jong dans Palestinian Academic Society for the Study of International Affairs (Passia, Jérusalem) et Foundation for Middle East Peace (FMPEP, Washington DC).	Sources: Arab Studies Society, Jerusalem; Palestinian Ministry of Planning and International Cooperation; Palgric, Jerusalem; cartography by Jan de Jong in Palestinian Academic Society for the Study of International Affairs (Passia, Jerusalem) and Foundation for Middle East Peace (FMPEP, Washington DC).
Jénine	Jenin
Kalkilya	Qalqilya

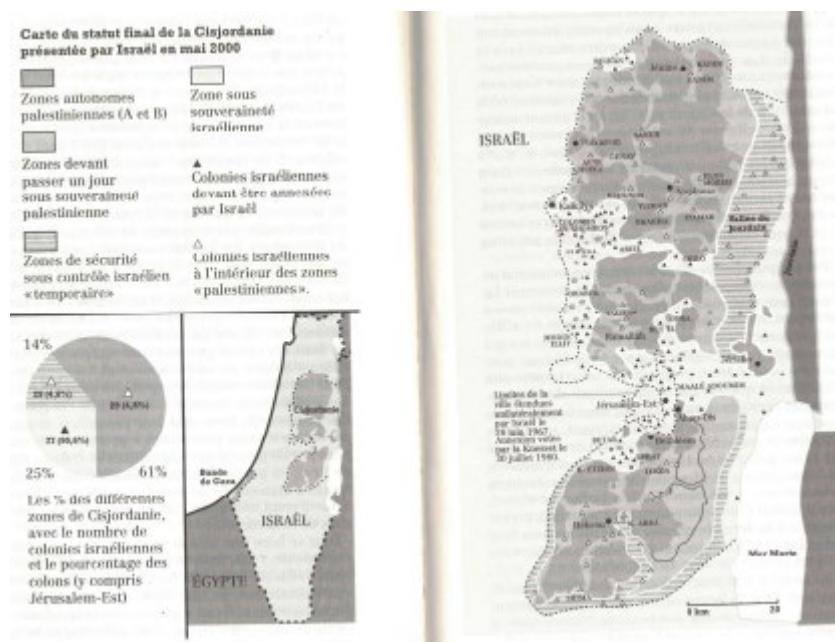
Naplouse	Nablus
Cisjordanie	West Bank
Vallée du Jourdain	Jordan Valley
Jourdain	[River] Jordan
Jordanie	Jordan
Jéricho	Jericho
Jérusalem ouest	West Jerusalem
Bethléem	Bethlehem
Hébron	Hebron
Jérusalem-Est	East Jerusalem
Mer morte	Dead sea

173. At Sharm el-Sheikh in September 1999 things seemed a little different because Labour's Ehud Barak had been elected Prime Minister of Israel and appeared resolved to relaunch the peace process. The final tally of achievements was nevertheless particularly sparse. The Palestinian self-government that was supposed to extend gradually to the whole of the territory occupied by Israel was still confined to a much smaller area than had been planned. It consisted of disconnected scraps of land. The Palestinian Authority genuinely controlled only Area A, which represented 3 per cent of the territory and contained 26 per cent of the Palestinian population. Area B (under joint control) covered 27 per cent of the territory with 70 per cent of the Palestinian population, and Area C, covering the rest, was entirely under Israeli control. The redeployment agreed at Sharm el-Sheikh would increase Palestinian control by only 13 per cent of the territory. The issue of safe passage between Gaza and the West Bank, a decisive one since the Accords acknowledged that they formed a single territory, was addressed only in a disappointing decision. The crossings agreed were in fact not open continuously and those wanting to enter or leave had to undergo strict checks.

174. On the crucial question of the ultimate achievement of a Palestinian State in a permanent agreement, the results of the Sharm el-Sheikh meeting were mixed. The process was split into two stages: a framework agreement was to be concluded in February 2000, laying down the principles on all the outstanding issues: the future of the settlements, determination of boundaries, the status of Jerusalem, the return of refugees and management of security. The final agreement was expected in September 2000.

175. Disappointments would only increase in 2000. The Israeli redeployment was not making progress. The United States attempted to make things happen and organized the Camp David summit from 11 to 25 July 2000. However, no meeting of minds was possible on the return of refugees or, above all, on Jerusalem, with Israel judging the Palestinian request for sovereignty over the eastern

sector and especially over the Haram al-Sharif to be unacceptable. A joint statement by the parties recalled their wish to reach agreement<sup>111</sup>. Israel's claims made that impossible.



**Map No. 11**, Final status of the West Bank submitted by Israel in May 2000, in Tanya Reinhart, *Détruire la Palestine ou comment terminer la guerre de 1948*, La Fabrique éditions, Paris, 2002, p. 33.

Carte du statut final de la Cisjordanie présentée par Israël en mai 2000	Map of the final status of the West Bank submitted by Israel in May 2000
Zones autonomes palestiniennes (A et B)	Palestinian self-governing areas (A and B)
Zones devant passer un jour sous souveraineté palestinienne	Areas to one day come under Palestinian sovereignty
Zones de sécurité sous contrôle israélien « temporaire »	Security areas under “temporary” Israeli control
Zone sous souveraineté israélienne	Area under Israeli sovereignty
Colonies israéliennes devant être annexées par Israël	Israeli settlements to be annexed by Israel
Colonies israéliennes à l’intérieur des zones « palestiniennes ».	Israeli settlements inside the “Palestinian” areas.
4,6 %, 90,6 %, 4,8 %	4.6%, 90.6%, 4.8%
Les % des différentes zones de Cisjordanie, avec le nombre de colonies israéliennes et le	Percentages of the various areas of the West Bank, with the number of Israeli settlements

<sup>111</sup> Israeli-Palestinian joint statement, George Marion, “Sans avoir abouti, le sommet de Camp David a levé de nombreux tabous” (“Although no agreement was reached, the Camp David summit removed many taboos”), *Le Monde*, 27 July 2000 (Ann. 31).

pourcentage des colons (y compris Jérusalem-Est)	and the percentage of settlers (including East Jerusalem)
Bande de Gaza	Gaza Strip
ÉGYPTE	EGYPT
ISRAËL	ISRAEL
Cisjordanie	West Bank
Limites de la ville étendues unilatéralement par Israël le 28 juin 1967. Annexation votée par la Knesset le 30 juillet 1980.	Boundaries of the City unilaterally extended by Israel on 28 June 1967. Annexation approved by Knesset vote on 30 July 1980.
ISRAËL	ISRAEL
Jénine	Jenin
Kalkilya	Qalqiliya
Naplouse	Nablus
COLONIES DE SHOMRON	SHOMRON SETTLEMENTS
Vallée du Jourdain	Jordan Valley
Jourdain	Jordan
Jéricho	Jericho
MAALÉ ADOUMIM	MAALEH ADUMIM
Abou-Dis	Abu Dis
Bethléem	Bethlehem
Hébron	Hebron
Jérusalem-Est	East Jerusalem
Mer morte	Dead sea

176. Demonstrating Israeli determination to concede nothing in respect of Jerusalem, on 28 September 2000 Ariel Sharon visited the Haram al-Sharif, thereby triggering a second Intifada. Violence escalated and by the end of 2000 there were 350 dead and several thousand injured. Despite that climate, United States mediation continued and led to the “Clinton Proposal”. This represented progress, first in relation to Jerusalem in so far as the United States President proposed the recognition of Palestinian sovereignty over the Haram al-Sharif and the Arab-populated parts of the City, and second in relation to the territory, since he proposed the restoration of 90 per cent of the

West Bank and 100 per cent of Gaza in such a way as to ensure contiguity<sup>112</sup>. There nevertheless remained the intractable question of the return of refugees.

177. Although these proposals contained real progress, their arrival at a late stage, the deteriorating climate on the ground and the fact that the United States President was at the end of his term of office prevented a positive outcome. Two meeting attempts, in Taba at the end of December 2000 and on the Egyptian border from 21 to 24 January 2001, during which it seemed that a meeting of minds was at last possible, failed to reach agreement.

“Already moribund for some years, the Oslo peace process has now ceased to exist or to have any future: the concerted progress towards self-government based on viable territorial foundations has been abandoned, as have any prospects of a way forward, a natural way forward it might be said, towards an independent State accepted by all”<sup>113</sup>.

178. At that time, in 2000 and 2001, the Palestinian Authority was the target of attacks of singular violence. The main infrastructure, often built with European aid, was hit: radio and television installations, Gaza’s port and airport, public buildings, prisons and telephone and electricity cables were badly damaged. According to an assessment by the European Commission, European aid worth €13,851 million was reduced to nothing<sup>114</sup>. The Palestinian economy was strangled by constant delays by Israel in paying taxes collected on behalf of the Palestinian Authority, and sometimes even refusals to pay those taxes

179. Israel’s Third Redeployment did not take place, while the settlements and their access roads continued to develop. The autonomy of the Palestinian Authority, which should have been as broad as possible in Area A, was reduced to nothing by Israeli army intrusions. The deprivation of liberty imposed on the President of the Palestinian Authority from the end of 2001 closed off any possibility of resuming negotiations. In response to the mounting violence and following the Israeli incursion inside the Jenin camp, in April 2002 the Security Council called for a fact-finding commission to be set up<sup>115</sup>. Israel turned down the request.

180. From March 2002, Ariel Sharon launched “Operation Defensive Wall”, a decision that involved building a barrier along a route that in part cut into the Occupied Palestinian Territory. That structure was later declared illegal by the International Court of Justice in an Advisory Opinion. Israel has nonetheless actively continued to build the wall<sup>116</sup>.

181. With the situation bogged down, in a speech on 24 June 2002 the new United States President, George W. Bush, sought to launch a new peace initiative in this conflict: a Quartet consisting of the United States, the European Union, Russia and the United Nations. It would produce

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<sup>112</sup> “Clinton Proposal on Israeli-Palestinian Peace”, [*The Peace Puzzle: Appendices and Resources*], The United States Institute of Peace, 22 January 2013, Appendi[x] 19 (Ann. 32).

<sup>113</sup> Alain Bockel, “Le pari perdu d’Oslo : le règlement du conflit israélo-palestinien dans l’impasse”, *Annuaire Français de Droit International*, 2000, p. 136 [*Translation by the Registry*].

<sup>114</sup> Jean Quatremer, “L’Europe chiffre les destructions israéliennes” (“Europe puts a figure on Israeli destruction”), *Libération*, 22 January 2001 (Ann. 33).

<sup>115</sup> Security Council resolution 1405 of 29 April 2002.

<sup>116</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 136-203.

a document known as the “Roadmap”, published on 30 April 2003<sup>117</sup>. The document was accepted by the parties, albeit with reservations on the part of Israel. It was endorsed by the Security Council on 19 November 2003<sup>118</sup>. Like the interim agreements of 1993 and 1995, this agreement envisaged a phased process aimed at the coexistence of two viable democratic States. Parallel simultaneous undertakings by both parties on security and institutions were intended to lead to progress. And an independent evaluation and monitoring mechanism was to oversee the process.

182. Yet the vicious cycle of attacks and reprisals continued. Despite the Israelis’ reluctant acceptance (with 14 reservations that completely undermined its underlying scheme), the new plan was incompatible with Israel’s long-term project: “to draw the country’s borders itself, encompassing the maximum amount of land for economic, security or ideological and religious reasons, and excluding as many non-Jewish inhabitants as possible”<sup>119</sup>.

183. Running counter to those constructive attempts to resolve the conflict, Ariel Sharon then opted for a unilateral policy with his decision to withdraw from Gaza. This consisted of a redeployment of settlements with a view to complete separation from the Arab population. It involved all the Jewish settlements in Gaza and also four small settlements in the north of the West Bank wedged between areas of Palestinian population in the Jenin area. Announced many months in advance, this withdrawal plan would ultimately be approved by the Quartet. However, the Quartet’s approval was subject to conditions that were not complied with (no expansion of settlements in the West Bank, the release of Palestinian prisoners and a slowing of construction of the separation wall). The withdrawal would be carried out amid intense publicity in August 2005.

184. Although Jewish settlements were dismantled and the Israeli armed forces withdrew from the Gaza Strip, this did not mean that the territory passed into genuine self-government. The Gaza Strip had to remain free of weapons and the State of Israel retained control of the external land boundary of the territory, completely dominated its airspace and continued its activities in the maritime area. All communications with the outside were under Israeli control. At the insistence of the United States, management of the border post with Egypt was conferred on the Palestinian Authority. From December 2005, a 1 km-wide security zone was established in the north of the Gaza Strip. It was fenced in and all movement within it was prohibited.

185. Although it had been acknowledged in the 1993 interim agreements that the West Bank and Gaza formed a single territorial unit and that the two territories together constituted the Palestinian entity, their physical separation and different situations vis-à-vis Israel have constantly pushed them apart. The West Bank is a form of archipelago made up of multiple isolated fragments. Gaza is a “prison island”<sup>120</sup> sealed off by an electric fence.

186. From 2006 the increasing political influence in the territory of Gaza of Hamas, a movement that does not recognize Israel, would be accompanied by rising violence. Gaza would also be subject to an Israeli blockade from 2007. Since that time rockets fired from Gaza have unleashed

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<sup>117</sup> United Nations Security Council, A performance-base [*sic*] road map to a permanent two-State solution to the Israeli-Palestinian conflict, 7 May 2003, S/2003/529, Annex (Ann. 34).

<sup>118</sup> Security Council resolution 1515 of 19 November 2003.

<sup>119</sup> Alain Bockel, “Le retrait israélien de Gaza et ses conséquences sur le droit international”, *Annuaire Français de Droit International*, 2005, p. 19 [Translation by the Registry].

<sup>120</sup> As put by Alain Bockel in “Gaza : le processus de paix en question”, *Annuaire Français de Droit International*, 2000, p. 175.

highly destructive Israeli bombings and raids with deadly consequences for the civilian population of Gaza, even though the Gaza Strip is still part of the Occupied Palestinian Territory.

187. “Operation Cast Lead” carried out by Israel over Gaza from December 2008 to January 2009 was followed by “Operation Pillar of Defense” in 2012 and then “Protective Edge” from 8 July to 26 August 2014. The latter, the harshest operation yet against the territory, claimed 1,500 Palestinian civilian dead and 12,000 wounded according to figures from the United Nations Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territories<sup>121</sup>. On 2 January 2015 Palestine deposited with the United Nations Secretary-General its instrument of accession to the Statute of Rome establishing the International Criminal Court and seised that Court, requesting an investigation into war crimes attributed to Israel.

188. The United States, which had played a constructive role in the few advances towards peace in the early 2000s, was to play a negative role from 2017. This is when the United States President, Donald Trump, saw fit to transfer the United States Embassy in Israel to Jerusalem, recognizing the city as the capital of Israel. In doing so the United States Government lent legitimacy to a claim by Israel hitherto condemned by the international community, and placed itself in breach of international law that had been reaffirmed many times by the United Nations. In fact, in 1995 the United States Congress had passed the Jerusalem Embassy Act, under which the Holy City was to be recognized as the capital of the Jewish State and the United States Embassy moved to it<sup>122</sup>. On 13 December 2017 the Organisation of Islamic Cooperation denounced the 2017 implementation of that plan as an attack on the historical, legal, natural and national rights of the Palestinian people<sup>123</sup>.

189. The ongoing deterioration in the situation means today that any prospect of peace has reached the end of the road. Admittedly, the State of Palestine, proclaimed in 1988, was admitted as a Member State of UNESCO in 2011 and recognized as a State by the United Nations General Assembly on 29 November 2012, albeit as a non-member State<sup>124</sup>. However, it does not enjoy any of the rights and powers of a State. It is systematically denied those rights and powers by Israel, the occupying Power for 56 years. Going even further, Israel’s Minister for Defence [*sic*], Bezalel Smotrich, passing through Paris on 21 March 2023, declared that the Palestinian people did not exist<sup>125</sup>. In so doing he disavowed the letters of mutual recognition signed by Israel and the PLO on 9 September 1993<sup>126</sup>.

## **(b) *An ongoing Israeli policy of settlement and repression***

190. It followed from the rationale of the Oslo Accords and their stated objective of peace that from the time of their signature there would be a reversal of Israeli settlement in the occupied

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<sup>121</sup> Laurent Trigeaud, “L’opération Bordure protectrice menée par Israël dans la Bande de Gaza (8 juillet-26 août 2014)”, *Annuaire français de droit international*, 2014, pp. 171-194.

<sup>122</sup> Jerusalem Embassy Act, 8 November 1995, *Public Law 104-45, 104th Congress, Legislative History S. 1322, Congressional Record*, vol. 141, 1995 (Ann. 35).

<sup>123</sup> “Final communique of the extraordinary Islamic summit conference to consider the situation in the wake of the U.S. administration’s recognition of the city of al-Qods al-Sharif as the so-called capital of Israel, the occupying power, and the transfer of the U.S. embassy to al-Qods”, Organisation of Islamic Cooperation, 13 December 2017, OIC/EX-CFM/2017/PAL/FC (Ann. 36).

<sup>124</sup> United Nations General Assembly, resolution [67/19] of 29 November 2012.

<sup>125</sup> Statement by the Israeli Minister for Finance, Bezalel Smotrich, “Bezalel Smotrich, ministre ultranationaliste israélien, poursuit ses diatribes antipalestiniennes depuis Paris” (“Bezalel Smotrich, an ultranationalist Israeli minister, continues his anti-Palestinian diatribes from Paris”), *Le Monde*, 20 March 2023 (Ann. 37).

<sup>126</sup> See Ann. 28.



territories. However, it was not expressly enshrined in the 1995 interim agreement that the peace process would entail an immediate halt to all settlement. Israel then simply strengthened its hold. Dividing the occupied territory into three areas has enabled it to retain control over a considerable portion of that territory. Area A, in which the Palestinian Authority supposedly exercises control, represents only 18 per cent of the area of the West Bank, whereas Area C, over which Israel has full jurisdiction, represents 60 per cent of that territory, bearing in mind that Israeli control remains strong over Area B, which includes the remainder.

191. Yet it was primarily by continuing to establish new settlements that Israel extended its hold, at the same time as the Palestinian State was becoming a figment of the imagination. After the failure of the meetings at Camp David in 2000 and Taba in 2001, it became clear that the territorial basis of the Palestinian entity was unviable. At that time its territory was limited to less than 50 per cent of the West Bank and to 60 per cent of the Gaza Strip. Most significantly, it was made up of a myriad of parcels of land separated from each other and subject to varying status.

192. In the West Bank, particularly in Area C, settlement has soared considerably in demographic terms since the Oslo Accords were signed. That increase has been accompanied by a network of bypass roads criss-crossing the territory. “In a territory as constrained as the West Bank, some 700 km of roads have been built, most of them after 1993, at the expense of agricultural land, but Palestinians have nevertheless been barred from many segments of road reserved for the settlers.”<sup>127</sup>

193. In Jerusalem, Israeli policy has consisted of revising the boundaries of the capital, expanding them in the north as far as Ramallah, in the south up to but not including Bethlehem, and in the east as far as Jericho. The threefold aim is to redraw the map of Jerusalem, fill in the areas not yet inhabited by Jewish residents and cut East Jerusalem off completely from the West Bank.

194. In twenty years the number of settlers in the West Bank, including in East Jerusalem, has increased considerably.

“Christian Salazar Volkmann, Director of the Field Operations and Technical Cooperation Division of the Office of the High Commissioner for Human Rights, [stated that from] 2012 to 2022, the population of Israeli settlers in the occupied West Bank, including East Jerusalem, had grown from 520,000 to over 700,000.”<sup>128</sup>

195. This all-out settlement has been accompanied by constant repression of the Palestinians. It was placed on record by the Human Rights Council in a 2019 resolution:

“*Deploring* in particular the construction and expansion of settlements by Israel in and around occupied East Jerusalem, including its so-called E-1 plan, which aims to connect its illegal settlements around and further isolate occupied East Jerusalem, the continuing demolition of Palestinian homes and eviction of Palestinian families from the city, the revocation of Palestinian residency rights in the city, and ongoing settlement

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<sup>127</sup> Pierre Blanc “Palestine : géopolitique d’une violence territoriale”, *Confluences Méditerranée*, No. 86, Summer 2013, [i]R[e]MMO, L’Harmatan, p. 24 [Translation by the Registry].

<sup>128</sup> United Nations, Human Rights Council, “Human Rights Council Hears that the Current Israeli Plan to Double the Settler Population in the Occupied Syrian Golan by 2027 is Unprecedented, and that 700,000 Israeli Settlers Are Living Illegally in the Occupied West Bank”, 28 March 2023 (Ann. 38).

activities in the Jordan Valley, all of which further fragment and undermine the contiguity of the Occupied Palestinian Territory,

*Expressing grave concern* at the continuing construction by Israel of the wall inside the Occupied Palestinian Territory, including in and around East Jerusalem, in violation of international law, and expressing its concern in particular at the route of the wall in departure from the Armistice Line of 1949, which is causing humanitarian hardship and a serious decline in socioeconomic conditions for the Palestinian people, fragmenting the territorial contiguity of the Territory and undermining its viability, creating a fait accompli on the ground that could be tantamount to de facto annexation in departure from the Armistice Line of 1949, and making the two-State solution physically impossible to implement,

*Deeply concerned* that the wall's route has been traced in such a way to include the great majority of the Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem,

*Gravely concerned* at all acts of violence, destruction, harassment, provocation and incitement by extremist Israeli settlers and groups of armed settlers in the Occupied Palestinian Territory, including East Jerusalem, against Palestinian civilians, including children, and their properties, including homes, agricultural lands and historic and religious sites, and the acts of terror carried out by several extremist Israeli settlers, which are a longstanding phenomenon aimed at, inter alia, displacing the occupied population and facilitating the expansion of settlements,

*Expressing concern* at ongoing impunity for acts of settler violence against Palestinian civilians and their properties, and stressing the need for Israel to investigate and to ensure accountability for all of these acts"<sup>129</sup>.

196. The situation imposed on the Palestinian people in the territories occupied by Israel has been addressed in detailed reports by various organs of the United Nations. The largest is the Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, in accordance with Human Rights Council resolution S-30/1<sup>130</sup>.

197. In the recent resolution by which it made the present request for an advisory opinion to the Court, the General Assembly itself took pains to set out in detail the serious human rights violations and grave breaches of international humanitarian law found to have occurred in the territories occupied by Israel. It summarized those violations and called for accountability<sup>131</sup>.

198. That assessment reflects the current situation in the Palestinian territories under Israeli military occupation. The outcome of a situation that has deteriorated over more than a century, it needs to be considered in light of the law applicable to it. It is therefore necessary at this stage to identify which norms characterize the facts of the situation and to assess those facts in light of the legal régime established by contemporary international law.

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<sup>129</sup> United Nations, Human Rights Council, Resolution 40/24, 22 March 2019, A/HRC/RES/40/24 (Ann. 39).

<sup>130</sup> United Nations General Assembly, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 14 September 2022, A/77/328 (Ann. 40).

<sup>131</sup> See Ann. 1.

### III. THE LAW APPLICABLE TO THE SITUATION PUT BEFORE THE COURT

199. Since its creation, Israel has demanded a form of exceptionality vis-à-vis the international law that governs global society. However, the exceptionality thus claimed equates in reality to gross violations of the rights of Palestinians as derived from the application of positive international law. After commenting on the need to address the issues on the basis of intertemporal law in this case, in which the facts have occurred over a period of more than a century, we shall catalogue all the provisions of international law which must be applied in resolving the dispute (A). We shall then focus more specifically on the right of peoples to self-determination, whose violation by Israel is central to this matter (B).

200. The conduct, first of the Zionist movement before and during the British Mandate for Palestine and then of the State of Israel from its declaration of independence on 14 May 1948, extends over a very long period. In order to evaluate that conduct in terms of compliance with the law it is therefore necessary to take account of the state of the law at the time of the facts. This is the principle of intertemporal law. Highlighted by the arbitrator Max Huber in the *Island of Palmas* case, the principle requires a judicial fact to be appreciated “in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”<sup>132</sup>.

201. In the framing of the question it has put to the Court, the General Assembly has indeed limited the question to “the Palestinian territory occupied by Israel since 1967”. The situation in that territory must therefore be assessed on the basis of the body of general international law, human rights and humanitarian law in cases of armed conflict, as established since 1967. The origins of the ongoing conflict nevertheless date back to a more distant past, when the League of Nations Mandates were created. We will therefore pay particular attention to the law of that period to ascertain when these ongoing violations of international law began.

#### A. The whole body of international law applicable to the questions posed

202. The settlement of the Palestinian question requires the application of international law. All States are subject to general international law under the United Nations Charter. Three fundamental branches of that law are at play here: the law of peace, international humanitarian law in the event of armed conflict and human rights.

203. The law of peace was codified by the United Nations Charter. The key elements of this law are the principles of the non-use of force, territorial integrity and the right of peoples to self-determination. The prohibition of the use of force applies to Israel as a Member State of the United Nations. Under that principle any military operation by one State against another State or against another people gives rise to condemnation unless it is one of the only two exceptions to that prohibition, namely self-defence and operations conducted by the United Nations under Chapter VII of the Charter. This rule entails the rule of respect for territorial integrity, which prohibits a State from acquiring by means of annexation any territory other than the territory recognized as being within its borders as defined when it joined the United Nations<sup>133</sup>. It also prohibits a State from occupying the territory of another State or another people by military means even without an explicit annexation. Supplementing the provisions of the Charter, on 24 October 1970 the General Assembly adopted resolution 2625 (XXV), entitled Declaration on Principles of International Law concerning

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<sup>132</sup> *Island of Palmas (Netherlands v. United States of America)*, PCA No. 1925-01, Award of 4 April 1928, p. 845.

<sup>133</sup> Art. 2, para. 4, of the Charter of the United Nations: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Friendly Relations and Co-operation among States, in which it emphasized that no territorial acquisition obtained through the threat or use of force would be recognized as legal. The law of peace also encompasses the right of peoples to self-determination, which will be expanded upon separately.

204. Humanitarian law in the event of armed conflict came into being as early as the nineteenth century in order to limit the tragic consequences of conflict and to protect civilian populations in times of war. Although Israel has developed numerous specious arguments to evade application of humanitarian law, the Court resolved the issue of its applicability to the Occupied Palestinian Territory in its 2004 Advisory Opinion. It held:

“In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.”<sup>134</sup>

205. Lastly, as regards human rights, even though Israel is a party to both the United Nations Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, here too it has disputed that these Conventions apply in the Occupied Palestinian Territory, claiming that human rights instruments are intended only to protect citizens against their own governments in times of peace. The Court dismissed that thesis and held: “In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>135</sup> The Court made the same finding in relation to the Covenant on Economic, Social and Cultural Rights<sup>136</sup>.

206. Following on from that finding, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, addressed that point on the international law applicable to the occupation in the report it submitted to the General Assembly on 14 September 2022. It recalled that:

“The Occupied Palestinian Territory, including East Jerusalem and Gaza, and the occupied Syrian Golan are currently under belligerent occupation by Israel, to which international humanitarian law applies concurrently with international human rights law.”<sup>137</sup>

207. Accordingly, the body of international law on the law of peace, humanitarian law in the event of armed conflict and human rights therefore represents all the law to be applied in order to answer the questions put to the Court by the General Assembly. We shall now look more specifically at the right of peoples to self-determination, mindful that the very foundations of this right are called into question by the policies and practices of Israel in the Occupied Palestinian Territory.

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<sup>134</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 177, para. 101.

<sup>135</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 180, para. 111.

<sup>136</sup> *Ibid.*, pp. 180-181, para. 112.

<sup>137</sup> See Ann. 40, para. 7.

## **B. The right of peoples to self-determination**

208. What is specific about the case of the Palestinian people in relation to the norm comprising the right of peoples to self-determination is that it holds that right under two separate and mutually reinforcing sources of law. The Palestinian people benefited from the first specific articulation of that right in international law in the League of Nations Covenant. At that time it was part of a *lex specialis* in favour of certain peoples (1). The Palestinian people also benefited from the enhanced and generalized articulation of the right under the auspices of the United Nations. There was now a *lex generalis* on the matter (2).

### **1. The right of peoples to self-determination enjoyed by the peoples subject to United Nations A Mandates**

209. It has been recalled above that the A Mandates established by the Covenant of the League of Nations for a number of peoples that had belonged to the Ottoman Empire had been conceived as transitional régimes intended to enable the peoples concerned to move to independence. This followed from Article 22 of the Covenant:

“Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”<sup>138</sup>

210. While it would be incorrect to say that this is when the right of peoples to self-determination received recognition as a norm of general international law applicable to all colonized peoples, it must nevertheless be acknowledged that a first breach had opened in the régime of domination that had hitherto formed part of the international system. Under the decisive influence of President Wilson, a requirement was now emerging that the interests and wishes of the populations concerned be taken into account. The A Mandates then created were envisaged as a step on the way to decolonization. That was indeed the Court’s interpretation in its Advisory Opinion on the wall built by Israel in the Occupied Palestinian Territory. In 2004,

“[t]he Court [recalled] that in 1971 it emphasized that current developments in ‘international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]’. The Court went on to state that ‘These: developments leave little doubt that the ultimate objective of the sacred trust’ referred to in Article 22, paragraph 1, of the Covenant of the League of Nations ‘was the self-determination. .. of the peoples concerned’ (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I. C. J. Reports 1971*, p. 31, paras. 52-53).”<sup>139</sup>

211. Although the requirement that peoples should gain independence was enshrined in law only for certain territories, those subject to Ottoman colonization, it was nonetheless clearly established:

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<sup>138</sup> See *supra*, paras. 41-51.

<sup>139</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136, para. 88.

“The Mandate must be considered in the light of the Covenant of the League of Nations. One of the primary responsibilities of the Mandatory Power was to assist the peoples of the territory to achieve full self-government and independence at the earliest possible date. Article 22, paragraph 1, of the Covenant stipulated that the ‘well-being and development of such peoples form a sacred trust of civilization’. The only limitation imposed by the League’s Covenant upon the sovereignty and full independence of the people of Palestine was the temporary tutelage entrusted to the Mandatory Power.”<sup>140</sup>

212. That system, which guaranteed the attainment of independence at the end of a transitional period, was the precursor of what was to become a fundamental norm of international law whereby the right of peoples to self-determination applies to all territories subject to foreign domination.

**2. The right of peoples to self-determination within the United Nations framework**

213. The right of peoples to self-determination is today a core norm of international law. The texts on which the right is founded have the broadest possible legal scope (a). The norm has been confirmed by the jurisprudence of the Court on many occasions (b). It can be defined precisely on the basis of the various aspects of its content (c).

**(a) The texts on which the right of peoples to self-determination are founded**

214. This right is enshrined in the Charter of the United Nations, in which it is mentioned twice, in Article 1, second paragraph, and in Article 55:

“Article 1

The Purposes of the United Nations are:

.....

To develop friendly relations among nations based on **respect for the principle of equal rights and self-determination of peoples**, and to take other appropriate measures to strengthen universal peace”. [(Emphasis added)]

“Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations **based on respect for the principle of equal rights and self-determination of peoples**, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” [(Emphasis added)]

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<sup>140</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Elaraby, p. 246.

215. The text of the Charter was, however, not free of contradictions, and its affirmation of the principle of the right of peoples to self-determination had not yet given rise to a true right to decolonization. Chapter XI of the Charter is in fact entitled “Declaration Regarding [Non]-Self-Governing Territories” and contains no obligation on the colonizing States to grant independence to the colonized peoples. They merely have a duty, under Article 73,

“to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement”.

216. It was the liberation struggles embarked upon by certain peoples (those of Viet Nam and Algeria in particular) and the support they would garner within the United Nations General Assembly that led to much more exacting content being given to the right of peoples to self-determination and to a condemnation of colonization. The key moment came in 1960 when the United Nations General Assembly adopted the Declaration on the granting of independence to colonial countries and peoples<sup>141</sup>. It presents the right to decolonization as an absolute principle binding on all States and covering all colonized territories, irrespective of the legal status given to them by the colonizer. The Court later confirmed that the declaration provided a basis for the right:

“The Court considers that, although resolution (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.”<sup>142</sup>

217. To give effect to that principle, in 1961 the General Assembly set up the Decolonization Committee, known as the Committee of Twenty-Four or Special Committee, with the task of implementing the Declaration in practice. Ten years later the Declaration was supplemented by other significant resolutions. Resolution 2621 of 12 October 1970 established a programme of action for the full implementation of the Declaration, and resolution 2625 of 24 October 1970 codified the seven principles of international law concerning friendly relations and co-operation among States, which include the principle of equal rights and self-determination of peoples. Lastly, resolution 2649 of 30 November 1970 emphasized the importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights.

218. The right of peoples to self-determination was then strengthened and acquired treaty force when it was included in the two United Nations Covenants, both adopted on 16 December 1966, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The right is articulated in the same terms in both, which read as follows:

“Article 1

1. **All peoples have the right of self-determination.** By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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<sup>141</sup> General Assembly resolution 1514 of 14 December 1960.

<sup>142</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 132, para. 152.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.” [(Emphasis added)]

219. It is apparent from this body of law that the right of peoples to self-determination has the value of a norm of positive international law. Formed as custom, this norm has been confirmed by treaty. It was cited as an example of a peremptory norm by the International Law Commission in its report on the law of treaties<sup>143</sup>. It was also characterized as a peremptory norm of general international law by the Arbitration Commission of the Conference on Yugoslavia<sup>144</sup>.

220. Such is the importance of the right to self-determination that the United Nations General Assembly has reaffirmed the legitimacy of national liberation struggles conducted by all means necessary. This emerges from resolution 3070 of 30 November 1973, which affirms: “the legitimacy of the peoples’ struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle”<sup>145</sup>.

221. Violation of the right of peoples to self-determination constitutes an international crime, as was recognized in United Nations General Assembly resolution 2621 in 1970 in which the General Assembly declared:

“the further continuation of colonialism in all its forms and manifestations a crime which constitutes a violation of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples and the principles of international law”<sup>146</sup>.

222. We would add here that the right to decolonization is inherent to the very existence of a people. Because a people’s freedom is an intrinsic part of its destiny, it exists as a potential before it becomes a reality. It therefore cannot be granted by anyone. It is only ever recovered, because it must be given back if it has been confiscated. That is why legal instruments recognizing the independence of a people hitherto dominated by a colonizer are purely declaratory and do not create rights. That consideration is very important in any process of decolonization. The right of the colonized people is innate and as a matter of principle non-negotiable.

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<sup>143</sup> *Yearbook of the International Law Commission, 1966, Vol. II*, p. [248].

<sup>144</sup> Conference for Peace in Yugoslavia, Arbitration Commission, *Opinion No. 1*, 1992, p. 3.

<sup>145</sup> United Nations General Assembly resolution 3070 of 30 November 1973.

<sup>146</sup> United Nations General Assembly resolution 2621 of 12 October 1970.



**(b) Confirmation of the right of peoples to self-determination in international jurisprudence**

223. The International Court of Justice has consistently reaffirmed in a series of judgments and advisory opinions that the right of peoples to self-determination is a norm of positive law, and has on occasion conferred on it *erga omnes* legal validity.

224. It did so on the occasion of the 1971 Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*<sup>147</sup>, in which the Court recalled that the right of peoples clearly included the inhabitants of the mandated territories<sup>148</sup>. It also stated:

“In the view of the Court, the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”<sup>149</sup>.

225. In its *Western Sahara* Opinion rendered in 1975 the Court, recalling the terms of resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples, stated that “the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned”<sup>150</sup>.

226. In its Judgment of 30 June 1995 in the *East Timor* case, the Court held that the right of peoples to self-determination is an essential principle of contemporary international law, and reiterated its *erga omnes* character:

“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law.”<sup>151</sup>

227. In the Advisory Opinion of 9 July 2004 on the *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court attached great importance to the right of peoples to self-determination. It declared, in particular, in relation to the circumstances in which the wall had been built: “That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of

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<sup>147</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *I.C.J. Reports 1971*, p. 31, para. 52.

<sup>148</sup> *Ibid.*, p. 33, para. 59.

<sup>149</sup> *Ibid.*, p. 56, para. 126.

<sup>150</sup> *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 32, para. 55.

<sup>151</sup> *East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 102, para. 29.

Israel's obligation to respect that right.”<sup>152</sup> It also reiterated that the right of peoples to self-determination creates obligations *erga omnes*:

“[T]he Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as ‘irreproachable’ the assertion that ‘the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character’ (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

‘Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . . ’<sup>153</sup>.

228. Lastly, in the recent Opinion rendered in 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court emphasized the defining moment represented by the adoption of United Nations General Assembly resolution 1514:

“The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination. Certain States justified their abstention on the basis of the time required for the implementation of such a right.”

“The wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that ‘[a]ll peoples have the right to self-determination’. Its preamble proclaims ‘the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations’ and its first paragraph states that ‘[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations’. This resolution further provides that ‘[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire’<sup>154</sup>.

Referring to the international covenants that form the treaty foundation of the right of peoples to self-determination, it adds:

“Article 1, common to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, by General Assembly resolution 2200 A (XXI), reaffirms the right of all peoples to self-determination, and provides, *inter alia*, that:

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<sup>152</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 122.

<sup>153</sup> *Ibid.*, p. 199, para. 156.

<sup>154</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, pp. 132-133, paras. 152 and 153.

‘The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’<sup>155</sup>

229. It can be seen that the highest court in the international system has, in consistent jurisprudence, confirmed the normative force of the right of peoples to self-determination, a cardinal principle of positive international law.

### **(c) *Content of the right of peoples to self-determination***

230. The norm of the right of peoples to self-determination presupposes that it is possible to identify the human groups that hold that right. It is also necessary to clarify what is meant by “self-determination” for a people and what are the various options available to it in order to realize that right. The territory allotted to that people also needs to be identified, as well as the rights it has over the natural resources that come from that territory.

#### **Identification of a people**

231. Although the concept of a people as a human entity enjoying the right to independence may be problematic in certain circumstances, not least because the independence claimed by a human group may conflict with the principle of the territorial integrity of States<sup>156</sup>, that scenario does not arise in the case of colonial situations. Indeed, the United Nations General Assembly resolution that forms the basis of the right (1514) recognizes the right to self-determination for peoples subjected to “alien subjugation, domination and exploitation”. The criterion that there must be domination or exploitation is therefore central. It applies in conjunction with the fact that the people in question has a status separate and distinct from that of the colonizing State, and is culturally and ethnically different from the people of that State<sup>157</sup> and subjected by that State to an occupation that is sometimes imposed by means of a war of conquest.

232. The United Nations clarified that point in a resolution of 1970, affirming that the independence of a colonized territory did not impair the territorial integrity of the administering Power:

“The territory of a colony or other Non-Self Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.”<sup>158</sup>

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<sup>155</sup> *Ibid.*, p. 133, para. 154.

<sup>156</sup> As the African Commission on Human and Peoples’ Rights observed and as noted in para. 96 above.

<sup>157</sup> Reference to ethnically and culturally separate territories was made by the General Assembly as early as 1960 in resolution 1541 of 15 December 1960: “*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”

<sup>158</sup> United Nations General Assembly, resolution 2625 of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

233. There are therefore several criteria for determining whether a human group is among those enjoying the right of peoples to self-determination, the most important of which are that the colonized people must be ethnically and culturally distinct from the colonizer and that it must be subject to domination.

234. Furthermore, the right of peoples to self-determination may not be denied or delayed on the pretext of considerations relating to their development. Anxious to put an end to the successive régimes that had postponed self-determination over the years in reliance on the argument of a lag in development (colonialism itself before the United Nations existed; the Mandate system under the League of Nations; the régime of Non-Self-Governing or Trust Territories in accordance with the United Nations Charter), the General Assembly declared in resolution 1514 of 14 December 1960: “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”<sup>159</sup>

### **The options made available through self-determination**

235. Self-determination means for a people that it has complete freedom to choose its political destiny. It was that concept of freedom that led the United Nations General Assembly to clarify the various ways in which the people of a non-self-governing territory can be regarded as having exercised the right in question. It did so in resolution 1541 of 15 December 1960, in the following terms:

#### “Principle VI

A Non-Self Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.”<sup>160</sup>

However, that list is not exhaustive. The political imagination can be given free rein. It might lead, for example, to a form of shared sovereignty or to varying degrees of internal self-government. Needless to say, the contemporary international law of decolonization, which has emerged from the work of the General Assembly, gives precedence to independence.

### **The right of return for the expelled populations**

236. This is a fundamental component of the right of peoples to self-determination. Independently of the individual right proclaimed as a human right whereby anyone who has left their country is entitled to return to it, the right of return is exercised collectively by a people that has suffered forcible removals, being as it is a precondition for realization of the right to self-determination. The United Nations has made it an essential element of its regular expressions of opinion on the inalienable rights of the Palestinian people. After resolution 194 of 11 December

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<sup>159</sup> United Nations General Assembly, resolution 1514 of 14 December 1960.

<sup>160</sup> United Nations General Assembly, resolution 1541 of 15 December 1960: Principles which should guide Members in determining whether or not an obligation exist to transmit the information called for under Article 73 e of the Charter.

1948, the resolution forming the basis of the right of return for Palestinians, the United Nations organs have maintained a consistent position of reaffirming that right<sup>161</sup>.

**The rights of a people to the integrity of its territory and freedom to dispose of its natural resources**

237. The right to self-determination must be exercisable over the entirety of a non-self-governing territory. No solution that entails division would be valid under international law. The International Court of Justice stated this fact in its Advisory Opinion of 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. After recalling that General Assembly resolution 1514 had a normative character, the Court noted that paragraph 6 of the resolution provides that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”<sup>162</sup>. It further clarified “that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination”<sup>163</sup>. No detachment of any part of a territory is therefore authorized by the law of decolonization.

238. In respect of natural wealth, the right to self-determination goes hand in hand with an economic component: the right of peoples over their natural resources. That right was affirmed in 1962 by General Assembly resolution 1803<sup>164</sup>. It is held to be an essential element of the right of peoples to self-determination. Its role is to preserve the future rights of peoples under domination and to prevent any pre-emancipation appropriation of resources by the colonizer.

239. It is now necessary to determine in what respects the body of norms set out above, dominated as it is by the peremptory norm that is the right of peoples to self-determination, has been applied or violated by the policies and practices of Israel in the Palestinian territory occupied since 1967.

**IV. ISRAEL’S REPEATED VIOLATION OF THE RIGHT TO SELF-DETERMINATION OF THE PALESTINIAN PEOPLE AND THE MEANS SYSTEMATICALLY EMPLOYED TO IMPEDE REALIZATION OF THAT RIGHT**

240. The General Assembly has specific competence in matters of decolonization, as the Court recalled in its Opinion of 25 February 2019 when examining another instance of incomplete decolonization: “The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization.”<sup>165</sup> It is in the exercise of that competence that the United Nations General Assembly has sought enlightenment on the questions posed in the request for an advisory opinion to which these written observations relate. In order to answer those questions, the

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<sup>161</sup> See United Nations General Assembly, resolution 2535 B (XIV) of 10 December 1969.

<sup>162</sup> [*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*], p. 133, para. 153.

<sup>163</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 134, para. 160.

<sup>164</sup> United Nations General Assembly resolution 1803 of 14 December 1962.

<sup>165</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 179.

Court is required to rule on Israel's practices and policies in the Palestinian territory occupied since 1967. The legal characterization that we shall endeavour to establish in this part is therefore of the acts and conduct of the Jewish State confined to that period.

241. Nevertheless, as made clear in the contextual account presented above, the military occupation of Palestinian territory undertaken by Israel in 1967 and uninterrupted ever since, and all the acts that have accompanied that occupation, have been merely a further stage in a continuous process that had begun before that time, a process comprising the ongoing, organized violation of the central norm of international law that is the right of the Palestinian people to self-determination. All the violations committed in connection with the Israeli-Palestinian conflict have been or still are today secondary violations stemming from that principal violation<sup>166</sup>.

242. When, in 1967, Israel waged the Six-Day War that would enable it to occupy the West Bank and Gaza, the right of the Palestinian people to emancipation was already under severe threat and the obstacles to its attainment had been mounting for several decades. We shall therefore demonstrate first how the independence of Palestine was rendered impossible as soon as the right of Palestinians to take control of their destiny was formulated (A), before then examining at greater length the situation put before the Court. That situation is characterized by illegal measures by means of which Israel is continuing to frustrate the right of the occupied people to self-determination (B). However, as recalled above, the lawfulness of each aspect of a situation must be assessed according to the law in force at the time it arose<sup>167</sup>.

#### **A. How the stage was set for impeding the right of self-determination of the Palestinian people**

243. The long history of the Palestinian people's inability to gain independence has been characterized by the recurring contradiction between, on the one hand, the advances made in affirming the right of peoples to self-determination that have resulted from the development of international law, and, on the other, Israel's deployment of multiple violations of that international law with the aim of frustrating the independence of Arab Palestine.

244. It has been shown above that, even before the League of Nations Mandate for Palestine was conferred upon it, Great Britain had made a perilous commitment to the Zionist Organization by professing itself favourable to the establishment of a National Home for the Jewish People in Palestine<sup>168</sup>. That position, expressed by Lord Balfour in 1917, was initially that of a British politician speaking in his personal capacity. It was subsequently taken up by the authorities of Great Britain, even though that State had never held any rights over the territory of Palestine, then under Ottoman administration.

245. Notwithstanding Zionist ambitions and the support they were being afforded by the British authorities at the time, the right of the Palestinian people to self-determination came into being on 28 June 1919 by virtue of Article 22, paragraph 4, of the Covenant of the League of Nations

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<sup>166</sup> In this part, the Organisation of Islamic Cooperation has not set out to provide the Court with an exhaustive survey of all the violations of international rules committed by Israel in the Occupied Palestinian Territory. It will simply highlight a number of eloquent examples illustrating Israel's refusal to apply the norms of international law in force and showing the means that have been employed to make it impossible for the Palestinian people to exercise its right of self-determination.

<sup>167</sup> See para. 200 above.

<sup>168</sup> See paras. 28-40 above.

incorporated in the Treaty of Versailles<sup>169</sup>. This right was then in its infancy. It was drafted with a small number of specific peoples in mind, under the influence of the liberal aspirations of the United States President Woodrow Wilson<sup>170</sup>. The essence of self-determination is nevertheless clearly present. For the communities concerned, “their existence as independent nations [could] be provisionally recognized . . . until such time as they [were] able to stand alone”. Furthermore, “[t]he wishes of these communities [had to] be a principal consideration in the selection of the Mandatory”.

246. Three [weeks] after it was adopted, that provision was the subject-matter of the first breach of the right of the Palestinian people to self-determination. Indeed, the Mandate for Palestine was conferred on Great Britain on 24 July [19]19 without consultation of the population of Palestine. The Mandate was given to Great Britain following strong representations by the British and bargaining between the great Powers. It was beyond doubt that had the population of Palestine (of which Arab Palestinians then comprised 91 per cent) been consulted, it would have vetoed the selection of Great Britain as the Mandatory, aware as it was of that great Power’s support for the Zionist designs on its country.

247. The holders of League of Nations Mandates were not granted sovereignty over the territories under their custody. The promise of independence made to the peoples placed under A Mandates had the consequence that those peoples were already considered to be subjects of international law and were by virtue thereof holders of sovereignty, although not in a position to exercise it during the period of the Mandate<sup>171</sup>. This was confirmed by the Court in respect of the Mandate for South West Africa: “The terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty to the Union of South Africa.”<sup>172</sup> Formulated in relation to the League of Nations “C” Mandates, this dictum of the Court applied *a fortiori* to the category A Mandates, for which the prospect of independence was explicitly envisaged.

248. Although the peoples placed under Mandate were not yet in a position to exercise sovereignty, they were recognized as having the potential for sovereignty. Only the exercise of that sovereignty was postponed. This was because, in general, “[t]he Mandatory Power, as such, was not the sovereign of the territory. It had no right of disposition, no *jus disponendi*: it was merely a Mandatory on behalf of the League”<sup>173</sup>.

249. It should also be noted that the Mandate for Palestine provided in Article 5 for the protection of territorial integrity: “The Mandatory shall be responsible for seeing that no Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.” That guarantee was given to “Palestine”, that is to say, to a territory and to a people that occupied it. In 1922, that people was the Arab people that represented 91 per cent of the population. It was therefore the Arab people that was protected against “the control of . . . any foreign Power”. Once again, the A Mandates were forerunners of what would later become, in expanded

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<sup>169</sup> “Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”

<sup>170</sup> See para. 43 *et seq.* above.

<sup>171</sup> To that effect, see Jean Salmon, “La proclamation de l’État palestinien”, *Annuaire français de droit international*, 1988, p. 37 *et seq.*, in particular p. 55.

<sup>172</sup> *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 132.

<sup>173</sup> *Ibid.*, *Advisory Opinion of 11 July 1950*, separate opinion of Judge Read, p. 168.

form and with universal scope, the fundamental norm that is the right of peoples to self-determination.

250. Such was Great Britain's awareness of its duty towards the Arab people of Palestine in that respect that, in its White Paper of 17 May 1939<sup>174</sup>, it envisaged the establishment of an independent Palestinian State within 10 years and the limitation of Jewish immigration to 75,000 people a year. However, overwhelmed by the strength of the Zionist demands that it had itself encouraged, the mandatory Power could do nothing to counter the prevailing cycle of confrontation.

251. The legal foundations of the right of the Palestinian people to independence had not changed in the 25 years of Great Britain's chaotic exercise of its Mandate for Palestine. However, the *de facto* situation created in Palestine fundamentally jeopardized any possibility of realizing that right. No longer able to sustain that contradiction, which had led to severe violence on the ground, the mandatory Power transferred to the United Nations a situation at boiling point.

252. That was the moment when, on 29 November 1947, in the circumstances related above<sup>175</sup>, the General Assembly adopted a resolution recommending a plan of partition for Palestine accompanied by a proposed *corpus separatum* for Jerusalem<sup>176</sup>. By the time this issue came back to the United Nations General Assembly, the emancipation promised to the Arab people of Palestine since 1922 had been fettered by a *de facto* situation long-encouraged by the mandatory Power: the advancement and political and military organization of the Jewish population in Palestine. However, the right of the Palestinian people to self-determination in its territory had not gone away. It had not renounced that right by any agreement enforceable against it. No norm of international law had arisen to contradict the principle articulated in the League of Nations Covenant. On the contrary, under the Trusteeship system, the United Nations then took up the promise of independence made to the peoples concerned, as was confirmed by the Court when it was called upon to examine the Mandate for South West Africa: "It obviously was the intention to safeguard the rights of States and peoples under all circumstances and in all respects, until each territory should be placed under the Trusteeship System."<sup>177</sup>

253. Did the advent of General Assembly resolution 181 of 27 November 1947 change the situation legally in any way? Put otherwise, was that resolution such as to modify the Palestinian people's inherent right, as endorsed by the Covenant of the League of Nations, to self-determination in the whole of its territory? The answer is that it was not, because, although the General Assembly had gradually been invested with a certain responsibility for decolonization, that fact clearly could not permit it to exercise powers of disposal over a territory that had been colonized, and then placed under a Mandate, by removing part of that territory from the formerly dominated people. Nothing in the Charter of the United Nations gives such powers to any organ of the Organization. It is therefore necessary to analyse the formal aspects of the General Assembly resolution and to consider whether it was capable of serving as the basis for obligations.

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<sup>174</sup> See Ann. 10.

<sup>175</sup> See paras. 86-100 above.

<sup>176</sup> See Ann. 12.

<sup>177</sup> *International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 134.



254. According to the dominant school of academic thought, resolutions of the General Assembly are not binding. This is borne out by the provisions of the Charter on the powers of that organ:

“Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may *make recommendations* to the Members of the United Nations or to the Security Council or to both *on any such questions or matters*.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may *make recommendations with regard to such principles* to the Members or to the Security Council or to both.

The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may *make recommendations with regard to any such questions* to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.” (Emphasis added.)

255. When, acting under those provisions, the General Assembly decided in 1947 to promote a plan for the partition of Palestine, it did so by means of a recommendation: “*Recommends* to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below”<sup>178</sup>. So convinced was the General Assembly that it would not be able to enforce the plan of partition for which its majority had voted that it turned to the Security Council to lend its support: “*Requests* that (a) The Security Council take the necessary measures as provided for in the plan for its implementation”<sup>179</sup>. Since resolution 181 was merely a recommendation, it did not exceed the substantive powers of the General Assembly. It was merely its contribution, in the form of a “plan”, to attempt to resolve a key conflict. Its content could only acquire binding force with the consent of those concerned, that is to say, the Arab people of Palestine.

256. Uncertainty on this point persisted for decades and has still not been completely dispelled. In the weeks following the vote on resolution 181 Israel was quick to accept its terms, not out of conviction (subsequent events would show that Israel in no respect accepted the border proposed in the partition plan as being its final border) but as a political calculation, since that acceptance served as confirmation of its existence as a State. It was plain at that time that what was lacking for the recommendation to become binding was acceptance by the people concerned, the Arab people of Palestine, whose right to self-determination in the whole of their territory was at stake. That people and its allies initially refused to accept a recommendation that amputated more than half the territory

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<sup>178</sup> See Ann.12, General Assembly resolution 181.

<sup>179</sup> *Ibid.*

of Arab Palestine. As a result, resolution 181 petered out in a form of legal vacuum, exacerbated by the fact that the part of the recommendation concerning Jerusalem was never implemented.

257. It is true that over 40 years later the PLO referred to resolution 181 in its 1988 Declaration of Independence, in the following terms:

“Despite the historical injustice done to the Palestinian Arab people in its displacement and in being deprived of the right to self-determination following the adoption of General Assembly resolution 181 (II) of 1947, which partitioned Palestine into an Arab and a Jewish State, that resolution nevertheless continues to attach conditions to international legitimacy that guarantee the Palestinian Arab people the right to sovereignty and national independence.”<sup>180</sup>

However, that Declaration well illustrates the ambiguity of the approach proposed by the General Assembly. The solution recommended did indeed safeguard the right of the Palestinian Arab people to sovereignty and independence, but it applied to a truncated territory, thereby condoning the terrible historical injustice inflicted on the Palestinian people. Furthermore, any attempt to attribute normative force to the resolution is even less likely to succeed in view of the fact that Israel had, through its military conquests from as early as the 1948-1949 war, deprived the recommendation of any force by taking over a portion of the territories that the partition plan allocated to the Arab State.

258. It must therefore be concluded that as a result of the intervention in the matter by the United Nations General Assembly in 1947 the right of the Palestinian people to self-determination was doubtless confirmed (since the General Assembly resolution envisaged an Arab State), but that the territorial foundation of that right was dismantled. As a right, it had therefore not ceased to exist, because the Palestinian people had not at that time consented to any waiver of that right. The fact that it unilaterally accepted resolution 181, several decades later, merely indicates that in a future peace agreement (uncertain though its conclusion may seem at the present time), Palestinians will not be able to revisit their recognition of the sovereignty of the Jewish State over the part of Mandatory Palestine assigned to Israel under the partition plan<sup>181</sup>.

259. It is worth noting that, on the part of the new Israeli State that declared independence on 14 May 1948, there was at that time no recognition that the Palestinian people existed. The Palestinian question gave rise only to “issues of individuals who can settle in the Arab countries in the region as part of Arab solidarity”<sup>182</sup>. The next phase, which began with the Arab-Israeli war of 1948, would have much more devastating consequences for the chances of survival of the right of the Palestinian people to self-determination. The attack on that right then targeted the elements that enable a people to become a State: territory and population.

260. Turning to its advantage the military situation created by the Arab forces, Israel then seized by force of arms a large part of the territory reserved for an Arab State in the United Nations partition plan<sup>183</sup>. The United Nations Charter, which had then been in force for nearly three years, prohibits the use of force against the territorial integrity of a State. Admittedly, Israel was not yet a

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<sup>180</sup> See Ann. 27.

<sup>181</sup> To that effect, see Jean Salmon, *op. cit.*, p. 44, and Frank L. M. Van de Craen, “The Territorial Title of the State of Israel to ‘Palestine’: an Appraisal in International Law”, *Revue belge de droit international*, Vol. XIV, 1978-1979-2, p. 505.

<sup>182</sup> Madjid Benchikh, “L’accord intérimaire israélo-palestinien sur la Cisjordanie et la Bande de Gaza du 28 septembre 1995”, *Annuaire français de droit international*, 1995, p. 24 [Translation by the Registry].

<sup>183</sup> See para. 92, Map No. 5, above.

Member of the United Nations, its first attempt at admission having been unsuccessful, but it was a candidate for membership, which it would be granted after being requested to state clearly that it accepted the obligations under the Charter and all the United Nations resolutions<sup>184</sup>. Admittedly, the Arab State of Palestine still existed only as a potential, because the circumstances in which the Palestinian people could declare itself a State would only come about much later. Yet that did not mean that the Arab territory of Palestine resulting from resolution 181 was *terra nullius*. It was set aside for the future exercise of Palestinian sovereignty. The Israeli conquests of parts of territories which were Palestinian according to the 1947 partition plan are therefore unlawful under Article 2, paragraph 4, of the Charter and cannot be the basis of a valid claim under international law.

261. Those conquests in breach of international law have not been validated in any respect by the organs of the United Nations. Furthermore, the armistice agreements concluded by Israel with the various Arab States engaged in the military operations of 1948 clearly indicated that the Armistice Line was not to be treated as a border:

“1. The line described in Article VI of this Agreement shall be designated as the Armistice Demarcation Line and is delineated in pursuance of the purpose and intent of the resolutions of the Security Council of 4 and 16 November 1948.

2. The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question.

3. The basic purpose of the Armistice Demarcation Line is to delineate the line beyond which the armed forces of the respective Parties shall not move except as provided in Article III of this Agreement.

4. Rules and regulations of the armed forces of the Parties, which prohibit civilians from crossing the fighting lines or entering the area between the lines, shall remain in effect after the signing of this Agreement with application to the Armistice Demarcation Line defined in Article VI.”<sup>185</sup>

262. Throughout the portion of the Palestinian territory that Israel seized in 1948, that forcible conquest of territories was accompanied by multiple atrocities against the Palestinian population and its property. The population suffered large-scale massacres and expulsions on a horrendous scale, the true facts of which were only brought to light much later thanks to the work of the Israeli “new historians” referred to above<sup>186</sup>. Another violation of international law committed against the populations of those territories arose from the appropriation of land owned by Palestinians<sup>187</sup>. That seizure of properties, which was deliberately conceived and ordained in law through the legislation on absentee property, was coupled with a prohibition on any return by Palestinians who had left their homes. The aim was indeed to destroy the Arab society already existing in those places:

“Prohibiting return meant creating facts on the ground that destroyed Arab society, that is to say, razing villages to the ground if possible during military operations, decimating agriculture to prevent harvests, installing Jewish inhabitants in Arab houses

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<sup>184</sup> See paras. 124-125 above.

<sup>185</sup> See Ann. 16, General Armistice Agreement between Egypt and Israel signed at Rhodes on 24 February 1949.

<sup>186</sup> See paras. 107-114 above and Jacques de Reynier, *op. cit.* See also, Catherine Rey Schyrr, “Le CICR et l’assistance aux réfugiés arabes palestiniens (1948-1950)”, *Revue internationale de la Croix-Rouge*, September 2001, Vol. 83, No. 843, p. 739 *et seq.*

<sup>187</sup> For a description of that appropriation, see paras. 115-119 above.

(in the urban areas), enacting legislation that prohibited return and a propaganda campaign to that effect . . . The expulsion of populations . . . took place with the clearly identified aim of ethnic homogenization, defined less by a general instruction to drive out populations than by strict instructions to prevent any return by destroying houses and means of subsistence.”<sup>188</sup>

263. In its resolution 181 proposing the plan to partition Palestine, the General Assembly had been at pains to establish protection for the property of the minorities in each of the two States whose creation it was proposing:

“No expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes. In all cases of expropriation full compensation as fixed by the Supreme Court shall be paid previous to dispossession.”<sup>189</sup>

264. Israel was bound by that specific provision as a result of the solemn undertaking given by its Government on joining the United Nations to respect the resulting obligations. The provision merely implements measures concerning Palestinian people and their property that in fact form part of general international law. Admittedly, the facts under examination here took place before the entry into force of the Geneva Conventions on humanitarian law in cases of armed conflict of 12 August 1949. However, the law of armed conflict already existed and at that time included the Fourth Hague Convention of 1907 and the Regulations annexed to it. In its Advisory Opinion of 2004 the Court recalled that those Regulations applied to the situation between Israel and Palestine:

“As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared ‘to revise the general laws and customs of war’ existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the ‘rules laid down in the Convention were recognized by all civilised nations, and were regarded as being declaratory of the laws and customs of war’ (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.”<sup>190</sup>

265. The activities carried on by Israel at that time must therefore be assessed in light of the provisions of those Regulations. It thus follows that, by seizing Palestinian territories in 1948 in a conquest that was itself illegal, Israel committed multiple acts that were war crimes under the international law then in force.

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<sup>188</sup> Henry Laurens, *La question de Palestine, Tome troisième 1947-1967, L’accomplissement des prophéties*, Paris, Fayard, 2007, pp. 150-151 [*Translation by the Registry*].

<sup>189</sup> See Ann. 12, Plan of Partition with Economic Union, C, Chapter 2, point 8, [footnote omitted].

<sup>190</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 172, para. 89.

266. The many massacres carried out by Israel at that time were violations of Article 25 of the Hague Regulations: “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” The appropriation of land owned by Palestinians was prohibited under Article 23 (g) of the Regulations, according to which it is unlawful “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. It was also prohibited under Article 28: “The pillage of a town or place, even when taken by assault, is prohibited”, and also under the second paragraph of Article 46: “Private property cannot be confiscated.”

267. The situation thus created with the emergence of the State of Israel, and then with the 1948-1949 war, resulted in the territory dedicated to an Arab State by the 1947 partition resolution being carved up into different parts. A significant portion containing part of Jerusalem was annexed by Israel, which has since sought to place it under its sovereignty. Despite that ambition, the legal status of that territory remains unclear because international law has established that the prohibition of the seizure of territory by force is a fundamental norm. It has been invoked in international jurisprudence not only as a treaty norm (Article 2, paragraph 4, of the Charter of the United Nations) but as a customary norm and as an example of a general peremptory norm:

“A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’ (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-11, p. 247).”<sup>191</sup>

268. In 1948 the part of the territory dedicated to an Arab State and not yet conquered by Israel comprised the West Bank, then under Jordanian administration, and the Gaza Strip under Egyptian administration. The Palestinian populations of those two parts of Palestine were not at that time subject to Israeli authority. The right of the Palestinian people to self-determination was nevertheless under threat. Its historical territory had suffered two amputations, the first as a result of the United Nations partition plan in 1947, the second through Israel’s territorial conquests in 1948. Its population was driven out or displaced in large numbers and is still awaiting realization of its right of return. However much that situation represented a deterioration in terms of the inalienable right of the Palestinian people to emancipation, it was but the beginnings of what would, from 1967, unfold throughout the Palestinian territory, which we shall now analyse.

### **B. Israeli policies and practices relating to the Palestinian territory occupied since 1967 in light of international law**

269. When Israel embarked upon the lightning Six-Day War in June 1967, a new chapter opened in the situation that had prevailed up until then. By imposing a military occupation on the whole of Palestine, by supporting the systematic settlement of the West Bank and East Jerusalem, by subjecting the Gaza Strip to an almost complete blockade, by engaging in negotiations that begin (but never reach a conclusion) under pressure from the United Nations or countries concerned at the

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<sup>191</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, *I.C.J. Reports 1986*, p. 100, para. 190.

continuance of a never-ending conflict, and by committing multiple atrocities against the population, Israel has confirmed that its plan is indeed to make the emancipation of the Palestinian people impossible.

270. Those policies and practices need to be examined from the perspective of the law contemporary with them. By the time Israel embarked on that new period in its conflict with Palestine, the international law that had been merely sketched out in earlier periods had undergone considerable consolidation. The right of peoples to self-determination, conferred only on certain territories under the League of Nations and still fragmentary when the Charter of the United Nations came into force, from 1960 acquired the legal force of a detailed general peremptory norm. This is borne out both by the impressive body of resolutions of the organs of the United Nations summarized above<sup>192</sup> and by many multilateral treaties of general scope. Humanitarian law, sketched out from the end of the nineteenth century and the start of the twentieth with the Hague Conventions, was supplemented and strengthened by the Geneva Conventions of 12 August 1949, the Additional Protocols thereto of 1977 and various specific conventions. Human rights were universally proclaimed in the 1948 Declaration. They would be given greater depth and detail through the international Covenants of the United Nations. Those texts form the basis of the obligations incumbent upon Israel, which is bound likewise by all those that flow from the Charter. Those obligations are even more binding on Israel as a result of the circumstances surrounding its admission to the United Nations.

271. That is because the State of Israel was only able to join the ranks of the Members of the United Nations after solemnly undertaking to respect the obligations under the Charter. And yet, bearing out the lack of trust that the international organization had expressed at the time of its admission, Israel has implemented policies in flagrant violation of those obligations in the territories occupied by the 1967 war. Those violations have certainly undergone slight variations from time to time depending on the political parties in power in the Jewish State. However, the overall thrust has barely wavered and, from the beginnings of the Zionist movement until the recent accession to power of its extremist fringes, it has typically been those elements of the movement that have steered the direction of travel.

272. Despite the undertakings given at the time of the various phases of negotiations entered into with the Palestinians under the aegis of major Powers and the United Nations, in particular its acceptance of Security Council resolution 242, which required withdrawal from all the Palestinian territories occupied in 1967 and a just settlement of the refugee problem<sup>193</sup>, Israel has conducted a continuous policy aimed at denying and extinguishing the right of the Palestinian people to self-determination.

273. We shall show here how the policies and practices of Israel have consisted of impeding the very possibility of the existence of a Palestinian State by attacking the three component elements of a State: territory (1), population (2) and the institutions of government (3). It will thus become apparent that those attacks could only be carried out following courses of action that are themselves flagrant violations of international law.

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<sup>192</sup> See paras. 214-240 above.

<sup>193</sup> Security Council resolution 242 is expressly referred to in the Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993, see Ann. 29.

274. The principal violation of the norm consisting of the right of peoples to self-determination can thus only be perpetrated through multiple secondary violations of the entire body of international law existing at the time.

### **1. The gradual and systematic elimination of the territorial foundations of a State**

275. Modern States are divided up according to areas of territory recognized as theirs by other States, and their geographical sphere, the basis of their sovereign powers, therefore underpins the exercise of power. The territorial foundations of the Palestinian State, however, as reduced since 1949 to the part delineated by the Armistice Line, also known as the Green Line, have been subject to cumulative Israeli measures with the result that the territory no longer affords any possibility of the exercise of sovereign power. It is significant that the expression “viable State” emerged during the most recent negotiations, as if to ward off the reality that current developments are jeopardizing that viability: “The possibility of establishing a viable and contiguous Palestinian State continues to be eroded by facts on the ground.”<sup>194</sup> That dismemberment of the territorial foundations of the State is the result of various actions and measures, none of which has any basis in law: an illegal military occupation (*a*); the control maintained over Gaza and the blockade of that part of Palestinian territory (*b*); multiple far-reaching violations of the rules governing military occupation, including the settlement at pace of the territory occupied by force (*c*); dismemberment of the territory contrary to the requirement to respect the integrity of the territory of a people (*d*); and an annexation in disguise (*e*).

#### **(a) *A prolonged, illegal military occupation of Palestinian territory***

276. When, in 1967, Israeli armed forces penetrated the Palestinian territory then under the control of Jordan (as regards the West Bank) and Egypt (in respect of Gaza), there was, according to the law of armed conflict, a military occupation. As framed by law, that situation is by definition temporary. “The occupation of territory in wartime is, under international humanitarian law, a temporary situation, which deprives the occupied Power of neither its statehood nor its sovereignty.”<sup>195</sup>

277. In his report of 23 October 2017, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 had already explained:

“32. Belligerent occupation is inherently a temporary and exceptional situation where the occupying power assumes the role of a de facto administrator of the territory until conditions allow for the return of the territory to the sovereign, which is the people of the territory. Because of the absolute prohibition against the acquisition of territory by force, the occupying power is prohibited from ruling, or attempting to rule, the territory on a permanent or even an indefinite basis. . . . ‘Temporality, together with the principles of self-determination and non-acquisition of territory by force, is what distinguishes occupation from conquest, and this distinction would be thwarted were occupation construed as indefinite.’

33. The laws of occupation do not set a specific length of time for the lawful duration of an occupation. However, the guiding principle that occupation is a form of alien rule which is a temporary exception to the norms of self-determination and sovereignty means that the occupying power is required to return the territory to the

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<sup>194</sup> Speech by the Under-Secretary-General for Political and Peacebuilding Affairs, Rosemary DiCarlo, to the Security Council on 29 April 2019, 8517th meeting (AM), CS/13794.

<sup>195</sup> See Ann. 40, para. 9.

sovereign power in as reasonable and expeditious a time period as possible, subject only to ensuring: (a) public safety and the security of the territory; (b) the resumption, or creation, of governing institutions and a functioning economy; and (c) the security of the occupying military. The occupying power, being obliged to work in good faith to achieve these goals consistent with the principles of the laws of occupation, would have no legitimate purpose to remain in the occupied territory beyond the time when conditions have allowed for the territory to be returned in toto to the sovereign power. Indeed, the longer the occupation, the greater the justification that the occupying power must satisfy to defend its continuing presence in the occupied territory.”<sup>196</sup>

278. The independent commission referred to above likewise focused on that indicator for determining the illegality of the occupation, namely the permanence of the occupation. It observed in that respect:

“[T]he Commission noted the strength of credible evidence that Israel has no intention of ending the occupation, has clear policies for ensuring complete control over the Occupied Palestinian Territory, and is acting to alter the demography through the maintenance of a repressive environment for Palestinians and a favourable environment for Israeli settlers. The present report will be focused on those elements with a view to investigating the human rights and legal consequences of the prolonged occupation, including whether, as part of its occupation regime, Israel has, to all intents and purposes, ‘annexed’ wholly or partly the Occupied Palestinian Territory, and providing concrete recommendations to relevant stakeholders.”<sup>197</sup>

279. It must therefore be concluded that because it is continuing indefinitely, Israel’s military occupation of the Palestinian territory is inherently an illegal occupation. It has, moreover, been the source of other violations of international law, as the Fact Finding Mission found in its Report on Human Rights in Palestine and other Occupied Arab Territories. The occupation has emerged as “the fundamental factor underlying violations of international humanitarian and human rights law against the protected population and undermining prospects for development and peace”<sup>198</sup>.

**(b) *The prolonged occupation of Gaza through control of that territory and the blockade imposed on it***

280. On 12 September 2005, Israel claimed that it had withdrawn its army from the Gaza Strip and dismantled the Jewish settlements built there. It cannot be concluded, however, that the military occupation came to an end.

“All the forms of control and the powers that Israel has reserved for itself over Gaza, in particular its complete control of people and goods entering and leaving, and the right of military intervention asserted (and used) mean that the Gaza Strip has remained highly dependent on Israel.”<sup>199</sup>

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<sup>196</sup> Ann. 41, United Nations General Assembly, Report of the Special Rapporteur on the situation of human rights in the [Palestinian territories occupied since 1967], 23 October 2017, A/72/556, paras. 32 and 33, [footnotes omitted].

<sup>197</sup> See Ann. 40, para. 3.

<sup>198</sup> Ann. 42, United Nations, Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict, 2[4] September 2009, A/HRC/12/48 (ADVANCE 2), para. 1897.

<sup>199</sup> Alain Bockel, “Le retrait israélien de Gaza et ses conséquences sur le droit international”, *Annuaire français de droit international*, 2005, p. 23 [Translation by the Registry].



Therefore, the territory of the Gaza Strip, which, together with the West Bank and Jerusalem, forms the combined Palestinian territory, is thus still under Israeli occupation and Israel must comply with the obligations of any occupying Power in that territory.

“The exercise of external control over boundaries obliges the occupying Power that has control to respect the rights of the civilian populations residing within them. That control . . . is complete, and has in particular strengthened since 2007, over the air, maritime and land boundaries.”<sup>200</sup>

281. As early as 2009, the United Nations Fact Finding Mission on the Gaza Conflict described the situation imposed on that territory by Israel as a blockade and recalled that Israel remained bound by the duties of an occupying Power in relation to the territory:

“27. The Mission focused (chap. V) on the process of economic and political isolation imposed by Israel on the Gaza Strip, generally referred to as a blockade. The blockade comprises measures such as restrictions on the goods that can be imported into Gaza and the closure of border crossings for people, goods and services, sometimes for days, including cuts in the provision of fuel and electricity . . .

28. The Mission holds the view that Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and other goods to meet the humanitarian needs of the population of the Gaza Strip without qualification.”<sup>201</sup>

282. Israeli practices and policies in respect of the Gaza Strip are therefore constitute two heads of illegality. The first is shared with the practices pursued in the West Bank and East Jerusalem and concerns the indefinite nature of the occupation, which is incompatible with the fact that an occupation is by definition temporary.

283. The measures amounting to a blockade constitute the second head of illegality on the part of Israel as regards the situation imposed on the Gaza Strip. We shall not enter here into the detail of those measures, which have regularly been condemned in the various reports submitted to the General Assembly: “Attacks on the foundations of civilian life in Gaza: destruction of industrial infrastructure, food production, water installations, sewage treatment plants and housing”<sup>202</sup>. They represent “a policy that may amount to collective punishment”<sup>203</sup>. Aimed at starving civilian populations and depriving them of the various basic requirements of life, measures that constitute a blockade are prohibited by Article 53 of the Geneva Convention of 12 August 1949:

“Article 53 - [Prohibited destruction -] Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

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<sup>200</sup> Alain Bockel, “Gaza, le processus de paix en question”, *Annuaire français de droit international*, 2009, p. 181 [Translation by the Registry].

<sup>201</sup> Ann. 43, United Nations, Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict, 23 September 2009, A/HRC/12/48 (ADVANCE 1), paras. 27 and 28.

<sup>202</sup> See Ann. 43, heading of point 9.

<sup>203</sup> See Ann. 40, para. 20.

Such measures are also prohibited by Article 54 of Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts:

“Article 54 - Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.”

That illegality constitutes a war crime and must therefore be prohibited and punished as such.

**(c) *Rapid settlement***

284. Israel began its project of settling the West Bank and East Jerusalem long before the military occupation of those territories. Over time that settlement has acquired significant proportions. In the words of a report by the European Union of 15 May 2023:

“According to the Israeli Bureau of Statistics, there are around 230,000 Israelis living in 14 settlements constructed in East Jerusalem. Between 1967 and now, government-initiated construction in East Jerusalem benefited 99% Israelis and only 1% Palestinians. A total of 57[, ]000 housing units were advanced in Jewish neighborhoods and only 600 in Palestinian ones.”<sup>204</sup>

Settlement is on a growth trajectory. On 28 March 2023, the Human Rights Council was told that the settler population increased from 520,000 to more than 700,000 between 2012 and 2022<sup>205</sup>. The settlement blocs thus built illegally have been consolidated by networks of bypass roads and by the wall.

285. Israel uses State funds to support hundreds of Jewish civilian settlements in the Occupied Palestinian Territory. Thousands of millions of dollars of both private and public funds have thus financed the building of settlements and the corresponding infrastructure<sup>206</sup>. Although all the settlements are illegal under international law, Israel distinguishes between settlements authorized according to Israeli law and outposts deemed illegal. The latter nevertheless have the benefit of essential services (such as electricity and security). In most cases, they are legalized subsequently.

286. Encouraged by the State of Israel and underpinned by the dispossession of considerable amounts of Palestinian land, the mass transfers of the population of the occupier into the occupied territory constitute infringements of a capital rule of international humanitarian law that forms part of both customary and treaty-based positive law and is enshrined in Article 49 of the Fourth Geneva

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<sup>204</sup> Ann. 44, European Union, Office of the European Union Representative (West Bank and Gaza Strip, UNRWA), 2022 Report on Israeli settlements in the occupied West Bank, including East Jerusalem, Reporting period - January-December 2022, 15 May 2023.

<sup>205</sup> See Ann. 38, United Nations, Human Rights Council, 28 March 2023.

<sup>206</sup> See Ann. 40, paras. 25, 26 and 29.

Convention of 12 August 1949, which reads as follows: “Article 49— [Deportations, transfers, evacuations —] The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

287. This rapid settlement is achieved through an administratively organized policy of dispossessing property belonging to Palestinians. Farming and grazing land is allocated to newly arrived settlers. In order to do so, Israel invokes military reasons for restricting access to vast areas of the West Bank, consisting in part of private Palestinian land, which enables it to then use that land to create new settlements. This “zoning” policy has resulted in 18 per cent of the territory of the West Bank (1,765,000 dunums), primarily in Area C, being assigned to military areas with regulated access. Decree No. 59 of 1967 (5727-1967) on absentee property has allowed more than 750,000 dunums of formerly Palestinian properties to be declared “State” land<sup>207</sup>.

288. Israeli policy on the granting of building permits in the West Bank greatly favours Jewish settlers at the expense of the Palestinian population. Palestinian applicants for permits to build on their own land thus have their applications refused in the name of the régime applied to reserved areas, while building is authorized, if not encouraged, for settlements. “In 2019 and 2020, 32 plans and permits for Palestinians were approved and 310 plans were rejected, while the Civil Administration of Israel approved plans for 16,098 units in Israeli settlements.”<sup>208</sup>

289. While it is difficult for Palestinians to obtain building permits, including on their own land, the demolition of properties belonging to Palestinians, on the other hand, has increased constantly. Figures show 15,000 pending demolition orders in Area C of the West Bank. In East Jerusalem, 100,000 residents have been placed in extremely precarious circumstances because their homes were built without permits, which are impossible to obtain. Going even further, the Israeli Planning and Building Law forces owners to demolish their properties themselves on pain of incurring fines exceeding the average income of Palestinian households. In 2021, 55 per cent of demolitions in East Jerusalem were carried out by owners threatened in that way<sup>209</sup>.

290. That control of Palestinian land for the benefit of Jewish settlers is accompanied by control of all the water resources of the West Bank to meet the needs of the settlements. A 1967 military order (No. 92) has allowed Israel to take control of the principal water sources in the West Bank and has prohibited Palestinians from constructing new water access installations or maintaining existing installations without authorization from the military authorities<sup>210</sup>.

291. All these measures pursue the same goal: to progressively deprive Palestinians of their properties and transfer them to the Israeli settlements. Speaking on 19 December 2022 before the Security Council, the Special Coordinator for the Middle East Peace Process, Tor Wennesland, voiced

“particular concern at the expansion of the Israeli settlements in the occupied West Bank, which in his view jeopardize the prospects for a two-State solution by

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<sup>207</sup> *Ibid.*, paras. 31-32.

<sup>208</sup> *Ibid.*, para. 42.

<sup>209</sup> Ann. 45, General Assembly, Economic and Social Council, “Economic and social repercussions of the Israeli occupation on the living conditions of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan”, 8 June 2022, A/77/90-E/2022/66, paras. 28-32.

<sup>210</sup> See Ann. 40, para. 35.

‘systematically’ eroding the possibility of establishing a contiguous, independent, viable and sovereign Palestinian State. Thus, in Area C alone, some 4,800 units were built in 2022, compared with 5,400 in 2021. In occupied East Jerusalem, however, the number of housing units more than tripled compared with the preceding year, increasing from 900 units in 2021 to some 3,100 units in 2022, Mr Wennesland stated. The continued demolition and seizure of Palestinian structures remained alarming, the senior official went on to say, lamenting in particular the demolition of a donor-funded school in Masafer Yatta.”

He warned “the Members of the Security Council that the violence and continued expansion of Israeli settlements in the occupied territories compromised the two-State solution, eroding any possibility of establishing a viable, independent Palestinian State”<sup>211</sup>.

292. Israel’s policy of rapid settlement in the West Bank and East Jerusalem has met with unqualified condemnation from the United Nations. The General Assembly has expressed its view countless times. The Security Council, its decision-making body, has also regularly condemned those practices, in particular in resolution 465:

“5. *Determines* that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity and that Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East:

6. *Strongly deplores* the continuation and persistence of Israel in pursuing those policies and practices and calls upon the Government and people of Israel to rescind those measures, to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem”<sup>212</sup>.

293. Those settlement measures are furthermore violations of international humanitarian law. That law strives to protect civilian populations subject to foreign military occupation, in particular to ensure their survival. This is clear from Article 53 of the Geneva Convention of 12 August 1949 and Article 54 of Additional Protocol I, both cited above<sup>213</sup>.

**(d) *Dismemberment of the Occupied Palestinian Territory contrary to the right of peoples to self-determination in the whole of their territory***

294. A key aspect of the right of peoples to self-determination is that each people concerned must be able to realize the right in the whole of their territory. In its Advisory Opinion of 23 February 2019 the International Court stated on that point:

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<sup>211</sup> Ann. 46, United Nations Security Council, 9224th Meeting, “Cycle of Violence, Bloodshed between Israelis, Palestinians Untenable, Delegate Stresses at Security Council Briefing on Middle East”, 19 December 2022, CS/15146 [*Translation by the Registry*].

<sup>212</sup> Security Council resolution 465 of 1 March 1980.

<sup>213</sup> Para. 283 above.

“In order to prevent any dismemberment of non-self-governing territories, paragraph 6 of resolution 1514 (XV) provides that:

‘Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.’”

.....

“The Court recalls that the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory, as stated in the aforementioned paragraph 6 of resolution 1514 (XV) (see paragraph 153 above). Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.”<sup>214</sup>

295. Israel has disregarded that requirement in many ways in relation to Palestine, its policies and practices forming as they do a long list of attacks on the integrity of the Palestinian territory. Leaving aside the first amputation of the Palestinian territory, that resulting from the partition resolution (taking the view that, after painful convulsions, the Palestinian people accepted the creation of Israel on that part of its historical territory), Israel then embarked on an armed conquest of a significant portion (nearly a quarter) of Mandatory Palestine. It then annexed its conquests, although those annexations have never been validated. This was undoubtedly a violation of the territorial integrity of a people.

296. Thereafter, Israel has continuously extended its settlement policy, fragmenting the Palestinian territory to the point of rendering it unviable. It has no intention of ever handing back those settlements. Protecting the settlements with a wall; identifying areas reserved for settlement expansion; affording impunity to settlers in respect of all the acts of violence they perpetrate in order not only to ensure security but to expand their properties — these are means employed to disrupt the territorial integrity of a people.

297. Lastly, the constraint imposed by the 1993 interim arrangements to the effect that the Palestinian territory left to be administered by the Palestinian Authority was divided into three areas, each with a different status, and the tight control retained by Israel in the largest of those areas further undermine the guarantee of territorial integrity that is central to the exercise of the right of peoples to self-determination.

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<sup>214</sup> *Ibid.*, [paras. 153 and] 160.

**(e) *Blatant creeping annexation in the West Bank and a purported de jure annexation in East Jerusalem***

298. There is no shortage of political statements by Israeli political figures indicating an intention never to end the occupation. “In all cases where we decided to create Israeli localities, we proceed on the basis that those regions will remain under our control and will have to be included within the new borders of the country once a peace agreement is concluded”<sup>215</sup>. The unrestricted roll-out of Israeli settlements and the resolute intention of the Jewish State to incorporate them into its territory testify that the intention is one of illegal annexation.

299. The Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, mandated by the United Nations General Assembly, expressed concern about the matter in its report of 14 September 2022, stating that it focuses on: “actions amounting to annexation, including unilateral actions taken to dispose of parts of the Occupied Palestinian Territory as if Israel held sovereignty over it”<sup>216</sup>. It recalls that *de jure* annexation is the formal extension of a State’s sovereignty into a territory, flowing from its domestic law although not necessarily recognized under international law, whereas *de facto* annexation implies a gradual or incremental process. *De facto* annexation is not formally proclaimed. It is therefore not easy to determine at what point the threshold between occupation and *de facto* annexation has been crossed.

300. Already in its Advisory Opinion of 9 July 2004 the Court considered the hypothesis of a *de facto* annexation, when it examined the situation created by construction of the Israeli wall in the occupied West Bank and Jerusalem.

“The Court considers that the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.”<sup>217</sup>

301. In the 20 years since the Court delivered that Opinion, Israeli leaders have persisted not only in continuing to build the wall but in expressing their intention to make the presence of the settlements irreversible and to annexe all or part of Area C of the West Bank. In 2020 Mr Netanyahu, then Prime Minister, stated with reference to Israeli sovereignty over the West Bank that the issue of sovereignty was still on the table<sup>218</sup>. More recently, on 17 May 2022, newly elected Prime Minister Bennet, emphasizing that the settlements already comprised an integral part of the State of Israel, declared: “With the help of God, we will also be here at the celebrations of Elkana’s fiftieth and seventy-fifth, 100th, 200th and 2,000th birthdays, within a united and sovereign Jewish State in the Land of Israel.”<sup>219</sup> The current Israeli Government, meeting as the Council of Ministers on

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<sup>215</sup> See Ann. 22, Statement by General Dayan.

<sup>216</sup> See Ann. 40, para. 11.

<sup>217</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 184, para. 121.

<sup>218</sup> Quoted in Ann. 40, para. 52, footnote 109.

<sup>219</sup> *Ibid.*, para. 53.

18 June 2023, has continued its project of creeping annexation by deciding to simplify considerably the administrative formalities for building in the settlements<sup>220</sup>.

302. The situation with regard to Jerusalem is both clearer and more serious. After seizing the western section of the city by force at the time of its illegal conquests in 1948, Israel declared it the eternal capital of Israel. In 1980, however, Israel went further by adopting the Basic Law that designated the whole of Jerusalem as the reunified capital of Israel. The purported *de jure* annexation of Jerusalem was thus confirmed.

303. The conclusion reached by the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, confirms that there has been *de jure* annexation (in Jerusalem) and *de facto* annexation (in the West Bank) by Israel:

“The Commission finds that there are reasonable grounds to conclude that the Israeli occupation of Palestinian territory is now unlawful under international law owing to its permanence and to actions undertaken by Israel to annex parts of the land *de facto* and *de jure*. Actions by Israel that are intended to create irreversible facts on the ground and expand its control over territory are reflections as well as drivers of its permanent occupation.

.....

Actions by Israel constituting *de facto* annexation include expropriating land and natural resources, establishing settlements and outposts, maintaining a restrictive and discriminatory planning and building regime for Palestinians and extending Israeli law extraterritorially to Israeli settlers in the West Bank.”<sup>221</sup>

304. Annexation, whether declared officially by a State that has used armed force to seize territories that are not under its sovereignty or where it results from factual measures demonstrating a claim to *de facto* sovereignty, has been an illegal act under international law since the Kellogg-Briand Pact of 1928. That illegality was confirmed by the Charter of the United Nations in Article 2, paragraph 4. This protection from illegitimate territorial encroachments was clarified and reinforced in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. “No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”<sup>222</sup>

305. Israel’s policy of *de jure* or simply *de facto* annexation of parts of the Occupied Palestinian Territory has also been very robustly condemned by the organs of the United Nations. The Organization has condemned the occupation itself (Security Council resolution 242), the settlement policy in the West Bank and, specifically to the extent that it has amounted to *de jure* annexation, Israel’s takeover of Jerusalem (resolution 252 of 21 May 1968, resolution 267 of 3 July

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<sup>220</sup> Ann. 47, Clothilde Mraffko, “Le gouvernement israélien fait un pas important vers une annexion de la Cisjordanie” (“The Israeli Government takes a significant step towards annexation of the West Bank”), *Le Monde*, 20 June 2023.

<sup>221</sup> See Ann. 40, paras. 75 and 76.

<sup>222</sup> United Nations General Assembly, resolution 2625 of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

1967, resolution 271 of 15 September 1969, resolution 298 of 25 September 1971, resolution 478 of 30 June 1980, and, more recently, Security Council resolution 2334 of 23 December 2016).

306. These attempts by the Jewish State to thwart the self-determination of the Palestinian people by depriving it of access to a viable territory have thus proved increasingly determined over time, while at the same time being the subject of constant condemnation by the international community.

## **2. Israeli policies and practices relating to the Palestinian population of the territory occupied since 1967 in light of international law**

307. Another element key to the existence of a State is its people. A people is a human group differentiated from other groups and possessed of a collective identity. That group becomes a nation through a sentiment of common belonging. Israel's wish to deny the Palestinian people its right to emancipation is manifested not only by the fact that it is leaving that people with ever-smaller areas of territory that are scattered and cut off from each other, but by its pursuit of a policy with the unconcealed aim of emptying the Palestinian Territory of as many of its Arab inhabitants as possible for the benefit of increasingly numerous Jewish settlers. That policy targeting the human foundation of the State of Palestine comprises several complementary limbs: first, dissuading as many Palestinians as possible from staying where they live by destroying their very means of subsistence (a); second, denying the nevertheless fundamental right to return to their country to all those who have fled as a result of the wars of 1948 and then 1967 or the increasingly perilous living conditions in Palestine (b); and, last, discriminating between the Israeli settlers and the Palestinian population by according them different legal status (c).

### **(a) *Destruction of the very means of subsistence of the population of the Occupied Palestinian Territory***

308. In recent times, the destruction of the very means of subsistence in the Occupied Palestinian Territory has been the result of the rapid establishment of Jewish settlements. It has been explored in detail above in relation to the offences against territory and will not be revisited here, save to note that the advancement of settlements, while depriving the State of the territorial basis of its authority, is also an offence against that other defining element of a State, its population. Yet Israeli policy towards the population under occupation consists not only of establishing Jewish settlements by destroying the spaces where Palestinians dwell and live. It entails extremely violent measures that have been implemented in all areas of life and have been documented in the reports submitted to the United Nations General Assembly by the various commissions mandated to do so.

309. One of the worst effects of Israeli settlement in the West Bank is the extreme fragmentation of the territory accessible to its Palestinian residents. That territory has been transformed into an archipelago of islets with no contact between them. Movement between them is hampered by considerably longer journey times between all the main centres of Palestinian population. The Palestinians of the West Bank and East Jerusalem are subject not only to travel restrictions under a permit system and a proliferation of checks at certain points on the roads, but to the obstacle represented by the wall. They find themselves cut off from parts of their families, care services or humanitarian assistance, access to their own properties and from the means of obtaining supplies of basic necessities<sup>223</sup>. Those most affected are the elderly, pregnant women, people with

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<sup>223</sup> See Ann. 40, para. 55.



disabilities and young children. The situation is even bleaker in Gaza, which has been locked down by the Israeli army since 2007.

310. Armed attacks and security incidents have increased continually and the coercive environment to which Palestinians are subjected has been marked by the destruction of houses and property, excessive use of force by the Israeli military authorities, the mass imprisonment of Palestinians and settler violence. The demolition and confiscation of livelihood structures (such as shops, animal shelters, warehouses, water pipes, cisterns and roads) have deprived Palestinians of the very means of subsistence. “Since the beginning of 2022, Israel has demolished 500 structures in the Occupied Palestinian Territory, 153 of which were related to agriculture and 136 to livelihoods.”<sup>224</sup> In the period from 1 April 2021 to 31 March 2022, Israeli military and security forces killed 351 Palestinians, including 22 girls, 64 boys and 46 women. They wounded 20,772 others, including 519 women and 3,432 children (of which 312 were girls). The number of casualties grew in 2021 compared with 2020, with three times more dead to be mourned in the West Bank and East Jerusalem, five times as many injured and seven times as many injured by live bullets<sup>225</sup>.

311. Settler violence against Palestinians is increasing, with complete impunity. Between 2008 and March 2022, attacks by settlers left 226 Palestinians dead and 5,252 injured. The severity of the attacks has also increased. By September 2021, settlers had burned 338 olive trees and had cut, uprooted or vandalized another 149<sup>226</sup>.

312. Palestinians’ legitimate opposition to the establishment of new settlements and the demonstrations expressing that opposition have been met with a disproportionate clampdown. The Office for the Coordination of Humanitarian Affairs has thus noted, for example, that the protests in response to establishment of the Evyatar outpost south of Nablus, established by settlers on 3 May 2021, were quelled using live ammunition, rubber-coated metal bullets, tear-gas canisters and stun grenades. The result was 10 Palestinians dead, including 2 children. More than 6,000 were injured<sup>227</sup>.

313. In the East Jerusalem sector, more than a third of the area has been expropriated in order to build Israeli settlements, taking the settler population to over 229,000. The space available for Palestinians has been substantially reduced and fragmented.

“An outer layer of settlements, beyond the municipal boundaries of Jerusalem, has also contributed to severing the geographical contiguity between East Jerusalem and the rest of the occupied West Bank. This includes the plan for the E1 area in eastern Jerusalem (outside the municipal boundary), intended to reinforce the settlements in the Ma’ale Adumim area and connect them with Jerusalem, which would divide the West Bank into two separate entities.”<sup>228</sup>

314. In the Gaza Strip, air strikes carried out by Israel during its various military operations have targeted civilian residential buildings. Those attacks are conducted using precision-guided weapons in the evening or early morning at times when families are together, and thus deliberately target civilians. While not giving an exhaustive survey of all the casualties of Israeli military forces

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<sup>224</sup> *Ibid.*, para. 62.

<sup>225</sup> See Ann. 45, paras. 10 and 11.

<sup>226</sup> *Ibid.*, paras. 38-41.

<sup>227</sup> See Ann. 40, para. 68.

<sup>228</sup> See Ann. 40, para. 15.

in Gaza, we cite as an example the 2014 operation “Protective Edge” which had a toll of 2,251 Palestinians killed — including 1,462 civilians, of whom 299 were women and 551 children — and 11,231 Palestinians injured, of whom 10 per cent suffered permanent disability as a result<sup>229</sup>. The same operation caused the destruction of 18,000 housing units. Seventy-three medical facilities were damaged, much of the electricity network and water and sanitation infrastructure were incapacitated and the number of people displaced reached 500,000, that is to say, 28 per cent of the population<sup>230</sup>. Neither the principle of proportionality that should govern and limit military attacks nor the obligation to issue warnings so that civilians can take shelter was respected<sup>231</sup>. Artillery and other explosive weapons were used in heavily populated areas.

315. Still in Gaza, more recently, a new surge in violence from 10 to 21 May 2021 led to the death of 281 Palestinians, including 71 children. There were 10,000 injured, including 548 children and 491 women. The Office of the High Commissioner for Human Rights has not gathered evidence such as to confirm Israel’s claims that the structures targeted were used for military purposes<sup>232</sup>.

316. All the actions given here as examples are violations of the norms of international humanitarian law according to which, by virtue of the principle of distinction, civilians and civilian property must not be targeted. The requirements of legality, necessity and proportionality that according to international humanitarian law must govern all military operations were not respected. Investigations carried out subsequently draw attention to unwarranted use of lethal force resulting in death<sup>233</sup>.

317. Impunity exists across the board for the Israeli forces. The Independent International Commission of Inquiry set up in 2015 had already concluded:

“The commission is concerned that impunity prevails across the board for violations of international humanitarian law and international human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrongdoers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition.”<sup>234</sup>

In 2022, the Economic and Social Council echoed that concern:

“Lack of accountability for the unlawful use of force remained pervasive. Amid a lack of transparency on the opening, status and closure of investigations concerning the killings of Palestinians, according to the Human Rights Committee, investigations have appeared not to meet the minimum standards of transparency, independence, promptness, thoroughness and credibility.”<sup>235</sup>

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<sup>229</sup> Ann. 48, United Nations, Human Rights Council, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, 24 June 2015, A/HCR/29/52, para. 20.

<sup>230</sup> See Ann. 4[8], para. 23.

<sup>231</sup> *Ibid.*, paras. 39, 40 and 54.

<sup>232</sup> See Ann. 45, paras. 15 and 16.

<sup>233</sup> *Ibid.*, para. 13.

<sup>234</sup> See Ann. 48, para. 76.

<sup>235</sup> See Ann. 45, para. 14.

318. Arbitrary detention and ill-treatment are other means used by Israel to terrorize the Palestinian population and encourage it to flee. Since 1967 more than 800,000 Palestinians have been brought before Israeli military courts and condemned to detention in Israel. That number increases every year. Some are detained as “security detainees”, sometimes without being charged or tried.

“These violations have created a coercive environment which is forcing Palestinians to leave their homes and their lands in possible forcible transfer — a grave breach of the Fourth Geneva Convention, which may amount to a war crime<sup>3</sup> — and the ultimate result of the cumulative effect of the settlement enterprise.”<sup>236</sup> [(Footnote omitted)]

319. It is however prohibited by the international humanitarian law applicable to Israel to transfer protected persons, including those accused of offences, to the territory of the occupying Power. “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>237</sup>

320. Ill-treatment, even including cases of torture, is frequently reported as having been inflicted on Palestinians in detention. More than 1,300 complaints of torture have been submitted to the Israeli Ministry of Justice since 2001. Only two investigations were opened, and they were closed. Furthermore, “the validation by the Attorney General of Israel of methods of interrogation used by the Israel Security Agency raises concerns about its disregard for the absolute and non-derogable prohibition of torture under international human rights law”<sup>238</sup>.

321. That prohibition derives from Article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

322. The situation imposed on the population of Palestine, as shown in the description above (which does not claim to be exhaustive) has persisted and worsened over more than four decades. Each day brings its share of news of increasingly violent incidents. After the Turmusaya attack on Wednesday 11 June 2023, the Israeli veterans’ NGO Breaking the Silence stated: “There is no loss of control: the pogroms happen over and over, planned openly online”<sup>239</sup>. That testimony confirms the occupier’s deliberate attempt to degrade the living conditions of residents to the point where they become untenable, driving those who can to flee the conditions imposed on them. However, freeing up the land for Israeli settlers involves satisfying a second requirement: that the Palestinians in exile be prevented from returning.

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<sup>236</sup> Ann. 49, United Nations, Human Rights Council, “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan”, Report of the United Nations High Commissioner for Human Rights, 15 March 2023, A/HRC/52/76, para. 2.

<sup>237</sup> Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 2 August 1949, Art. 49, first paragraph.

<sup>238</sup> See Ann. 45, para. 22.

<sup>239</sup> See Ann. 47, news report by Clothilde Mraffko, special correspondent, *Le Monde*, Saturday 22 June 2023, p. 5 [Translation by the Registry].

**(b) *Israel's persistent denial of the right of return for Palestinians in exile***

323. Ever since the spread of the Zionist movement in Palestine under the British Mandate, Jewish settlement and the brutality of its implementation have led to the departure of many Palestinians. That exodus acquired considerable proportions during the war of 1948 and again in 1967 and has continued insidiously since then as a result of the worsening living conditions imposed on the Palestinians of the occupied territory<sup>240</sup>. It is difficult to put an exact figure on the number of these refugees, because they went into exile at very different times, in some cases a very long time ago, and because the places where they have found refuge are dispersed. The vast majority (5.7 million) have been counted in censuses by UNRWA (United Nations Relief and Works Agency)<sup>241</sup>. This United Nations Agency was the successor, in 1950, to a first body called UNRPR (United Nations Relief for Palestine Refugees), created on 11 December 1948 by United Nations General Assembly resolution 194. Its mission is to provide assistance to Palestinian refugees and their descendants scattered among the refugee camps in the West Bank, Gaza, Jordan, Libya and Syria.

324. That body holds basic information — demographic data and family files — on the number of refugees and their lives. That information is based on the URS (unified registration system), which is a database rather than a census since it relies on a voluntary refugee registration procedure. It is therefore not a comprehensive figure for the total number of refugees. At the beginning of the twenty-first century the number of Palestinian refugees was estimated as 4,263,000 in their former territory and 3,534,000 outside that territory.

325. In common with all human beings forced by war or a deterioration in their living conditions to leave the place where they live, Palestinians in exile want to be able to return there. Their legitimate claims to do so were expressed at a time when general international law was formulating the right of return to one's own country as a human right. In parallel, the United Nations General Assembly adopted a stance on the issue as early as 1948 by formulating a collective right of return for exiled Palestinians.

326. In the field of human rights, the right of return is one component of a broader right recognized as one of the fundamental human rights, the right to freedom to come and go. In the wake of the wars that marked the early twentieth century and caused the mass displacement of people, freedom of movement was enshrined in Article 13 of the Universal Declaration of Human Rights of 10 December 1948, and includes the right for all those who have had reason to leave their countries to return to them if they so wish.

“Article 13.

1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.”

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<sup>240</sup> Ann. 50, Table of refugees in each phase of the conflict, in *Le droit au retour. Le problème des réfugiés palestiniens*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Actes Sud, 2002, p. 114.

<sup>241</sup> Ann. 51, United Nations General Assembly, Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, 1 January-31 December 2012, A/68/13.

Some years later, the United Nations Covenant on Civil and Political Rights would reiterate that freedom in Article 12, paragraph 4 of which enshrined the right of return in very precise terms: “4. No one shall be arbitrarily deprived of the right to enter his own country.”

327. Israel signed that Covenant on 19 December 1966, ratified it on 3 October 1991 and has not expressed any reservations in respect of that article. Enshrining as it does a customary norm, already expressed in the Universal Declaration, that right applied to the situation of the Palestinians from the very start of their exile. Realization of that right is not contingent on any need to prove that they were forced to leave. The argument sometimes used by Israel to the effect that Palestinians left freely, encouraged by their leaders, and as a result had no “right of return”, is therefore completely baseless. Return is a right as much for those who left their country voluntarily as for those who were forced to do so.

328. With the development of the right of peoples to self-determination, the right of return as an individual right became coupled with a collective right. At that time this was the right of a national group to be protected in the event of conflict or armed occupation. That is the thrust of the first and second paragraphs of Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949:

“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. *Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.*” (Emphasis added.)

329. The reasoning behind those provisions would be extended and reinforced a few years later with the resolutions of the United Nations General Assembly on the protection of national unity and territorial integrity of any State or country<sup>242</sup>.

330. The special case of the flows of Palestinian refugees who were victims of the 1948 war would, however, prompt the United Nations to concern itself specifically with that situation. The report on the right to repatriation left by the United Nations mediator, Count Bernadotte, when he was assassinated was to inspire the resolution on which the right of return for Palestinian exiles is founded, General Assembly resolution 194 of 11 December 1948. By that resolution, the General Assembly resolved:

“that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

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<sup>242</sup> Resolution 2625 of 24 October 1970 and resolution 2734 (XXV), Declaration on the Strengthening of International Security, of 16 December 1970.

[and instructed] the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation”.

331. After the failure of the Conciliation Commission, for a number of years the issue was reduced to a humanitarian question. However, the 1967 war caused a fresh outflow of refugees and the Palestinian question returned to centre stage in the concerns of the international community. Israel would as a result be compelled to authorize the return of a certain number of refugees (between 14,000 and 16,000), a derisory figure compared with the total flow. The General Assembly has ever since reaffirmed the right of return for Palestinian refugees. Although taking more of a back seat on this question, the Security Council nevertheless expressed a view first in its resolution 237 of 14 June 1967 in which it: “call[ed] upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities”. A few months later it again took a stance, in resolution 242, since it affirmed

“the necessity

.....

(b) For achieving a just settlement of the refugee problem”.

332. Those resolutions created an obligation for Israel to accept and organize the return of the Palestinians in exile. In the months following the 1948 war, it appeared that Israel was resolved to co-operate with the United Nations on this question. Nevertheless, doubts as to Israel’s intentions in this respect were behind the United Nations’ first refusal to admit Israel as a Member. The Jewish State then tried to persuade the international community that it was amenable on the matter. During the debate preceding the vote on admission, on 5 May 1949, the Israeli delegate sought to reassure the General Assembly about his Government’s intentions. Yet his words already fully conveyed the extent of the ambiguity of the Israeli position:

“1. The problem of the Arab refugees was a direct consequence of the war launched by the Arab States which were entirely responsible for that as well as for other forms of suffering inflicted by that war;

2. The ensuing problem had raised a humanitarian issue and also had serious implications for the future peace, development and welfare of the Middle East. The Government of Israel believed that a solution of the problem was inseparably linked with a solution of the outstanding issues between it and the Arab States and that no satisfactory solution was possible except by the restoration of peace in the Middle East. A solution could be found only within a final settlement creating conditions of co-operation between Israel and its neighbours;

3. The Government of Israel was earnestly anxious to contribute to the solution of that problem although the problem was not of its making. That anxiety proceeded from moral considerations and from Israel’s vital interest in stable conditions throughout the Middle East. Any rehabilitation of Arab refugees in any part of the Middle East, whether in Israel or in the neighbouring countries, involved intricate tasks of resettlement. The two most widely advocated principles were (a) resettlement of the refugees in the places from which they had fled, thus creating a large minority problem and a possible menace to internal peace and stability and also placing masses of Arabs under the rule of a Government which, while committed to an enlightened minority policy, was not akin to those Arabs in language, culture, religion or social or economic

institutions; (b) the resettlement of the refugees in areas where they would live under a Government akin to them in spirit and tradition and in which their smooth integration would be immediately possible with no resultant friction. A study of the economic, irrigation and other potentialities of the under-populated and under-developed areas of the Arab States revealed greater possibilities for a stable solution by the latter method than by resettlement in Israel. Therefore, the Government of Israel contended that resettlement in neighbouring areas should be considered as the main principle of solution. However, Israel would be ready to make its own contribution to a solution of the problem. It was not yet ascertainable either how many wished to return under conditions that might be prescribed by the Assembly, or how many Arabs Israel could receive in the light of existing political and economic considerations. Israel's first objective at Lausanne would be to reach an agreement by direct negotiation on the contribution to be made by each Government toward the settlement of this grave problem. The extent of the contribution of the Israeli Government would depend entirely on the formal establishment of peace and relations of good neighbourliness between Israel and the Arab States."<sup>243</sup>

333. Despite the ambiguity of that speech, Israel would be admitted on the strength of a further undertaking by it to respect the United Nations resolutions and all the obligations under the Charter, including those relating to the right of return of Palestinian refugees. Subsequent events, in particular the negotiations that took place between Israel and the PLO from 1991, demonstrated that no negotiated solution to that question was possible. The problem of the return of Palestinians to their homes remained the main stumbling block, alongside the issue of Jerusalem. Israel's political will to define itself openly as a Jewish State, which found official expression in the 2018 Law, presented an increasingly insurmountable obstacle to compliance by that State with its obligations towards Palestinian refugees. By opposing return, not only to the part of Mandatory Palestine now regarded as Israeli but also to the Occupied Palestinian Territory, Israel was in fact confirming its intention to thwart the right of the Palestinian people to self-determination and to the reunification of its population in its territory.

**(c) *Discrimination between Israeli settlers and the Palestinians of the occupied territory based on their different status and the law applicable to each***

334. The Palestinians living in the territory occupied by Israel have a different status from that of the Israeli settlers. The origins of that discrimination are remote since it was already in the making in the very wording of the Balfour Declaration. By talking only of the civil and religious rights of the non-Jewish communities without mentioning their political rights, while a "national home for the Jewish people" was emerging, the Declaration made them foreigners in their own country. Since the 1967 occupation Israel has imposed application of its legislation to the whole territory, but with two sets of legislation existing side by side: military legislation, which applies to the Palestinian population, and Israeli domestic legislation, which is applied extraterritorially only to Israeli settlers. The law therefore differs in fields including criminal law, taxation, elections and health insurance<sup>244</sup>. There are also separate legal systems for traffic laws and planning and building matters. Apartheid has therefore built up in stages, as described in the Amnesty International report produced further to observation and documentation carried out over several years<sup>245</sup>. The crime of apartheid is a crime

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<sup>243</sup> [United Nations, *Official Records of 2nd Part of the 3rd session the General Assembly, Ad Hoc Political Committee, summary record of meetings, 6 Apr.-10 May 1949, [29th-54th meetings]* - 1949, document A/AC.24/SR.45], pp. 239-240.

<sup>244</sup> See Ann. 40, para. 46.

<sup>245</sup> See Ann. 3.

against humanity under the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1993:

“Article 1.

1. The States Parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.”

The Statute of Rome and customary international law confirm that characterization.

335. In the territory of East Jerusalem, Israel has applied its law since 1967. Jerusalem has been illegally annexed since that time. The Palestinians who live there are considered “permanent residents”. Unlike the Israelis, who are citizens, the Palestinians of Jerusalem must hold a residence permit in order to live there. However, Israel has assumed the right to revoke that permit in several ways. More than 14,500 Palestinians have lost that status in the last 50 years, including 13 in 2018.

“Authorities have justified most revocations based on a failure to prove a ‘center of life’ in Jerusalem but, in recent years, they have also revoked status to punish Palestinians accused of attacking Israelis and as collective punishment against relatives of suspected assailants. The discriminatory system pushes many Palestinians to leave their home city in what amounts to forcible transfers, a serious violation of international law.”<sup>246</sup>

These people have therefore become non-citizens. They are non-citizens “excluded from any nation State, belonging neither to Israel nor to the Palestinian proto-State”<sup>247</sup>.

336. The Palestinians living in the occupied territory experience severe discrimination and acts of repression, as do private legal persons, especially Palestinian civil society organizations. Palestinian organizations striving to promote human rights and engaged in peaceful activities, often in partnership with the United Nations, are harassed, and sometimes declared to be terrorist organizations and barred from carrying on their activities<sup>248</sup>. This policy on the part of Israel has been described as the “delegitimization of civil society” by the authors of the Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel<sup>249</sup>.

337. In that way, while the Palestinian territory has been fragmented, its population has been broken up among different places and its various parts have varying status. The basis of the national

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<sup>246</sup> Human Rights Watch, <https://www.hrw.org/news/2017/08/08/israel-jerusalem-palestinians-stripped-status>.

<sup>247</sup> Sylvaine Bulle, “Jérusalem-Est : Les sinistrés de la ville-monde” (“East Jerusalem: the casualties of the city-world”), *Multitudes*, 2004/3 (No. 17), pp. 165-173 [Translation by the Registry].

<sup>248</sup> See Ann. 45, para. 7.

<sup>249</sup> Ann. 52, United Nations, Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, 9 May 2023, A/HRC/53/22, para. 6 *et seq.*



community has been undermined and realization of the right of peoples to self-determination jeopardized. Going even further, Israel is working to attack and undermine the self-governing institutions authorized only at a late stage within a framework of mere autonomy.

### 3. Israeli policies and practices aimed at preventing the emergence of State institutions

338. A third component is required for a national community to be an effective State: access to self-governing institutions. In this respect, Israel has demonstrated its determination to thwart the emergence of a State of Palestine in several ways. After the failure to implement the plan of partition proposed by the United Nations in 1947, all options seemed to remain on the table until 1967. However, from that date it was clear that should a State of Palestine one day come into being it would be against the wishes of Israel.

“The situation changed radically from the Six-Day War. On the ‘seventh day’ we had to decide, and were able to decide, whether that war was a defensive war or a war of occupation. We decided that it was, after the event, a war of occupation and decided to eat its fruits.

That changed not only the character of Israel but its very *raison d’être*. It was a qualitative rather than a quantitative change. It consisted not of increasing the number of Arabs living under Israeli government, which had risen from half a million to 2 million, but of denying the right of the Palestinian people to its independence.”<sup>250</sup>

339. That refusal to allow the right of the Palestinian people to be fulfilled in State institutions took various forms and continues to do so more and more visibly at the present time. Thus we have the repression inflicted on Palestinians during demonstrations when they wave their flag, a symbol of claims to nationhood. Israeli military law has deemed that act to be a threat to security<sup>251</sup>. We have the — not symbolic but very real — intention of preventing the emergence of Palestinian authorities exercising sovereign powers in Palestine. Those authorities (represented by the PLO since it was set up in 1964) have long been deprived of a seat of authority in Palestine and have wandered from Amman (until 1971), to Beirut (until 1982) and then to Tunis (until the Palestinian Authority was established in Ramallah in 1996). In 1985 an attack on the PLO headquarters in Tunis, attributed to an Israeli fighter aircraft, killed 50 Palestinians and 18 Tunisians.

340. Once it was established in Palestine, the Palestinian Authority, headed by Yasser Arafat from 1996 until his death in 2004 and then by Mahmoud Abbas, would be the target of measures by Israel to discredit it, humiliate it and deprive it of the ability to perform its functions. The physical destruction of State infrastructure intensified. Public buildings, radio and television facilities and economic infrastructure are regularly hit<sup>252</sup>. Members of the Palestinian government and legislature are frequently deprived of freedom of movement and therefore prevented from going abroad. From 2001 Yasser Arafat was confined to Al-Muqata’a, his headquarters in Ramallah, encircled by Israeli forces and prevented from travelling either within Palestine or abroad. The Palestinian Authority is deprived of its financial resources by delays in paying taxes collected by Israel on behalf of the Palestinian Authority, and sometimes even refusals to pay those taxes.

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<sup>250</sup> Yeshayahu Leibovitz, “Quarante ans après”, *Revue d’études palestiniennes*, No. 100, summer 2006, p. 97 [Translation by the Registry].

<sup>251</sup> See Ann. 40, para. 47. It cites the Order Concerning the Prohibition of Acts of Incitement and Hostile Propaganda (Judea and Samaria) (No. 101), 5727–1967.

<sup>252</sup> See Ann. 33, “L’Europe chiffre les destructions israéliennes” (“Europe puts a figure on Israeli destruction”), *Libération*, 22 January 2022.

341. These are therefore direct attacks against the ability of the Palestinian institutions to perform the normal political functions of government authorities. Israel is deliberately trying to destroy the process set in motion by the Oslo Accords. From as early as 2000 Ariel Sharon made no secret of this: “[w]e are not going ahead with Oslo. There will be no more Oslo. Oslo is over”<sup>253</sup>. His successors have followed faithfully along the same path.

342. An Israeli academic coined the term “politicide” to describe this phenomenon<sup>254</sup>. It consists of “a gradual but systematic attempt to cause their annihilation as an independent political and social entity”<sup>255</sup>. There is no lack of statements by Israeli leaders confirming the extent to which this project has been an abiding concern ever since they became leaders. Golda Meir, Prime Minister from 1969 to 1974, was denying the reality of Palestine even then, asking as she did in a speech on 8 March 1969: “How can we return the occupied territories? There is no one to return them to.” Three months later, she added: “the Palestinians have never existed”<sup>256</sup>. The position of Israel’s leaders remains the same 54 years later, as borne out by the recent statements by the Israeli Defence Minister passing through Paris on 20 March 2023: “the Palestinians do not exist because the Palestinian people does not exist”<sup>257</sup>.

343. That refusal to countenance the birth of the State of Palestine, which is nevertheless the just realization of the right of the Palestinian people to self-determination, has in that way been applied systematically to each of the components that underpin a State: territory, population and State institutions. The refusal has been even more categoric in relation to an aspect fundamental to the freedom of a people — the right to set up its capital anywhere it decides on the territory recognized as belonging to it. Respect for the Palestinian institutions is nevertheless the *sine qua non* of its accession to statehood, which remains the objective of the international community, as the Security Council recalled in its resolution of 16 December 2008 in which it:

“[c]all[ed] on all States and international organizations to contribute to an atmosphere conducive to negotiations and to support the Palestinian government that is committed to the Quartet principles and the Arab Peace Initiative and respects the commitments of the Palestinian Liberation Organization, to assist in the development of the Palestinian economy, to maximize the resources available to the Palestinian Authority, and to contribute to the Palestinian institution-building programme in preparation for statehood”<sup>258</sup>.

We shall now devote a specific section to the question of Jerusalem in order to show how, by entirely annexing the city and its environs understood in the broad sense, Israel is providing the final proof of its opposition to the realization of the legitimate rights of the Palestinian people.

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<sup>253</sup> *Haaretz*, 18 October 2000. (Quoted by Tanya Reinhart, “Détruire la Palestine ou comment terminer la guerre de 1948”, *La Fabrique*, Paris, 2002, p. 96) [Translation by the Registry].

<sup>254</sup> Baruch Kimmerling, *Politicide: Sharon’s War against the Palestinians*, London, Verso Books, 2004, quoted by Pierre Blanc in “Palestine : géopolitique d’une violence territoriale”, *Confluences Méditerranée*, No. 86, summer 2013, p. 14.

<sup>255</sup> Baruch Kimmerling, *op. cit.*

<sup>256</sup> Quoted by Pierre Blanc, *op. cit.* p. 14 [Translation by the Registry].

<sup>257</sup> See Ann. 37.

<sup>258</sup> Security Council, resolution 1850 of 16 December 2008.

## V. ANNEXATION AND SETTLEMENT OF JERUSALEM IN DEFIANCE OF THE RIGHT OF PALESTINIANS TO MAKE IT THEIR CAPITAL

344. The question of Jerusalem has come up several times in the foregoing pages, in particular in relation to the events that coupled the fate of the city with that of the West Bank from 1967, when those territories were occupied by Israel. It is necessary to dwell on it specifically, however, given the peculiarities of the situation facing this iconic city. Not included in the territory intended to form an Israeli State under the United Nations partition plan of 1947, but not subject to the international status envisaged at that time because the status proposed by the partition plan did not see the light of day, Jerusalem has seen each of its parts, West and East, illegally annexed by Israel. Today the Jewish State thus occupies the whole of the city, which it is expanding repeatedly at the expense of the Palestinian territory of the West Bank. Through the rapid settlement of the Jewish population, Israel is depriving the Palestinian people of a key component of the right of peoples to self-determination: the right of a people to establish its capital in the city of its choice.

345. In a first section we shall summarize the various factual circumstances that have led to this situation (A). In a second section we shall analyse the various facets of the resulting illegality (B).

### A. Jerusalem, an Arab city confiscated by Israel

346. As with the Palestinian territory as a whole, in the history of Jerusalem events before the 1967 Israeli occupation (1) need to be distinguished from those that came after it (2), on which they shed light.

#### 1. Israel's designs on Jerusalem before 1967

347. The situation regarding Jerusalem was very unclear throughout the Mandate of Great Britain (a). Non-application of United Nations General Assembly resolution 181 in 1947 left things uncertain (b). The war of 1948 was then the occasion for Israel to seize and annex the West of the city (c).

##### (a) *Before and during the British Mandate*

348. For several centuries Jerusalem was under Ottoman domination. Inhabited by Palestinian Arabs, it was then a religious centre but was not a centre of government. Within the Ottoman administration it was a *pashaluk* and then from 1873 became a sandjack directly under the aegis of Istanbul<sup>259</sup>. The city was open to other communities whose presence was linked to the fact that it is the site of emblematic monuments of the three monotheistic religions. The number of Jewish people in the city increased during the nineteenth century, reaching approximately 20,000 in 1880.

349. At the start of the British Mandate, Jerusalem was its political capital. The Jewish population grew in the districts of western Jerusalem; the Arab population was located in the East and in the Old City, but formed the majority above all in the rural area around Jerusalem. The city was not the centre of the Zionist movement, which was headquartered in Tel Aviv. For the Arab elites belonging to important families that had been stripped of political authority by the mandatory Power, Jerusalem would be their base for taking control of the Arab political movement. Jerusalem has ever since been central to Palestinian political consciousness.

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<sup>259</sup> Henry Laurens, "Jérusalem, capitale de la Palestine mandataire", in *Jérusalem, le sacré et le politique*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Actes Sud, Sindbad, 2000, p. 219 *et seq.*

350. When the League of Nations conferred the Mandate for Palestine on Great Britain in 1922, Article 14 thereof provided for the creation of a special Commission to resolve the specific problems of the Holy Places and the different religious communities:

“Article 14.

A special Commission shall be appointed by the Mandatory to study, define and determine the rights and claims in connection with the Holy Places and the rights and claims relating to the different religious communities in Palestine. The method of nomination, the composition and the functions of this Commission shall be submitted to the Council of the League for its approval, and the Commission shall not be appointed or enter upon its functions without the approval of the Council.”<sup>260</sup>

However, the difficulties of setting up the Commission and ensuring the representation of the different religions on it were so great that it proved untenable. The mandatory Power was therefore responsible for the Holy Places and the Ottoman status quo governing relations between the various communities remained in place.

351. The tensions between Jews and Muslims that had existed since the beginning of the Mandate grew worse in Jerusalem, and were about access to and management of the religious sites. In 1929, following the Al-Buraq uprising, the British Government appointed an international commission of inquiry led by Sir Walter Shaw. It was charged with investigating the rights of Jews and Arabs over the Western Wall in Jerusalem. The report that it submitted to the League of Nations in 1930 confirmed the exclusive rights of Muslims to the western wall of the Haram al-Sharif and to the pavement in front of the Wall and the Maghrabi Quarter opposite it. Ownership vested in them on the basis of *waqf* (property held in mortmain). This property is therefore inalienable and dedicated exclusively to public or charitable purposes. Jewish worshippers were nevertheless granted authorization to come as far as the foot of the Wall to pray. The Commission’s decisions were enacted as a Law of 8 June 1931<sup>261</sup>.

352. From the time of the major revolts of 1936, Great Britain lost control of the situation. In 1947, unable to restore calm, it left the matter to the United Nations. What was at stake for the Arab States, on the one hand, and the major Western Powers, on the other, in the solutions then envisaged was to a large extent bound up with their concern for the Holy Places. Their interest had become heightened in the nineteenth century by rivalry between Orthodox and Catholic Christians, which fuelled a proliferation of charitable works supported by all the European nations, and ultimately prompted some of those nations to propose the idea of a special status. Behind the rhetoric of freedom of access to the places of prayer one could discern a desire to maintain influence in the region.

### **(b) *The United Nations plan of partition in 1947 and the proposals for Jerusalem***

353. Consensus emerged among the Member States of the new international organization to move towards a partition of Mandatory Palestine into two States and to separate Jerusalem from the plan of partition under a special status devised for it. By resolution 181 the General Assembly accordingly proposed to internationalize and demilitarize Jerusalem<sup>262</sup>. The plan was to make the Holy City a *corpus separatum* under a special international régime, backed by the Trusteeship Council. The city would in that way fall outside the authority of both States, the Jewish State and the

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<sup>260</sup> Ann. 7, League of Nations, Mandate for Palestine.

<sup>261</sup> Ann. 53, “The Status of Jerusalem”, United Nations, New-York, 1997, p. 5, note 4.

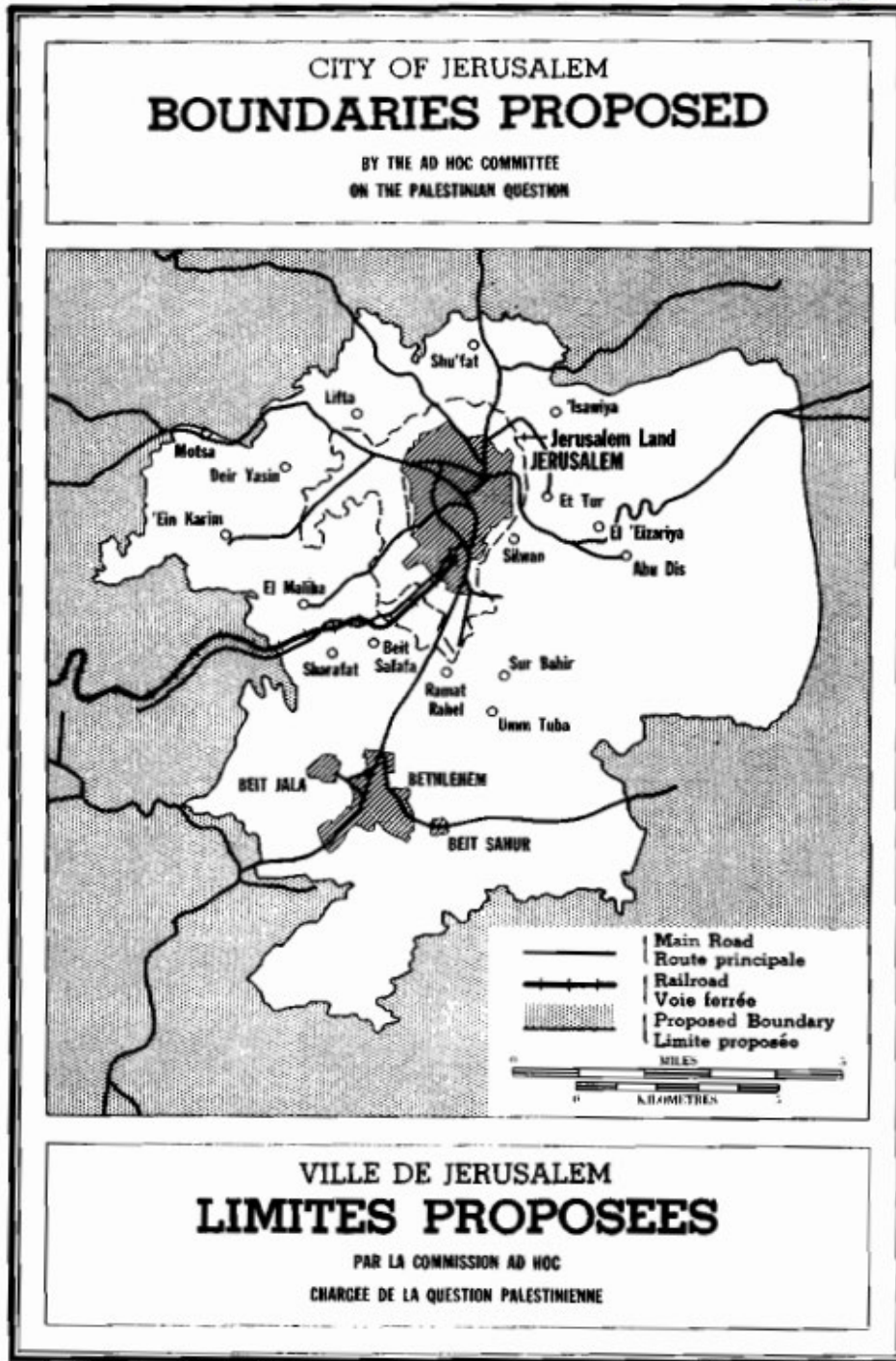
<sup>262</sup> See Ann. 12.

Arab State, whose creation was being proposed. It was planned that an enclave would be created encompassing Jerusalem and Bethlehem, that is to say, the most significant holy places of Christianity. However, the concept of "Holy Places", hitherto reserved for those of Christianity, now encompassed the holy places of Islam and Judaism.

354. The territory of the city, geographically located in the part destined to become an Arab State, would be an enclave within it. Its boundaries were defined as follows:

"B. BOUNDARIES OF THE CITY

The City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat, as indicated on the attached sketch-map (annex B)."



MAP NO. 10101 UNITED NATIONS  
NOVEMBER 1947

UN PRESENTATION 600 (1)

Map No. 13, The boundaries of Jerusalem according to United Nations General Assembly resolution 181.

355. The General Assembly then charged the Trusteeship Council with drawing up a Statute (indicated only in outline in resolution 181) which would be valid for 10 years.

“After the expiration of this period the whole scheme shall be subject to re-examination by the Trusteeship Council in the light of the experience acquired with its functioning. The residents of the City shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the City.”

356. Resolution 181 was never implemented in the absence of consent by the Arab people of Palestine and the Arab States. The representatives of the Zionist movement in Palestine had however accepted its terms, notably in a declaration reiterated in connection with Israel’s admission to the United Nations<sup>263</sup>. Israel’s acceptance of resolution 181 constituted acknowledgment by it that Jerusalem did not form part of the territory attributed to it. That commitment was repudiated during the 1948 war.

### **(c) *Israel’s annexation of West Jerusalem during the 1948 war***

357. When war broke out between the Arab armies and Israel’s military forces in 1948, the fighting was particularly violent in Jerusalem. As in the rest of Palestine, the Israeli armed forces drove the Arab population to flee. It is estimated that 60,000 Christians and Muslims were expelled from the whole of the district of Jerusalem<sup>264</sup>. In November 1948 a local ceasefire recorded the position of the two armies at that moment. It enshrined the *de facto* division of the city into two, along a curved north-south line that ran along the western wall of the Old City. The western sector was under Israeli control while the eastern section including the Old City and the Holy Places was in the hands of the Transjordanians.

### **The powerlessness of the United Nations**

358. The United Nations did not accept that situation. However, casting aside the broad tenets of the plan for Jerusalem outlined by resolution 181 and the plan drawn up by the Trusteeship Council, resolution 194 of 11 December 1948 entrusted the Conciliation Commission for Palestine with drawing up a detailed statute for the Holy City<sup>265</sup>. In September 1949, the Commission submitted a new plan which in reality enshrined the partition of the city between Israel and Transjordan and proposed that the management of Jerusalem be placed in the hands of a Council composed of Jewish and Arab representatives and representatives of the United Nations. A commissioner would be responsible for military control of the city and for ensuring free access to the Holy Places. It was no longer a question of the full territorial internationalization of Jerusalem, but merely of limited functional internationalization.

359. That plan was robustly opposed by a number of States. On 9 December 1949, by resolution 303, the General Assembly, abandoning the plan presented by the Conciliation Commission, reverted to the internationalization formula that had been proposed by resolution 181<sup>266</sup>. It called on the Trusteeship Council to draw up a new plan to that effect. However, in the absence of a majority likely to approve it, this plan would not be put to a vote of the General

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<sup>263</sup> *Supra*, paras. 124-12[5].

<sup>264</sup> Youakim Moubarac, “La question de Jérusalem”, *Revue d’études palestiniennes*, No. 6, winter 1983, p. 49. See also Ann. 53, “The Status of Jerusalem”, United Nations, New York, 1997, p. 6.

<sup>265</sup> See Ann. 17.

<sup>266</sup> United Nations General Assembly resolution 303 (IV), Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places, 9 December 1949.

Assembly. The Member States were divided between those who wished to formalize the division of the city and those who adhered to the idea of imposing territorial internationalization.

360. The United Nations had therefore reached an impasse on the question of Jerusalem. On 26 January 1952, by resolution 512 the General Assembly acknowledged by implication that it was unable to resolve the question of Jerusalem, which was therefore now left with no governing régime<sup>267</sup>.

361. On the ground, the western and eastern sections of the city, controlled by the Israelis and the Transjordanians respectively, were separated by a “no man’s land” in two sectors. Under agreements concluded between Israel and Transjordan in July 1948<sup>268</sup>, Mount Scopus, in the eastern sector of the city, was an international demilitarized zone under the authority of the United Nations. A second neutral zone was established in August 1948 by the Truce Commission, under the name “Government House sector”, which included the former residence of the British government, an Arab school and the School of Agriculture. That situation was governed by the Israeli-Jordanian Armistice Agreement concluded in Rhodes on 3 April 1949 (Article V, paragraph 1, subparagraph (b)) and approved by the Security Council on 11 August 1949<sup>269</sup>. Parts of those zones were placed under the control of United Nations forces<sup>270</sup>. Moreover, the agreements referred to above were concluded under the auspices of the United Nations.

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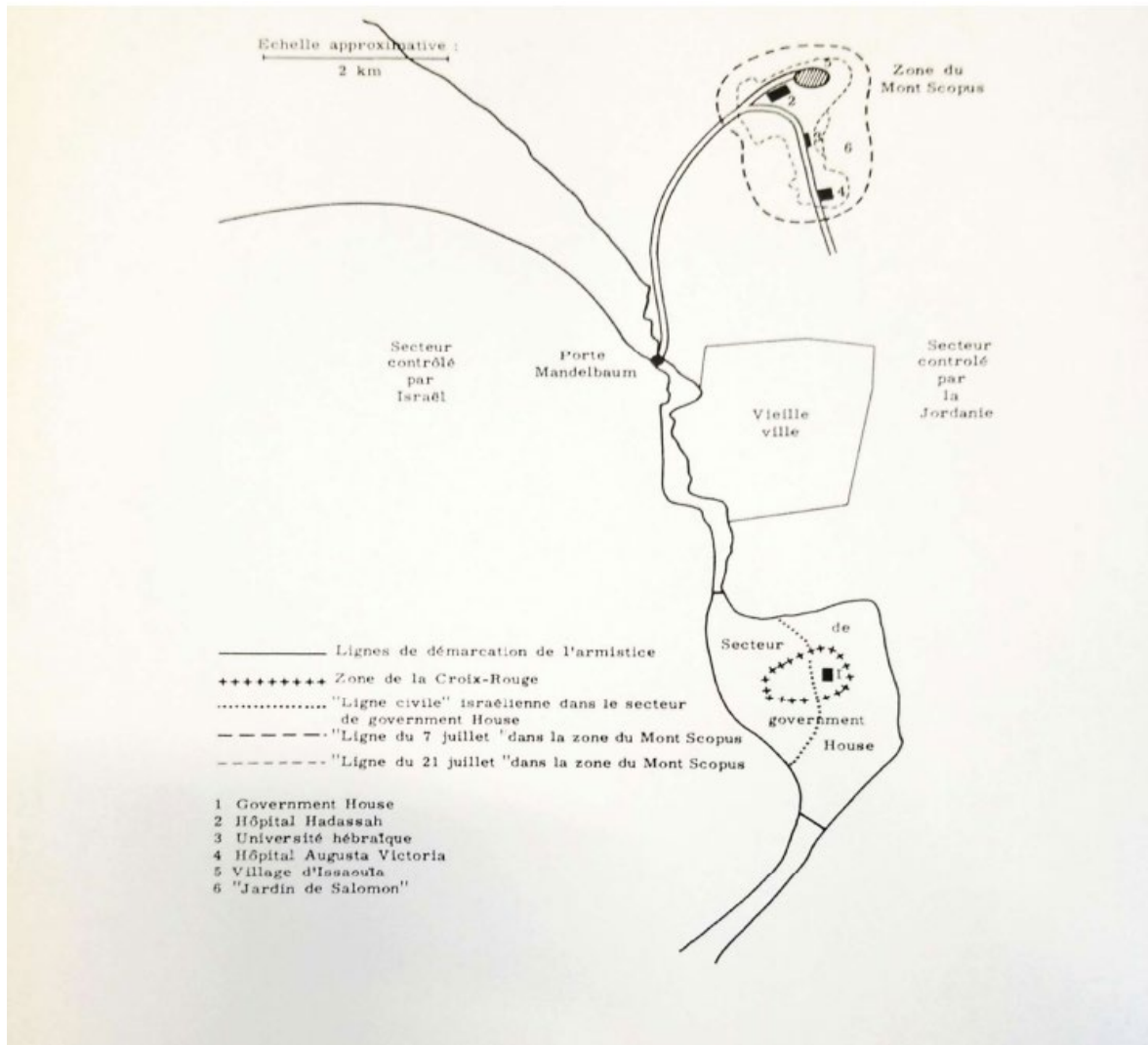
<sup>267</sup> United Nations General Assembly resolution 512 (V), Report of the United Nations Conciliation Commission for Palestine, 26 January 1952.

<sup>268</sup> Special agreement concluded on 7 July 1948 and two agreements of 21 July and 30 November 1948.

<sup>269</sup> Ann. 54, General Armistice Agreement between the Hashemite Jordan Kingdom and Israel of 3 April 1949, *Security Council, Official Records, Fourth year, S/1302/REV.1*.

<sup>270</sup> On the status of those zones, see Guy Feuer, “Le statut des zones de Jérusalem contrôlées par l’ONU”, *Annuaire français de droit international*, 1966, pp. 245 *et seq.*





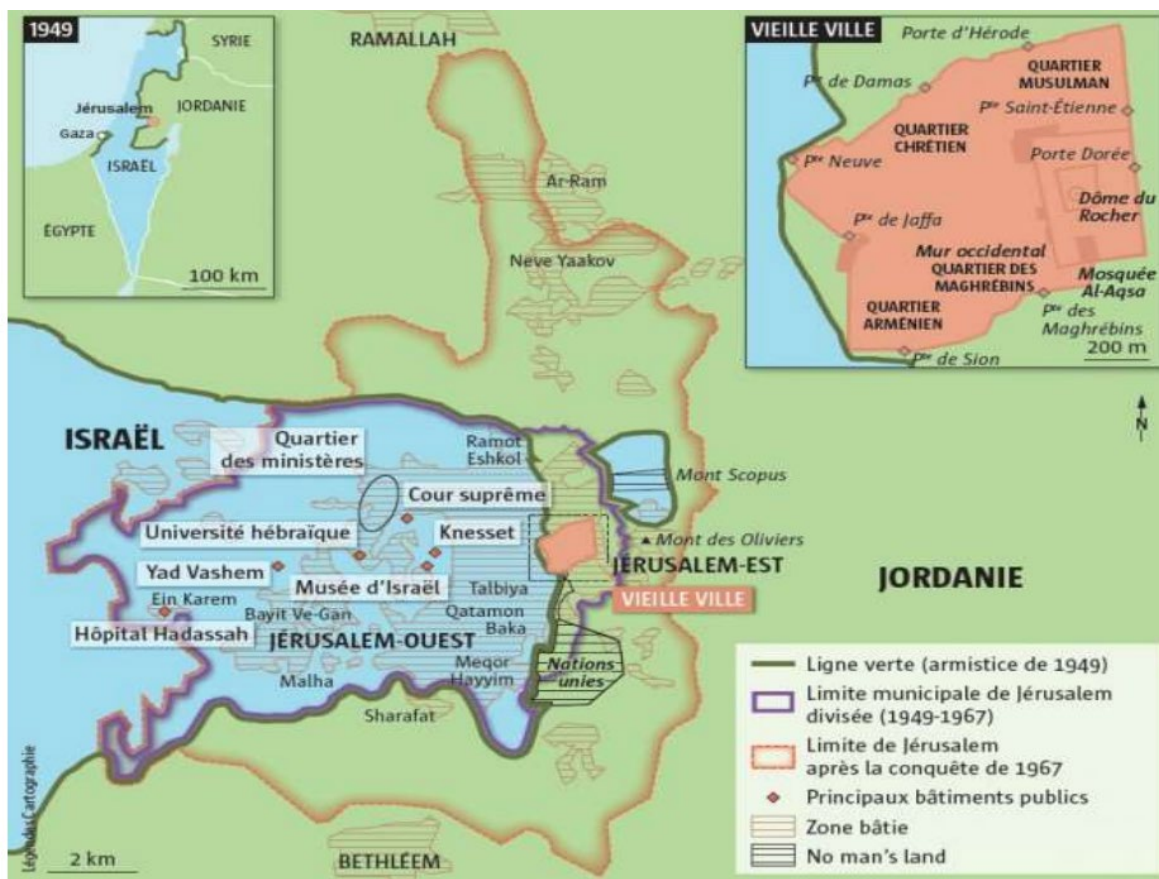
Map No. 14, from Guy Feuer, *Annuaire français de droit international*, 1966, p. 246.

Echelle approximative:	Approximate scale:
Zone du Mont Scopus	Mount Scopus area
Secteur contrôlé par Israël	Sector controlled by Israel
Porte Mandelbaum	Mandelbaum Gate
Vieille ville	Old City
Secteur contrôlé par la Jordanie	Sector controlled by Jordan
Secteur de government House	Government House sector
Lignes de démarcation de l'armistice	Armistice Demarcation Lines
Zone de la Croix-Rouge	Red Cross zone

“Ligne civile” israélienne dans le secteur de government House	Israeli “civilian line” in the Government House sector
“Ligne de 7 juillet” dans la Zone du Mont Scopus	“7 July line” in the Mount Scopus area
“Ligne de 21 juillet” dans la Zone du Mont Scopus	“21 July line” in the Mount Scopus area
Hôpital Hadassah	Hadassah Hospital
Université hébraïque	Hebrew University
Hôpital Augusta Victoria	Augusta Victoria Hospital
Village d’Issaouïa	Village of Al-Issawiya
“Jardin de Salomon”	“Solomon’s Garden”

#### **Israel’s policy on Jerusalem following its conquests in 1948**

362. From the time of its declaration of independence Israel, had shown itself hostile to any plan to internationalize the City of Jerusalem, accepting at most international control of the Holy Places. The Israelis’ objective had been clear since their declaration of the State of Israel: to take over Jerusalem entirely and make it their political capital. As early as December 1949, in the days following the United Nations resolution reaffirming that Jerusalem should remain under an international régime, the Government headed by David Ben Gurion decided to transfer the seat of government and the ministries from Tel Aviv to Jerusalem. A few days later, the Israeli Parliament moved to the city.



Map No. 15, Jerusalem, history, 1947- 2017.

SYRIE	SYRIA
JORDANIE	JORDAN
ÉGYPTE	EGYPT
VIELLE VILLE	OLD CITY
Porte d'Hérode	Herod's Gate
Pte de Damas	Damascus Gate
Pte Neuve	New Gate
Pte de Jaffa	Jaffa Gate
Pte Saint-Étienne	St Stephen's Gate
Porte Dorée	Golden Gate
Dôme du Rocher	Dome of the Rock
Mosquée Al-Aqsa	Al-Aqsa Mosque

Pte des Maghrébins	Maghrabi Gate
Pte de Sion	Zion Gate
Mur occidental	Western Wall
QUARTIER MUSULMAN	MUSLIM DISTRICT
QUARTIER CHRÉTIEN	CHRISTIAN DISTRICT
QUARTIER DES MAGHRÉBINS	MAGHRABI DISTRICT
QUARTIER ARMÉNIEN	ARMENIAN DISTRICT
Quartier des ministères	Ministry district
Cour suprême	Supreme Court
Université hébraïque	Hebrew University
Musée d'Israël	Israel Museum
Hôpital Hadassah	Hadassah Hospital
JÉRUSALEM-OUEST	WEST JERUSALEM
JÉRUSALEM-EST	EAST JERUSALEM
Nations Unies	United Nations
Mont Scopus	Mount Scopus
Mont des Oliviers	Mount of Olives
Ligne verte (armistice de 1949)	Green Line (1949 Armistice)
Limite municipale de Jérusalem divisée (1949-1967)	Municipal boundary of divided Jerusalem (1949-1967)
Limite de Jérusalem après la conquête de 1967	Boundary of Jerusalem after the 1967 conquest
Principaux bâtiments publics	Principal public buildings
Zone bâtie	Built-up area
BETHLÉEM	BETHLEHEM

363. In a letter to the Israeli Prime Minister, the United Nations Conciliation Commission for Palestine emphasized that those measures were incompatible with the United Nations resolutions and should be revoked. The issue was to be crucial during the debates in the General Assembly on Israel's admission to membership of the Organization. During those discussions, Israel's representative declared:

“The Government of Israel advocated the establishment by the United Nations of an international regime for Jerusalem concerned exclusively with the control and protection of Holy Places, and would co-operate with such a regime.

It would also agree to place under international control Holy Places in parts of its territory outside Jerusalem, and supported the suggestion that guarantees should be given for the protection of the Holy Places in Palestine and for free access thereto.”<sup>271</sup>

Pressed to give his reasons for opposing the régime consisting of the internationalization of the whole of the Holy City as proposed by the United Nations, Israel’s delegate replied that he would submit proposals differentiating between the powers of an international régime with respect to the Holy Places and the aspiration of the Government of Israel to be recognized as the sovereign authority in Jerusalem.

364. Following the failure of the Trusteeship Council to secure the adoption of an internationalization plan by the Member States, Israel informed the Council that the Statute of Jerusalem could not be implemented on account of the creation of Israel and because the western section of the city had been integrated into its territory. The United Nations therefore abandoned any plan to internationalize Jerusalem. In the ensuing years, the Conciliation Commission for Palestine put its efforts into actions directed at refugees and the identification of their property. In relation to Jerusalem, it put the value of the property of the evicted Arab population at 9.25 million Palestinian pounds at 1947 prices<sup>272</sup>.

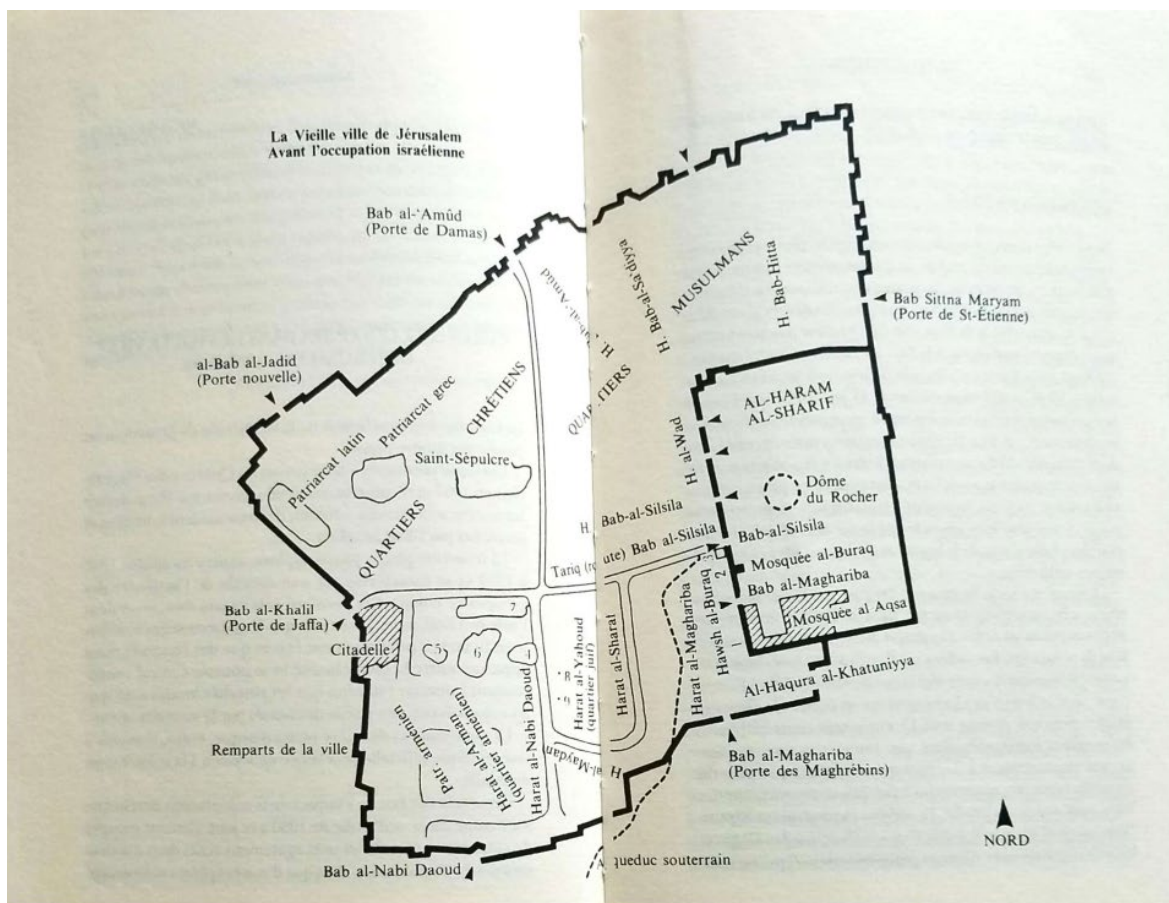
365. On 23 January 1950, the Knesset declared the western section of Jerusalem the single capital of Israel (by 50 votes to 2). From 1952, the area of West Jerusalem expanded westwards at the expense of Palestinian villages and would continue to do so to the point of doubling in size. At the same time the Jewish State was attempting to persuade other countries to move their diplomatic missions from Tel Aviv to Jerusalem. In the 1950s, the major Western Powers and Russia were unfavourable to the idea. Other countries, however, allowed themselves to be persuaded. The trend gradually increased. By the eve of the 1967 war, some 20 diplomatic missions were based in Jerusalem.

366. East Jerusalem was still an Arab city under Jordanian administration. It consisted of districts that differed according to the Holy Places of the various religions.

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<sup>271</sup> See Ann. 18 [*sic*], p. 236.

<sup>272</sup> See Ann. 53, “The Status of Jerusalem”, p. 11.



**Map No. 16**, The Old City of Jerusalem before the Israeli occupation. From Michael Dumper, “Colons et colonies dans la Vieille ville de Jérusalem : 1980-2000” in *Jérusalem, le sacré et le politique*, Farouk Mardam-Bey and Élias Sanbar (eds.), Arles, Actes Sud, 2000, pp. 274-275.

La Vieille ville de Jérusalem avant l'occupation israélienne	The Old City of Jerusalem before the Israeli occupation
Porte de Damas	Damascus Gate
Porte Nouvelle	New Gate
Porte de Saint-Étienne	St Stephen's Gate
QUARTIERS MUSULMANS	MUSLIM DISTRICTS
Patriarcat latin	Latin Patriarchate
Patriarcat grec	Greek Patriarchate
QUARTIERS CHRÉTIENS	CHRISTIAN DISTRICTS
Saint Sépulcre	Holy Sepulchre
route Bab al-Sisilia	Bab al-Sisilia street
Porte de Jaffa	Jaffa Gate

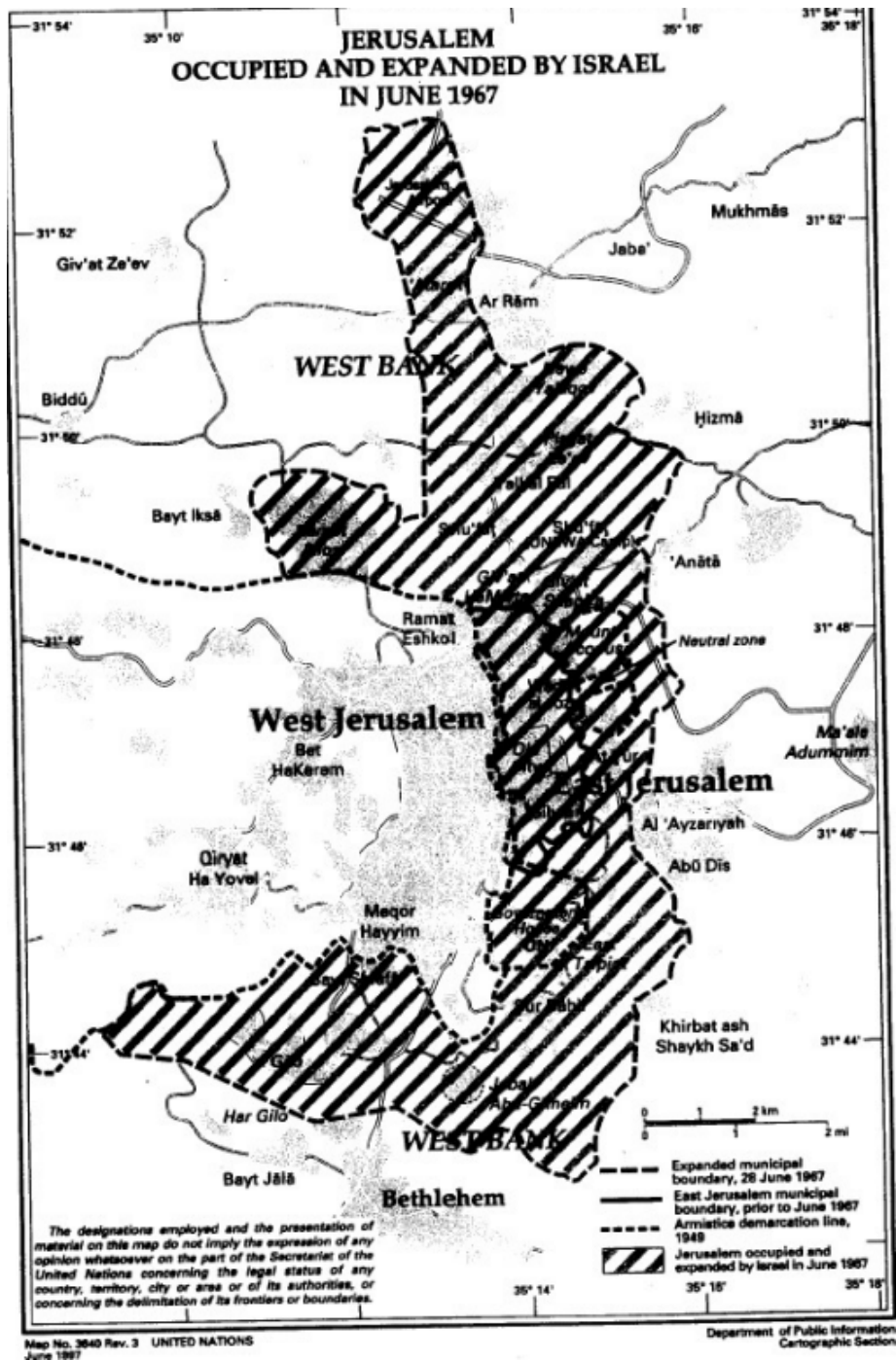
Dôme du Rocher	Dome of the Rock
Mosquée al-Buraq	Al-Buraq Mosque
Mosquée Al-Aqsa	Al-Aqsa Mosque
Citadelle	Citadel
Remparts de la ville	City walls
Ptar. Arménien	Armenian Patriarchate
Quartier Arménien	Armenian district
quartier juif	Jewish district
Porte des Maghrébins	Maghrabi Gate
Aqueduc souterrain	Underground aqueduct
NORD	North

## **2. Israel's complete takeover of Jerusalem from 1967**

367. This takeover was initially the outcome of the military operations of 1967 (a). It was then continued by means of legislative measures and an uninterrupted policy of settlement and expansion (b). The irreversible nature of the Israeli takeover of the city was reflected in the fact that when peace negotiations commenced it would be impossible to make progress on that point (c).

### ***(a) The conquest by force of East Jerusalem and its effects on the ground***

368. During the Six-Day War, Israel seized the eastern districts of Jerusalem by force on 5 June 1967. The Security Council's adoption of resolution 233 of 6 June 1967 calling for an immediate ceasefire produced no effect. The 135 dwellings in the Maghrabi Quarter, dating from the fourteenth century, were dynamited, causing the eviction of 650 people.



Map No. 17, Map 4. Jerusalem occupied and expanded by Israel in June 1967, in Annex 55, *The Status of Jerusalem*, New York, United Nations, 1997, p. 16.

369. The residents of East Jerusalem were all remembering the events of 1948. Ibrahim Dakkak, a young Palestinian engineer living in Jerusalem, recounted the experiences of the Arab inhabitants of the city: “[T]he weather forecast for Jerusalem was given on Radio Israel but no longer



on Radio Amman . . . We knew that Jerusalem had fallen into the hands of the Israeli forces. What could we do? Was history going to repeat itself? Would the same happen as in 1948?”<sup>273</sup>

370. Yet in 1967 there was no spontaneous flight by the Arab population. East Jerusalem had been developed little since 1948 and had only some 70,000 inhabitants. As early as 27 June 1967, the Knesset passed three framework laws modifying the status of Jerusalem as defined by the Armistice Agreement signed on 3 April 1949 between Israel and Jordan. The Israeli laws and institutions applicable in the western section of the city were extended to the entire city. The boundaries between the two sectors of the city were abolished. Israel passed a law on the protection of the Holy Places, which were thus *de facto* under its sole control. The inhabitants of the eastern section boycotted the municipal elections and in a few years the municipal institutions would be in the hands of the former West Jerusalem staff.

371. Incidents and attacks occurred from 1968 and international condemnation spread. It was first expressed at the United Nations General Assembly, which found the measures taken by Israel to be invalid and called on Israel to rescind them<sup>274</sup>. A Security Council resolution of 3 July 1969, with the favourable vote of even the United States representative, clearly censured the Israeli policy and denounced the expropriation and confiscation of property and the demolition of buildings, which it declared unlawful, and called on Israel to rescind all those measures as a matter of urgency<sup>275</sup>.

372. Notwithstanding condemnation of the military occupation of the city, Israel would transform it into an annexation by the Law of 29 July 1980, which declared: “Jerusalem, whole and united, is the capital of Israel. Jerusalem is the seat of the President of the State, the Knesset, the Government and the Supreme Court”<sup>276</sup>. In the wake of the vehement international criticism triggered by the annexation, the countries that had set up their diplomatic missions in Jerusalem in the 1950s moved them back to Tel Aviv.

373. The following years would see an increase in incidents. There have been so many that it is impossible to recount them all. They have been the subject of detailed reports by the United Nations<sup>277</sup>. The Palestinian inhabitants of Jerusalem are subject to numerous restrictions on their rights in all areas of life. Since the city was occupied by Israel in 1967, Palestinians living within the city boundaries (according to the broad definition of Jerusalem used by the Jewish State) are treated as permanent residents in the State of Israel. However, those who were not physically present at the time of the 1967 census lost that status (a situation which affected some 8,000 people). To travel abroad, residents must apply for a permit that is valid for three years. Failure to renew the permit leads to forfeiture of residency status. The status is automatically lost if someone stays abroad for more than seven years. Going to a neighbouring village in the West Bank is likewise grounds for losing residency status. Non-resident spouses and the children of residents do not automatically become residents. They have to apply for residence and it is unlikely to be granted. In March 2018,

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<sup>273</sup> Ibrahim Dakkak, “Juin 1967, la résistance au quotidien”, in *Jérusalem. Le sacré et le politique*, F. Mardam-Bey and E. Sanbar (eds.), Arles, Sindbad, Actes Sud, 2000, p. 244 *et seq.* [*Translation by the Registry*].

<sup>274</sup> United Nations General Assembly resolutions 2253 (ES-V) of 4 July 1967 and 2254 (ES-V) of 14 July 1967.

<sup>275</sup> Security Council resolution 270 of 26 August 1969.

<sup>276</sup> See Ann. 53, “The Status of Jerusalem”, New York, United Nations, 1997, p. 13.

<sup>277</sup> Among the most recent, see Human Rights Council, Fifty-second session, 27 February-31 March 2023, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, “Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice”, 13 February 2023, A/HRC/52/75; and General Assembly, “Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan” — Report of the United Nations High Commissioner for Human Rights, A/HRC/52/76, 15 March 2023.

the Israeli Parliament passed a law enabling the Minister for the Interior to confiscate the papers of any inhabitant of Jerusalem who has committed an offence punishable by Israeli law or who has merely “espoused ideas not in line with the interests of Israel” [*Translation by the Registry*].

374. Other restrictions have been imposed on the civil rights of Jerusalem’s Palestinians. Arabic-language publications are censored, a number of newspapers have been banned, educational and cultural institutions have been closed and their representatives have been arrested. Since the start of the Oslo negotiations in 1993, many offices associated with the Palestinian Authority have been closed. Palestinians were authorized to participate in the elections of January 1996. However, of those entitled to participate, only 30 per cent did so, since most feared jeopardizing their residency status by voting. Lastly, the restrictions on the movement of people and goods between Jerusalem and the West Bank and Gaza have had dire consequences on the rights of Palestinians and their living conditions<sup>278</sup>.

**(b) *The Judaization of East Jerusalem through settlement***

375. Immediately after the occupation of East Jerusalem in 1967, the Israeli authorities decided on a policy of intensive settlement. Speaking before the Security Council on 3 May 1968, Rouhi El-Khatib, a former mayor of Jerusalem, stated that the Israeli project could also “contain the Arabs of Jerusalem in a limited space, which will ultimately reduce their numbers and afford Israel the opportunity to bring in new immigrants and make Jews the majority of the population in Arab Jerusalem in a few years”<sup>279</sup>.

376. The Israeli authorities expanded the municipality from the 6 q km of its previous area to 73 sq km and created two circles of settlements surrounding the city, taking over 28 Palestinian villages. Some 10 km from the city centre, the band of settlements comprising Efrat, Gilo, Har Homa, Maaleh Adumim, Bet El and Psagot encircled the Palestinian districts and has prevented their development. Labelled “Greater Jerusalem”, this expansion included 330 sq km gained from the West Bank. Every means has been deployed to prevent the development of Palestinian districts and expand the Israeli settlements. Thus, for example:

“the Jabal Abu-Ghneil hill on the outskirts of Jerusalem on the road to Bethlehem was declared a ‘protected green space’ in 1969 and then turned into a ‘residential zone’ in 1996 in order to build the Har Homa (literally ‘mountain barrier’) settlement, which now has nearly 15,000 inhabitants”<sup>280</sup>.

377. The second circle of settlements, known as “Metropolitan Jerusalem”, swallowed 665 sq km of the West Bank. It covers a region stretching “from Ramallah in the north to Bethlehem in the South, Maaleh Adumim in the east, and Mevasseret in the west in one metropolitan area”<sup>281</sup>.

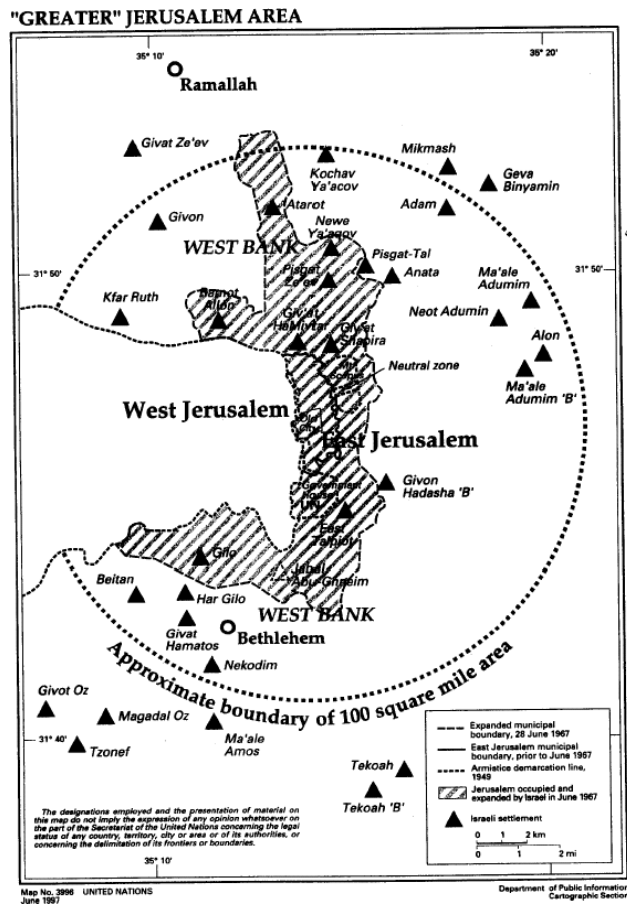
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<sup>278</sup> For more information, see Ann. 53, p. 21 *et seq.*

<sup>279</sup> See Ann. 53, p. 17.

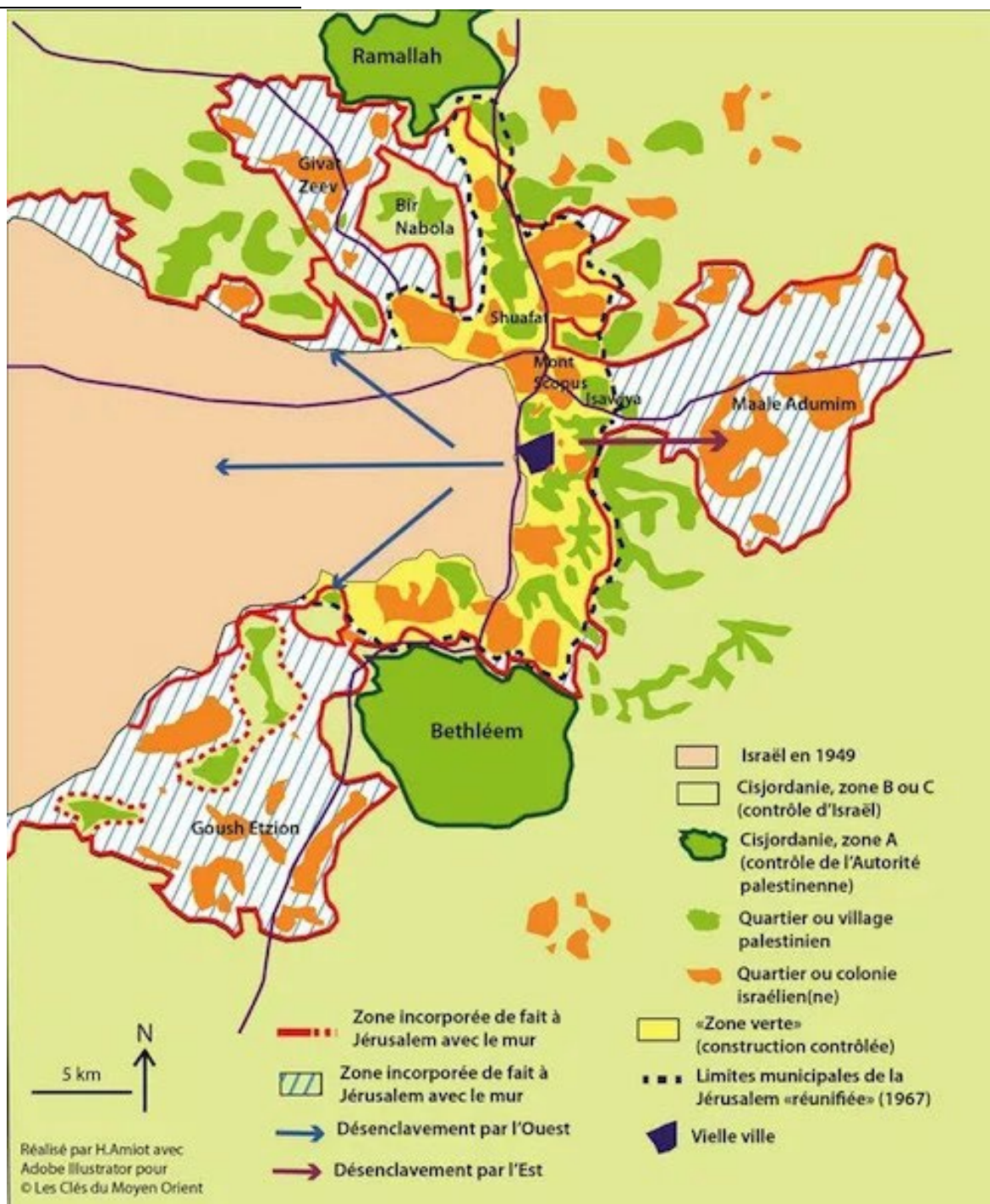
<sup>280</sup> Vincent Lemire, “L’impossible capitale”, in [*L’Histoire*,] *monthly edition* 436, <https://www.lhistoire.fr/limpossible-capitale>.

<sup>281</sup> See Ann. 53, p. 18.



Map No. 18, Map 5. Israeli settlements in and around Jerusalem, Annex 55, p. 20.

378. That trend increased after signature of the Oslo Accords. On the pretext of “natural” demographic growth, the Israeli Government has authorized the construction of tens of thousands of new housing units intended to extend existing settlements towards the Dead Sea and the Jordan Valley. The Arab districts are separated by the wall.



**Map No. 19.** The fragmentation of "Greater Jerusalem" as a result of Israeli settlement, from Henri Amiot, "À relire, en lien avec l'actualité : Jérusalem, une ville divisée chargée de symboles", *Les clés du Moyen Orient*, 8 December 2017.

Mont Scopus	Mount Scopus
Israël en 1949	Israel in 1949
Cisjordanie, zone B ou C (contrôle d'Israël)	West Bank, Area B or C (Israeli control)

Cisjordanie, zone A (contrôle de l’Autorité palestinienne)	West Bank, Area A (control of the Palestinian Authority)
Quartier ou village palestinien	Palestinian district or village
Quartier ou colonie israélien(ne)	Israeli district or settlement
Réalisé par H. Amiot avec Adobe Illustrator pour © Les Clés du Moyen Orient	Created by H. Amiot using Adobe Illustrator for © Les Clés du Moyen Orient
Zone incorporée de fait à Jérusalem avec le mur	Area <i>de facto</i> incorporated into Jerusalem as a result of the wall
Désenclavement par l’Ouest	Enclave broached to the west
Désenclavement par l’Est	Enclave broached to the east
“Zone verte” (construction contrôlée)	“Green space” (regulated construction)
Limites municipales de la Jérusalem “réunifiée” (1967)	Municipal boundaries of “reunified” Jerusalem (1967)
Vie[i]lle ville	Old City

In 1978 an association, Ateret Cohanim, was set up, which works explicitly to promote the “reconquest” of the Old City of Jerusalem, house by house. In 1994, the Israeli Minister of Defence set out the plan for the defence of Jerusalem: “The consolidation of the existing territorial continuity through expansion of settlements as well as construction of roads, tunnels and bridges and further land acquisition, would be presented in the future negotiations as a geographic fact.”<sup>282</sup>

379. In a 1994 report, a non-governmental organization observed that this Israeli policy had led to 21,000 Palestinian families being homeless and having to stay with other Palestinians and that, denied building permits, many of those families had been forced to leave the city (a figure estimated at that time as 50,000).

380. The situation has deteriorated considerably over the years. Between 2012 and 2021, 1,407 Palestinian houses were demolished in East Jerusalem and the number of Palestinians compelled to demolish their own properties increased (16 in 2013, 58 in 2019, 89 in 2020 and 101 in 2022). Demolition is the only way they can avoid paying the heavy fines and costs imposed when the destruction is carried out by the Israeli municipal authority.

381. Over the last 10 years, the number of plans submitted and approved for the construction of settlements has increased, threatening to cut Jerusalem off from the rest of the West Bank.

“On 5 September 2022, Israel advanced plans for some 700 units in the planned settlement of Givat Hashaked in East Jerusalem and planning processes moved forward for the expansion of the Har Gilo settlement on the lands of the Palestinian village of

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<sup>282</sup> See Ann. 53, p. 18.

Al-Walaja, placing over 304 Palestinian people (151 children, 80 men and 73 women) under imminent risk of forced displacement.”<sup>283</sup>

A ring road under construction (which is barred to Palestinians) will connect the settlements south of Jerusalem with those to the east of Jerusalem. In order to build it, an expropriation order was issued affecting 55 dunams of land in the Palestinian village of At-Tur. A tramway has been built linking the distant settlements of the metropolitan area with the city centre.

382. The Israeli courts have moved towards greater tolerance of these practices. Whereas the High Court of Justice had since 1979 outlawed the use of military orders to expropriate land for the purpose of settlement, a judgment of 28 February 2022 held that the Israeli security forces were justified in requisitioning a private Palestinian property in Hebron in order to establish a new settlement on the land<sup>284</sup>.

**(c) *Israel’s claim that the complete Judaization of Jerusalem is irreversible and the impasse reached in the peace negotiations on this point***

383. Israeli leaders, flouting all the United Nations resolutions, have consistently asserted that they will never put an end to the settlement policy. Their agenda is thus to test their impunity within the international community and to reaffirm the irreversibility of Israeli sovereignty over Jerusalem. In May 2010, Benjamin Netanyahu stated: “The Israeli Government has not pulled back and will not pull back in response to the United States and will continue to build everywhere in Jerusalem, the capital of the Jewish people for eternity”<sup>285</sup>. He repeated the message in May 2011 before the United States Congress, where he reiterated his refusal to withdraw from East Jerusalem and accept partition of the city.

384. During the various phases of negotiations that have punctuated the years since the start of the Oslo process, the question of Jerusalem, together with that of the return of exiles, has remained the stumbling block to any positive outcome of the talks entered into. At the very start of the negotiations that would lead to the Oslo Accords in 1993, the Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 stated that the question of Jerusalem was one of the remaining issues whose resolution was reserved to a subsequent stage, that of the permanent status negotiations<sup>286</sup>.

385. At the start of the 2000s, at the instigation of the United States, negotiations seemed to enter a more active phase. What was proposed at that time for the capital of the State of Palestine is indicative of Israel’s position of denying all aspects of the right of peoples to self-determination for the Palestinian people, in particular the right to establish its capital in the city of its choice. Ehud Barak’s position was presented as one amenable to the division of Jerusalem as the capital of both States. However, the part reserved for an Arab State was not East Jerusalem. The area in question was instead that identified as “Al Qods”, beyond the area annexed by Israel in 1967. That ambiguous definition poorly camouflaged a refusal to partition the city and the relegation of the future capital of the State of Palestine to Abu Dis, a village on the periphery of Jerusalem. This village, approximately

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<sup>283</sup> Ann. 49, para. 6.

<sup>284</sup> See Ann. 49, para. 18.

<sup>285</sup> *Le Monde*, AFP, 20 May 2010 [Translation by the Registry].

<sup>286</sup> See Ann. 29, Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993, Art. V, para. 3.

3 km from the Arab city of Jerusalem, is one of a group of three villages, which had been within the boundaries of Jerusalem under Jordanian administration.

386. Signalling the fact that to Israel its occupation of Jerusalem — both West and East — is irreversible, that proposal was testament to the contempt in which the Israeli negotiators and their allies held the future Palestine, whose institutions were thus intended to have their seat in a village in the suburbs. When negotiations resumed in Taba in 2002, after the outbreak of the second Intifada, the Israeli proposal for the capital of the State of Palestine was unchanged. Although Jerusalem was shown as the capital of both States, it was with the same sleight of hand as before: Jerusalem — West and East — would be the capital of Israel and the village of Abu Dis on the periphery would be the capital of Palestine. The negotiations failed and the question of Jerusalem (together with the right of return for exiles) has ever since remained one of the principal stumbling blocks to any settlement of the conflict.

## **B. The annexation of Jerusalem, an emblematic violation of the right of the Palestinian people to self-determination and to choose its capital within its territory**

387. An analysis of the situation of Jerusalem in the light of international law involves examining what is encompassed by the expression “status” of Jerusalem (1); exploring the best way to ensure free access to the Holy Places (2); and confirming the right of the Palestinian people to self-determination in a territory that includes the whole of the City of Jerusalem and the right to have that city as its capital (3).

### **1. The question of the “status” of Jerusalem**

388. United Nations resolutions have repeatedly condemned the measures that have modified the “status” of Jerusalem. Resolution 476 of 30 June 1980 can be taken as an example:

“4. *Reiterates* that all such measures which have altered the geographic, demographic and historical character and *status* of the Holy City of Jerusalem are null and void and must be rescinded in compliance with the relevant resolutions of the Security Council.” (Emphasis added.)

However, the use of the term “status” has led to a degree of confusion\* on account of the meaning given to the term in United Nations resolution 181. In its third part, which deals with Jerusalem, after announcing in Section A that the city would be placed under a “special régime”, the resolution contained a Section C entitled “Statute of the city”. This was a matter of the city being administered by neither the Jewish State nor the Arab State envisaged in the plan of partition and of it being provided with a régime of demilitarization and internationalization.

389. However, what was a proposal in resolution 181 did not acquire normative force. The Trusteeship Council was never able to produce the more detailed statute requested of it and the Security Council was never able to take measures to implement the plan of partition. Resolution 181 as a whole and the part concerning Jerusalem in particular were abandoned. Yet that abandonment,

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\* [The French term “*statut*” has the meanings of both “status” and “statute”.]

formally acknowledged by the United Nations itself<sup>287</sup>, of the plan to internationalize the City of Jerusalem did not leave the city without a “status”.

390. The fact that the United Nations uses that term, even though the “status” envisaged in 1947 has fallen away, is clearly because the term is being given a different meaning. Since the United Nations has consistently condemned the annexation of Jerusalem, the term “status” cannot refer to a validation of Israel’s claim to sovereignty. There is therefore only one other plausible hypothesis, namely that the “status” of Jerusalem is that of a territory under military occupation by a foreign Power, as the whole of the Palestinian territory has been since 1967. The end of that occupation would enable the occupied people to recover its sovereignty. Yet do the peculiar circumstances of Jerusalem and the presence of the historical places of worship in the territory of Jerusalem justify the need for a specific legal régime for the city? They do not, because it is sufficient that the State having sovereignty over the city applies international law in order to ensure protection of those sites and freedom of access.

## **2. International guarantees of access to the Holy Places and measures to conserve them**

391. The concerns that had brought the Members of the United Nations to the idea of a special status for Jerusalem are understandable. The city houses symbolic and very ancient sites which are pilgrimage destinations for adherents of the major monotheistic religions. Because they are fragile, special measures must be taken to preserve these sites. Because they are very heavily visited, they must be accessible to all those who wish to come and pray. Yet there is no reason why those concerns should interfere with the question of sovereignty over the City of Jerusalem. That question must be resolved in and of itself. Once it has been determined which State has jurisdiction over the part of the city where the Holy Places are located, that State is then bound to respect certain obligations under international law in relation to the Holy Places.

392. Freedom of access to places of prayer and pilgrimage is guaranteed by the general freedom of movement that forms part of the international corpus of human rights. It flows from Article 1[3] of the Universal Declaration of Human Rights of 10 December 1948<sup>288</sup>. It was confirmed by Article 1[2] of the United Nations Covenant on Civil and Political Rights of 23 March 1976<sup>289</sup>. While admittedly, under Article 1[2], paragraph 3, the State where the site is located may regulate that freedom (as it can all the others), it can do so only on the specific grounds referred to in the Covenant, the principal of which concerns public order and national security. Israel, the holder of

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<sup>287</sup> *Supra*, para. 360, United Nations General Assembly resolution 512 of 26 January 1952.

<sup>288</sup> “Art. 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.”

<sup>289</sup> “Art. 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.”



usurped sovereignty over Jerusalem, has arbitrarily abused that ability to curb access to the Holy Places, to the detriment of Muslims in particular.

393. The places of prayer must be not only accessible to the public; they must also be protected so that they are not damaged. However, it is not necessary to resort to a special status for that purpose. UNESCO was created to perform that function and to contribute to finding the best ways to protect sites, working with, and regrettably sometimes against, the States concerned. The international rules issued by UNESCO for the protection of world heritage are such as to safeguard conservation of the Holy Places of the different religions and the right of access to them.

394. Since 1968, the General Conference of UNESCO has laid down the principles that Israel is strictly bound to accept, that is to say, it must respect the cultural heritage of the city and refrain from modifying it. In 1976 the Director-General had reason to arrange an inspection of breaches by Israel<sup>290</sup>. Friction persists in respect of the cultural heritage of Jerusalem. Tensions have been particularly high since 2016, and a series of decisions has been issued in the wake of the many Security Council resolutions (252, 476 and 478) and the UNESCO resolutions deprecating Israeli attempts to alter the status of the Holy City of Jerusalem. The decision of 5 June 2017, recalling in its preamble those earlier resolutions of the international community:

“Affirm[s] the importance of the Old City of Jerusalem and its Walls for the three monotheistic religions [and aims] at the safeguarding of the cultural heritage of Palestine and the distinctive character of *East Jerusalem*

.....

[d]eeply regrets the Israeli refusal to implement previous *UNESCO* decisions concerning Jerusalem

.....

[d]eeply deplores the failure of Israel, the *occupying Power*, to cease the persistent excavations and works in East Jerusalem particularly in and around the Old City, and reiterates its request to *Israel*, the occupying Power, to prohibit all such works in conformity with its obligations”<sup>291</sup>. [(emphasis added)]

Indifferent to those decisions, Israel has pursued a policy in Jerusalem oriented entirely to benefiting the Jewish population and culture and with no regard for conservation of the city’s multicultural heritage.

**3. Jerusalem (in common with the whole of the West Bank and Gaza) is Palestinian territory by virtue of the right of peoples to self-determination, which must be exercised in full**

395. Both parts of Jerusalem, West (*a*) and East (*b*), have been illegally occupied by force of arms by Israel. That occupation must not be allowed to impede either the sovereignty of Palestine or the right of that State to make Jerusalem its capital.

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<sup>290</sup> See Raymond Goy, “La question de Jérusalem à l’UNESCO”, *Annuaire français de droit international*, 1976, pp. 420 *et seq.*

<sup>291</sup> Ann. 55, UNESCO, Executive Board, Decision, Occupied Palestine, 201st session, 19 April-5 May 2017, *201 EX/Decisions*, pp. 39-41.

**(a) *The uncertainty surrounding West Jerusalem***

396. Israel's ambition to annex the City of Jerusalem in its entirety has no basis in law, either in respect of the western section annexed in 1950 or in respect of the eastern section annexed in 1980. As regards the western section, it will simply be recalled here that in 1948 Israel forcibly conquered territories to which that State had no title, and that its purported sovereignty over West Jerusalem has no basis in law. Neither the Charter of the United Nations nor the customary or treaty-based law of occupation permit the sovereignty of a State to be recognized where that State is the occupier by military force of a territory to which it has no title.

“Application of Israeli law to the western part of Jerusalem from 1948, the transfer of the main institutions to that sector and the first declarations, made the same year, that Jerusalem (without further qualification) is ‘the eternal capital of Israel’ and ‘an inseparable part’ of the Jewish State therefore seem to be devoid of any legal basis”<sup>292</sup>.

397. As in the case of all the territories that Israel conquered by force of arms in 1948, the legal situation of West Jerusalem therefore remains uncertain in law. No act consistent with international law has thus far caused the Palestinian people to forfeit its right to self-determination over its historical territory. The situation of West Jerusalem will therefore only be settled in favour of Israel by a peace agreement with Palestine.

**(b) *The measures taken by Israel since 1967 in respect of East Jerusalem are illegal under international law and violate the sovereign right of the Palestinian people to choose its capital***

**A general violation of the right of the Palestinian people to self-determination**

398. It is not our intention here to review all the United Nations resolutions and all the reports provided to the General Assembly by the various organs, including the Human Rights Council, on the subject of the violations of international law committed by Israel in East Jerusalem since the city was occupied in 1967<sup>293</sup>. Those violations constitute war crimes and engage the individual criminal responsibility of the persons involved. Violence by settlers, protected by the Israeli security forces, gives rise to responsibility on the part of Israel, which has failed in its duty as the occupying Power to protect Palestinians and their property<sup>294</sup>.

399. Nor are we going to review in detail the reasoning set out above in relation to the Occupied Palestinian Territory<sup>295</sup>. As in respect of the rest of the West Bank and Gaza, the countless very serious violations of human rights and of international humanitarian law committed in Jerusalem are secondary violations that underpin the principal violation of the right of peoples to self-determination<sup>296</sup>. The reports provided to the General Assembly by the various commissions mandated by it emphasize how the policies of rapid settlement have reduced the likelihood of an end to the occupation and violate the right of Palestinians to self-determination. In the case of Jerusalem,

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<sup>292</sup> Thierry Fleury-Graff, “A box of Realism : La décision des États-Unis d’Amérique de reconnaître Jérusalem comme capitale d’Israël et d’y transférer leur ambassade”, *Annuaire français de droit international*, 2019, p. 66 [Translation by the Registry].

<sup>293</sup> Those resolutions and reports are cited in Section IV above and underpin the arguments submitted in relation to the Occupied Palestinian Territory as a whole.

<sup>294</sup> See Ann. 49, paras. 58-62.

<sup>295</sup> *Supra*, paras. 307-343.

<sup>296</sup> See Ann. 40, para. 15.

that principal violation is exacerbated by the fact that as a result of its *de facto* annexation of the city, Israel's violation of the right of peoples to self-determination comes hand in hand with a violation of the prohibition of annexing territories conquered by force.

400. As elsewhere in the Occupied Palestinian Territory, Israel's intention of destroying the very foundations of any possibility of self-determination has taken the form in Jerusalem of attacks against all the component elements of a State. Territory has been occupied using expropriation, demolition and encirclement measures. The population has been forced into exile, unable to access its means of subsistence. The Palestinian institutions have also been attacked.

### **Specific violation of the sovereign right of a State to choose its capital**

401. In this respect, however, the attacks against the Palestinian institutions are exceptionally grave. It is beyond doubt under international law that Jerusalem is not an Israeli territory but is a territory where the right of peoples to self-determination applies to the benefit of Palestine. By virtue of that right, the Palestinian people is free to choose where its capital should be based. It has expressed that freedom since the end of the British Mandate.

402. If international law says anything at all on this question it is to prohibit one State from placing its capital on the territory of another State or on disputed territory<sup>297</sup>.

“A careful reader might have noted that so far, the recognition of a capital city has not been mentioned in the text. The reason is simple. International law does not know such a recognition as an autonomous institution. The choice of the capital city, as well as its potential change, are left to individual States. It could also be argued that the recognition of the capital city is automatically entailed in the recognition of the State, as such a recognition confirms that the State has the right to decide in its internal affairs. However, this right is not unlimited and that is true even[] with respect to the choice of the capital city. States may not choose as their capital a city which is located in the territory of another State or a city whose legal status is disputed. Jerusalem falls into the latter category.”<sup>298</sup>

403. Indeed, choosing a capital is a sovereign decision governed by the domestic law of each State. Israel's complete annexation of Jerusalem and the resolute irreversibility of that annexation are therefore the most striking manifestation of the deeper significance of all Israel's practices and policies in Jerusalem: they condemn any political solution to failure by rendering nugatory the highly symbolic capacity of a sovereign people, namely the capacity to establish its capital in the city of its choice.

404. Israel has therefore placed itself in breach of international law and of the ensuing right of the Palestinian people to an independent State. That right has nevertheless been reaffirmed many times by United Nations bodies, including by the General Assembly resolution of 16 December 2019

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<sup>297</sup> Ann. 56, [*Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Application instituting proceedings,] 28 September 2018.

<sup>298</sup> Veronika Bilkova, “Recognition of Jerusalem as the capital city of Israel – an acknowledgement of the obvious or an unlawful act?”, *Policy Publications*, 22 January 2018, <https://www.iir.cz/en/kontroverzni-otazka-jeruzalema-z-pohledu-mezinarodniho-prava-2>.

which “[r]eaffirms the right of the Palestinian people to self-determination, including the right to their independent State of Palestine”<sup>299</sup>.

**CONCLUSION: HOW THE POLICIES AND PRACTICES OF ISRAEL AFFECT THE LEGAL STATUS  
OF THE OCCUPATION AND THE LEGAL CONSEQUENCES THAT ARISE FOR ALL STATES  
AND THE UNITED NATIONS FROM THIS STATUS**

405. The Organisation of Islamic Cooperation respectfully makes the following submissions to the Court:

- The Court has jurisdiction to give the advisory opinion requested by the General Assembly in its resolution A/RES/77/247 of 30 December 2022 and there is no compelling reason such as to induce it to refuse.
- As demonstrated above, Israel’s policies and practices in the Occupied Palestinian Territory have since the birth of that State given rise to a deliberate violation of the fundamental right of the Palestinian people to self-determination, which entails the right to become a sovereign State embodied in freely chosen institutions; the right to control its territory and have access to its natural resources; the right for the members of that people to live on its territory; the right to return to it for those who have been exiled and the right to establish its capital in that territory in the city of its choice. That is the principal violation that Israel has been perpetrating methodically for a century.
- That principal violation has only been possible through multiple other violations of international law: violation of the prohibition of the use of force; violation of the various aspects of humanitarian law in cases of armed conflict, primarily the prohibition of the occupying Power transferring its own population into the occupied territory; multiple violations of all the human rights guaranteed by international law.
- Those policies and practices by Israel have the effect that its occupation of the Palestinian territory is an illegal occupation that must cease immediately and all of whose consequences must be remedied. That remediation includes:
  - withdrawal of the occupying military forces from the whole of the territory occupied by Israel in 1967;
  - ending the blockade of the Gaza Strip;
  - releasing the Palestinians unjustifiably detained by Israel;
  - guaranteeing freedom of movement between the different parts of the Palestinian territory and to outside that territory;
  - the right of return for all exiled Palestinians who so wish;
  - the payment of reparation as established in the United Nations resolutions for those who do not wish to return to the place from which they were driven;
  - dismantling the settlements in the West Bank and East Jerusalem and fair reparation of all expropriation and demolition of property and all infringements of human rights caused by those illegal settlements;

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<sup>299</sup> United Nations General Assembly resolution 7[3/158] of 1[7] December 201[8].

- recognition by Israel of East Jerusalem as the capital of Palestine.
- It follows from the illegal nature of that occupation and from the large-scale violations of international law it has entailed since 1967 that the United Nations and all its Member States have a duty to use all means within their reach to bring that illegality to an end. That duty includes:
  - in respect of the United Nations, using the means established by the Charter, in particular through the system of penalties in Chapters VI and VII of the Charter, to bring an end to all the actions by Israel that are contrary to international law;
  - in respect of the International Criminal Court, investigating and trying the violations put before it;
  - in respect of the other States, refraining from collaborating with Israel in any way that might be conducive to the above-mentioned illegal acts; using the diplomatic means available to them to bring an end to those illegal acts; ultimately, using the procedures and penalties through which they can bring pressure to bear on the policies and practices of Israel in the Occupied Palestinian Territory in order to bring them to an end.

20 July 2023

on behalf of the Organisation of Islamic Cooperation.

*(Signed)* Hissein Brahim TAHA,  
Secretary-General.

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