



Written Statement submitted by  
the International Association of Jewish Lawyers and Jurists  
under ICJ Practice Direction XII  
in the  
Advisory Proceedings on the  
*“Legal Consequences arising from the Policies and  
Practices of Israel in the Occupied Palestinian Territory,  
including East Jerusalem”*  
as initiated by UNGA A/RES/77/247

**Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem**

**Statement of the International Association of Jewish Lawyers and Jurists**

**Introduction**

1. On 30 December 2022, the General Assembly of the United Nations adopted Resolution 77/247. Its Article 18 included a request to the International Court of Justice to provide an advisory opinion on the following two questions:

"(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?"
2. Just over a year has elapsed since the General Assembly made this request. During this period, the Court fixed time limits for the submission of written statements and scheduled 19 February 2024 as the date for the commencement of public hearings.
3. Since 7 October 2023, following a barbaric, genocidal, armed attack initiated from the Gaza Strip by the Hamas and Palestinian Islamic Jihad terror organisations - in which over 1000 Israelis were massacred, raped, tortured, and mutilated, thousands of others injured and over 250 taken hostage - Israel and Palestinian armed groups in Gaza have been at war. These recent and tragic events provide important context to the current discussion, as they provide a clear factual backdrop to the proceedings, which should inform - in a concrete manner - the Court's deliberations when assessing the reality on the ground.
4. It is for this purpose that the International Association of Jewish Lawyers and Jurists (IJL) is publishing this statement. The IJL, a UN-ECOSOC special consultative accredited NGO, was founded in 1969 to promote human rights and international cooperation based on the rule of law, including by combating all forms of racism, anti-Semitism, Holocaust denial, and the negation of the State of Israel. The IJL membership comprises judges, lawyers, and academic jurists, spanning over 25 countries across the globe, and is widely recognised as a leading international organisation in the fields of human rights and international law. On the basis of its special consultative status at the UN, for over 20 years the IJL has attended sessions of, and delivered statements to, UN and related committees monitoring human rights such as the Human Rights Council and the Office of the High Commissioner for Human Rights. The IJL has brought and

participated in human rights related legal proceedings before international tribunals as well as national courts.<sup>1</sup>

5. This statement is intended to assist the Court when considering the numerous legal and factual issues arising from Resolution 77/247. With respect to such statements from non-governmental organisations, the ICJ Practice Direction XII provides:

"1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.

2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted."

6. The IJL intends that this submission, which is being communicated without prejudice to the Court's determination of whether it would be proper to issue an opinion on the merits, will assist the Court properly to consider whether it is appropriate for it to respond to the questions posed before it, as formulated by the General Assembly. We recall that this is the situation which, in the *Wall* Advisory Opinion, gave rise to Judge Buergenthal stating that he was "compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case."<sup>2</sup>
7. Judge Buergenthal was further "guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is 'whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.'"<sup>3</sup> Judge Buergenthal concluded that giving an opinion without having "before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and

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<sup>1</sup> The IJL thanks and acknowledges Anne Herzberg and the Institute for NGO Research for their assistance with the development of this submission.

<sup>2</sup> *Legal Consequences of the Building of a Wall in Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports (2004) (hereinafter "*Wall* Advisory Opinion"), Declaration of Judge Buergenthal, p.240.

<sup>3</sup> *Wall* Advisory Opinion, Declaration of Judge Buergenthal, p.240, para. 1 citing *Western Sahara*, Advisory Opinion, ICJ Reports 1975 (hereinafter "*Western Sahara* Advisory Opinion), pp. 28-29, para. 46.

upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law.”<sup>4</sup>

### **Judicial propriety and the questions before the Court**

8. The General Assembly’s questions contained in Resolution 77/247 rest on certain assumptions, namely that: (1) Israel's presence in the West Bank, the Gaza Strip and Jerusalem is without any legal justification; (2) Israel's presence in these areas violates Palestinian rights; and (3) this territory is “Palestinian.” These assumptions are inherent in the framing of the General Assembly’s questions which presuppose Israel’s “ongoing violation” of the Palestinian people’s right to self-determination, and settlement and “annexation” of “Palestinian territory.”
9. While the language of Resolution 77/247 portrays these assumptions as true, we submit, as further detailed in this statement, that while they may accurately reflect certain actors’ political aspirations, they do not accurately represent legal facts. Consequently, it will be for the Court to carry out its obligation to unpack, test and verify these assumptions, both for the purpose of determining whether the Court should exercise its jurisdiction and deliver the requested opinion, and also substantively should it choose to do so.<sup>5</sup>
10. With respect to the legal component of the General Assembly’s assumptions, this statement will attempt to clarify certain legal principles applicable in this context, which the Court may consider are not properly represented in the existing formulation of the General Assembly’s questions. With respect to the factual elements underlying the General Assembly’s request, we observe that the preponderance of materials upon which the General Assembly bases Resolution 77/247 originate from various organisations whose methodology and decision-making processes have often been questioned when dealing with the Palestinian-Israeli conflict. It follows that it is crucial for the Court to fulfill its fact-finding mandate by testing independently the credibility and reliability of the information contained in these documents and not simply rely on materials referred to in UNGA Resolution 77/247.
11. A crucial point for the purposes of the current proceedings must be made: the fact that pronouncements made in UN resolutions might, under certain circumstances, be used to ascertain the content of customary law, cannot also apply to the ascertainment of facts. Indeed, determining factual circumstances is not a matter of legal opinion, but a matter of evidence. Repetition of the same pronouncement as a “fact” cannot transform reality in the absence of concrete and verifiable evidence; if it could, it would transform the judicial process into an Orwellian exercise disconnected from the facts on the ground, which would be contrary to the judicial function of the Court.<sup>6</sup>

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<sup>4</sup> *Wall Advisory Opinion*, Declaration of Judge Buergenthal, para. 3, p.241.

<sup>5</sup> See *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ reports 2012, p.10, para. 62.

<sup>6</sup> Just as a cautionary example, we note the recent decision of the UN Secretary General immediately to terminate the employment of an undisclosed number of UN employees in Gaza (employed by UNRWA) on the basis of intelligence reports proving their personal involvement in the massacre of October 7. See *Allegations Against UNRWA Staff*, 8 February 2024 available at <https://www.unrwa.org/newsroom/official-statements/allegations-against-unrwa-staff#>. According to various international media reports, the same intelligence reports which served as the basis for the Secretary General’s decision also indicated that approximately 10% of the overall employees of this UN body are actually members of, or otherwise affiliated with, internationally designated terrorist groups. See ‘UN agency probes staff suspected of role in Oct 7 attacks’, *Reuters*, Gabrielle Tétrault-Farber, 27 January

12. The General Assembly’s formulation of the questions before the Court, if accepted as they are, will prevent the Court from conducting the in-depth factual and legal analysis that is required, and will naturally raise questions as to the propriety of the Court’s accepting the General Assembly’s request, should they not be reconsidered. It follows that the Court should consider whether to reformulate the General Assembly’s questions. As put by Judge Kooijmans in his separate opinion in the *Wall* Advisory Opinion:

“In the present case the request is far from being ‘legally neutral’. In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity. The Court has done so but in my view it should have done so *proprio motu* and not by assuming what the Assembly ‘necessarily’ must have assumed, something it evidently did not.”<sup>7</sup>

13. The Court may also wish to exercise care not to shy away from recognising the interplay of politics and law in this case. The structural partiality of the organs and entities responsible for sponsoring Resolution 77/247 is relevant. As stated by Judge Kooijmans in the *Wall* Advisory Opinion:

“The Court, however, does not function in a void. It is the principal judicial organ of the United Nations and has to carry out its function and responsibility within the wider political context. It cannot be expected to present a legal opinion on the request of a political organ without taking full account of the context in which the request was made.”<sup>8</sup>

14. The Court will wish to remain mindful that its statements do not amount to the determination of a “dispute or legal controversy,” enabling the General Assembly to “exercise its powers and functions for the peaceful settlement of that dispute or controversy” absent the consent of Israel.<sup>9</sup> In *Western Sahara*, although there was a “legal controversy” between Morocco and Spain,<sup>10</sup> the Court observed that the issue between them was “not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization.” The Court therefore concluded that “[t]he settlement of this issue will not affect the rights of Spain today as the

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2024, available at <https://www.reuters.com/world/middle-east/un-palestinian-refugee-agency-investigates-staff-suspected-role-israel-attacks-2024-01-26/>; ‘Intelligence Reveals Details of U.N. Agency Staff’s Links to Oct 7 Attack’, *Wall Street Journal*, Carrie Keller-Lynn and David Luhnow, January 29, 2024, available at <https://www.wsj.com/world/middle-east/at-least-12-u-n-agency-employees-involved-in-oct-7-attacks-intelligence-reports-say-a7de8f36>; ‘10% of UNRWA Staffers Tied to Terrorist Groups: Report’, *Washington Free Beacon*, Charles Hili, 29 January 2024, available at <https://freebeacon.com/latest-news/10-of-unrwa-staffers-tied-to-terrorist-groups-report/>; ‘A U.N Agency Is Accused of Links to Hamas. The Clues Were There All Along’, *Wall Street Journal*, David Luhnow and Carrie Keller-Lynn, February 2, 2024, available at <https://www.wsj.com/world/middle-east/hamas-israel-attack-united-nations-unrwa-0ec8d325>.

<sup>7</sup> *Wall* Advisory Opinion, Separate Opinion of Judge Kooijmans, p.227, para. 26.

<sup>8</sup> *Id.*, p.223, para 12.

<sup>9</sup> See *Western Sahara* Advisory Opinion, pp. 26-27, para. 39. See also *Wall* Advisory Opinion, Separate Opinion of Judge Higgins, p. 210, para 12.

<sup>10</sup> *Western Sahara* Advisory Opinion, p. 25, para. 34.

administering Power.”<sup>11</sup> The Court also found that “the request for an opinion does not call for adjudication upon existing territorial rights or sovereignty over territory.”<sup>12</sup>

15. In *Chagos*, Judge Donoghue found, on this basis, compelling reasons for the Court to exercise its discretion not to render an Advisory Opinion, as it had “the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago and thus undermines the integrity of the Court’s judicial function.”<sup>13</sup> Although there was “no reference to ‘sovereignty’ in the request,” Mauritius’ own statements, as well as the observations of other States, made it “clear that the dispute over sovereignty” was at the “heart of the request.”<sup>14</sup> Judge Donoghue concluded that “the Court’s pronouncements can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius.” It followed that the Court had “decided the very issues that Mauritius has sought to adjudicate, as to which the United Kingdom has refused to give its consent.”<sup>15</sup>
16. Judge Tomka similarly opined that the “Court must not forget that what looms in the background is a bilateral dispute over which the Court lacks jurisdiction.”<sup>16</sup> Judge Tomka accordingly expressed concern that the Court, despite stating that it is not “dealing with a bilateral dispute” between Mauritius and the United Kingdom,” made “an unnecessary pronouncement on ‘an unlawful act of a continuing character’” on the part of the United Kingdom.<sup>17</sup> Judge Tomka warned that advisory proceedings “are not an appropriate forum for making these kinds of determinations, especially when the Court is not asked to make them and they are not strictly necessary for providing advice to the requesting organ.”<sup>18</sup>
17. In this case, too, although there is no express reference to “sovereignty” in the General Assembly’s request, by virtue of multiple express references to “Palestinian territory” in Resolution 77/247, and in particular its request for an opinion on the legal consequences arising from Israel’s “annexation of the Palestinian territory occupied since 1967,” the General Assembly has made it clear in this case that a dispute over sovereignty lies at the heart of its request.

### ***The scope of this submission***

18. This submission therefore addresses three topics: firstly, the nature and legal status of the parties’ respective sovereign legal entitlement to the West Bank and Jerusalem; secondly, the international and bilateral framework for resolution of the conflict; thirdly, the content and status of international law relating to the law of occupation in relation to the conflict. The Court may agree that answers to questions arising from these topics will, in turn, impact on its answers to the question of the propriety of answering the General Assembly’s questions, as well as the merits of the questions

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<sup>11</sup> *Western Sahara Advisory Opinion*, p. 27, para. 42.

<sup>12</sup> *Western Sahara Advisory Opinion*, pp. 27-28, para. 43.

<sup>13</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Report 2019 (hereinafter “*Chagos Advisory Opinion*”), Dissenting Opinion of Judge Donoghue, p. 261, para. 1.

<sup>14</sup> *Id.*, p. 263-264, paras. 11-14.

<sup>15</sup> *Id.*, p. 265, para 19.

<sup>16</sup> *Chagos Advisory Opinion*, Declaration of Judge Tomka, p. 150, para. 6.

<sup>17</sup> *Id.*, para. 8.

<sup>18</sup> *Id.*

themselves, should the Court exercise its jurisdiction to deliver an Advisory Opinion in this case.

## **The nature and legal status of the parties' respective rights to the West Bank and Jerusalem**

19. General Assembly Resolution 77/247 refers to the West Bank, the eastern part of Jerusalem, and the Gaza Strip as “Palestinian territory.” The resolution appears to assume that sovereign rights to this area rest exclusively with the Palestinian people. It disregards any potential claims the State of Israel and the Jewish people may have with respect to some of these areas. We enclose as Annex “A” a comprehensive, separate, submission from the IJL addressing these matters in detail.<sup>19</sup>
20. In summary of the detailed explanations in Annex “A”, it is incorrect to assume that Israel and the Jewish people have no valid legal claims, under international law, in the West Bank and Jerusalem. Without prejudice to, but without accepting the validity of any Palestinian claims,<sup>20</sup> this is plainly a situation of competing claims to sovereign legal entitlement.
21. In law and in fact, for over a century, sovereign legal title over the West Bank (and indeed the Gaza Strip) has been, and continues to be, indeterminate, or in abeyance. This has been the legal position under international law since the end of the First World War, when Turkey (as the successor to the Ottoman Empire) ceded sovereignty of the areas outside of its current borders.<sup>21</sup> No agreement, instrument, judgment, opinion, or event with legal effect has changed this status since, as reflected – and explicitly stated – in agreements between the interested parties, and particularly agreements between the Israeli and Palestinian authorities. Under these agreements, the question of the final disposition of these areas shall be determined only by negotiation. Until then, both sides have agreed to provisional arrangements, which continue to apply and govern the legal relationship between them today.
22. In Annex “A” we also provide a comparison of the different terminology used by UN bodies (in political statements) to describe these territories. This comparison shows that the terms used in this context have evolved over the years, not as a result of any change in legal status, but rather as a result of structural, diplomatic, and political dynamics within the UN organisation. Consequently, the reference by the General Assembly to these territories as “Palestinian territory,” while reflecting the political aspirations of certain parties, should not be confused with statements of law and fact.

## **The international and bilateral framework for resolution of the conflict**

23. The primary mechanism for international dispute resolution is negotiation and agreement.<sup>22</sup> UN Security Council Resolutions 242 (1967) and 338 (1973) establish a

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<sup>19</sup> Annex “A” entitled ‘Israel’s Legal Claims to the West Bank’.

<sup>20</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995 (hereinafter “Interim Agreement”).

<sup>21</sup> See Annex “A” to this submission.

<sup>22</sup> See, e.g., statements made during the debate at the General Assembly on Resolution 77/247, at which (for example) the representative of the United States stated that “a negotiated two-State solution remains the best way to ensure Israel’s security and fulfil the Palestinian desire for a State of their own.” Fourth Committee Hears Support for Referring Question of Palestine to International Court of Justice for Advisory Opinion, GA/SPD/770, 10 November 2022.

framework for peace which has been mutually endorsed and agreed by both parties, and they remain the international framework for resolution of the Israeli-Palestinian conflict. Resolutions 242 and 338 leave open the possibility – indeed probability – of Israeli sovereignty in parts of the West Bank in a final peace agreement. Resolution 242 provides that peace “should” (not “must”) include withdrawal of Israeli forces “from territories occupied in the recent conflict”, not from “all the territories occupied” in that conflict.<sup>23</sup> The Security Council’s deliberations suggest that this wording was no accident and many of the drafters intended that withdrawal “is required from some but not all of the territories.”<sup>24</sup> Resolution 338 “calls upon” the parties to implement Resolution 242.

24. Resolution 242’s “land-for-peace” scheme remains the cornerstone of all proposed peace plans. It served as a basis for the regional peace initiative in Camp David in 1978; the Israel-Egypt Treaty of Peace of 1979; and the Israel-Jordan Treaty of Peace of 1994. Furthermore, all Israeli-Palestinian agreements, including the Interim Agreement (discussed further at paragraph 26 below), invoke both Resolution 242 and Resolution 338.<sup>25</sup> These Resolutions have also been invoked in numerous decisions of international organisations (including the UN) relating to the ultimate resolution of the regional conflict. The Security Council and General Assembly have reiterated on numerous occasions their support for the existing bilateral agreements as the applicable legal framework for settling the Israeli-Palestinian conflict and determining the sovereign status of the territory in dispute.<sup>26</sup> This is evidence which underscores the position both that the relevant framework for a territorial settlement begins with Resolution 242, and that any Palestinian right or title to exercise authority over disputed territory (and its inhabitants) is not necessarily exclusive.
25. Building on this existing international legal framework, the Oslo Accords are bilateral international agreements which were entered into between the Israeli and Palestinian authorities, pending a final settlement between the parties.<sup>27</sup> Issues to be addressed in permanent status negotiations include “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours and other issues of common interest.”<sup>28</sup> Specifically with respect to recognition of the Palestinian people’s right to self-determination, in the Oslo Accords Israel for the first time recognised the Palestinian Liberation Organization (PLO) as the representative of the

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<sup>23</sup> Notably, Resolution 242 (1967) also interrelates Israeli withdrawal with its right to “secure and recognized boundaries free from threats or acts of force.” See also A. J. Goldberg, ‘United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East’, 12 (2) Col. J. Transnat’l L. (1973) 187 (hereinafter “Goldberg”), p.190.

<sup>24</sup> See Goldberg, pp.190-192 (Amb. Arthur Goldberg, US ambassador to the UN in 1967, suggesting that there is no single, objectively correct interpretation of Resolution 242, that its ambiguities were intended, and that the vagueness and flexibility enabled the parties to accept the resolution). See also Security Council, S/PV.1382 (OR), 22 November 1967, para. 93 (where Mr Eban (Israel) said: “For us, the resolution says what it says. It does not say that which it has specifically and consciously avoided saying”).

<sup>25</sup> See Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), 13 September 1993, Article I (hereinafter “Declaration of Principles”); Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement), 4 May 1994, Preamble; and Interim Agreement, Preamble. These resolutions were also similarly endorsed by the Arab League in its March 2002 Arab Peace Initiative.

<sup>26</sup> See, for example, G.A. Res. 73/19, U.N. Doc. A/RES/73/19, preambular para. 25 and operative paras. 16 and 19 (23 Jan. 2019); G.A. Res. 73/256, U.N. Doc. A/RES/73/256, preambular para. 2 (5 Dec. 2018); S.C. Res. 2334, U.N. Doc. S/RES/2334, para 8 (23 Dec. 2016); G.A. Res. 67/19, U.N. Doc. A/RES/67/19, at para. 5.

<sup>27</sup> Israel and the PLO specifically reserved their rights, claims and positions regarding, *inter alia*, borders pending the outcome of the permanent status negotiations. Interim Agreement, Art. XXXI.6. See also J. Stone, *Of Law and Nations* (London 1974), p. 79 and pp. 90-95.

<sup>28</sup> Declaration of Principles, Art V(3).



Palestinian people,<sup>29</sup> and the Accords reflect the agreed bilateral framework through which Palestinian self-determination is and can be realised.

26. The Oslo Accords in general, and in particular the “Interim Agreement”, are agreements between subjects of international law (namely Israel and the PLO) and bind any successor to the PLO.<sup>30</sup> The Security Council,<sup>31</sup> the General Assembly,<sup>32</sup> the Quartet, the Secretary-General’s special envoy, and the subsequent agreements between the parties have all referred to the Oslo Accords and their consistency with applicable UN resolutions.<sup>33</sup>
27. In the absence of termination clauses, general international law presumes that an international agreement remains in force unless either: (1) the parties intended to permit denunciation or withdrawal; or (2) a right of denunciation or withdrawal may be “implied by the nature of the treaty.” Even had the Interim Agreement been lawfully terminated (which it has not), Article 70 of the Vienna Convention on the Law of Treaties shows that termination does not affect any right, obligation or “legal situation” of the parties created through the execution of the treaty prior to termination.<sup>34</sup> Examples of such “legal situations” are the delimitations of borders, territorial arrangements, and recognitions.<sup>35</sup> Although the VCLT does not cover agreements between a State and a non-State subject on a conventional basis, it can definitely inform us as to the legal standing of such agreements and supports the conclusion that the Oslo Accords are still in legal force and effect.<sup>36</sup>
28. The continued legal relevance of the Oslo Accords as the applicable legal framework is also illustrated by the parties’ continued reaffirmation of their principles. These were reaffirmed by the Parties in the 1998 Wye River Memorandum,<sup>37</sup> the 1999 Sharm El

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<sup>29</sup> Interim Agreement. See also Letter from Rabin to Arafat, 9 September 1993.

<sup>30</sup> See G. R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford 2000), Chapter 5; E. Benvenisti, Forum: Towards Peace in the Middle East? The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement, 4 EJIL (1993) 542, 545 (hereinafter “Benvenisti – Forum”); Vienna Convention on the Law of Treaties, Article 3; Article 10 of Responsibility of States for Internationally Wrongful Acts, 2001. See also International Law Commission, First report on succession of States in respect of State responsibility, A/CN.4/708, Sixty ninth session, 31 May 2017, para. 92. But see *Croatia v Serbia* (2015), para. 105 (declining to consider whether Article 10(2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter). See also *Situation in the State of Palestine*, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, ICC-01/18-143 05-02-2021 1/60 EC PT, 5 February 2021, Judge Péter Kovács’ Partly Dissenting Opinion (hereinafter “Kovács”), paras. 286-288.

<sup>31</sup> See Security Council, Resolution 1850, pp. 1-2; Security Council Resolution 2334, p. 2.

<sup>32</sup> G.A. Res 67/19.

<sup>33</sup> See Kovács, paras. 289-291.

<sup>34</sup> Vienna Convention on the Law of Treaties (hereinafter “VCLT”), Article 70(1)(b) and Article 71(2)(b).

<sup>35</sup> G. Fitzmaurice, Special Rapporteur, Law of Treaties – Second Report, Document A/CN.4/107, ILC Yearbook, Vol II (1957) 16, 67. Similarly, Article 54(b) of the VCLT shows that States cannot simply release themselves at will from binding treaty obligations.

<sup>36</sup> VCLT, Article 56(1)(b). See Y. le Bouthillier and J.F. Bonin, ‘Art.3 1969 Vienna Convention’ in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), p. 74, para. 25 (With respect to *inter alia* national liberation movements, territorial entities dependent on States, and entities created to administer territories, ‘[t]here is a strong consensus that the entities listed supra have the capacity to conclude treaties.’), para. 30 (‘While international agreements involving the entities discussed supra do not fall within the scope of the Convention, it is worth repeating that the purpose of Article 3 was to ensure that their legal validity was not questioned by the Convention. In fact, many of the rules of the Convention that have since then acquired customary status can be transposed to these agreements. As a result, the Convention has indirectly contributed to the clarification of rules applicable to agreements excluded from its scope’).

<sup>37</sup> Israel-Palestinian Liberation Organization, Wye River Memorandum, 1998, 37 ILM 1251 (1998).

Sheikh Memorandum,<sup>38</sup> as well as *inter alia* in the 2003 Road Map,<sup>39</sup> which was reaffirmed in Security Council Resolution 2334, as well as recently in 2023's joint communiqué agreed in Aqaba.<sup>40</sup> As put by Shaw, the arrangements established through Oslo are "still in force and define the legal situation as between the parties until such time as a final agreed settlement has been concluded."<sup>41</sup>

29. In Israel, numerous judicial decisions support the view that Israeli courts recognise the continuing legal effect of the Oslo Accords.<sup>42</sup> In areas controlled by the Palestinian Authority,<sup>43</sup> Courts have also confirmed their legal effect, as have several scholars who have addressed the question.<sup>44</sup> Furthermore, in practice, both the Israeli and the Palestinian authorities continue to comply with key principles set out in the Oslo Accords (the division of the West Bank into three zones, each with unique powers and jurisdictions for each side; the division of water resources; and many others).
30. The Interim Agreement states that the Oslo process was "irreversible."<sup>45</sup> It follows that, notwithstanding that the Interim Agreement states that the lifetime of the Palestinian Council shall "not exceed... five years from the signing of the Gaza-Jericho Agreement on May 4, 1994",<sup>46</sup> which was to end at the latest on 13 April 1999,<sup>47</sup> as a matter of international law, international acceptance and the parties' own actions, its provisions continue to govern relations between Israeli and Palestinian authorities.

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<sup>38</sup> Sharm-el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, 1999, 38 ILM 1465 (1999).

<sup>39</sup> Letter Dated 7 May 2003 from the Secretary-General addressed to the Security Council, Annex: A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, U.N. Doc. S/2003/529, 30 April 2003.

<sup>40</sup> Aqaba Joint Communiqué, 26 February 2023, available at <https://www.state.gov/aqaba-joint-communicue/>.

<sup>41</sup> M.N. Shaw, The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law, JICJ 9 (2011), 301-324, 308. See also, e.g., M. Rabbani, 'Twenty Years of Oslo and the Future of the Two-State Paradigm', in 20 Years Since Oslo: Palestinian Perspectives, Heinrich Böll Stiftung (2013), p.29.

<sup>42</sup> *Jamil Hossein Hamdan Abu Sarhan v Commander of the IDF in the West Bank*, 31 August 2023, HCJ 5585/21; *The Association of the Conference of Islamic Sciences and Education v. Jerusalem Assessing Officer*, 27 October 2021, HCJ 2079/20; *Silwad Municipality v. Knesset*, 9 June 2020, HCJ 1308/17; *Hevron Municipality v. State of Israel*, 30 June 2019, HCJ 358/18; *Yesh Din v. IDF Commander in the West Bank*, 26 December 2011, Israeli High Court of Justice (HCJ) 2164/09; *Hof Aza Regional Council v. The Knesset*, 9 June, 2005, HCJ 1661/05; *International Legality of the Security Fence and Sections near Alfei Menashe*, 15 September 2005, HCJ 7957/04; *Zinbakh v. IDF Commander in Gaza*, Judgment, 28 May 2002, HCJ 4363/02; *Gusin v. IDF Commander in Gaza*, HCJ 4219/02, 56(4) P.D. 608 (2002); *Dr. Ahmed Tibi v. The Government of Israel and Others*, Judgment, 18 October 1995, HCJ 6230/95 (unpublished) (analysed in R. M. Giladi, 'The Practice and Case Law of Israel in Matters Related to International Law' in 29 Israel Law Review 506 (1995), p. 535, n. 148). See D. Kretzmer, 'The law of belligerent occupation in the Supreme Court of Israel', 94 International Review of the Red Cross 207 (2012), n. 83. See Kovačs, para. 292.

<sup>43</sup> 'In the Name of the Palestinian People: Court Abrogates Oslo Accords', The Legal Agenda (24 February 2015), available at <https://www.legal-agenda.com/en/article.php?id=3062>

<sup>44</sup> P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law' in 7 European Journal of International Law 485 (1996); J. Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' in 30 Cornell International Law Journal 717 (1997); E. Mendes, 'Statehood and Palestine for the purposes of Article 12(3) of the ICC Statute: a contrary perspective' (30 March 2010), p. 23; C. Bell, 'Peace Agreements: Their Nature and Legal Status' in 100 American Journal of International Law 373 (2006); K. N. Calvo-Goller, 'L'Accord du 13 septembre 1993 entre Israël et l'O.L.P.: le régime d'autonomie prévu par la Déclaration Israël/O.L.P.' in 39 Annuaire Français de Droit International 435 (1993); M. Benchikh, 'L'accord intérimaire israélo-palestinien sur la Cisjordanie et la bande de Gaza du 28 septembre 1995' in 41 Annuaire Français de Droit International 7 (1995).

<sup>45</sup> Interim Agreement, Preamble, para. 4.

<sup>46</sup> Interim Agreement, Article III(4).

<sup>47</sup> See Benvenisti – Forum, p.547.

## **Conclusion**

31. In summary, the Oslo Accords are binding bilateral agreements which were entered into by Israel and the official representatives of the Palestinian people, to serve as an irreversible mechanism for reaching a compromise solution acceptable to both parties, within the framework of the internationally recognised formula for resolving the regional dispute. This is reflected by the widespread and continuing acceptance of the validity of the agreements by organs of the international community, and in particular statements that they reflect both the parties' and the international community's enduring commitment to mutual recognition, freedom from violence, incitement, and terror, and the two State solution.<sup>48</sup>
32. The foregoing analysis with respect to the international and bilateral framework for the resolution of the conflict has a major implication on the scope of what is requested from the Court. Indeed, to the extent that the General Assembly's request for an advisory opinion would be an attempt to involve the Court in a proceeding, one of the purposes of which is to by-pass the international "land for peace" formula set out in UN Security Council Resolutions 242 and 338, and to invalidate the bilateral Oslo Accords (for which the relevant leaders all received the Nobel Peace Prize) and their legal consequences, the Court should decline from entering any findings that would have as an effect to unwind a legal framework for peace which has, repeatedly, been endorsed by the Security Council and the parties themselves.
33. The foregoing discussion is also of consequence with respect to the contention that Israel's continuing exercise of certain powers and responsibilities in the West Bank might be characterised as "illegal." The international and bilateral framework for the resolution of the conflict, on the contrary, establishes a legal basis for such exercise. This legal basis further provides a point of distinction between Israel's continuing presence in the territory, and the illegality underpinning South Africa's continuing presence in Namibia following the termination of its mandate to administer South-West Africa.
34. The South African-Namibian case is therefore distinguishable from the Israeli-Palestinian case as, in the latter, there is a mutually agreed – and consensual – international framework for resolution of the conflict. This further distinguishes the Israeli-Palestinian case from that of Iraq in Kuwait, as well as Portugal in Guinea Bissau (as to which see further below). Unlike in those cases, the subsisting legal and political framework for resolution of the conflict has been adopted by the Security Council, agreed by the parties, and remains in force. It provides for the continuation of Israel's exercise of certain powers and responsibilities over areas in the West Bank, pending the conflict's negotiated resolution.

## **The content and status of the international law of occupation**

35. Israel's military action in the Six-Day War of 1967, through which it acquired control of the West Bank and Gaza Strip, was justified by Article 51 of the UN Charter as a legitimate exercise of its right to self-defence against inter-State aggression;<sup>49</sup> its

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<sup>48</sup> Security Council Resolution 1850, pp.1-2.

<sup>49</sup> A. Shapira, *The Six-Day War and the Right of Self-Defence*, *Israel Law Review*, Volume 6, Issue 1, January 1971, pp. 65 – 80; Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press Fifth) (2011), p. 206-207 (hereinafter "Dinstein – Self-Defence").

subsequent control of these territories did not arise from aggressive war. In addition to the international and bilateral legal framework for resolution of the conflict (discussed above), this further distinguishes the Israeli-Palestinian case from that of the South African presence in Namibia, or Iraq's occupation of Kuwait, where there was no equivalent legal basis for the South African or Iraqi presence respectively.

36. The existence of an occupation is a matter of fact. Once occupation has been established an occupant is permitted, subject to the laws of war, to apply lawful force to maintain and restore public security and safety, and to prevent security and other threats within and from the territory in question.<sup>50</sup> An occupation does not become illegal with the passing of time and there is no basis in public international law to conclude that an occupation preventing the exercise of the right of self-determination becomes illegal.
37. Even assuming, *arguendo*, it is accepted that an occupying power is required to justify, on a continuing basis, its presence in occupied territory pending resolution of a conflict, then, given the reality of the factual and political situation on the ground in Israel, the West Bank and Gaza, it would be incumbent on the Court to take into account the application of Israel's right to use force in its protection as a relevant aspect of the applicable legal framework. Indeed, there is currently little doubt, especially in light of events on 7 October 2023, that Israel (a) continues to face serious security challenges and threats of armed attacks from both the West Bank and Gaza which it is entitled to address in the exercise of its rights under the law of occupation and, as a sovereign State, to protect its territory and its citizens, and (b) that an Israeli military presence in these territories is necessary to prevent such threats.

### ***Occupation is a matter of fact***

38. Article 42 of the Hague Regulations, which reflects customary international law,<sup>51</sup> states that "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."<sup>52</sup> The test for the existence of an occupation is therefore a factual one.<sup>53</sup> It follows that, "under the law of belligerent occupation, the fact of occupation is the basis for the Occupying Power to exercise authority over the occupied territory"<sup>54</sup> and, as this principle's corollary, "once an occupation exists in fact, the law of occupation applies, regardless of whether the invasion was lawful under *jus ad bellum*."<sup>55</sup> The distinction between the operation of the *in bello* law of occupation and the legality of the use of force which gives rise to it "is an example of how *jus in bello* rules and *jus ad bellum* rules generally operate independently of one another."<sup>56</sup>

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<sup>50</sup> Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 43, The Hague, Oct. 18, 1907, 36 Stat. 2295, 205 Consol. T.S. 277 (hereinafter "Hague Convention (IV)").

<sup>51</sup> *Wall Advisory Opinion*, paras 78, 89. See also Brussels Declaration (1874), Art 1; Lieber Code (1863), Art. 3(1).

<sup>52</sup> Hague Convention (IV), Art. 42. See also *Armed Activities Judgment*, I.C.J. Reports 2005 (Dec. 19, 2005), pp. 229-30, 172 (hereinafter "*Armed Activities*").

<sup>53</sup> Roberts, p. 256 ("Most sources follow the Hague Regulations, Article 42, in stating that occupation may be said to begin when the invader actually exercises authority, thus stressing that it is factual criteria that are important. See also United States Department of Defense, Law of War Manual, June 2015 (Updated July 2023) (hereinafter "US DoD Manual"), para 11.2.1.

<sup>54</sup> US DoD Manual, paras. 1.3.3.2, 11.2.1.

<sup>55</sup> *Id.*, paras. 3.5.2.1, 11.2.1.

<sup>56</sup> *Id.*, para. 11.2.1.

39. As a primary matter, then, a situation of belligerent occupation cannot be illegal *per se*, nor is its duration proscribed under the law of armed conflict. Since the *jus in bello* applies equally to all parties to the conflict, regardless of the legality of a conflict under the *jus ad bellum*, the material questions, once an occupation exists (as a factual matter), are simply whether the occupant has complied with the law of occupation under the *jus in bello*.<sup>57</sup> It is a “myth” that the legal regime of belligerent occupation “is, or becomes in time, inherently illegal under international law.”<sup>58</sup>
40. In the matter at hand, Israel assumed control over the territories in June 1967 in response to a clear and present threat, initiated by a group of Arab states, to destroy the Jewish State. The legitimacy of Israel’s control of these territories at that time was generally uncontested, as it was understood that it had done so within the framework of the legitimate exercise of its right of self defence. While the international community did eventually develop a framework for the resolution of the results of this war (UN Security Council Resolutions 242 and 338, discussed above), it was not contended at that time that Israel’s occupation of these territories, pending such resolution, was illegal.
41. Today, more than 50 years later, there are new voices claiming that the Israeli occupation has become illegal, or even that it was illegal *ab initio*. To this we respond: first - as explained above, under international law, the existence of an occupation is a matter of fact. A fact is not legal or illegal.
42. Second, there is an insufficient legal basis to support the claim that an occupation can become “illegal” due to external circumstances, such as it having being achieved through the illegal use of force (which is, in any event, not the case in the current situation), due to an occupation preventing exercise of the right of self-determination, or due to the passage of time.

***There is insufficient basis to conclude that an occupation resulting from an unlawful use of force is illegal under public international law***

43. Security Council practice does “not provide any support for the view that the notion of ‘illegal occupation’ may extend to occupation resulting from a lawful use of force.”<sup>59</sup> Given the circumstances of Israel’s occupation of the territories in question in 1967, this should suffice.
44. However, even with respect to occupation resulting from an unlawful use of force, there is insufficient basis in public international law to conclude that it is illegal *per se*. The Declaration on Principles of International Law Concerning Friendly Relations and

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<sup>57</sup> For framing of the issue in this way, see E. Lieblich, E. Benvenisti, *Occupation in International Law* (Oxford, 2022) (hereinafter “Lieblich and Benvenisti”), p.32 citing Y. Dinstein, *The International Law of Belligerent Occupation*, Second Edition (Cambridge 2019) (hereinafter “Dinstein - Occupation”).

<sup>58</sup> Dinstein - Occupation, para. 6.

<sup>59</sup> A. Zemach, ‘Can Occupation Resulting from a War of Self-Defense Become Illegal?’ (2015), *Minnesota Journal of International Law*, 316 (hereinafter “Zemach”), at 327 *citing* in relation to the Israeli-Palestinian conflict, SC Resolution 242 (1967), Security Council Resolution 252, Security Council Resolution 478, Security Council Resolution 497 (1981). Although several General Assembly resolutions specifically addressing the Israeli occupation of Arab territories refer to the occupation as “illegal,” review of the voting records shows that none of the Western democracies supported the resolutions asserting the illegality of the Israeli occupation. See Zemach, p.327-332.

Cooperation among States (“Declaration on Friendly Relations”),<sup>60</sup> adopted by consensus by the General Assembly, states that “the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.”<sup>61</sup> The question arises whether an occupation resulting from an unlawful use of force is “illegal” or, alternatively, whether the Declaration of Friendly Relations simply reflects subsisting customary and UN Charter prohibitions on the unlawful use of force. To answer this question, the substance of the rules regulating the situation must be looked for primarily in the actual practice and *opinio juris* of States.<sup>62</sup>

45. Suggesting that the existence of a military occupation is simply a question of fact, even in the context of an unlawful use of force, the International Military Tribunal at Nuremberg affirmed the applicability of the 1907 Hague Convention in occupied territory, and it referred explicitly to the occupant's rights to collect taxes and make requisitions in kind.<sup>63</sup> Similarly, in the *Hostages* case, an American Military Tribunal sitting at Nuremberg stated:

“International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.”<sup>64</sup>

46. More recently, Security Council Resolution 1483 (2003), relating to the occupation of Iraq by the armed forces of the United Kingdom and United States, referred to Iraq’s takeover by “occupying powers” and was accompanied by a call to “all concerned” to comply fully with their international legal obligations under the Hague Regulations and Geneva Conventions.<sup>65</sup> As Benvenisti and Keinan note, in and of itself, this text refutes “the claim that occupation, as such, is illegal.”<sup>66</sup>

47. The UN Security Council noted the illegality of the occupation of Kuwait by Iraq in August 1990,<sup>67</sup> widely perceived as the result of an illegal use of force on the part of

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<sup>60</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) ¶ 10, U.N. GAOR, 25<sup>th</sup> Sess. Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970).

<sup>61</sup> *Id.* The ICJ held that this General Assembly resolution is indicative of customary international law. See *Military and Paramilitary Activities* (Nicar. V. U.S.), 1986 I.C.J. 14, pp. 188, 191, 98-101 (June 27); *Wall* Advisory Opinion, at 171, para. 87.

<sup>62</sup> *Libya/Malta* ICJ Reports 1985, pp.13, 29; ILR, p.239. See also the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp.226, 253; 110 ILR, p.163; and Draft Conclusion 2 provisionally adopted by the ILC Drafting Committee on the Identification of Customary International Law, A/CN.4/L.869 (2015). See also M. N. Shaw, *International Law* (8<sup>th</sup> ed.) (2017, Cambridge), p.55.

<sup>63</sup> Roberts, p.294 citing *The Trial of German Major War Criminals* (London, 1946-5 I), vol. 22, pp. 457, 467.

<sup>64</sup> *Hostages trial (List et al.)*, US Military Tribunal, Nuremberg, 1948, 8 LRTWC 34, 59.

<sup>65</sup> Security Council Resolution 1483, preamble and para. 5. E. Benvenisti and G. Keinan, *The Occupation of Iraq – a Reassessment*, *International Law Studies Vol.86 in R. A. “Pete” Pedrozo* (ed.), *The War in Iraq: A Legal Analysis* (hereinafter “Benvenisti and Keinan”), p.277.

<sup>66</sup> Benvenisti and Keinan, p.277.

<sup>67</sup> S.C. Res. 674, para. 8, U.N. Doc. S/RES/674 (Oct. 29, 1990) (The Security Council warned Iraq that “it is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.”).

Iraq.<sup>68</sup> In Resolution 674, it expressly linked the “illegal occupation” to the Iraqi “invasion.”<sup>69</sup> Even though Resolution 674 has value as an executive pronouncement of the Security Council, however, it remains a statement unsupported by legal reasoning.

48. In *Demopoulos v Turkey*, the Grand Chamber of the European Court of Human Rights stated, with respect to the Turkish occupation of northern Cyprus commencing in 1974, that “the mere fact that there is an *illegal occupation* does not deprive all administrative or putative legal or judicial acts therein of any relevance under the [European] Convention [on Human Rights]” (emphasis added).<sup>70</sup> Dinstein has posited that it “would have been more accurate” for this passage to “have adverted to an illegal use of force generating occupation rather than to an illegal occupation,” as the “crux of the matter is that, whether the use of force on which it is predicated is lawful or unlawful under the *jus ad bellum*, belligerent occupation is the font of the same body of law under the *jus in bello*.”<sup>71</sup> It is indeed regrettable that the Strasbourg Court did not provide more clarity with respect to the criteria that it employed to make its determination.<sup>72</sup>
49. An amendment to the Rome Statute of the ICC, adopted by consensus by the States Parties to the ICC in 2010, provides that one of the acts that qualify as an “act of aggression” is “the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack.”<sup>73</sup> This provision, to the extent that it may be said to reflect customary international law, does not support the view that there would exist *per se* a category, under international humanitarian law, of “illegal occupation,” but simply that an occupation resulting from an “act of aggression” could also be considered as part of a further act of aggression. In other words, the term “occupation” in this context is used to define the scope of the international crime arising from the *jus ad bellum* prohibition and does not proscribe such a situation as constituting an “illegal occupation” *per se*.
50. In *Armed Activities*, the Court concluded that the occupation of the Congolese province of Ituri resulted from an unlawful use of force by Uganda.<sup>74</sup> The Judgment’s *dispositif* provides that “the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri[...] violated the principle of non-use of force in international relations and the principle of non-intervention[.]”<sup>75</sup> Ronen notes that the “Court listed the ‘occupation of Ituri’ as an international wrongful act, without expressly stating the ground for its illegality: thus it remains unclear whether the Court regarded the illegality of the occupation as a consequence of the violation of *jus ad bellum* or whether it considered any occupation

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<sup>68</sup> S.C. Res. 661, preamble, U.N. Doc. S/RES/661 (Aug. 6, 1990).

<sup>69</sup> Y. Ronen, *Illegal Occupation and its Consequences*, *Israel Law Review*, Vol. 41 (2008), pp.201-245 (hereinafter “Ronen”), p.224.

<sup>70</sup> *Demopoulos and Others v. Turkey* (dec.), Grand Chamber of the European Court of Human Rights, App. Nos. 46113/99, 3843/02, 13751/02 et al, 1 March 2010 (hereinafter “*Demopoulos v. Turkey*”), para 94.

<sup>71</sup> Dinstein - Occupation, p.4 (para. 9).

<sup>72</sup> After noting that its “conclusion does not in any way put in doubt the view adopted by the international community regarding the establishment of the ‘TRNC’ or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus,” the Strasbourg Court expressly maintained “its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law.” *Demopoulos v Turkey*, para. 96.

<sup>73</sup> Rome Statute, Art 8bis(2)(a); *Resolution RC/Res.6* of the Review Conference of the Rome Statute, Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, (June 11, 2010).

<sup>74</sup> *Armed Activities*, paras. 165, 171. Also see Ronen, at p.224 (“... the occupation of Ituri is a simple case of aggressive use of force”).

<sup>75</sup> *Armed Activities*, at para. 345

to be *ipso facto* illegal. The *dispositif* is ambiguous and sheds little light on the matter.”<sup>76</sup>

51. A more likely interpretation, Ronen suggests, is that the phrase “by occupying Ituri” is implicitly qualified by a phrase such as “without justification” or “aggressively” and the occupation by Uganda was characterised as violating the principle of the non-use of force because it arose through a violation of the *jus ad bellum*.<sup>77</sup> Ronen notes that this position is supported by the separate opinion of Judge Kooijmans, which stated that “the occupation of Ituri should not have been characterized in a direct sense as a violation of the principle of the non-use of force.”<sup>78</sup> Ronen notes that it is “not clear whether Judge Kooijmans regarded the majority’s error as one of drafting or of law; from the fact that he did not dissent on this point but only appended a separate opinion, the former may be inferred. This strengthens the interpretation of the majority opinion proposed above, namely tying the illegality of the occupation to the illegal use of force.”<sup>79</sup>
52. That being so, the claimed illegality arising from Uganda’s occupation of Ituri stemmed from Uganda’s violation of the principle of the non-use of force, and the violation of Uganda’s general obligation under customary international law to cease internationally wrongful conduct, and to eliminate its consequences.<sup>80</sup> As such, the Judgment in *Armed Activities* does not establish or reflect the existence of a separate legal criterion of “illegal occupation”, even arising from the unlawful use of force.
53. With respect to South Africa’s continuing occupation of Namibia following the termination of its mandate to administer the territory, the Court stated that “by maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities...”<sup>81</sup> It has been suggested that this statement implies that the Court found South Africa’s occupation of Namibia to be illegal; however, this is not stated in terms, and it is notable that the Court did not use the term “illegal occupation” to describe the situation.<sup>82</sup> Ronen notes that from that moment, “the Security Council and the General Assembly... began to refer to Namibia as ‘illegally occupied’” and to a situation of “illegal occupation”, whereas it had until then referred to Namibia as territory in which South Africa maintained an “illegal presence.”<sup>83</sup> Portugal’s failure to end its colonial administration over Guinea-Bissau following its declaration of independence led the General Assembly to adopt Resolution 3061 (1973), which “strongly condemn[ed] the policies of the Government of Portugal in perpetuating its illegal occupation of certain sectors of the Republic of Guinea-Bissau.”<sup>84</sup> However, General Assembly resolutions are not binding on States.<sup>85</sup>
54. Considering this practice, it is submitted that there is arguably insufficient support for the proposition that the existence of an occupation can be considered to be illegal even

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<sup>76</sup> Ronen, p.225.

<sup>77</sup> *Id.*

<sup>78</sup> *Armed Activities*, Separate opinion of Judge Kooijmans, para. 56.

<sup>79</sup> Ronen, p.226.

<sup>80</sup> See, e.g., Zemach, p.4.

<sup>81</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 of 21 June 1971, ICJ Reports 1971, p.16, para. 118.

<sup>82</sup> Ronen, p.214.

<sup>83</sup> *Id.*

<sup>84</sup> G.A. Res. 3061 (XXVIII), U.N. GAOR, 28<sup>th</sup> Sess. Supp. No. 30, U.N. Doc. A/9030 (Nov. 2, 1973).

<sup>85</sup> *South West Africa Voting Procedure Advisory Opinion*, 1955 I.C.J. at 115 (H. Lauterpacht, J., concurring).



if it arises from an unlawful use of force (which it has not in the current situation). State practice and *opinio juris* is not sufficiently uniform to establish such a principle as a matter of customary international law. The existence of an occupation is, rather, a matter of fact.

***There is no basis in public international law to conclude that an occupation preventing the exercise of the right of self-determination is illegal***

55. Considering the foregoing, it is submitted that it is still more doubtful whether State practice and *opinio juris* is sufficiently uniform to support the conclusion that an occupation arising from a lawful use of force can *become* illegal by virtue of actions taken in its context. Ronen, however, argues that “an occupation *may be* considered illegal if it is [sic] involves the violation of a peremptory norm of international law that operates *erga omnes*, and is related to territorial status. Accordingly, illegal occupations are primarily those achieved through violation of the prohibition on the use of force *and of the right to self-determination*, or maintained in violation of the right to self-determination” (emphasis added).<sup>86</sup> Lieblich and Benvenisti argue that the “an occupation can become *per se* illegal” when “a state that was mandated to administer a territory remains there after its mandate is revoked.” The “paradigmatic example for such cases,” they say, was “South Africa’s continuing control of Namibia long after its mandate was terminated.”<sup>87</sup> Portugal’s continuing occupation of Guinea-Bissau is relied upon as an additional example.
56. Benvenisti further argues that “an occupation regime that refuses earnestly to contribute to efforts to reach a peaceful solution should be considered illegal. Indeed, the failure to do so should be considered outright annexation.”<sup>88</sup> This submission is, however, unsupported by analysis of State practice and *opinio juris* showing that a customary international law rule has developed with sufficiently widespread acceptance to the effect that an occupation regime that refuses earnestly to contribute to efforts to reach a peaceful solution is illegal. Notably, Benvenisti’s argument is couched in the conditional future tense (i.e. such a regime “should be” considered illegal); as such, it appears to reflect the author’s view of the *lex ferenda* rather than the *lex lata*. In any event, in the circumstances of this matter, it cannot be said that the responsibility for not resolving the conflict lies with Israel alone.
57. State practice and *opinio juris* do not support the existence of a rule of customary international law providing that a lawfully created occupation may subsequently become illegal on account of violations of the right to self-determination of the population under occupation.<sup>89</sup> In its Advisory Opinion of 2004 on the *Wall*, the Court found Israel responsible for several breaches of the law of belligerent occupation, but it refrained from characterising the Israeli occupation as “illegal” as a whole, or otherwise to opine on the legality of Israel’s presence in the West Bank.<sup>90</sup> Ronen concludes that the “advisory opinion thus supports the proposition that individual acts,

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<sup>86</sup> Ronen, abstract.

<sup>87</sup> Lieblich and Benvenisti, p.34.

<sup>88</sup> E. Benvenisti, *The International Law of Occupation* (Oxford 2012), p.245 (hereinafter “Benvenisti – Occupation”).

<sup>89</sup> Zemach, p.313.

<sup>90</sup> In a separate opinion, Judge Elaraby referred to “the illegality of the Israeli occupation regime itself.” *Wall Advisory Opinion, Separate Opinion of Judge Elaraby*, p.256.

even when they adversely affect the right to self-determination, do not render an occupation illegal.”<sup>91</sup>

58. Moreover, and as noted by Zemach, the “occupations of Namibia and Guinea-Bissau did not result from foreign military invasion. However, those occupations were created through illegal use of force consisting in the refusal on the part of South Africa and Portugal to withdraw their military forces from the territory upon loss of title. Such circumstances are indistinguishable from an occupation resulting from the refusal of a foreign army, initially invited to a territory by the legitimate sovereign, to withdraw from that territory after the invitation has expired. International law considers such refusal an act of aggression.”<sup>92</sup> In this case, the Namibian and South African examples are distinguishable as there is no valid claim that Israel’s actions in the Six-Day War of 1967 constituted an unlawful use of force.

*An occupation does not become illegal with the passing of time*

59. Article 6(3) of Geneva IV limits the applicability of certain provisions of the Convention in occupied territory to one year after the “close of military operations”:

“In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.”

60. The issue of whether and how to limit the duration of occupation, with emphasis on the Arab-Israeli situation, was a focus during the drafting process of the Additional Protocols.<sup>93</sup> While Additional Protocol I did not contain a provision proscribing the length of an occupation, it did not adopt the approach of Article 6(3). Instead, the drafters included Article 3(b) which mandated application of the Conventions and the Protocol until the “general close of military operations and, in the case of occupied territories, on the termination of the occupation.” According to the Commentaries, it was argued that this provision would then supplant Article 6(3).<sup>94</sup>
61. Neither the Hague Regulations nor the Fourth Geneva Convention limits the duration of the occupation, nor requires the occupant to restore the territories to the sovereign before a peace treaty is signed.<sup>95</sup> Rosalyn Higgins has similarly noted that “there is nothing in either the [UN] Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal.”<sup>96</sup>

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<sup>91</sup> Ronen, p. 221.

<sup>92</sup> Zemach, p. 325.

<sup>93</sup> A. Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967,” 84 American J. Intl Law 44, 52 (1990), 56.

<sup>94</sup> Yves Sandoz, et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee for the Red Cross 1987 at para 151.

<sup>95</sup> Benvenisti – Occupation, p.245.

<sup>96</sup> R. Higgins, The Place of International Law in the Settlement of Disputes by the Security Council, 64 AM. J. INT’L L. 1, 8 (1970).

62. Former Israeli Chief Justice, Meir Shamgar, also rejected the concept of “illegal occupation,” stating that “pending an alternative political or military solution [occupation]... could, from a legal point of view, continue indefinitely.”<sup>97</sup> Zemach has noted that a “review of conventional international law reveals no treaty provision that refutes these statements of law.”<sup>98</sup> Imseis acknowledges that although “occupation is meant to end under international law, nothing in the IHL/IHRL paradigm expressly compels this result.”<sup>99</sup>
63. In a 2005 article, Gross, Ben Naftali, and Michaeli first argued, apparently as *lex ferenda*, that occupation should be viewed as a normative phenomenon which can be subjected to a test of legality and illegality.<sup>100</sup> They argued that violation of one of the three basic principles (as they saw them) of the law of occupation, namely that it entails (i) the non-acquisition of sovereignty; (ii) a relationship of trusteeship; and (iii) temporariness, should render an occupation illegal *per se*.<sup>101</sup> Indicating that their proposed test was *lex ferenda*, the authors concluded that the time had come for the international community to promulgate clear time limitations for the duration of an occupation.<sup>102</sup> However, as Ronen observes, as a matter of *lex lata* it is “questionable” whether a prolonged occupation constitutes grounds for illegality.<sup>103</sup>

### ***Israel’s presence in the West Bank is justified by self-defence***

64. Given that the Israeli control of the West Bank and Gaza Strip arose from Israel’s lawful exercise of its right to self-defence, Israel is not required under international law continuously to demonstrate the existence of a self-defence justification for its presence. However, even if such justification was required, it is submitted that Israel’s presence in the West Bank is required in order to protect its citizens from attacks such as the one that occurred on 7 October 2023.
65. It is trite that international law recognises the right to self-defence. The right is recognised in the UN Charter as an “inherent” right (a “droit naturel” in the French version of the Charter), which means it is considered as an essential, natural, and inseverable aspect of statehood, flowing from the basic principle of sovereignty. More specifically, Article 51 of the UN Charter provides that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security,”<sup>104</sup> and this right has also clearly been recognised as existing under customary international law.<sup>105</sup>
66. States, in the exercise of their right to self-defence, can take necessary measures not only to halt one specific occurrence of an attack, but to ensure that the capabilities to

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<sup>97</sup> M. Shamgar, Legal Concepts and Problems of the Israeli Military Government – The Initial Stage, in Military Government in the Territories Administered by Israel 1967-1980 – The Legal Aspects 13, 43 (Meir Shamgar ed., 1982).

<sup>98</sup> Zemach, p.326.

<sup>99</sup> A. Imseis, Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020, EJIL (2020), Vol. 31 No. 3, 1055–1085, p.1064.

<sup>100</sup> Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, Illegal Occupation: Framing the Occupied Palestinian Territory, 23 BERKELEY J. INT’L L. 551 (2005).

<sup>101</sup> *Id.*, at 552–56.

<sup>102</sup> *Id.*, at 612.

<sup>103</sup> Ronen, p.208.

<sup>104</sup> Article 51 of the UN Charter.

<sup>105</sup> *Armed Activities*, para. 176.

continue the attack are removed, without any limitation of time in terms of when this objective can be achieved, as long as the measures are still required.<sup>106</sup>

67. There is strong support for the proposition that a State can invoke self-defence in the context of a threat or risk of further attacks. This right is for example illustrated by UNSC Resolutions 1368 and 1373. Indeed, when these resolutions were adopted, the terrorist attacks of 11 September 2001 were completed. What point would there have been for the Security Council to recall the right of self-defence in relation to an attack that has already ceased, if it did not cover the possibility to invoke self-defence to prevent reasonably foreseeable attacks from the same origin?<sup>107</sup>
68. There is support in doctrine for this view. Zemach notes that “the prevailing view seems to hold that “unless the armed attack is limited, localized, and unconnected to a previous ‘accumulation of events’ or war-threatening situation,” the victim state may use force to eliminate or at least significantly reduce reasonably foreseeable future threats.”<sup>108</sup> For Gill and Fleck, “the right of self-defence is an exception to the prohibition of the use of force which provides for a recognised legal basis for the use of transboundary force in response to a prior or impending illegal use of force originating or directed from abroad with the aim and purpose of halting the attack and forestalling the occurrence of further attacks in the immediate future from the same source.”<sup>109</sup> Meara concludes that more “recent state practice, most notably in the context of the response to transnational terrorism, points to an increased willingness of states to accept more expansive defensive action to counter further threats from the same source.”<sup>110</sup>
69. Ruys, having analysed State practice, concludes “that if a state has been subject to a series of armed attacks, and if there is a considerable likelihood that more attacks will imminently follow, then self-defence is not automatically excluded”, otherwise States “would have little defence against consecutive pin-prick attacks whereby opposing forces withdraw immediately after having carried out an attack.”<sup>111</sup> Commenting on this finding by Ruys, Meara adds: “This logic is inescapable and remains applicable today, especially in the context of armed attacks by NSAs [non-State actors] deemed to be terrorists. Sporadic, but often devastating, attacks, possibly across a number of geographical locales, might occur under the umbrella of a continuing threat comprising past and imminent armed attacks. The most recent state practice relating to the international community’s response to Daesh reinforces the proposition that states have a lawful right to respond to such a continuing threat.”<sup>112</sup>
70. Finally, when determining the immediacy of future possible attacks, if the concept is to have meaning, immediacy cannot be understood in a narrow sense, in relation to a specifically identified armed attack, but must be analysed in the broader factual context,

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<sup>106</sup> O’Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law*, OUP 2021, p. 130 (hereinafter “O’Meara”).

<sup>107</sup> *Id.*, p. 82.

<sup>108</sup> Zemach, p. 340, referring to David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum*, 24 EUR. J. INT’L L. 235, 239 (2013) and Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, in George C. Marshall European Center for Security Studies, The Marshall Center Papers, No. 5 (2002), at 20.

<sup>109</sup> Gill and Fleck, *The Handbook of the International Law of Military Operations*, OUP, 2015, p. 213 (hereinafter “Gill and Fleck”).

<sup>110</sup> O’Meara, p. 81.

<sup>111</sup> T. Ruys, “Armed Attack” and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press) (2010), p. 106.

<sup>112</sup> O’Meara, p. 83.

taking into account a number of relevant factors. Bethlehem proposes the following contextual elements: “Whether an armed attack may be regarded as ‘imminent’ will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.”<sup>113</sup> On this point, specifically in the context of a terrorist threat, the Leiden Policy Recommendations On Counter-Terrorism And International Law note that it should be borne in mind that “terrorists typically rely on the unpredictability of attacks in order to spread terror among civilians.”<sup>114</sup>

71. From the previous analysis, it follows that international law recognises that a State, in implementing its right to self-defence, in particular in the context of fighting terrorism, can in principle take all required measures to put an end to an ongoing attack and to avoid any future attack from the same source,<sup>115</sup> especially when they are part of the same pattern of conduct which constitutes the overall armed attack.
72. In this context, the Court should not take specific incidents in isolation and analyse whether each meets the threshold of an “armed attack” under the law of self-defence. Actions by armed groups should be seen as a whole and as a pattern of conduct amounting to an armed attack or the threat thereof.<sup>116</sup> International criminal law supports this interpretation of the term “attack” as a series of incidents taken together.<sup>117</sup> Supporting this view, Bethlehem argues that: “The term “armed attack” includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity. The distinction between discrete attacks and a series of attacks may be relevant to considerations of the necessity to act in self-defence and the proportionality of such action,” and an “appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert.”<sup>118</sup>

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<sup>113</sup> Daniel Bethlehem, *Self-Defence against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770 (2012), p. 775, p. 775-776 (hereinafter “Bethlehem”).

<sup>114</sup> Leiden Policy Recommendations On Counter-Terrorism And International Law, *Netherlands International Law Review*, LVII: 531-550, 2010, para. 46 (Hereinafter “Leiden”). On this aspect, see also Amos N. Guiora, *Anticipatory Self-Defence and International Law—A Re-Evaluation*, *Journal of Conflict & Security Law* (2008), Vol. 13 No. 1, 3–24.

<sup>115</sup> “In general practice of States, a war of self-defense is not limited at all to a mere repulse of an armed attack: force is often used tenaciously, with a view to bring about the utter collapse of the aggressor’s armed forces.” Dinstein - *Self-Defence*, p. 285.

<sup>116</sup> *Id.*, p. 211, referring to several ICJ judgments where an accumulation of acts could be regarded collectively as an “armed attack”, and noting that “this is a case where the whole (the series of acts amounting to an armed attack) is greater than the sum of its parts (single acts none of which does by itself).”

<sup>117</sup> For example, Article 7(2)(a) of the Rome Statute of the ICC defines an “attack” as a “course of conduct involving the multiple commission of acts.”

<sup>118</sup> Bethlehem, p. 775.

73. As a result, actions by Palestinian armed groups should be considered as a whole, constituting one ongoing armed attack which is not hypothetical, since it has already started. As noted by Gill and Fleck: “The purpose of forestalling future repeated attacks from a given source once an attack has been launched or is imminent should not be confused with the notion of ‘preventive self- defence’, in advance of any clear and manifest threat of an armed attack in the immediate future.”<sup>119</sup>
74. In light of the magnitude of the threat from Palestinian armed groups evidenced by the horrific attack of 7 October 2023, there can be little doubt that Israeli presence in the West Bank and the Gaza Strip is legally justified as a measure of self-defence.

***The existence of a situation of occupation is not material per se to the determination of whether a State can invoke self-defence against attack emanating from outside its territory***

75. The *Wall* advisory opinion is often interpreted as finding that the existence of an occupation is a legal bar to the invocation of the right to self-defence by a State against an armed attack emanating from occupied territory. Interestingly, however, this is not expressly stated in the Court’s opinion. The Court simply notes “that Israel *exercises control* in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory” (emphasis added) before immediately referring to UNSC Resolutions 1368 (2001) and 1373 (2001), which do not relate to occupation as such, but instead to the recognition of the exercise of the right to self-defence against non-state actors in the context of terrorism.
76. Therefore, the ICJ seems to consider occupation as a factual rather than legal element which enables the Court to ground its conclusion that given that the threat emerges from within territory *controlled* by Israel, this in turn justifies the non-applicability of the right to self-defence. There is nothing in the advisory opinion that expressly supports an inference that the ICJ has made a legal pronouncement on the impact of occupation *per se* (as opposed to a State’s control of territory absent a cross-border element) on a State’s right to invoke self-defence.
77. This analysis changes the nature of the discussion because it renders the question of whether territory is *occupied* (as a legal fact) by a State irrelevant to the assessment of whether self-defence can be invoked by that State. It further demonstrates the fallacy of the existing, unnecessary confusion in the debate, and invites us to refocus on a more simple question: why should a State, under the law of self-defence, not be allowed to exercise its right to self-defence against armed attacks that emanate from beyond its sovereign territory, irrespective of who controls the territory from which the armed attacks emanate?
78. It is submitted that there is no basis in international law to limit the right of self-defence, which we recall is premised on the inherent right of State to protect its territory and citizens as a natural consequence of its sovereignty, in this way. This was the view expressed by several ICJ Judges in 2004.

79. As Judge Buergenthal stated:

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<sup>119</sup> Gill and Fleck, p. 213, fn. 4.

“Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory - whatever the concept of ‘control’ means given the attacks Israel is subjected from that territory - or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court’s formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.”<sup>120</sup>

80. Judge Higgins added:

“I also find unpersuasive the Court’s contention that, as the uses of force emanate from occupied territory, it is not an armed attack ‘by one State against another.’ I fail to understand the Court’s view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory - a territory which it has found not to have been annexed and is certainly ‘other than’ Israel.”<sup>121</sup>

81. From the preceding legal analysis, it follows that the existence of an occupation is not material to the determination of whether a State can invoke its right to self-defence. The material factor is whether the armed attack, or the imminent threat of armed attack, emanates from outside the State’s sovereign territory.

82. In exercising its function, the ICJ will wish to analyse the facts concretely, without excluding relevant considerations through an arbitrary narrowing of the legal framework. This would not be in the interest of justice and of judicial propriety. As noted by Judge Buergenthal in 2004 about the Court’s approach to self-defence: “To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court’s formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.”<sup>122</sup>

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<sup>120</sup> *Wall* Advisory Opinion, Declaration of Judge Buergenthal, p. 243, para. 5.

<sup>121</sup> *Wall* Advisory Opinion, Separate Opinion of Judge Higgins, p.215, para. 34.

<sup>122</sup> *Wall* Advisory Opinion, Declaration of Judge Buergenthal, p. 243, para. 6.

### *Self-defence can be invoked in situations which involve non-State actors*

83. A further aspect of the *Wall Advisory Opinion* to be discussed is reliance on the opinion to claim that a State's right to self-defence can only be invoked against non-state actors in circumstances where the attack is attributable to a State. First of all, it should be noted that paragraph 139 of the Wall Advisory Opinion is linguistically ambiguous. While the Court does indeed claim that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State", it then goes on to explain why, factually, Israel could not rely on UNSC Resolutions 1368 (2001) and 1373 (2001), which recognise a right of self-defence against terrorist attacks by non-state actors. This reasoning, *a contrario*, leaves open the possibility that these resolutions could be relied upon in different factual circumstances.
84. Moreover, the more general claim that self-defence can only be invoked against a State is contradicted by the UN Charter and by the evolution of international law, especially since September 2001. It should be recalled at the outset that the UN Charter provides for no such limitation. As noted by Judge Higgins in 2004: "There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State."<sup>123</sup> Similarly, Judge Buergenthal recalls that "the United Nations Charter, in affirming the inherent right of self defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State"<sup>124</sup>. In a comprehensive study on Article 51 of the UN Charter, Tams, having done a detailed "literal, contextual, purposive and historical" analysis of Article 51, concludes that "the text of Article 51, on balance, supports a broad construction of self-defence that permits responses against armed attacks by non-State actors."<sup>125</sup>
85. The Court, in *Armed Activities*, considered that in the specific factual circumstances of that case, it had "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self defence against large-scale attacks by irregular forces,"<sup>126</sup> suggesting that, under different factual circumstances, the Court would have been open to engage in a discussion on this matter, rather than reject the legal premise *ab initio* (otherwise the Court could have just repeated its statements from the *Wall* Opinion).<sup>127</sup>
86. Moreover, UNSC Resolutions 1368 and 1373 (the latter being made under the authority granted to the Security Council under Chapter VII of the UN Charter) recognise "the inherent right of individual or collective self-defence in accordance with the Charter" in the context of terrorist attacks conducted by non-State actors, without any discussion of whether these acts could be attributed to a State or not.<sup>128</sup>

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<sup>123</sup> *Id.*, para. 33.

<sup>124</sup> *Wall Advisory Opinion*, Declaration of Judge Buergenthal, p. 242, para. 6.

<sup>125</sup> C. Tams, "Self-Defence against Non-State Actors: Making Sense of the 'Armed Attack' Requirement", in O'Connell ME, Tams CJ, Tladi D. in *Self-Defence against Non-State Actors*. Vol 1. Max Planck Trialogues. Cambridge: Cambridge University Press; 2019: i-ii, 90-173, p. 124.

<sup>126</sup> *Armed Activities*, para. 147.

<sup>127</sup> N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (Oxford 2010), p.33 (hereinafter "Lubell").

<sup>128</sup> UNSC Resolutions 1378 and UNSC Resolution 1373.



87. There is evidence that the invocation of self-defence against a non-State actor is a practice of States,<sup>129</sup> and one can reasonably argue, even if one were to consider that at some point in time invocation of self-defence was limited to responding to armed attacks by States, that, at the very least, a new customary law norm has emerged recognising the possibility of invoking self-defence against non-State actors, even in the absence of an attribution of conduct to a State. Lubell, analysing State practice and discussions from publicists like Frank, Greenwood, Dinstein, and Schmitt, concludes “that self defence may lawfully be invoked in response to attacks perpetrated by non-state actors.”<sup>130</sup> Bethlehem also considers that: “States have a right of self-defence against an imminent or actual armed attack by nonstate actors.”<sup>131</sup>
88. The Chatham House “Principles Of International Law On The Use Of Force By States In Self-Defence,” adopted in 2005 with the goal of providing “a clear statement of the rules of international law governing the use of force by states in self-defence,” indicate without any ambiguity that: “Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.”<sup>132</sup> The principle is adopted following an analysis of customary law (beginning with the *Caroline* case) and Security Council practice after September 2001. They also rely on the views of the recognised publicists who participated in the discussion and supported the principle, such as Berman, Bethlehem, Greenwood, Lowe, Roberts, Sands, Shaw, Warbrick, and Wood.<sup>133</sup>
89. The Leiden Policy Recommendations produced at the behest of the Dutch government, concluded, after a three-year consultation process: “It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon request of the victim state) self-defence.”<sup>134</sup>
90. In this specific context, it should finally be noted that one should not automatically assume that terrorist threats and attacks faced by Israel cannot be attributed to a subject of international law under the current factual circumstances. Indeed, the Oslo Accords, as consented to by the PLO – and the international law foundation for the relations between it and Israel – reflect the fact that the PLO is an entity under international law capable of signing an internationally binding agreement, which arguably constitutes a reasonable basis for considering, depending on the specific factual circumstances, that actions of certain groups over which it has a certain authority or control can be attributed to it under international rules of attribution. Going further, to the extent that Palestine claims to be, and is recognised, as a State under international law, it automatically entails that it would be subject to international law obligations, including those relating to attribution of conduct under customary international law. Palestine cannot assert its statehood under international law while at the same time rejecting the obligations that logically flow from its assertion. Equally, as noted by Judge Higgins in 2004: “Palestine cannot be sufficiently an international entity to be invited to these

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<sup>129</sup> Lubell, chapter 2.

<sup>130</sup> *Id.*, p. 35.

<sup>131</sup> Bethlehem, 115, p. 775.

<sup>132</sup> Chatham House “Principles Of International Law On The Use Of Force By States In Self-Defence”, principle 6.

<sup>133</sup> Along the same lines, the *Institut de Droit International* adopted a resolution in 2007 stating that: “In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.”

<sup>134</sup> Leiden Policy Recommendations On Counter-Terrorism And International Law, *Netherlands International Law Review*, LVII: 531-550, 2010, par. 38.

proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.”<sup>135</sup>

## Conclusion

91. The Israeli-Palestinian dispute is one component of a historic, wider, dispute between the Arab world and the State of Israel, which is widely viewed as having commenced in 1948 (although some would date it before or after). This submission has shown that there are competing claims over the disputed territory which forms the subject of the General Assembly’s referral. The territory’s current legal status is that of indeterminacy pending agreement by the parties.
92. We have further explained that there is an international legal framework (UN and bilateral) in force for the resolution of the conflict, which is based on the principle of land for peace, and which does not view the presence of Israeli forces in the West Bank until peace is achieved as unlawful. Over the last 45 years, significant strides have been made in resolving the wider dispute. Peace treaties between Egypt and Israel and Jordan and Israel were signed and implemented in 1979 and 1994 respectively. In 2020, in the context of the Abraham Accords, normalisation agreements (equivalent to peace treaties) have been reached between Israel and a diverse list of Arab countries including the UAE, Bahrain, Morocco, and Sudan. The Israeli presence in the West Bank pending the conclusion of a peace agreement between Israel and the Palestinians is consistent with the international and bilateral frameworks for the resolution of the conflict.
93. We also explained that Israel’s presence in the West Bank is a result of lawful use of force in self-defence in 1967. Israel’s presence in the West Bank since then is governed by the *jus in bello*, and in particular, the law of occupation. We demonstrated that international law does not include a requirement to end a situation of occupation before the resolution of the conflict. We also highlighted that while international law does not require Israel to provide an ongoing self-defence justification for its continued presence in the West Bank, in reality Israel’s presence in the West Bank is required in order to protect its citizens from attacks such as the one that occurred on 7 October 2023.
94. The historic peace processes between Israel and its neighbours show that, in this context, one-time enemies can set aside their differences and resolve their disputes without resorting to force and compulsion. What is required is that both the Israeli and Palestinian sides accept that a negotiated solution is the only way forward. In the words of Judge Sebutinde:

“As can be seen from the above history, it is clear that a permanent solution to the Israeli Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement.”<sup>136</sup>

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<sup>135</sup> *Wall Advisory Opinion, Id*, Separate Opinion of Judge Higgins, para. 34, para. 6.

<sup>136</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, Dissenting opinion of Judge Sebutinde, para. 11.

95. The Court has twin functions under its Statute, namely (1) to resolve disputes between States when all relevant States consent and (2) to provide advisory opinions to authorised UN entities. This submission has further shown how, in the current matter, the Court may conclude that it is, in effect, being requested to use its advisory role to resolve a dispute in an alternative manner to that which has been stipulated by the Security Council, and agreed between the parties, in the absence of the consent of one of those parties to its judicial dispute resolution. Yet this is a dispute which the parties thereto have agreed, in binding international agreements which have been the subject of international recognition and support, including through the award of three Nobel Peace Prizes, to resolve through direct bilateral negotiation.

96. The IJL therefore urges the Court to exercise caution. Addressing the questions raised in Resolution 77/247, especially in their current form, runs the risk of ignoring the *lex lata* international legal framework, undermining the mutually agreed framework for resolution of the Israeli-Palestinian conflict, and the prospect of its negotiated solution.

Respectfully submitted,

Daniel Reisner, Deputy President, IJL

Dr. Roy Schondorf, Counsel

Dr. Dov Jacobs, Counsel

Joshua Kern, Counsel

Date this 16<sup>th</sup> day of February 2024

At Tel Aviv, Israel, The Hague, Netherlands, and London, United Kingdom

## Annex A

### Israel's Legal Claims to the West Bank

This paper has been written in connection with the proceedings concerning the “Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem.”<sup>137</sup>

The request for the advisory opinion refers to the West Bank and the eastern part of Jerusalem as “Palestinian territory.” Accordingly, it appears to assume that sovereign rights to this area rest solely with the Palestinian people, and it ignores the State of Israel’s own legal claim in these areas. This paper seeks to amend this omission.

The following analysis shall focus on the international law grounds that underpin the State of Israel’s claims to the area commonly referred to as the West Bank, which lies east of the Israel-Jordan Armistice Lines of 1949 (as adjusted). However, it would be remiss not to mention that the Jewish people also hold strong and continuous historical, religious and cultural ties to this area, which geographically lies within the areas of Judea and Samaria, part of the historical Land of Israel, and which is deeply connected to Jewish history and tradition. Jewish tribal confederations and kingdoms existed there for hundreds of years, including the kingdoms of Saul, David, and Solomon. It is the home of many sites of significant Jewish importance, including the traditional burial place of the patriarchs and matriarchs of Judaism in Hebron, the traditional birthplace of David and Rachel’s Tomb in Bethlehem, and in Shilo, the place of the Ark of the Covenant before being brought to Jerusalem. In Jerusalem stood the Temple of Jerusalem, which for generations was the focal point of the Jewish faith.

Despite various periods of forced exile, there remained a continuous Jewish presence in the area, except for the nineteen years between 1949, when Jordan expelled all Jews from the West Bank, and 1967 when Jordan lost its control over the area. The Jewish people never ceded their claims to the area comprised by the West Bank, including Jerusalem, and it remained an integral element of its political and religious conscience; thus the prayers ‘Next Year in Jerusalem’ and ‘If I forget thee, O Jerusalem’. This connection was not lost in modern times, and in the decades prior to the establishment of the State of Israel, Jewish communities built towns and industries in this area.

The historical, religious, and cultural ties of the Jewish people to the Land of Israel, which encompasses today’s West Bank, were acknowledged in Israel’s Declaration of Independence:

“The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books... Jews strove in every successive generation to re-establish themselves in their ancient homeland...”<sup>138</sup>

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<sup>137</sup> Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Req. for Advisory Op.) (Order of 8 Feb., 2023), available at <https://www.icj-cij.org/sites/default/files/case-related/186/186-20230208-PRE-01-00-EN.pdf>.

<sup>138</sup> THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, 5708-1948, 1 L.S.I. 3 (1948), <https://main.knesset.gov.il/en/about/pages/declaration.aspx>.

This paper demonstrates that the State of Israel – independent of the historical, religious and cultural ties mentioned above – has strong legal claims to this area. It establishes – using sources that include the Court’s own reasoning – that sovereign title over the West Bank has been in abeyance for over a century. This has been the legal position under international law since the close of the First World War, when Turkey (as the successor to the Ottoman Empire) ceded its sovereignty of the areas outside of its current borders. No agreement, instrument, judgment, opinion, or event with legal effect has changed this status since, as reflected – and explicitly stated – in agreements between the interested parties, and particularly agreements between Israel and the Palestinians. Under these agreements, the question of the final disposition of this area shall be determined by negotiation between Israel and the Palestinians. Until then, the sides have agreed on provisional arrangements, which continue to apply and govern the legal relationship between the sides today.

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*Terminological Note:* This paper refers to the legal rights over an area of different political and geographical borders over time, and which constituted part of different political and historical entities. The term ‘West Bank’ refers to the area east of the Jordan-Israel Armistice Lines of 1949 and west of the Hashemite Kingdom of Jordan. This term first came into use following the 1947-49 Israeli War of Independence, to denote Jordan’s control over the area west of the Jordan river. Geographically, the West Bank is part of the historical Land of Israel (which extended over both sides of the Jordan river; in Hebrew, ‘Eretz-Israel’) and is part of a mostly mountainous region which has been referred to, historically and presently, as the Judea and Samaria region. This region, and therein the area referred to today as the West Bank, formed part of ‘Mandatory Palestine’, the name given by the League of Nations to the territory administered by Great Britain that encompassed roughly the present State of Israel, the Gaza Strip and the West Bank, and is the territory that was subsequently excised from the Mandate to establish the present Hashemite Kingdom of Jordan. The term ‘Palestine’ derives from the names used by the Roman and Byzantine empires following Rome’s conquests in the 2nd Century CE (including Syria Palaestina, and Palaestina Prima, Secunda and Salutaris), which in turn was derived from the Ancient Greek ‘Philistia’, used to refer to the area inhabited by the ancient Philistines in approximately the 12th century BCE.<sup>139</sup>

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<sup>139</sup> NABIH AMIN FARIS ET AL., *Palestine*, ENCYCLOPEDIA BRITANNICA, (Jan. 22, 2024), <https://www.britannica.com/place/Palestine>. For a historical overview, see SHMUEL SAFRAI, *The Era of the Mishnah and Talmud*, in A HISTORY OF THE JEWISH PEOPLE 70, 307-334 (H.H. Ben-Sasson ed., 1976) (“In an effort to wipe out all memory of the bond between the Jews and the land, Hadrian changed the name of the province from Iudaea [Judea] to Syria-Palestina ...”).

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## 1. The Ottoman Empire – the last sovereign title over the West Bank

The last sovereign title over the area comprising the West Bank rested with the Ottoman Empire. On the eve of the First World War, the Ottoman Empire extended from present-day Egypt in the south, to present-day Turkey in the north, and from the Mediterranean Sea eastwards over the Jordan river, covering swathes of the Persian Gulf and the Red Sea:



Britannica: <https://www.britannica.com/place/Ottoman-Empire>

As the Allied Powers took control of these areas during the First World War, their military forces took up presence where Ottoman forces were defeated. The areas encompassing present-day Israel, the West Bank and the Gaza Strip, and Jordan (without any distinction between these areas), came under the control of British armed forces. Following the Armistice Convention of 30 October 1918 (the Mudros Armistice),<sup>140</sup> British forces established direct military rule over these areas.

Following the Mudros Armistice, the British Empire, France, Italy, and Japan (the Principal Allied Powers), additional allied powers and Turkey negotiated a full Treaty of Peace, known as the Treaty of Sèvres of 10 August 1920. As part of the Treaty, Turkey ceded all territories under its control and agreed to the establishment of alternative legal regimes. However, despite having been agreed upon and signed by the parties, the Treaty was not subsequently ratified due to internal political changes in Turkey's government.<sup>141</sup>

<sup>140</sup> FREDERICK MAURICE, THE ARMISTICES OF 1918 85-87 (Oxford Univ. Press 1943); YUCEL YANIKDAG, *Mudros, Armistice of*, ENCYCLOPEDIA OF ISLAM (Kate Fleet et al. eds., 3<sup>rd</sup> ed. 2020) (last visited Jan. 23, 2024), [http://dx.doi.org/10.1163/1573-3912\\_ei3\\_COM\\_36577](http://dx.doi.org/10.1163/1573-3912_ei3_COM_36577).

<sup>141</sup> Treaty of Peace Between the Allied and Associated Powers and Turkey art. 95-96, Aug. 10, 1920, U.K. 020/1920 (Article 95: "The High Contracting Parties agree to entrust, by application of the provisions of Article 22, the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a Mandatory to be selected by the said Powers. The Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917, by the British Government, and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being understood that nothing shall be done which may prejudice the civil or religious rights of existing non-Jewish communities

The 1923 Treaty of Peace with Turkey – the Treaty of Lausanne<sup>142</sup> – followed the Treaty of Sèvres. Article 16 of the Treaty states that Turkey “renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognized by the said Treaty.”<sup>143</sup> The Treaty parties did not grant sovereignty to another state in place of Turkey; the Treaty explicitly stated that the future of these territories was “to be settled by the parties concerned.”<sup>144</sup> This provision was considered by the Permanent Court of Arbitration in *Eritrea v. Yemen*, in an award concerning a maritime boundary dispute over the sovereignty of a number of islands in the Red Sea claimed by both the State of Eritrea and the Republic of Yemen.<sup>145</sup> As with the Land of Israel, these islands were under Ottoman sovereignty before the First World War, and Turkey (as successor) ceded its rights to these territories through Article 16 of the Treaty of Lausanne. The Tribunal, consisting of a panel of five arbitrators, three of whom served as Presidents of the International Court of Justice, noted:

“... in 1923 Turkey renounced title to those islands over which it had sovereignty until then. They did not become *res nullius*—that is to say, open to acquisitive prescription—by any state, including any of the High Contracting Parties (including Italy). Nor did they automatically revert (insofar as they had ever belonged) to the Imam. Sovereign title over them remained indeterminate *pro tempore*.”<sup>146</sup>

The Tribunal reaffirmed this finding later in the award, stating that:

“[N]one of the authorities doubts that the formerly Turkish islands were in 1923 at the disposal of the parties to the Lausanne Treaty, just as they had formerly been wholly at the disposal of the Ottoman Empire, which was indeed party to the treaty and in it renounced its sovereignty over them. Article 16 of the Treaty created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties; and this legal position was generally recognized...”<sup>147</sup>

Applying the reasoning of the Permanent Court of Arbitration in *Eritrea v. Yemen* to this case, it follows that, as a territory ceded by Turkey under Article 16 of the Treaty of Lausanne, the legal status of the West Bank is also one of indeterminacy until its status is resolved by the interested parties.<sup>148</sup>

## 2. In place of Ottoman sovereignty – the creation of a Mandate

The Covenant of the League of Nations, signed on 28 June 1919, provided for the legal regimes applicable to those “colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them,” stating that “[c]ertain

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in Palestine, or the rights and political status enjoyed by Jews in any other country.” Article 96: “The terms of the mandates in respect of the above territories will be formulated by the Principal Allied Powers and submitted to the Council of the League of Nations for approval”).

<sup>142</sup> Treaty of Peace, signed at Lausanne, Jul. 24, 1923, 28 U.N.T.S. 11.

<sup>143</sup> *Id.* Art. 16.

<sup>144</sup> *Id.*

<sup>145</sup> Territorial Sovereignty and Scope of the Dispute (*Eri. v. Yemen*), XXII 209-332 (Perm. Ct. Arb. 1998).

<sup>146</sup> *Id.* at ¶ 165.

<sup>147</sup> *Id.* at ¶ 445.

<sup>148</sup> Indeed, the Award states that the legal status of the islands in dispute applied also with regard to other territories ceded by Turkey under Article 16: “Although ‘territories’ and ‘islands’ are separately mentioned, their treatment under Article 16 is identical.” *Id.* at ¶ 158.



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.”<sup>149</sup>

The mandate system was created to provide certain states with the authority to govern, on behalf of the League of Nations, territories ceded by Germany and the Ottoman Empire during the First World War.<sup>150</sup> The “underlying policy and principles” of the Mandate system as a “new legal institution” were considered briefly by Sir Arnold McNair in a separate opinion appended to the International Court of Justice’s Advisory Opinion on the International Status of South-West Africa.<sup>151</sup> With respect to sovereignty, Judge McNair opined that “the doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State... sovereignty will revive and vest in the new State.”<sup>152</sup>

With regard to Palestine, the Principal Allied Powers, meeting in San Remo, Italy in April 1920 (the San Remo Conference), passed a resolution “to entrust, by application of the provisions of Article 22 [of the Covenant of the League of Nations], the administration of Palestine, within such boundaries as may be determined by the Principal Allied Powers, to a mandatory, to be selected by the said Powers.”<sup>153</sup> Importantly, the resolution stated that “[t]he mandatory will be responsible for putting into effect the declaration originally made on the 8<sup>th</sup> [sic] November, 1917, by the British Government, and adopted by other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine...”

In doing so, the Principal Allied Powers gave legal effect to the declaration made by the British Government on 2 November 1917 (commonly known as the ‘Balfour Declaration’).<sup>154</sup> As such, the Mandatory power was legally obligated to fulfil the Balfour Declaration’s provisions – which were already endorsed by a number of states (including the United States of America and France) – as part of the Mandate itself.

### 3. Terms of the Mandate - reconstituting a Jewish national home

The terms of the Mandate for Palestine were subsequently agreed upon in detail by the Allied Powers and endorsed by the League Council on 12 August 1922 (the “Mandate for Palestine”).

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<sup>149</sup> League of Nations Covenant art. 22.

<sup>150</sup> RUTH GORDON, *Mandates*, MPEPIL, (Feb. 2013), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1066>.

<sup>151</sup> International Status of South-West Africa, Advisory Opinion, 1950 I.C.J 128, 150 (Jul. 11) (separate opinion by Sir McNair A.) (hereinafter South-West Africa Advisory Opinion).

<sup>152</sup> *Id.*

<sup>153</sup> San Remo Res. (April 25, 1920), <https://www.un.org/unispal/document/auto-insert-207297/>.

<sup>154</sup> *Id.*; Letter from Arthur James Balfour, Secretary of State for Foreign Affairs, to Lord Rothschild, a leader of British Jewish Community (Nov. 2, 1917) (on file with British Library). The Balfour Declaration stated that “His Majesty’s Government [of the United Kingdom of Great Britain and Northern Ireland] view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country”. The text of the Balfour Declaration had been submitted to and approved by President Wilson before publication, and on 14 February and 9 May, 1918, the French and Italian governments publicly endorsed the Declaration. *see* GOVERNMENT OF PALESTINE, A SURVEY OF PALESTINE, 1945-6, 1, at 1, [https://www.bjpa.org/content/upload/bjpa/a\\_su/A%20SURVEY%20OF%20PALESTINE%20DEC%201945-JAN%201946%20VOL%20I.pdf](https://www.bjpa.org/content/upload/bjpa/a_su/A%20SURVEY%20OF%20PALESTINE%20DEC%201945-JAN%201946%20VOL%20I.pdf).

As with the San Remo Conference, the terms reflected the obligation to advance a national home for the Jewish people, stating that the Mandatory “should be responsible for putting into effect the declaration originally made on November 2<sup>nd</sup>, 1917, by the Government of His Britannic Majesty... in favor of the establishment in Palestine of a national home for the Jewish people.” To achieve this, the Mandatory “shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble... [i.e. the Balfour Declaration].”

In doing so, and as noted in the Preamble itself, the Mandate recognizes the “historical connection of the Jewish people with Palestine and to the grounds for *reconstituting* their national home in that country [emphasis added].”<sup>155</sup> The word ‘reconstituting’ was purposefully used in acknowledgement of the historical rights of the Jewish people to revive their national home in this land.

The Mandate for Palestine, as with the San Remo Conference, Covenant of the League of Nations and the Balfour Declaration itself, did not provide that political rights vested in any other group, requiring only that implementation of the obligations therein shall be without prejudice to “the *civil and religious* rights of existing non-Jewish communities in Palestine” [emphasis added].<sup>156</sup>

#### 4. The territorial scope of the Mandate included the present-day West Bank

The Mandate for Palestine included areas west and east of the Jordan river. The terms of the Mandate provided that the Mandatory, with the consent of the League of Nations, may exclude the application of certain provisions of the Mandate to the area lying east of the Jordan river.<sup>157</sup> In September 1922 the Council of the League of Nations approved the separation of the area known as Transjordan from the territory of the Mandate.<sup>158</sup> In so doing, the League cemented the understanding that the *entire* area west of the Jordan river was assigned for the establishment of the Jewish national home as required under the Mandate.

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<sup>155</sup> [Mandate for Palestine, League of Nations Doc. C. 529. M. 314. 1922. VI \(1922\).](#)

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Art. 25; U.N. Secretary-General, *Question of Palestine Text of Mandate*, Memorandum by the British Gov’t., U.N. Doc. A/292 (Sep 16, 1922); ROBBIE SABEL, *INTERNATIONAL LAW AND THE ARAB-ISRAELI CONFLICT* 72 (Cambridge Univ. Press 2022).

<sup>158</sup> *Note Presented by the Secretary General Relating to [The Mandate for Palestine] Application to the Territory Known as Trans-Jordan Under the Provisions of Article 25*, League of Nations, (1922), available at <https://dp.la/item/86adc8e9d50b0ccaaf32f2bc888f7855>; *The International Criminal Court’s Lack of Jurisdiction over the so called “Situation in Palestine”*, State of Israel Office of the Attorney General ¶ 27 (Dec. 18, 2019), <https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf>.



It has been suggested that in correspondence from 1915 between Sir Arthur Henry McMahon, Britain’s High Commissioner in Cairo, and Sharif Hussein bin Ali, Emir of Mecca, the High Commissioner irrevocably promised Palestine to the Arabs and thus nullified the subsequent Balfour Declaration, the Terms of the Mandate, and all subsequent international binding instruments concerning the territory of Palestine.<sup>159</sup> However, it was the British position following the correspondence, which was affirmed on a number of occasions, that the letters did not promise the territory west of the Jordan river, including the West Bank, for Arab independence. Indeed, the letters did not explicitly promise that territory to the Arabs and the Sharif did not request it explicitly. McMahon himself, in a written response to a request for clarification, stated that his intent was “to exclude Palestine from independent Arabia.” This understanding was confirmed in a British White Paper of 1922 issued by the Secretary of State for the Colonies, Winston Churchill, on 3 June 1922,<sup>160</sup> which affirmed the Balfour Declaration and confirmed the British government’s ongoing position regarding the areas that the pledge excluded, stating that the “whole of Palestine west of the Jordan was thus excluded from Sir H. McMahon’s pledge.” This position was reaffirmed in a further British White Paper in 1939: “the whole of Palestine west of Jordan was excluded from Sir Henry McMahon’s pledge, and they therefore cannot agree that the McMahon correspondence forms a just basis for the claim that Palestine should be converted into an Arab state.”<sup>161</sup>

<sup>159</sup> The correspondence concerns the willingness of the Sharif to mount a revolt against the Turks in exchange for British assurances of Arab independence, and in this regard, discusses the borders of future Arab autonomous states.

<sup>160</sup> PALESTINE: CORRESPONDENCE WITH THE PALESTINE ARAB DELEGATION AND THE ZIONIST ORGANIZATION (1922), (also known as the ‘British White Paper of June 1922’ or the ‘Churchill White Paper’) [https://avalon.law.yale.edu/20th\\_century/brwh1922.asp](https://avalon.law.yale.edu/20th_century/brwh1922.asp).

<sup>161</sup> PALESTINE: STATEMENT OF POLICY 5 (1939) (also known as the ‘British White Paper of 1939’ or the ‘MacDonald White Paper’), [https://avalon.law.yale.edu/20th\\_century/brwh1939.asp](https://avalon.law.yale.edu/20th_century/brwh1939.asp); For additional British statements regarding this correspondence, and detailed linguistic and legal analysis of the correspondence and support of the British position, see STEVEN E. ZIPPERSTEIN, LAW AND THE ARAB-ISRAELI CONFLICT: THE TRIALS OF PALESTINE, 36-45 (Routledge, 2020).

It is thus without doubt that the territorial scope of the Mandate, in which the Jewish national home was to be established, encompassed all of the area west of the Jordan river, including the present-day West Bank.

5. The Mandate years – the terms and obligations of the Mandate remain unchanged

Throughout the period during which Britain served as the Mandatory no changes were made to the Terms of the Mandate. The entire territory west of the Jordan river remained part of the original Mandate, and the Mandatory remained charged with working towards the establishment of the Jewish national home therein.

Nevertheless, in the face of Arab pressure and violence, and due to British interests locally and abroad, the British imposed policy restrictions on Jewish immigration, settlement, and purchase of land.<sup>162</sup> Despite these restrictions, Jewish communities were spread across the entire Mandatory territory throughout the Mandate period. In the West Bank area, Jewish communities resided in Hebron (except for a few years after the massacre of the Jewish residents in 1929) and in the Dead Sea area, Jewish communities and agricultural industries operated in the Gush Etzion area, and, of course, Jewish communities maintained a constant presence in Jerusalem, including in the Old City.<sup>163</sup>

Eventually, the United Kingdom sought to end the Mandate. In a series of commissions and policy positions, the British proposed different – and novel – solutions, including dividing the territory into two states (one Jewish and one Arab), formalizing British control over areas of importance to British interests (such as ports), and proposing unique internationally-governed systems for the Jerusalem and Bethlehem areas due to their communal religious importance.<sup>164</sup> Ultimately, all of the British proposals were rejected by either of, or both, the Jewish and Arab communities, and the terms and obligations of the Mandate remained unchanged.

6. The continuation of the Mandate following the establishment of the United Nations and the rejection of the General Assembly partition plan

The creation of the United Nations in 1945 did nothing to change the Jewish people's rights in the Land of Israel or the legal validity or continuity of the Mandate over Palestine. While the UN Charter introduced a new "trusteeship system", tasking the UN with supervising the administration of non-self-governing territories, the trusteeship system did not automatically replace mandate governance. Article 80 of the UN Charter states that nothing in the Charter shall "alter in any manner the rights whatsoever of any states *or any peoples*" or alter "*the terms of existing international instruments*" [emphases added] to which UN member states are

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<sup>162</sup> For an overview of the British political considerations in its policy changes concerning Palestine and Arab rights, see ZIPPERSTEIN, *ZIONISM, PALESTINIAN NATIONALISM AND THE LAW: 1939-1948*, Ch. 4,6 (Routledge, 2021), and ZIPPERSTEIN, *supra* note 25, Ch. 5.

<sup>163</sup> SABEL, *supra* note 21, at 295.

<sup>164</sup> For example, the Peel Commission proposed creating Jewish and Arab states without detailing their borders (suggesting that each state's territory be based on population concentrations), alongside an enclave comprising of Jerusalem and the Bethlehem surroundings under a new international mandate. Subsequent policy papers and commissions rejected this proposal; for example, the Statement of Policy by the British Government on 9 November 1938 stated that "the political, administrative and financial difficulties involved in the proposal to create independent Arab and Jewish States inside Palestine are so great that this solution of the problem is impracticable," and decided that the British Government would continue their responsibility for the government of the whole of Palestine. Subsequent commissions found that dividing the Mandatory territory violated the Terms of the Mandate and Britain's obligations thereunder. See Anglo-American Committee of Inquiry Report to the United States Government and His Majesty's Government in the United Kingdom regarding the problems of European Jewry and Palestine c. X ¶ 3 (1946), [https://ecf.org.il/media\\_items/307](https://ecf.org.il/media_items/307).

parties, unless agreed otherwise individually.<sup>165</sup> The wording of Article 80 was negotiated in consideration of the Mandate over Palestine.<sup>166</sup> Thus, both the Jewish people's longstanding claim to this area, as well as the continuation of the Mandate's terms and obligations – including the requirement to establish a Jewish national home in Mandatory Palestine – were upheld by the UN Charter.<sup>167</sup>

In another effort to end the Mandate, in early 1947 Britain requested the General Assembly to consider the Palestine issue.<sup>168</sup> The request itself did not constitute a surrender of the Mandate, and the British acknowledged the continuation of the Mandate and their obligations thereunder while the UN considered the issue.<sup>169</sup>

The General Assembly voted to approve the request and established the United Nations Special Committee on Palestine (UNSCOP). UNSCOP recommended dividing the Mandate area into Jewish and Arab states and putting Jerusalem and its environs under international control (called a *corpus separatum*). A subsequent committee, the Ad Hoc Committee on the Palestine Question, was established to consider UNSCOP's reports and possible implementation; this committee, too, recommended partition.

On 29 November 1947, the General Assembly adopted these recommendations in Resolution 181(II),<sup>170</sup> calling for the establishment of a Jewish state, an Arab state, and an international special regime for the Jerusalem region. The Resolution also established the Palestine Commission in order to work with the parties to implement these recommendations. While the Jewish representative organizations accepted these recommendations,<sup>171</sup> the Resolution was rejected, violently, by the various Arab states in the region, as well as by local Arab communities in the Mandate area who immediately executed a previously threatened conflict

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<sup>165</sup> U.N. Charter art. 80, [https://legal.un.org/repertory/art80/english/rep\\_orig\\_vol4\\_art80.pdf](https://legal.un.org/repertory/art80/english/rep_orig_vol4_art80.pdf)

<sup>166</sup> Huntington Gilchrist, *Colonial Questions at the San Francisco Conference*, 39(5) Amer. Pol. Sci. Rev. 982, 990-991(1945) (referring to Article 80 in saying that “[t]his clause resulted from the fears of mandatory powers lest their legal position in the mandated territories be taken away out of hand by the trusteeship system. There were also fears on the part of minority groups (such as the supporters of the Jewish people in relation to Palestine) lest their privileges under the League Covenant and the mandates should be taken away”); State of Israel Office of the Attorney General, *supra* note 22, ¶ 28. The Arab states were aware of this importance and attempted, unsuccessfully, to ensure different wording for the Charter; see SABEL, *supra* note 21, at 90.

<sup>167</sup> The ICJ considered Article 80 in the South-West Africa Advisory Opinion, noting that “...as far as mandated territories are concerned, to which paragraph 2 of this article refers – this provision presupposes that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations. 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.”

International Status of South-West Africa, Advisory Opinion of 11 July 1950, *supra* note 15, at 134; Judge van Wyk, in a dissenting opinion to an ICJ judgement in a further case concerning South-West Africa, stated: “Article 80(1) of the Charter of the United Nations applied as much to Palestine as it applied to South West Africa”; see South-West Africa Cases (Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J 636 (Dec. 21).

<sup>168</sup> The request was submitted under the authority of the UN Charter, which provided the General Assembly the authority to “discuss any questions or any matters within the scope of the Charter... and... may make recommendations... on any such questions or matters”. see U.N. Charter, *supra* note 29, art. 10.

<sup>169</sup> HC Deb (18 Feb. 1947) (433) Cols. 988-989, [https://api.parliament.uk/historic-hansard/commons/1947/feb/18/palestine-conference-government-policy#column\\_988](https://api.parliament.uk/historic-hansard/commons/1947/feb/18/palestine-conference-government-policy#column_988) (“[w]e have, therefore, reached the conclusion that the only course now open to us is to submit the problem to the judgment of the United Nations...”); see also Letter from Alexander Cadogan to Dr. Victor Chi Tsai Hoo, Assistant Sec. Gen., U.N. Doc. A/286 (Apr. 2, 1947), <https://www.un.org/unispal/document/auto-insert-189500/>.

<sup>170</sup> G. A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947) (hereinafter Resolution 181(II)).

<sup>171</sup> SABEL, *supra* note 21, at 95-95.



with the area's Jewish communities.<sup>172</sup> Having been rejected, the implementation of Resolution 181(II) was abandoned.<sup>173</sup>

Britain had already declared its intention to terminate its Mandate failing the achievement of a solution acceptable to the interested parties. Following the failure to implement Resolution 181(II), the British government stated that it would end its Mandate on 15 May 1948. When the time came, the British noted that “it had originally been the intention of the United Nations that the [Palestine] Commission appointed to implement the Assembly’s recommendations should succeed to the authority exercised by the Government of Palestine and should arrange for the transfer and maintenance of the essential services operated by the Government”; however, acknowledging the failure of the UN effort to implement a resolution, the British unilaterally declared that “British responsibility for Palestine has ceased.”<sup>174</sup>

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<sup>172</sup> *Id.*; ZIPPERSTEIN, *supra* note 25, at 372-376, 385; see also *Palestine: Termination of the Mandate*, Colonial Office and Foreign Office 10 (May 15, 1948), [https://content.ecf.org.il/files/M00702\\_TerminationOfTheMandateCOReport1948OriginalEnglish.pdf](https://content.ecf.org.il/files/M00702_TerminationOfTheMandateCOReport1948OriginalEnglish.pdf) (“Arabs announced their intention of resisting it [the partition plan] by every means within their power and were promised full support in their resistance by Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan and the Yemen.” For declarations made by Arab delegates immediately after the adoption of the Partition Resolutions, see *The Arab Reaction*, Ministry of Foreign Affairs, (Nov. 29, 1947), <https://www.gov.il/en/Departments/General/the-arab-reaction-29-nov-1947>).

<sup>173</sup> General Assembly resolutions are without binding effect; see MALCOLM SHAW, *INTERNATIONAL LAW* 1077 (Univ. of Cambridge 9th ed. 2021) (“Except for certain internal matters, such as the budget, the Assembly cannot bind its members. It is not a legislature in that sense, and its resolutions are purely recommendatory”). The wording and history of Resolution 181(II) clearly indicate that G.A. resolutions are merely recommendations and are not legally binding. As noted by Crawford: “The conclusion must be that the partition plan, though valid, was intended as no more than a recommendation. This conclusion is reinforced by the history of the resolution after 29 November 1947. Both the Security Council and the United Kingdom refused to enforce the partition plan, and various alternative schemes were mooted... By 14 May 1948 the Assembly itself had, in effect, abandoned the partition plan as a whole.” see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 430-432 (Oxford Univ. Press 2nd ed. 2007). On 14 May 1948, the UN resolved to stop the work of the Palestine Commission whose purpose was to assist with implementing Resolution 181(II), see *Further Consideration of the Question of the Future Government of Palestine*, G.A. Res. 554, U. N. Doc. A/554 (May 4, 1948).

<sup>174</sup> Colonial Office and Foreign Office, *supra* note 36, at 12.



7. The establishment of the State of Israel – Israel retains its claims over the West Bank

With the end of the Mandate, the State of Israel was established on 14 May 1948, in the midst of the ongoing civil violence with local Arab forces.

Israel’s Declaration of Independence declared “the establishment of a Jewish state in the Land of Israel (‘Eretz-Israel’), to be known as the State of Israel” and offered “complete equality of social and political rights to all its inhabitants.” The Declaration expressed the State’s readiness to cooperate with the UN in implementing Resolution 181(II), calling on the UN to assist with state-building and on the Arab parties waging conflict to “preserve peace” and participate in building the new State with “full and equal citizenship and due representation in all its provisional and permanent institutions.”<sup>175</sup>

On the same day, Arab forces launched an air attack on the newly formed state, followed by the invasion by the regular forces of Lebanon, Syria, Iraq, Transjordan and Egypt, assisted by military contingents from additional countries including Saudi Arabia.<sup>176</sup>

The war ended through a series of armistice agreements with most of the invading states, based on military positions at the time of such agreements and agreed-upon modifications. On 30 November 1948 a ceasefire for the Jerusalem area was agreed upon by Jordanian and Israeli

<sup>175</sup> While referring to ‘Eretz-Israel’, the Declaration did not define the declared borders of the newly formed sovereign state. *see* THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 2.

<sup>176</sup> The Arab-Israeli War of 1948, Milestones in the History of U.S. Foreign Relations <https://history.state.gov/milestones/1945-1952/arab-israeli-war#:~:text=On%20the%20eve%20of%20May,Syria%2C%20Iraq%2C%20and%20Egypt> (last visited Jan. 24, 2024); *Israel’s War of Independence (1947-1949)*, Ministry of Foreign Affairs, <https://embassies.gov.il/MFA/AboutIsrael/history/Pages/Israels%20War%20of%20Independence%20-%201947%20-%201949.aspx>.

military officers, who drew a rough map of the military positions at the time, and on 3 April 1949 a general armistice agreement was entered into by Israel and Jordan, incorporating the Jerusalem ceasefire agreement and conducting agreed-upon territory swaps. The lines reflect the positions of the Israeli, Iraqi and Transjordanian forces at the time of the ceasefire, with agreed-upon swaps, and did not denote lines based on any principled political considerations.



The Armistice Agreement between Israel and Jordan did not affect any issues of sovereignty; its clear and stated purpose was to delineate the lines beyond which the armed forces of the respective parties shall not cross.<sup>177</sup> The Agreement explicitly stated that it shall not “...prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question...”,<sup>178</sup> and that the armistice lines are “without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto.”<sup>179</sup> The lines were also subject to negotiated amendments in the months following the agreement.<sup>180</sup>

<sup>177</sup> General Armistice Agreement, Isr.-Jordan, art IV, ¶ 2, Apr. 3, 1949, 654 U.N.T.S. 304. David Ben Gurion, the first Israeli prime minister to the Knesset stated in a Knesset session as follows “This agreement, like those with Egypt and Lebanon, is purely military. It does not determine anything political or territorial for the moment. It merely fixes a certain line, extending from Eilat to the southern end of Lake Tiberias, from there via the Gilboa and Samaria mountain ridges to the mountain ridges of Judea and thence to Jerusalem, on either side of which the military forces of both sides can move under certain conditions. These negotiations were perhaps the hardest of those we have conducted to date, even though they were limited solely to military matters.” *see* DK, 1st Knesset, Session No. 20 (1949) (Isr.) *translated in* The Constituent Assembly First Knesset 1949-1951, <https://www.jcpa.org/art/knesset2.htm>.

<sup>178</sup> Isr.-Jordan Agreement, *supra* note 41, § II ¶ 2.

<sup>179</sup> *Id.* § VI ¶ 9.

<sup>180</sup> Press Release, United Nations Department of Public Information, 200 Displaced Arabs Return to Their Village Under UN Auspices, U.N. Doc. PAL/537 (Nov. 4, 1949), <https://www.un.org/unispal/document/auto-insert-208243/>.



## 8. Jordan's claims to the West Bank and its renunciation thereof

Following the conclusion of the Armistice Agreement, in 1950 Jordan purported to annex the West Bank.<sup>181</sup> West Bank residents were granted Jordanian citizenship and given the right to vote, and were represented in the Parliament in Amman.<sup>182</sup> This action, however, was met with widespread international opposition and was recognized by only two countries: the United Kingdom and Pakistan.<sup>183</sup> In particular, on 15 May 1950, the Arab League agreed that Jordan's purported annexation of the West Bank that year was illegal.<sup>184</sup> Israel, for its part, maintained its claim to the territory. In asserting that it did not consider itself bound by the Jordanian Parliament's unilaterally proclaimed annexation, Israel stressed that the status of the West Bank could be resolved only via peace negotiations leading to a political settlement:

“This is a unilateral act that is in no way binding on Israel. We have concluded an armistice agreement with the Hashemite Jordan Kingdom and it is our firm intention fully to abide by it. This agreement, however, entails no final political settlement, and no such final settlement is possible without negotiations and the conclusion of a peace treaty between the two parties. It should therefore be clear that the status of the Arab areas west of the Jordan [River] remains an open question as far as Israel is concerned.”<sup>185</sup>

Jordan's purported annexation failed to confer Jordanian sovereignty over the West Bank.<sup>186</sup> In any event, in 1988, King Hussein of Jordan formally relinquished Jordan's claims to the West Bank in favor of the Palestine Liberation Organization (PLO).<sup>187</sup> This renunciation was formalized in the Algiers Declaration, effectively ending any purported Jordanian claim to the area.<sup>188</sup>

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<sup>181</sup> See, e.g., SABEL, *supra* note 21, at 299-300.

<sup>182</sup> See, e.g., Michael Sharnoff, *Does Jordan Want the West Bank?* 27(4) Middle East Q. 1, 2 (2020).

<sup>183</sup> *Id.*; Eugene V. Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate*, 5 Yale Stud. World Pub. Ord. 147, 153 (1979); ALLAN GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 42-47, 76-78 (Routledge, 1978).

<sup>184</sup> *Jordan's Annexation in Palestine is Called Illegal by Arab League*, N.Y. TIMES, May 16, 1950, <https://www.nytimes.com/1950/05/16/archives/jordans-annexation-in-palestine-is-called-illegal-by-arab-league.html>. In contrast, the Palestinians did not take any steps towards the creation of a Palestinian state in the Jordanian territory, and themselves later ascribed to Jordanian sovereignty over the West Bank. In fact, it is explicitly stated in the 1964 Palestinian National Charter of the Palestinian Liberation Organization that “This Organization does not exercise any regional sovereignty over the West Bank in the Hashemite Kingdom of Jordan, [or] the Gaza Strip.” (National Covenant of the Palestine Liberation Organization art. 24, 1964 <https://www.gov.il/en/Departments/General/11-national-covenant-of-the-palestine-liberation-organization-28-may-1964>).

<sup>185</sup> See statement by Foreign Minister Moshe Sharett in DK, 1st Knesset, Session No. 135 (1950) 1282 (Isr.), [https://fs.knesset.gov.il/1/Plenum/1\\_ptm\\_250228.pdf](https://fs.knesset.gov.il/1/Plenum/1_ptm_250228.pdf).

<sup>186</sup> See, e.g. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV 279, 292 (1968) (“[T]he Kingdom of Jordan never acquired the status of a legitimate sovereign over Judea and Samaria and enjoyed at the most the rights of a belligerent occupant there ...”).

<sup>187</sup> *Address to the Nation*, Office of King Hussein I, Amman (July 31, 1988), [http://www.kinghussein.gov.jo/88\\_july31.html](http://www.kinghussein.gov.jo/88_july31.html) (last visited Jan. 24, 2024); see also Sharnoff, *supra* note 46.

<sup>188</sup> Written Statement of the Hashemite Kingdom of Jordan, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. ¶ 2.41 (Jan. 30), <https://www.icj-cij.org/sites/default/files/case-related/131/1559.pdf>.

## 9. Israeli control over the West Bank in 1967 and Security Council Resolutions 242 and 338

In June 1967 (the “Six Day War”), acting in self-defense,<sup>189</sup> Israel acquired control over significant territories outside of Israel’s sovereign areas, including the West Bank, and passed legislation applying Israeli law over the whole of Jerusalem. Although the status of the West Bank as occupied territory has been the subject of debate and contention amongst Israel and the international community, Israel has administered the West Bank according to the international law of belligerent occupation, holding the position that the treaties on such law do not apply *de jure*.<sup>190</sup>

Irrespective of whether the West Bank is occupied territory as a matter of general international law, Israel’s longstanding claims in that territory, and the fact that sovereignty over it remains in abeyance, are unaffected, as belligerent occupation does not invalidate any pre-existing claims to the territory concerned. Furthermore, claims that the West Bank is occupied territory do not determine its disposition after the occupation has ended.<sup>191</sup>

A few months after the Six Day War, the Security Council passed Resolution 242.<sup>192</sup> Under the terms of the resolution, the establishment “of a just and lasting peace” in the Middle East requires the application of the two following principles: (i) withdrawal of Israel “from territories” gained in the Six Day War,<sup>193</sup> and (ii) “Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to exist within secure and recognized borders free from threats or acts of force.”

In practice, this language was understood to mean that Israel was not required to withdraw from territories that came under its control during the Six Day War in the absence of an agreement incorporating the principles set forth by the resolution.<sup>194</sup>

This resolution, together with Resolution 338 adopted by the Security Council following the 1973 Yom Kippur War, constitutes today the agreed-upon basis for all peace agreements

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<sup>189</sup> See *Statement to the Security Council by Foreign Minister Eban*, Ministry of Foreign Affairs (June 6, 1967), <https://www.gov.il/en/Departments/General/19-statement-to-the-security-council-by-fin-eban-6-june->: “But as time went on, there was no doubt that our margin of general security was becoming smaller and smaller. Thus, on the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hasheloshah we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the United Nations Charter, Israel responded defensively in full strength.”

<sup>190</sup> See generally, Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. YB HUM. Rts, 262 (1971).

<sup>191</sup> This finding was made specifically in the context of the West Bank by International Criminal Court Judge Péter Kovács; see Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18-143, ¶ 268-281, Partly Dissenting Opinion by Judge Kovacs P (Feb. 05, 2021), <https://www.icc-cpi.int/court-record/icc-01/18-143-anx1> (“...I find unpersuasive the Prosecutor’s argument implicitly suggesting that the call for retreat and the condemnation of the occupation automatically and ipso facto mean the confirmation of Palestine’s legal title over the occupied territory and, moreover, the whole territory according to the 1967 lines. The reference to a general right to self-determination and to the right to self-determination of the Palestinian people, also recognized by the ICJ in its advisory opinion on the Wall, and which is uncontested, is not helpful in determining an existing and recognized legal state-boundary in 2021.”).

<sup>192</sup> S.C. Res. 242, U.N. Doc S/RES/242 (Nov. 22, 1967).

<sup>193</sup> For a consideration of the interpretation of Resolution 242 as regards to the term “territories”, see State of Israel Office of the Attorney General, *supra* note 22.

<sup>194</sup> *The Cornerstone of the Arab-Israeli Peace Process*, Ministry of Foreign Affairs (Nov. 9, 2015), <https://embassies.gov.il/tbilisi/NewsAndEvents/Pages/48-years-since-Resolution-242.aspx>; *Statements Clarifying the Meaning of Resolution 242*, Ministry of Foreign Affairs (Mar. 8, 1999), <https://www.gov.il/en/Departments/General/2-statements-clarifying-the-meaning-of-resolution-242-8-mar-1999>.

between Israel and its neighbors. While it has been argued that these Resolutions did not apply to the Israeli-Palestinian conflict,<sup>195</sup> they were later adopted by Israel and the PLO as an agreed upon basis for negotiations, in the framework of which the parties can raise their respective legal claims regarding the final disposition of the area.<sup>196</sup>

The importance of these resolutions to the international community is evident from the International Court of Justice 2004 Advisory Opinion on “the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, in which the Court expressed its opinion that the resolutions’ implementation is key to ending the conflict:

“Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973).”<sup>197</sup>

#### 10. The evolving language used in UN Resolutions relating to the West Bank

Since 1967, the language used in UN Resolutions to refer to the West Bank and Gaza Strip has evolved without clear legal justification which is indicative of a shift in political rhetoric rather than of the legal status of the territory. At the UN Security Council, early Resolutions do not refer to “Palestinian territories”. For example, UNSC Resolution 242 refers to “territories occupied in the recent conflict.” UNSC Resolution 259 refers to “Arab territories under military occupation by Israel.” This language is used until the beginning of the 1980s, where there is a shift: UNSC Resolutions 465 and 478 refer to “the Palestinian and other Arab territories occupied since 1967”, while in the 1990s, UNSC Resolution 681 mentions “the Palestinian territories occupied by Israel since June 1967, including Jerusalem,” and UNSC Resolution 904 begins referring to “the Occupied Palestinian territory.”

At the UN General Assembly, a similar shift can be observed. Resolution 2546 (December 11, 1969) refers to “Arab territories occupied by Israel.” Resolution 2727 (December 15, 1970) refers to “Arab territories under military occupation by Israel.” This qualification is used consistently throughout the 1970s.

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<sup>195</sup> In a statement that it issued the day after Resolution 242 was adopted, the Palestine Liberation Organization (PLO) declared: “For these reasons, the most important of which is that the Security Council ignores the existence of the Palestinian people and their right of self-determination, the *Palestine Liberation Organisation hereby declares its rejection of the Security Council resolution as a whole and in detail.*” [emphasis added]. See Statement Issued by the Palestine Liberation Organization Rejecting U.N. Resolutions (sic) 242, Cairo, 23 November 1967, reproduced in THE ISRAELI-PALESTINIAN CONFLICT: A DOCUMENTARY RECORD 1967-1990, 290-291 (ed. by Yehuda Lukacs, 1992). The PLO further stated, in a document adopted at the 12<sup>th</sup> Session of the Palestine National Council, Cairo, 8 June 1974 (“The 10 Point Program of the PLO (1974)”), that: “To reaffirm the [PLO’s] previous attitude to Resolution 242, which obliterates the national right of our people and deals with the cause of our people as a problem of refugees. The Council therefore refuses to have anything to do with this resolution at any level, Arab or international, including the Geneva Conference.” See *Political Program Adopted at the 12th Session of the Palestine National Council*, Permanent Observer Mission of Palestine to the United Nations (June 8, 1974), <https://web.archive.org/web/20110805192136/http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/12354;jsessionid=ED2AC7E70A82F5C7CCB42BC6357FCDEC>; See also generally SABEL, *supra* note 21, at 207.

<sup>196</sup> Israel-PLO Recognition - Exchange of Letters between Prime Minister of Israel Yitzchak Rabin, and Palestinian Authority Chairman Yasser Arafat, 9 September 1993, at <https://www.gov.il/en/Departments/General/israel-plo-recognition-exchange-of-letters-between-pm-rabin-and-chairman-arafat-sept-9-1993>.

<sup>197</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 162 (Jul. 9).

However, in parallel, the UNGA starts adopting the language of self-determination of the “Palestinian people” and the “inalienable national rights of the Palestinian people” (UNGA Resolutions 2649 (November 30, 1970), Resolution 3236 (November 22, 1974), Resolution 3414 (December 5, 1975)).

In 1978, UNGA resolution 33/113 refers to “Palestinian and other Arab territories occupied” by Israel, which becomes “continued Israeli occupation of the Palestinian territories” in 1981 (UNGA Resolution 36/120), “occupied Palestinian Arab territories, including Jerusalem” in 1982 (UNGA Resolution ES-7/4), “Palestinian territory occupied since 1967, including Jerusalem” in 1989 (UNGA Resolution 44/40), and “occupied Palestinian Territory” in 1990 (UNGA Resolution 45/74).

As to self-determination, in 1980 the UNGA started linking the exercise of that right with the territories occupied in 1967 (see UNGA Resolution 35/169 (December 15, 1980)), explicitly claiming in 1988 “the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967” (UNGA Resolution 43/177 (December 15, 1988)).

The inconsistency of the language used at the UNGA can be illustrated by its consideration of the alleged illegality of the occupation. Imseis accepts that, following an analysis of relevant UNGA practice: “... in 1975 and 1976 the General Assembly condemned the occupation as a ‘violation of the Charter of the United Nations’, while from 1977 to 1981 it expressly qualified it as ‘illegal’. Between 1981 and 1991 the Assembly dropped this reference and reverted to condemning the occupation as a ‘violation of the Charter of the United Nations’, albeit demanding Israel’s ‘immediate, unconditional and total withdrawal’. Taken together, this practice suggests the Assembly was of the view that at least by the eighth year of the occupation, Israel’s presence in the OPT had become illegal for being in violation of the jus ad bellum provisions of the Charter and, accordingly, could not condition its end on negotiation in line with the law of state responsibility. The problem arises from the fact that from 1992 onward – just after the convening of the Madrid Peace Conference – all such references in Assembly resolutions simply vanish. From that point on, the Assembly has satisfied itself with an annual affirmation that ‘the occupation itself’ constitutes a ‘grave’, ‘gross’ or ‘primary’ violation only of ‘human rights’, while expressing the ‘hope’ that the parties are able to bring it to an end through negotiation.”<sup>198</sup>

Interestingly, what does emerge consistently from UN Resolutions is the need to resolve the situation through negotiation. More specifically, UN Resolutions do not specifically address the issue of sovereign legal title, nor do they delimit Israel’s or Palestine’s borders. For example, Resolution 67/19 expressly refers to the need to resolve the issue of borders via negotiations, highlighting that the territorial issues are still unsettled. It does not foreclose land swaps (which nearly all agree are essential to any two-State solution).<sup>199</sup> The resolution, in its own terms, leaves the exact path of the boundary line to be determined by political negotiations, not by international lawyers.<sup>200</sup>

Moreover, Security Council Resolution 2334 leaves the question of borders open. While the resolution refers to a Palestinian territory, it makes no determinations as to its scope. Indeed, by urging intensification and acceleration of international and regional diplomatic efforts aimed

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<sup>198</sup> Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine, 1967–2020*, 31 Eur. J. Int. Law. 3, 1055, 1069–1070 (2020).

<sup>199</sup> See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, ¶ 58 (Univ. of Cambridge 2nd ed. 2019).

<sup>200</sup> See DAVID LUBAN, *Palestine and the ICC – Some Legal Questions*, JUST SECURITY, Jan. 2, 2015, <https://www.justsecurity.org/18817/Palestine-icc-legal-questions/>

at achieving a just and lasting peace on the basis of “the relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap”, Resolution 2334 leaves open the question of the status of West Bank and Gaza territory and the borders of a future Palestinian State.<sup>201</sup>

Since Resolution 242, together with Resolution 338 which called for its implementation, constitute the agreed-upon basis for all future peace negotiations concerning the territories, and since those resolutions leave the status of the territories in abeyance pending a negotiated agreement, subsequent UN resolutions cannot impart on the legality of Israeli presence in the West Bank or Gaza Strip or on the validity of legitimate sovereign claims that could be made in relation to that territory. This is due both to the inconsistent language utilized in subsequent UN resolutions concerning that territory, and, more importantly, those resolutions' consistent call for a negotiated settlement. Subsequent UN resolutions should therefore be used with caution when attempting to ascertain the content of applicable customary law and when identifying relevant facts for the determination of the issues under consideration in the current proceedings, and, in any event, cannot constitute a sound legal basis for the adjudication of these issues.

#### 11. Israel's peace treaties with its neighbors left the status of the West Bank undetermined until a future political settlement

The agreements concluded over the years between Israel and its neighbors did not resolve the status of the West Bank and left sovereignty over the territory in abeyance until a future political settlement is reached between Israel and the Palestinians. Israel also retained all of its legal claims to the area constituting the West Bank.

The 1979 Egypt-Israel Peace Treaty makes no mention of the West Bank.<sup>202</sup> In a Letter Agreement additional to the Peace Treaty, Israel and Egypt confirmed their previous commitment under the 1978 Camp David Accords<sup>203</sup> to start negotiations, the purpose of which was the “establishment of the self-governing authority in the West Bank and Gaza in order to provide full autonomy to the inhabitants.”<sup>204</sup> The Camp David Accords envisaged that, following the establishment of such a self-governing authority, “negotiations [based on UN Security Council Resolution 242] will take place to determine the final status of the West Bank and Gaza and its relationship with its neighbors,” as well as to “resolve, among other matters, the location of the boundaries and the nature of the security arrangements.”<sup>205</sup>

While subsequent Israeli-Egyptian negotiations over the implementation of the autonomy plan failed, the Camp David Accords established the principle that the status of the West Bank and the Gaza Strip would have to be negotiated between Israel and the Palestinians, and the idea of a transitional period of self-governance was later implemented by these parties in the Oslo Accords.<sup>206</sup>

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<sup>201</sup> See Pnina Sharvit Baruch, *UN Security Council Resolution 2334: The Legal significance*, 48, INSS 275, 329-333 (2016).

<sup>202</sup> Treaty of Peace, Egypt-Isr., Mar. 26, 1979, 1136, I-17813 U.N.T.S. 115.

<sup>203</sup> *Id.* at 195 (Letter Agreement additional to the Treaty of Peace, concerning the Establishment of Full Autonomy in the West Bank and the Gaza Strip). For further reading on the 1978 Camp David Accords, see The Camp David Accords, Jimmy Carter Presidential Library & Museum, <https://www.jimmycarterlibrary.gov/research/additional-resources/camp-david-accords> (last visited, Jan. 28, 2024).

<sup>204</sup> *Id.*

<sup>205</sup> *The Camp David Accords: the Framework for Peace in the Middle East*, Ministry of Foreign Affairs, art. A(1)(c) (Sep. 17, 1978), <https://www.gov.il/en/Departments/General/camp-david-accords>.

<sup>206</sup> *Declaration of Principles on Interim Self-Government Arrangements*, Ministry of Foreign Affairs art. I, art. V (Sep. 13, 1993), <https://www.gov.il/en/Departments/General/declaration-of-principles>.



The 1994 Jordan-Israel Peace Treaty was concluded without prejudice to the status of the West Bank. The Treaty delimited the international boundary not only between the two states but also between Jordan and the West Bank, and provided that this boundary was the “permanent, secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israeli military government control in 1967.”<sup>207</sup> The Treaty further acknowledged issues that would be subject to the “permanent status negotiations” pertaining to the West Bank, such as the issues of borders, refugees and the Muslim Holy Shrines in Jerusalem.<sup>208</sup> Thus, the Jordan-Israel Peace Treaty left sovereignty over the West Bank in abeyance and the status of the territory undetermined pending future negotiations between Israel and the Palestinians.

## 12. The “Oslo Accords” – Israel and the Palestinians agree to resolve their competing claims to the West Bank through bilateral negotiations

In 1993, Israel and the Palestinians agreed to settle their dispute – including their competing claims in the West Bank – through bilateral negotiations leading to the implementation of Security Council Resolutions 242 and 338 and to a just and lasting peace.<sup>209</sup> In the Preamble of the Israeli-Palestinian Declaration of Principles, the parties agreed:

“[I]t is time to put an end to decades of confrontation and conflict, *recognize their mutual legitimate and political rights*, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation *through the agreed political process*.”<sup>210</sup> [emphases added.]

The 1995 Interim Agreement set out detailed arrangements that would govern a transitional period prior to the completion of the permanent status negotiations. Such arrangements included the division of powers and responsibilities in the West Bank between Israeli authorities and Palestinian self-governing authorities. During the transitional period, the parties committed not to take any actions that would change the status of the West Bank:

“Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”<sup>211</sup>

Among the issues that the parties left for permanent status negotiations are the issues of borders, Jerusalem, settlements, security arrangements, and foreign relations.<sup>212</sup> All of these issues have direct bearing on the question of the final disposition of the West Bank. Over the years, Israel and the Palestinians have engaged in numerous efforts to negotiate a resolution to their conflict, including with respect to the permanent status of the West Bank. Unfortunately, these efforts have yet to succeed. Nonetheless, although the five-year transitional period

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<sup>207</sup> Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jor., art. 2, 3 ¶ 1, annex I(A) art. A ¶ 7, Oct. 23, 1994, 2042, I-35325 U.N.T.S. 393.

<sup>208</sup> *Id.*, art. 8 ¶ (2)(B)(ii), 9 ¶ 2.

<sup>209</sup> *Supra* note 73, art. I.

<sup>210</sup> *Id.*, preamble.

<sup>211</sup> *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Ministry of Foreign Affairs, art. XXXI ¶ 7 (Sep. 28, 1995), <https://www.gov.il/en/Departments/General/the-israeli-palestinian-interim-agreement>. Art. XXXI ¶6 further acknowledges that each side maintained claims to the territory concerned: “... Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.”

<sup>212</sup> *Id.* art. XXXI ¶ 5; *Supra* note 73, art. V ¶ 3.

originally envisaged by the Declaration of Principles and by the Interim Agreement has long passed, and despite the fact that both Israel and the Palestinians have leveled accusations of violations of the agreements by the other party, both sides, as well as the international community, have repeatedly acknowledged that the agreements continue to form the applicable legal framework governing their relations.<sup>213</sup>

As permanent status negotiations have not yet been concluded and the permanent status of the West Bank has yet to be determined, sovereignty over the West Bank remains in abeyance to the present day and the parties' competing claims to the territory remain indeterminate.

### 13. Concluding remarks

The request for the advisory opinion appears to assume that sovereign rights to the West Bank rest solely with the Palestinian people and suggests that the State of Israel has no legal claim in these areas.

This is incorrect. As this paper has demonstrated, sovereign legal title over the West Bank has been indeterminate, or in abeyance, for over a century. This has been the legal position under international law since the end of the First World War, when Turkey (as the successor to the Ottoman Empire) ceded sovereignty of the areas outside of its current borders. No agreement, instrument, judgment, opinion, or event with legal effect has changed this status since, as reflected – and explicitly stated – in agreements between the interested parties, and particularly in agreements between Israel and the Palestinians. Under these agreements, the question of the final disposition of the West Bank shall be determined by negotiation. Until then, both sides have agreed to provisional arrangements, which continue to apply and govern the legal relationship between them today.

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<sup>213</sup> For recent statements by the parties in this regard, together with Egypt, Jordan and the United States, *see, e.g.*: *Joint Communiqué from the March 19 meeting in Sharm El Sheikh*, U.S Department of State, ¶ 3-5 (Mar. 19, 2023), <https://www.state.gov/joint-communicue-from-the-march-19-meeting-in-sharm-el-sheikh/> (“The two sides reaffirmed, in this regard, their unwavering commitment to all previous agreements between them.” and “The two sides reaffirmed their commitment to all previous agreements between them, and reaffirmed their agreement to address all outstanding issues through direct dialogue.”); *Aqaba Joint Communiqué*, U.S Department of State, ¶ 1 (Feb. 26, 2023), <https://www.state.gov/aqaba-joint-communicue/> (“The two sides (Palestinian and Israeli sides) affirmed their commitment to all previous agreements between them, and to work towards a just and lasting peace.”); *See also*, SABEL, *supra* note 21, at 280-282.