PAUL J.I.M. DE WAART

DYNAMICS OF SELF-DETERMINATION IN PALESTINE

Protection of Peoples as a Human Right

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Protection of Peoples as a Human Right

BY

PAUL J.I.M. DE WAART

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ABBREVIATIONS

ACP states	African, Caribbean and the Pacific states
AJIL	American Journal of International Law
ATF	Arab Thought Forum, Jerusalem
BMA	British Mandatory Administration in Palestine
CSCE	Conference on Security and Cooperation in Europe
CERDS	Charter of Economic Rights and Duties of States, UNGA res. 3281 (XXIX) of 12 December 1974
CHR	Commission on Human Rights
DAC	OECD Development Assistance Committee
DD	Development Decade
DPIL	Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA res. 2625 (XXV) of 24 October 1970
DSD	Dynamic of Self-determination, a joint project of the ATF, the ICPME, the Katholieke Universiteit van Nijmegen (KUN), the Rijksuniversiteit Gent, the Vrije Universiteit Amsterdam (VU) and the IDF.
DSPD	Declaration on Social Progress and Development, UNGA res. 2542 (XXIV) of 11 December 1969
E(E)C	European (Economic) Community
EBRD	European Bank for Reconstruction and Development
ECA	UN Economic Commission for Africa
ECE	UN Economic Commission for Europe
ECOSOC	UN Economic and Social Council
EJIL	European Journal of International Law
ESCRC	Economic, Social and Cultural Rights Committee
EU	European Union
FAO	Food and Agriculture Organisation
GATT	General Agreement on Tariffs and Trade
HM	Helsinki Monitor, Quarterly on Security and Cooperation in Europe
HRQ	Human Rights Quarterly
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep.	Reports of Judgments, Advisory Opinions and Orders of the ICJ.

ICPME	International Centre for Peace in the Middle East, Tel Aviv
ICSID	International Centre for the Settlement of Investment Disputes
IDF	International Dialogues Foundation, The Hague
IBO	Intergovernmental Organisation
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
LDCs	Least Developed Countries
Limburg Princ.	Principles on the Implementation of the ICESCR, drawn up by a NGO symposium at Maastricht (Limburg) in 1986.
LJIL	Leiden Journal of International Law
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
NICs	Newly Industrialized Countries
NIEO	New International Economic Order
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
OAU	Organization of African Unity
ODA	Official Development Assistance
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PLO	Palestine Liberation Organization
PNC	Palestine National Council
SC	Security Council
Siracusa Princ.	Limitation and Derogation Provisions in the ICCPR drawn up by a NGO symposium at Siracusa (Sicily) in 1984
Seoul Decl.	Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, adopted by the 62nd Conference of the ILA in Seoul (24-30 August 1986)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCIO	United Nations Conference on International Organization at San Francisco 25 April-26 June 1945
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Conference of the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNDP	UN Development Programme
UNDRD	UN Declaration on the Right to Development

UNEP	UN Environment Programme
UNESCO	UN Educational, Cultural and Scientific Organisation
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNPO	Unrepresented Nations and Peoples Organization
UNSCOP	UN Special Committee on Palestine
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNSCOP	UN Special Committee on Palestine
UK	United Kingdom
USA	United States of America
USSR	former Union of Soviet Socialist Republics
Vienna Decl.	Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

PREFACE

The 1919 Covenant of the League of Nations intended to promote international cooperation and to achieve international peace and security "by the firm establishment of the understandings of international law as the actual rule of the conduct among Governments" and "by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another." Unlike the Jewish people, the Palestinian people had the misfortune not to belong to the organized peoples at the time. Zionism had managed to fit its aspirations for a Jewish national home in Palestine into the framework of the then existing international law.

The scourge of the second World War, including the Holocaust, led the "Peoples of the United Nations" to decide to give priority to politics over and above international law. They were determined "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." According to the United States and the Soviet Union the partition of Palestine and the creation of Israel belonged to those conditions. The Arab states and the Palestinian people overlooked the negotiating element in international order (Chapter One).

In the aftermath of the second World War the UN also became aware of the necessity to protect peoples against oppression. To that end, the Universal Declaration of Human Rights was adopted in 1948. This instrument focused on the position of individuals. Their protection, however, also required the recognition of collective human rights, particularly the rights of peoples to self-determination and to development (Chapter Two). In doing so the UN shaped the framework for the settlement of the conflicting territorial claims of peoples to Palestine (Chapter Three). The UN should now give justice to the Palestinian people and guide the dynamics of self-determination into the creation of Palestine (Chapter Four).

The abundance of scholarly books and articles on the Israeli-Palestinian conflict seems to be inversely proportional to their impact

on a just and adequate solution. It seems like a Sysiphean labour to devote another book to the topic. I decided to run the risk out of respect for all those Israelis and Palestinians who—despite strong opposition in their own group—dared to bridge the yawning gap which the League of Nations Mandate and, with that, international law has caused between their peoples.

One of the Palestinians in the Occupied Territories who has devoted his life to a peaceful solution of the dispute on self-determination is the Palestinian journalist Hanna Siniora, Editor-in-Chief of Al Fajr Newspapers in Jerusalem. In August 1987 he asked a number of international lawyers to provide legal advice on whether Palestinians in Jerusalem could take part in municipal elections without weakening the Palestinian claim to sovereignty. His initiative was overtaken by the outburst of the intifada.

Another such person is my highly respected colleague from the Faculty of Law of the Hebrew University in Jerusalem, David Kretzmer, who as a former citizen of South Africa did not hesitate to compare the humiliating military rule in the occupied Palestinian territory with *apartheid.*

Only a few days after the outbreak of the intifada the Netherlands Organisation for International Cooperation (NOVIB) asked me to join a mission to the West Bank and the Gaza Strip in order to submit a recommendation on the role of international law in solving the conflict. The mission in February 1988 was an impressive experience. It laid down the foundation for a joint Israeli-Palestinian-European project on Dynamics of Self-determination.

The project was directed by a Project Board of Israeli, Palestinian and European researchers, including some American colleagues. Despite all the tensions, the will prevailed from the very beginning to study ways and means in which academics could contribute to a just and lasting peace.

The NOVIB mission and my participation in the Project Board convinced me of the desirability to clarify the role of international law in the rise and—hopefully—the coming end of the Israeli-Palestinian conflict. Therefore I highly appreciated the invitation of my distinguished colleague C.A.O. van Nieuwenhuijze, editor of the Social, Economic and Political Studies of the Middle East, published by Brill Leyden, to write a book on that topic.

Europe exists too much in a glass house to be able to throw stones at ethnic cleansing. After all, the rise of Zionism is due to European—and not Arab—discrimination as regards the Jewish people. Nevertheless, satisfaction was demanded from the Arab world, particularly the Palestinian people, for European misconduct. The League of Nations could do so under the then prevailing international law. For that reason the creation of Israel was legitimate.

The United States and the European Union should now do everything to realize the right to self-determination of the Palestinian people. This would be in conformity with current international law, which recognizes the right of all peoples to self-determination and development as human rights. The present book intends to convey this message.

Hopefully the study will contribute to a satisfactory outcome of the present negotiations on the permanent status of the occupied Palestinian territory in the framework of the 1993 Declaration of Principles on Interim Self-government Arrangements. I owe this to my Israeli and Palestinian colleagues and to the staff of the Arab Thought Forum in Jerusalem and the International Center for Peace in the Middle East who contributed so much to paving the way for the present *détente*.

I owe it also to my colleagues from the Katholieke Universiteit Nijmegen, the Rijks Universiteit Gent and the Vrije Universiteit Amsterdam who spent much time in organizing and hosting the seminars in 1988, 1990 and 1991.

The European Union, the Ford Foundation, the McArthur Foundation, the Netherlands Ministry of Foreign Affairs, the NOVIB and the Vrije Universiteit provided the budget, thus setting the trend of a civil society in which international organizations, states and non-governmental organizations join forces in the interest of peace in the Middle East

Of all the members of the Project Board, Naomi Chazan and Leila Shahid in particular were very successful time and again in overcoming tensions. For that reason I would like to devote this book to them as the personification of the cordial atmosphere during the seminars on Dynamics of Self-determination. I would like to include my wife Ria in this tribute, not only for her patience but also for her willingness to extend hospitality to participants.

Finally, I would like to thank the staff of Brill for advice on desktop-editing and Mr. Peter Morris who very skilfully and efficiently revised the English text.

It needs no argument that none of the above persons and agencies may be held responsible for any shortcomings in this study.

Leidschendam, March 1994.

CHAPTER ONE

THE ELEMENT OF NEGOTIATION IN INTERNATIONAL ORDER

The United Nations is based on the principle of the sovereign equality of all its members (section 1). This implies that it is not a supranational organization, let alone a world government. The resulting element of negotiation in the UN decision-making processes is very pertinent to the position of non-self-governing territories in international law. This holds particularly true for the Question of Palestine. After all, the element of negotiation implies that the UN is not always in a position to give preference to the interests of the population of non-self-governing territories over those of states.

A good understanding of the element of negotiation in the UN system is essential to any study of the Israeli-Arab conflict under international law. For that reason the present chapter briefly defines the element of negotiation in the most relevant functions and powers of the UN in respect of the Question of Palestine, i.e. maintenance of international peace and security (section 2); peaceful settlement of disputes (section 3) and the supervision of non-self-governing territories (section 4).

The emerging principles of good governance are intended to bring the element of negotiation somewhat under control, with Europe as the moving spirit. The accompanying process of democratization is worldwide. It may enable international society to gain a better grip on the element of negotiation regionally and in the UN system (section 5).

The fate of the Palestine Mandate illustrated the urgency of running things this way. The resulting Israeli-Palestinian conflict has become the most striking example of inadequate regional and UN governance. Its inherent challenges of international law are the subjects of the other chapters (section 6).

1. Sovereign Equality in the Context of the UN Charter

The originally European principle of sovereign equality of states has increasingly dominated international relations since the Westphalian Peace of 1648. In so doing it gave shape to the concept of the sovereign state by replacing "the idea of a hierarchical structure of Christian society under the Holy Roman Emperor" with the sovereign equality of states as the organizational basis of international society.[1]

It was the Swiss jurist Emery de Vattel (1714-1765) who proclaimed the sovereign equality of states as the core principle of his natural law of states.[2] In doing so, he dethroned Grotius' natural law based on equality of men by attributing states the right of recognition as persons before international law to the exclusion of human beings.[3] The removal of the latter from the ambit of international law enveloped them in national law in such a way that human beings ran the risk of becoming instrumental to states thus placing them in an upside down situation. Vattel's trick intended to fill the power vacuum resulting from the Peace of Westphalia putting behind it the authority of the Pope over and above emperors, kings and other rulers once and for all.

1.1. *Horizontal Structure of International Society*

Actually, the principle of sovereign equality of states raised the power vacuum to the organizational principle of international society. This situation may explain why states time and again find it very difficult to accept that international law may bind them without their approval.[4] They find it even more difficult to subject themselves to the interpretation and application of international law by a supranational authority. That is the reason why the jurisdiction of the Inter-

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[1] De Zayas (1985), 539.

[2] Vattel (1758), part I 8.

[3] *Infra* Chapter Two section 1.

[4] The 1969 Vienna Convention on the Law of Treaties defines a peremptory norm of international law (*jus cogens*) as a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Article 53).

national Court of Justice—hereafter also referred to as the ICJ or the Court—comprises only cases which the parties refer to it either by mutual agreement or when they have declared that they recognize it as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation.[5]

It goes without saying that the present horizontally structured international order can only survive if all member states scrupulously respect each other's sovereignty and territorial integrity. Therefore the concepts of sovereignty and territorial integrity still dominate the scope and content of the UN Charter. However, they greatly humour the position of the permanent members of the Security Council (hereafter also referred to as the SC).

The organization has no authority to intervene in matters which are essentially within the domestic jurisdiction of *any* state, whether or not a member, or to require members to submit such matters to settlement under its Charter. However, this principle does not prejudice the application of enforcement measures under Chapter VII of the Charter devoted to action by the Security Council with respect to threats to the peace, breaches of the peace, and acts of aggression. Thus, the scope of this exception will all be decided at the discretion of the permanent members.[6] The permanent members and their clients have nothing to fear from such measures. They are practically beyond the reach of the UN even when they cannot honestly invoke the principle of non-intervention.

1.2. *Membership*

The UN Charter reflects a trudging after-effect of the nineteenth century when 'Britannia [largely] ruled the waves'. This effect is echoed in the Charter distinction between original UN members and other peace-loving nations. Despite the sovereign equality of states, the latter may only apply for membership if they accept the present Charter, and *in the judgment of the Organization*, are able and willing to carry out these obligations.[7] The former were supposed to be

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[5] Statute of the ICJ, Article 36(1) and (2).

[6] *Infra* section 2.

[7] UN Charter, Article 4, emphasis added. The admission will require the approval of the UNGA upon the recommendation of the SC.

peace-loving by the mere fact that they subscribed to a common programme of purposes and principles embodied in the Atlantic Charter.[8] This programme based the hopes for a better future for the world on eight principles:

> *First*, their countries seek no aggrandizement, territorial or other;
> *Second*, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
> *Third*, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;
> *Fourth*, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic property;
> *Fifth*, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security;
> *Six*, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;
> *Seventh*, such a peace should enable all men to traverse the high seas and oceans without hindrance;
> *Eighth*, they believe that all the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

It is true that states abiding by such principles may indeed be called peace-loving. Unfortunately not all *United Nations* or other original members met these standards in that respect. This may explain why no other states applying for membership were ever requested to demonstrate their peaceableness, let alone that any application for mem-

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[8] According to Article 3 of the UN Charter states which, having participated in the UN Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations, signed and ratified the Charter. See *infra* at note 22.

bership was rejected on that very ground.[9] The cold war in the 1950s perverted the application of the other conditions of states to membership into a package deal between the Soviet Union and the United States. After this time states applying were admitted to UN membership as it were automatically if the super-powers were not involved in a package deal, as happened in the case of divided states (Germany, Korea, Vietnam).

Decisions of the General Assembly—hereafter also referred to as the UNGA—on important questions such as those on membership shall be made by a two-thirds majority, regardless of the votes of the states which are permanent members of the Security Council. In other words, permanent members may prevent but cannot secure the admission of states to membership of the United Nations. The same holds true for suspension or expulsion of members.[10] The required combined action of the Security Council and the General Assembly on membership fits into the common model of an organization with the exception of the fact that a positive recommendation of the Security Council is a *conditio sine qua non*:[11]

> The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, could treat the absence of a recommendation as equivalent to what is described in that statement as an "unfavourable recommendation", upon which the General Assembly could base a decision to admit a State to membership.

The Security Council is thus not an ordinary executive. Within the UN systems it evolved into its own master in respect of UN membership. This was at the expense of legitimate demands of peoples for

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[9] Feuer (1985), 170: "Au vu de tout ce qui est passé depuis 1945, cette condition [peace-loving, PdW], faire sourire." Feuer adds to this that even if by way of exception the question of peace-loving was raised, no state ever tried to propose an interpretation of universal validity.

[10] A UN Member, against which preventive or enforcement action has been taken by the Security Council may be suspended (Article 5); a member which has persistently violated the principles of the Charter may be expelled from the organization (Article 6). In both cases the decision has to be taken by the UNGA upon the recommendation of the SC. Article 19 states that a member which is in arrears in the payment of its financial contributions "shall have no vote in the UNGA if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years."

[11] Admission to the United Nations, Advisory Opinion, ICJ Rep. 9 (1950).

self-determination, the Kurdish and Palestinian peoples becoming the most poignant examples. Moreover, due to this situation the Charter sanctions on misbehaviour on the part of members remained a dead letter.

1.3. *Structural Weakness*

Despite its vast task the UN is so imbued with the sovereign equality of states as an organizational principle that its Charter does not provide for an executive committee and a general board. The authority of the Security Council does not cover the whole field of the organization but only one of its purposes, i.e. to maintain international peace and security. Moreover, the UN Charter does not place the Security Council in a subordinate position in respect of the General Assembly.

The opposite even holds true in the field of the maintenance of international peace and security, where the Security Council has primary responsibility.[12] The General Assembly is not a kind of general board exercising democratic control on the executive committee and the secretariat. It may discuss any questions or matters relating to the powers and function of any organs, it is true, but it may only make recommendations to member states and to the Security Council in that respect.[13] It even lacks a decisive vote in respect of the membership of the organizations.

Under the impact of the cold war the admission of new states to UN membership degenerated into arbitrary package deals among the permanent SC members making a mockery of the conditions for membership laid down in the UN Charter. Consensus among permanent members became more decisive than a thorough investigation into whether candidates, in the judgment of the organization, were able and willing to carry out the obligations contained in the UN Charter.[14] This malpractice had its repercussions on the composition

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[12] UN Charter, Articles 12 and 24. See also Admission to the United Nations, Advisory Opinion, ICJ Rep. 8-9 (1950); Certain Expenses Case, Advisory Opinion ICJ Rep. 162-163 (1962).

[13] *Infra* note 138.

[14] Benchikh (1985), 448-450. According to Article 23, paragraph 1 of the UN Charter the UNGA shall elect ten other UN members to be non-permanent members of the Security Council, due regard being paid, in the first

of the General Assembly and the Security Council. It prevented these organs from co-operating effectively in pursuing the UN purpose to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

The development of UN membership of the good with the bad has to date been an obstacle to such a composition. The Security Council did not mirror the main forms of civilization and the principal cultural, economic, legal, political and social systems of the world like, for instance, the International Court of Justice does.[15] Moreover it has not enabled the organization to take effective action with regard to non-self-governing territories. For the effectiveness of such action depends on good co-operation between all UN organs involved, in particular the General Assembly and the Security Council.

Apart from the maintenance of international peace and security the UN Charter does not provide a true division of work between the General Assembly and the Security Council in respect of realizing the other purposes of the United Nations. The realization of these purposes is thus less secured. For, unlike the Security Council, the General Assembly is not so organized that it is able to function continuously. The General Assembly meets in regular annual sessions and in such special sessions as occasion may require.[16]

To put it briefly, the UN Charter has not provided for a type of administration that may effectively call to order (member) states which are guilty of bad governance. The cold war did not cause this structural weakness. In a way it even disguised the fact that the weakness was a deliberate choice. This may explain why the end of the cold war did not place the UN in a much better position to deal effectively with hotbeds such as Iraq, the Israeli-Palestinian conflict, Somalia and the former Yugoslavia.

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instance to the contribution of UN members to the maintenance of international peace and security and to the other purposes of the organization, and also to equitable geographical distribution.

[15] According to the ICJ Statute, Article 9, in the Court the representation of the main forms of civilization and of the principal legal systems should be assured.

[16] UN Charter, Articles 20 and 28. The ECOSOC and the Trusteeship Council do not function continuously either (Articles 23 and 90).

It does not seem likely that the end of the cold war will remove the structural weakness of the UN Charter. It appears that permanent SC members may back out of their treaty obligations simply by manipulating the Security Council in such a way that they obtain a binding decision under Chapter VII assigning them rights at the expense of the peaceful settlement of disputes under Chapter VI of the UN Charter. Western powers are in a position to do so due to the dependence of the poor(er) non-permanent SC members upon the rich(er) countries. The International Court of Justice did not put a check on the Security Council's self-proclaimed room for manoeuvre in that respect:[17]

> Whereas both Libya and the United States [respectively the United Kingdom, PdW], as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.

The Court failed in rendering the Security Council with those aspects that are of the Security Council and in rendering itself as a court of law with those aspects that are of a court of law. That is no small matter for the reasoning of the Court implies that the Security Council is above international law and without democratic control by the General Assembly! Admittedly, the International Court of Justice is not a constitutional court. Nevertheless, the Court should never have accepted the fact that the Security Council did not care at all about treaties to which all the states concerned were parties, whether they liked it or not. It goes without saying that the Security Council should have taken into account the existence of treaty provisions on the peaceful settlement of disputes between the adversaries concerned.[18]

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[17] ICJ Rep. 126 (1992)

[18] This is the very rationale of Article 36 paragraph 2 of the UN Charter. See Stern (1985), 620.

2. Peace and Security at the End of the Cold War

The end of the cold war raised the hope that the United Nations would at long last be able to live up to the high expectations evoked by its Charter. The Preamble of the UN Charter brilliantly set the tone for a future in which the peoples of the United Nations are determined to practice tolerance and to live together in peace with one another as good neighbours and to employ international machinery for the promotion of the economic and social development of all peoples.

The truth turned out to be much more harsh. Consensus among the permanent SC members did not guarantee action in cases of threats to the peace, breaches of the peace and acts of aggression without the respect of (member) states. For the first time in its history the Security Council had to face the possibility that the non-permanent members could prevent an affirmative vote of nine members despite the unanimous support of the permanent members. Because of that the United States all too eagerly took the transitional security arrangements in the Charter out of mothballs. After all, these arrangements enable(d) the permanent members to act on behalf of the UN outside the context of the Charter if necessary. The transitional security arrangements were rooted in the joint action of the United Kingdom and the United States against the *Third Reich*. Their exhumation had a tremendous impact on the right of collective self-defence and with that on the course of the Iraq-Kuwait Gulf War and the resulting Peace Conference on the Middle East.

2.1. *Transitional Security Arrangements*

In their Joint Declaration of Principles, known as the *Atlantic Charter* of 14 August 1941, the President of the United States of America and the Prime Minister of the United Kingdom stated that after the final destruction of the Nazi tyranny,[19]

> they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.

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[19] Kapteyn (1981), I.A.1.d.

On the first of January, 1942, 25 states subscribed to the common programme of purposes and principles embodied in the Atlantic Charter. During the course of the war this *Declaration by United Nations* was adhered to by other nations "which are, or may be, rendering material assistance and contributions for victory over Hitlerism."[20] Among these nations were states which became main actors in post-war Middle East conflicts in general and the Arab-Israeli conflict in particular, i.e. Egypt, Iran, Iraq, Lebanon, Saudi Arabia, Syria and Turkey. The Declaration marked the membership of the United Nations Organization in that its signatories, as they existed on 8 February 1945, were officially invited to the inaugural meeting of the UN at San Francisco in the spring of 1945.[21]

The United States and the United Kingdom further defined the future world organization in 1943 and 1944, albeit this time together with the Soviet Union and China. In the Moscow Four-Nation Declaration on General Security of 30 October 1943 these countries recognized[22]

> the necessity of establishing at the earliest possible date a general international organization, based on the principle of sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

In so doing they also declared at that time that[23]

> for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations [the states that signed the Declaration by United Nations of 1 January 1942, PdW] with a view to joint action on behalf of the community of Nations.

This self-imposed power underlaid the 1944 Dumbarton Oaks Proposals on permanent seats in the Security Council for the four states "and, in due course, France", and on transitional arrangements.[24] The

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[20] *Id.*, I.A.1.e.

[21] Protocol of the Proceedings of the Conference, in Kapteyn (1981), I.A.k.i. The Declaration entered into force for 46 states in all.

[22] *Id.*, I.A.1.f.

[23] *Id.*, I.A.1.e and f.

[24] *Id.*, I.A.1.j. 4 and 10. In those days the Vichy government was still in power in France.

relevant proposals paved the way for the corresponding Articles 23 and 106 of the United Nations Charter. The latter provision was included in the transitional arrangements of the Dumbarton Oaks Proposals.[25] It is one of the two articles in Chapter XVII of the UN Charter: Transitional Security Arrangements. The pertinent article explicitly refers to the responsibilities of the parties to the Four-Nation Declaration, and France.[26] The permanent SC members could act on behalf of the UN but outside its framework pending the coming into force of the special arrangements contained in Article 43 between UN members and the Security Council on making available armed forces and the like.[27]

Article 106 derived its significance from Article 107 enabling the parties to the 1943 Four-Nation Declaration and France to take action "in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter." After these enemies—in particular Germany and Japan—themselves became UN members the transitional security arrangements should have spent their force. Be this as it may, it is anyhow revealing that its validity has been upheld to this very day in order to defend the powers of the parties to the 1943 Four-Nation Declaration and of France to take action on behalf of the UN even without being based on a SC resolution.[28] The United States considered whether to apply this transitional security arrangement against Iraq in 1990 if the non-permanent

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[25] *Id.*, I.A.1.j.

[26] UN Charter, Article 106.

[27] UN Charter, Article 43 reads: "All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call, and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

[28] Scheffer (1991), 108. See also Ghebali (1985), 1406-1407. In the Second Gulf War Article 106 was not applied because of the success of the well-tried stick-and-carrot method. See Weston (1991), 523-525.

members would have prevented Operation Desert Storm.[29] The post-cold war consensus among the permanent SC members thus again tempted the exhumation of Article 106. For there is still no question of "the coming into force of such special agreements referred to in Article 43 as *in the opinion of the Security Council* enable it to begin the exercise of its responsibilities."[30]

In other words, whatever the opinion of the General Assembly and the non-permanent SC members, consensus among the permanent members would authorize joint action as long as Article 43 remains a dead letter. Of course, this development is not in conformity with the spirit of the UN Charter. It suggests a return to the UN as an inner circle of the five permanent members more than that it shows the UN as a forerunner of good governance in international society. This state of affairs gives rise to concern. For the Security Council increasingly shows an inclination to interpret its authority extensively on breaches of the peace. No other UN organ or member state can blow the whistle on the Security Council. Libya was turned down by the International Court of Justice when it correctly tried to do so.

In its Order the Court took into consideration that in accordance with Article 103 of the Charter, the obligations of the Parties prevail over their obligations under any other international agreement, including the Montreal Convention.[31] The Court went rather too far when it considered that an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United States (United Kingdom) by virtue of SC resolution 748 (1992).[32] There was no question of any rights to be *prima facie* enjoyed by these countries. Such rights could have been derived only from binding SC resolutions under Article 94 dealing

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[29] Damrosch/Scheffer (1991), 65, 108.

[30] Article 106, emphasis added.

[31] Order with regard to Request for the Indication of Provisional Measures in the Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States/United Kingdom), ICJ Rep. 126 (1992). UN Charter, Article 3 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[32] ICJ Rep. 126 and 127 (1992). See Graefrath (1993), 190-191; Franck (1992), 518-523.

with the non-performance of obligations incumbent upon states under a judgment rendered by the Court.

The question whether the transitional security arrangements still apply is still of the utmost importance in relation to the intended enlargement of the Security Council, particularly the number of permanent seats. New members obviously cannot become parties to the 1943 Four-Nation Declaration. Therefore new permanent members will not be able to decide on enforcement actions undertaken on behalf of but without the approval of the UN. They may expect at best that the present five permanent members will consult them.[33] Even then, the Four-Nation Declaration will drive a wedge between the present permanent members and the new ones which will be detrimental to the required representativity. It will endorse the illusion that a review of the lawfulness of decisions of the Security Council does not speak for itself because of the fact that such an identification would be, from the very nature of the decisions, more a political than a legal affair.[34]

It is not correct, by the way, to base the membership of the Security Council only on the capacity of candidates to contribute to the maintenance of international peace and security and on an equitable geographic contribution. Article 23(1) also requires that due regard be paid to "the contribution to the other purposes of the United Nations", i.e.

- the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples as an appropriate measure to strengthen universal peace, as well as
- the achievement of international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

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[33] Article 106 states that parties to the Four-Nations Declaration and France shall consult with one another with a view to joint action on behalf of the UN "and as occasion requires with other Members of the United Nations".

[34] Memorandum Foreign Affairs of 17 September 1992, "De Verenigde Naties in een veranderende wereld" [The United Nations in a changing world] Tweede Kamer, vergaderjaar 1992-1993, 22 828, nr. 1, 13.

Admittedly, the Security Council did not act accordingly during the cold war. Such an explanation no longer holds true. However, there is still no question of a favourable about-turn in this respect. This fact is the more regrettable since the unanimity among the permanent members considerably weakened the secondary role of the General Assembly in respect of maintaining peace as one of the rare positive achievements of the cold war.

2.2. *Collective Self-defence*

The maintenance of international peace and security by the Security Council has been mainly a matter of power-policy in disguise—if not out in the open—from the very beginning of the UN.[35] The end of the cold war unfortunately did not change the situation that the UN is still no more than an association of sovereign States.[36] States would not want it any different. Otherwise they would have prevented the UN from balancing on the edge of bankruptcy time and again as a result of its peace-keeping operations. The fresh unanimity of the permanent members enhanced the power politics of the United States in spite of the present "tidal wave of democracy".[37]

Outside a true situation of self-defence the use of force by states should have been absolutely out of question. The UN member states have clearly ceded their competence to use force to the Security Council. This cession should have resulted in a narrow interpretation of 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 measures necessary to maintain peace and security."[38] The key question is whether the attacked state and its allies or the Security Council should assess the necessity and effectiveness of the measures taken.[39] Only one answer seems to be in conformity with the letter and spirit of the UN Charter: the Security Council. After all, only this Council has the authority to determine

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[35] Schwarzenberger (1964), 14.
[36] Boutros-Ghali (1992a), 1.
[37] Boutros-Ghali (1992b), 67.
[38] UN Charter, Article 51.
[39] Rostow (1991), 506-516.

whether or not aggression occurred. If not, there is no question of individual or collective self-defence.

In the Iraq-Kuwait conflict the Security Council acted from the beginning under Chapter VII of the UN Charter. In doing so it also affirmed the inherent right of individual or collective self-defence in response to the armed attack by Iraq against Kuwait.[40] The 1990 authorization by the Security Council of member states cooperating with the Government of Kuwait to use all necessary means to uphold and implement resolution 660 (1990) [condemnation of the invasion of Kuwait and a demand to withdraw immediately and unconditionally all Iraqi forces, PdW] sowed the seeds of confusion in that it put the final judgment with states and not with the Council.[41] On the other hand, the authorization gave the impression that Operation Desert Storm would not be an act of collective self-defence. This ambiguity characterized the structural incapacity of the UN to maintain or restore international peace and security impartially.

The West invoked its right to the collective self-defence of states in the region after the Iraqi aggression on the basis of an ad hoc request by Kuwait and Saudi Arabia.[42] It is obvious that agreements on collective security may deter potential aggressors only if they are public and permanent. The NATO, the Warsaw Pact and other treaties on mutual security and assistance met these conditions. The Arab world was too divided for such an approach. Its conflict with Israel prevented it from entering an alliance with the West. Moreover, the UN did not amount to much in the eyes of the Arab states, including Iraq. After all, the Council's resolutions against Israel had not had the slightest effect over the years. Of course, this state of affairs did not provide any excuse whatsoever for Iraq to take the law into its own hands in its dispute with Kuwait. It explained, however, that the combined action of the Security Council and the states cooperating with Kuwait lacked any effect on the conduct of Iraq.

The lesson from the Iraqi-Kuwait dispute should be that the International Court of Justice as the main judicial organ of the international community should give its (advisory) opinion on the use of

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[40] SC res. 661 (1990) of 6 August 1990.

[41] SC res. 678 (1990) of 28 November 1990.

[42] Lavalle (1992), 9-11.

force by way of collective self-defence. In its dispute with Nicaragua the United States claimed its right to collective self-defence in order to protect Costa Rica, El Salvador and Honduras against the pretended aggression of Nicaragua. The Court rightly interpreted the inherent right to collective self-defence restrictively so as to prevent the erosion of the prohibition of the use of force.[43]

The UN Charter states unambiguously that states shall settle their disputes peacefully without endangering international peace and security. The Security Council rightly branded the Iraqi invasion of Kuwait as aggression. However, international good governance would have required a much more transparent and democratic decision-making. The Security Council did not act accordingly. The permanent members all too eagerly availed themselves of the new opportunity to place the Security Council above the rule of law in the post-cold war era. The Lockerbie case was telling in that respect.[44]

2.3. *Peace Conference on the Middle East*

The in-crowd spirit of the Four-Nation Declaration determined as it were the organizational set-up of the International Peace Conference on the Middle East. The United States and the then USSR ignored the almost unanimous resolution of the General Assembly on the convening of the conference under the auspices of the UN and on the principles for the achievement of a comprehensive peace:[45]

> (a) The withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from other occupied territories;
> (b) Guaranteeing arrangements for the security of all States in the region, including those named in resolution 181 (II) of 29 November 1949 [recommending the partition of Palestine into an Arab state and a Jewish state, PdW] within secure and internationally recognized boundaries;
> (c) Resolving the problem of the Palestine refugees in conformity with General Assembly resolution 194 (III) of 11 December 1949 [estab-

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[43] Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Rep. 103-104 and 120 (1982).

[44] *Supra* at note 17.

[45] UNGA res. 45/68 of 6 December 1990, adopted by 144 votes in favour, 2 against (Israel, USA), with no abstentions. See also *infra* Annexes 1 and 2.

> lishing a UN Conciliation Commission and the right to return, PdW], and subsequent relevant resolutions;
> (d) Dismantling the Israeli settlements in the territories occupied since 1967;
> (e) Guaranteeing freedom of access to Holy Places, religious buildings and sites

Both permanent members and parties to the Four-Nation Declaration invited as co-sponsors and chairs Egypt, Israel, Jordan, Lebanon and Syria as well as the Palestinians, albeit as part of a joint Jordanian-Palestinian delegation only. The European Community was allowed to participate alongside the United States and the Soviet Union. The UN, however, was only invited to send an observer, representing the Secretary-General. Nevertheless, the General Assembly welcomed the convening of the Madrid Conference but maintained its position that a peace conference under UN auspices with the participation of all parties to the conflict, including the Palestine Liberation Organization (PLO), on an equal footing, and the five permanent SC members would contribute to the promotion of peace in the region.[46] The European Community and its twelve member states on that occasion expressed their belief that the UN will have an important role to play in the Middle East peace process.

The USA-sponsored International Peace Conference on the Middle East indeed gained no power to impose solutions on the parties or to veto agreements reached by them. Neither was it authorized to make decisions for the parties and to vote on issues or results.[47] This might seem to indicate that co-sponsors were aware of the fact that legally speaking only the UN was authorized to impose solutions and to vote on issues or results when it came to the crunch. The 1992 Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements should also be interpreted and applied within the international context.[48] The UN authority was inherent in the Palestine

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[46] UNGA res. 46/75 of 11 December 1991, adopted by 104 votes in favour, 2 against (Israel and the USA), with 43 abstentions (including all other western states, Japan and the USSR).

[47] In that respect the negation of the PLO as an official party in the peace process was all the more a grave error. The decision of the Israeli government in January 1993 to revoke the law forbidding direct contacts with the PLO was a step forward, but was not intended to rectify the error. This only happened in September 1993.

[48] See *infra* Annex 10.

Mandate and the UN trusteeship system within the limits of the above defined element of negotiation. That is just the way it is in the present international legal order of sovereign states.

The above-mentioned documents and articles from the UN Charter monopolized as it were the position of the permanent members by bending the letter and spirit of sovereign equality in the context of the Charter to their will time and again at the expense of other states, in particular the newcomers.[49]

3. Peaceful Settlement of Disputes by UN Organs

The law of power applied by the Security Council in the post-cold war era substantially undermined the UN system for the peaceful settlement of disputes. The unanimity of the permanent members against the Iraqi aggression illustrated how the possibility of enforcement actions made the Council's responsibility in respect of peaceful settlement of disputes secondary to its primary responsibility for the use of military force. This development paralysed the role of the General Assembly in the peaceful settlement of disputes under the UN Charter. Admittedly, formally the General Assembly shall not make any recommendations with regard to a dispute or situation while the Security Council is exercising its functions. However, any moderation of the Council's conception of its function in the post-cold war hotbeds would have been in accordance with the spirit of the UN Charter which is the prevention of the scourge of war.

According to *An Agenda for Peace* the world organization is merely "a gathering of sovereign states". What the UN can do depends on the common ground that it creates between them:[50]

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[49] The UN Charter refers only to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security (Articles 33 and 34).The means for the pacific settlement of disputes are negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement. From a methodological point of view these means can be divided into two main groups. The first group includes those in which the parties reserve to themselves the decision which may settle the dispute whether they call in a third party or not; The second includes the means by which the parties entrust the decision to third parties.

[50] Boutros-Ghali (1992a), 1.

> If conflicts have gone unresolved, it is not because techniques for peaceful settlement were unknown or inadequate. The fault lies first in the lack of political will of parties to seek a solution to their differences through such means as are suggested in Chapter VI of the Charter, and second, if the lack of leverage at the disposal of a third party if this is the procedure chosen.

The element of negotiation dominates the UN system of peaceful settlement of disputes almost despotically. The sovereign equality of its members prevents the UN from prescribing any specific method for the settlement of disputes. The consent of states is so essential to the application of whatever method that even the jurisdiction of the International Court of Justice comprises only cases which the parties refer to it by mutual consensus.[51] The UN organs are fully aware of their limited powers and capacities in the field of peaceful settlement of interstate disputes. The sacrosanctity of the equal sovereignty of states and the related principle of free choice of means urged the General Assembly to stress that recourse to judicial settlement of legal disputes, particularly to the Court, should not be considered as an unfriendly act between states.[52]

Only states may be parties in cases before the Court. However, the General Assembly and the Security Council may request the Court to give an advisory opinion on any legal question arising during the course of its proceedings. Other UN organs and specialized agencies may also be authorized by the General Assembly to request advisory opinions from the Court arising within the scope of their activities.[53] As for the UN, such opinions cannot detract from the predominant position of the Security Council in the peaceful settlement of disputes.[54]

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[51] UNGA res. 2625 (XXV) of 24 October 1970, adopted without a vote. The DPIL states in that respect: "International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality."

[52] Manilla Declaration on the Peaceful Settlement of Disputes, UNGA res. 37/10 of 15 November 1982, adopted without a vote.

[53] UN Charter, Article 96.

[54] Certain Expenses of the United Nations, Advisory Opinion, ICJ Rep. 168 (1962): "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no

Unlike the General Assembly the Security Council may investigate at its own discretion any dispute or situation in order to determine whether its continuance is likely to endanger the maintenance of international peace and security. The pertinent role of the General Assembly is left to the discretion of any member or of a state which is not a member but a party to the dispute. It may only discuss general principles of co-operation in the maintenance of international peace and security at its own initiative.[55]

The cold war between the Soviet Union and its former allies led to the immobilization of the Security Council. This enabled the General Assembly, the Secretary-General and the International Court of Justice to develop themselves as truly main organs, but with varying success. The Soviet Union and the United States began to court the General Assembly. The paralysing influence of the cold war on the effectiveness of the Security Council led the United States to propose in the General Assembly its so-called Acheson Plan in 1950. This plan underlaid the Uniting for Peace resolution and enhanced the role of the Secretary-General as well.[56]

According to the resolution the General Assembly shall make appropriate recommendations to members for collective measures in any case where the Security Council "because of lack of unanimity of the permanent members, fails to exercise is primary responsibility for the maintenance of international peace and security".[57] Because of that it was considered as *ultra vires* by a minority of states. However, the Court confirmed the secondary responsibility for maintaining international peace and security of the General Assembly in its 1962 Advisory Opinion on Certain Expenses of the UN.[58] Thus it became reputed as an example of a constitutional development by

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analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted (...)." See also de Waart (1973), 1.

[55] UN Charter, Articles 11, 34 and 35.

[56] UNGA res. 337 A (V) of 3 November 1950, adopted by 51 votes in favour, 5 against (Byelorussia, Czechoslovakia, Poland, Ukraine SSR, the USSR), with 2 abstentions (Argentina, India); van Langenhove (1964), 31, 50, 241-242.

[57] UNGA res. 337 A (V).

[58] ICJ Rep. 162-163, 164 (1962); Butcher (1987), 432-435.

political UN organs.[59] Unfortunately, it turned out to be a Pyrrhic victory. Some states, including France and the Soviet Union, refused to pay. The Charter sanction of suspending the right to vote of members in arrears of paying their contribution was not effective, for the loss of vote would only apply to the General Assembly.[60]

The 'new' authority of the General Assembly suggested that the UN system could take a stand against the permanent SC members during the cold war. Be this as it may, the current *détente* anyhow induced euphoria into the world, for now things could become even better! However, the daily routine fell short of expectations. The Uniting for Peace resolution lost its meaning, for there was no longer any lack of unanimity among the permanent members. When there is no question of lack of unanimity among the permanent SC members the Uniting for Peace resolution does not apply when the Security Council fails to act because of the votes of non-permanent members.[61]

The Uniting for Peace resolution did not enhance the role of the General Assembly in the peaceful settlement of disputes. That role remained limited even when states had brought a dispute to the attention of the General Assembly.[62] A cautiously worded innovative element of the 1988 Declaration on the UN role in this field was that it reminded the General Assembly and the Security Council of the possibility of requesting the International Court of Justice to give an advisory opinion on any legal question.[63] The daily UN routine did not take the slightest notice of this Declaration. In addition, the present Declaration, like previous UNGA resolutions on the topic, dealt with disputes between states and not with disputes between UN members and their organization or UN organs amongst themselves. The UN

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[59] Brownlie (1990), 701; Bennani (1985), 265.

[60] UN Charter, Article 19.

[61] Decisions of the SC on substantive matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members (Article 27). This implies that the non permanent members may prevent the adoption of any decision, even if the votes of the permanent members concur.

[62] Daoudi (1985), 594-596.

[63] Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security on the Role of the United Nations in this Field, UNGA res. 43/51 of 5 December 1988, adopted without a vote.

Charter does not contain any provision in this respect despite the fact that it defines the International Court of Justice as the principal judicial organ of the UN.

The lack of provisions by which to settle disputes between UN organs amongst themselves or with members effectively damaged the authority of the world organization. This became clear when in the aftermath of the cold war the Security Council could take a strong stand towards Iraq. In doing so the Security Council seemed to have overlooked the fact that its resolutions on the terms of peace could provoke legal disputes. The world organization apparently had not learnt a lesson from peace treaties between states when it drafted a peace settlement itself for the first time in its history. That does not alter the fact that formally speaking the pertinent resolution dealt with a cease fire and an armistice between states and not between Iraq and the UN.[64] On the contrary, the Security Council should have known better for its pertinent resolutions affirmed the commitment of all member states to the independence, sovereignty and territorial integrity of Iraq. The consensus among the permanent SC members prevented the General Assembly from asserting any moderating influence on post-cold war disputes.

The recent developments in the former Yugoslavia and the Middle East apparently were considered as political questions only. Despite the post-cold war *détente* neither the General Assembly nor the Security Council gave evidence to deem it necessary that the International Court of Justice would cast light on important legal issues such as the condition for admission to UN membership; of transitional security arrangements in the UN Charter, the Palestine Mandate in respect of the Occupied Territories or the interpretation of the concept of deportation in the context of the Fourth Geneva Convention.[65] This is the more regrettable since the International Court of Justice has quite a good record in providing advisory opinions on burning issues relating to non-self-governing territories.

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[64] SC res. 686 (1991) of 2 March 1991 and 687 (1991) of 3 April 1991.

[65] The Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Civilians Convention) of 12 August 1949, Part III: Occupied Territories (Articles 47-78). See SC res. 799 (1992) of 18 December 1992. See also *infra* section 6.3. and Chapter Two section 3.5.2.

4. Supervising Non-Self-governing Territories

According to the International Court of Justice the UN has no authority to impose its trusteeship system on territories originally held under a League of Nations mandate by a UN member. In its 1950 Advisory Opinion on the International Status of South West Africa the Court held that the language of the articles on the international trusteeship system in the UN Charter is permissive and refers to subsequent agreements by which the territories in question may be placed under the Trusteeship System:[66]

> An 'agreement' implies consent of the parties concerned, including the mandatory Power in the case of territories held under mandate (Article 79). The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party.

Decisions of the Trusteeship Council shall be made by a majority of the members present and voting. The total number of members of the Council, however, should be equally divided between those UN members which administer trust territories and those which do not.[67] To put it differently, the votes are equally divided if all the members are present and voting. Moreover, questions relating to the operation of the trusteeship system belong to those which the General Assembly shall take by a two-thirds majority of the members present and voting. Admittedly, such decisions are binding but their enforcement depends on action by the Security Council. Illustrative in that respect was the 1966 UNGA decision to terminate the Mandate for South West Africa:[68]

> (...) 4. *Decides* that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations; (...)
> 8. *Calls the attention* of the Security Council to the present resolution; (...).

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[66] International Status of South West Africa, ICJ Rep. 139 (1950).

[67] UN Charter, Articles 86 and 89.

[68] UNGA res. 2145 of 27 October 1966, adopted by 114 votes in favour, 2 against (Portugal, South Africa), with 3 abstentions (France, Malawi, the UK).

In its 1971 Advisory Opinion on Namibia (South West Africa) the International Court of Justice held in that respect[69]

> By resolution 2145 (XXI) the General Assembly terminated the Mandate. However, lacking the necessary powers to ensure the withdrawal of South Africa from the Territory, it enlisted the co-operation of the Security Council by calling the latter's attention to the resolution, thus acting in accordance with Article 11, paragraph 2, of the Charter.

The supervision of Namibia by the General Assembly could thus have been paralysed by the veto of a permanent member. In other words, the ill-fated Palestine Mandate probably would not have been better off if it would have been placed under the UN trusteeship system by means of a trusteeship agreement between the United Kingdom as the Mandatory Power and the United Nations. This does not detract from the fact, however, that mandated territories have an international status:[70]

> The Mandate was created, in the interest of the inhabitants of the Territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization. (...) The international rules regulating the Mandate constituted an international status for the territory recognized by all the Members of the League of Nations, including the Union of South Africa.

When the authors of the League of Nations Covenant created the mandate system,[71]

> they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. (...) The competence of the General Assembly of the United Nations to exercise such supervision and to receive and examine reports is derived from Article 10 of the Charter, which authorizes the General Assembly to discuss any

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[69] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Rep. 51 (1971). Article 11, paragraph 2, of the UN Charter reads: "The General Assembly may discuss any questions relating to the maintenance of international peace and security (...). Any such question in which action is necessary shall be referred to the Security Council either before or after discussion."

[70] International Status of South West Africa, ICJ Rep. 132 (1950).

[71] ICJ Rep. 136-137 (1950).

> questions or any matters within the scope of the Charter and to make recommendations on these questions or matters to the Members of the United Nations.

These opinions were not related to the special position of the South West Africa mandate. On the contrary, they were derived from the legal status of A and B mandates:[72]

> In the light of the foregoing, the Court is unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B' mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under 'C' mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could "be best administered under the laws of the Mandatary as integral portions of its territory" (Article 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with 'A' or 'B' mandates.

According to the Court the "rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are so to speak, mere tools given to enable it to fulfil its obligations."[73]

It is said that the power of the General Assembly to revoke the mandate for South West Africa[74]

> was not of a general discretionary or governing kind, but was more in the nature of a declaratory power exercised on behalf of the international community in a situation where no state had sovereignty over the territory concerned.

The occupied Palestinian territory is in the very same situation unless one is of the opinion that Israel "was not admitted to the United Nations on the basis of a division of territory which in any way reflected the partition resolution."[75]

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[72] ICJ Rep. 32 (1971).

[73] South West Africa case, Preliminary objections (Ethiopia/Liberia v. South Africa), ICJ Rep. 329 (1962).

[74] Crawford (1990), 312.

[75] *Id.*, 313.

5. Thirst for Democracy: Towards International Good Governance

The eighties have been called a decade of the people.[76] The 1987 Palestinian uprising—intifada—in the Occupied Territories was no exception in that respect. It was said that it took the Israeli government by surprise.[77] However, its seeds had already been sown thanks to the efforts of grass-roots activists over the years.[78] Moreover, the intifada was a symptom of the decade in that all over the world, "people had an impatient urge to guide their political, economic and social destinies."[79] Authoritarian rule had to give in to political freedom and democracy.[80] A regime of occupation is by definition not democratic. If it continues too long it even affects the democratic character of the occupying state, particularly when that state pursues a policy of integration of the occupied territory but not of the people living there.[81]

The occupation of the West Bank and the Gaza Strip in 1967 has become a lamentable record-breaker as regards duration and the harm to democratic values resulting from *de facto* annexation.[82] The breakthrough did not come from the United States and the—former—Soviet Union sponsored Peace Conference on the Middle East nor from the bilateral negotiations between Israel and its Arab neighbours but from direct talks between Israel and the PLO as of September 1993. This scenario remarkably illustrated the significance of people's participation. It also drew attention to the rising tide of fundamentalism as a threat to democracy in the wake of the increasing "pragmatic partnership between market efficiency and social compassion".[83]

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[76] UNDP (1993), iii. The *Human Development Report 1993* focused on people's participation.

[77] Schiff/Ya'ari (1990), 42,43.

[78] Hiltermann (1991), 174.

[79] UNDP (1993), 9.

[80] *Id.*, 65.

[81] Hiltermann, 30-31; Beit-Hallahmi (1992), 92-94; Schiff/Ya'ari (1990), 289.

[82] Shehadeh (1985), 63-75.

[83] UNDP (1993), 1 and 66.

Fundamentalism has been defined as the belief in an extreme or old form of religion or theory.[84] In Islam it has a variety of meanings.[85] Islamic fundamentalist groups have in common that they militantly challenge the prevailing order.[86] As for the Occupied Territories this militancy affected more Palestinian nationalistic groups than the Israeli occupation authorities. The latter even used the Muslim Brotherhood to weaken Palestinian nationalism.[87] This undemocratic approach overlooked the fact that in the long run Israel as a state in and from the Middle East will gain more from the creation of a Palestinian neighbour state as the first Arab democracy than with continuing occupation.[88] Moreover, any conclusion that Iranian fundamentalism cut off the path of Arab and other Muslim states to democracy for quite some time would ignore the popular instinct that men of religion, like any other rulers in authoritarian regimes, may also give in to the temptations of power and wealth.[89]

In the legal systems of well-established democracies temptations of power and wealth are checked by principles of good governance such as adequate governmental transparency, financial accountability, measures to combat corruption, as well as respect for the rule of law and human rights. The interesting feature of the present wave of democratization is that such principles are being transferred to the international level. Democratization in many countries was complemented by efforts to enhance transparency and accountability of governments.[90] The hard lesson from the Palestinian question is that principles of good governance do not allow violation without adverse

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[84] *Collins Cobuild English Language Dictionary* (1987), 590.

[85] Hourani (1991), 457.

[86] Shadid (1988), 658.

[87] *Id.*, 658-659; Schiff/Ya'ari (1991), 223-225.

[88] Abed/Kaufmann (1992), 4: "While Israelis, for example, might be willing to concede that a democratic Palestinian state could be a desirable future neighbor, many disbelieve absolutely that the Palestinian (or any Arabs for that matter) are capable of establishing and maintaining a democracy. The fact that there has never been an Arab democracy (with the exception of Lebanon—hardly an encouraging example!) is considered as proof that there will never be one. The Arab people are often viewed by Israelis and other Westerners as inherently incapable of self-government through democratic means."

[89] Hourani (1991), 458.

[90] Boutros-Ghali (1992a), 34. See also *infra* at notes 117 and 131.

effects. It may be no coincidence that a lasting peace in the Middle East came within reach in a decade in which the concept of good governance might succeed at regional and international levels.

5.1. *Democratization within Europe*

The new movement towards democracy started in Europe in the eighties when the Soviet Union introduced its domestic and foreign policy of perestroika and glasnost. Gorbachev's *New Thinking for Our Country and the World* reaffirmed western values of liberalism as part of a wider European tradition.[91] Unfortunately, it appeared to be not so much the result of the intrinsic persuasiveness of democracy as of the apparent weakness of authoritarian regimes.[92]

It is evident that the required simultaneous introduction of democratization and economic liberalization could not produce the desired good fortune overnight. The 1975 Final Document of the Conference on Security and Co-operation in Europe (CSCE)—Helsinki Act—is generally seen as heralding the present *détente* by including respect for human rights in its Declaration on Principles Guiding Relations between Participating States.[93] The CSCE Charter of Paris stated that these principles will guide the Heads of state or government of the CSCE participants towards the ambitious future of *A New Era of Democracy, Peace and Unity*, "just as they have lighted our way towards better relations for the past fifteen years".[94]

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[91] Carty (1990), 13.

[92] UNDP (1993), 65. Economically speaking, there is no guarantee that democracy will by itself secure for poor states the Great Leap Forward. See Axworthy (1993), 724-725; Clark (1993), 684-686.

[93] Final Act of the Conference on Security and Co-operation in Europe of 1 August 1975, Principle VII: "In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants, by which they may be bound."

[94] 30 *ILM* 193 (1991). The Maastricht Treaty on European Union enacted as general principles of Community Law the fundamental human rights, guaranteed by the 1950 European Convention for Human Rights and resulting from the constitutional traditions common to the member states. This enactment might be more than merely symbolic due to the establishment of Citizenship of the Union for every person holding the nationality of a member state. See 31 *ILM* 256 and 258-260 (1992).

The European Union is closely involved in CSCE activities. The Maastricht Treaty on European Union affirmed its attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.[95]

5.1.1. *Conference on Security and Co-operation in Europe*

The Helsinki Summit Declaration of 10 July 1992 established that all states participating in the Conference on Security and Co-operation in Europe "now take democracy as the basis of their political, social and economic life."[96] It proudly welcomed their commitment to good governance within the CSCE, i.e. respect for human rights—including the protection of minorities—, democracy, the rule of law, economic liberty, social justice and environmental responsibility.[97]

The 1992 CSCE Seminar of experts on democratic institutions noted that the reciprocal relationship between international human rights norms and national practices was very important for the development of a democratic culture.[98] In so doing it pointed out that the effective functioning of a market economy is compatible with the regulation of the economy or with government measures to meet the basic needs of citizens.[99] This conclusion is particularly relevant for the implementation of economic, social and cultural rights. After all, a state party to the International Covenant on Economic, Social and Cultural Rights should take steps,[100]

> individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative means.

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[95] Treaty on the European Union and Final Act of 7 February, 31 *ILM* 253 (1992).

[96] *ILM* 1992/6, p. 1390. See also the CSCE Charter of Paris for a New Europe of 21 November 1990. The theme of its Preamble was "A new era of democracy, peace and unity" (ILM 1991/1, 193-198).

[97] 31 *ILM* 1390 (1992).

[98] 31 *ILM* 377 (1992).

[99] *Id.*, 386.

[100] ICESCR, Article 2 (1).

The Office for Democratic Institutions and Human Rights (ODIHR) was created as the main mechanism of the Conference on Security and Co-operation in Europe to give shape to the human dimension and the democratic process. Admittedly, like the other CSCE organs it is still mainly an administrative body.[101] Nevertheless, the role of the CSCE in the protection of minorities in the Baltic states, for instance, clearly showed that administrative and substantive work are not strictly separated by definition. Illustrative in this respect is the 1993 Report of the Mission on the Study of Estonian Legislation of the Office on Democracy and Human Rights. It expressed some concern about the current situation of a large number of stateless residents in Estonia, most of whom are Russian-speaking former citizens of the Soviet Union.[102] The former Yugoslavia has become a tragic example of how ethnic tensions may easily get out of hand.

The first CSCE Commissioner on National Minorities, the former Netherlands Minister for Foreign Affairs, Max van der Stoel, could note with satisfaction that his mission had a mitigating impact on the ethnic and linguistic tensions in the Baltic states.[103] Although one swallow does not make a summer, the CSCE experiment should be carefully studied as to its possible merits for regional cooperation in the Middle East.

5.1.2. *European Union*

The Treaty of Maastricht aims at further to enhance the democratic and effective functioning of the European Union's institutions. In doing so it pretends to mark "a new stage in the process of an ever closing union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen."[104] The Union set itself the following objectives:

- promotion of economic and social progress which is balanced and sustainable;

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[101] 31 *ILM*, 1409 (1992). See Buchsbaum (1993), 18-19; Plomp (1993), 28-30.

[102] 4 *HM* (1993) 63-75 at 74.

[103] *Id.*,76-79, 84-86 and 89-91.

[104] 31 *ILM*, 255 (1992).

- assertion of its identity at the international level through the implementation of a common foreign and security policy;
- strengthening the protection of the rights and interests of the nationals of its member states through the introduction of citizenship of the Union;
- maintaining in full the achievements of the community ("acquis communautaire").

Within the context of the elements of good governance the idea of citizenship of the Union sounds particularly interesting and challenging as a means by which to bridge the gap between national and European identity. The Union shall respect the national identities of the member states, "whose systems of government are founded on the principles of democracy".[105] Every person holding the nationality of a member state is a citizen of the Union. Citizens have the right to move and reside freely within the territory of the member states as well as the right to vote and to stand as a candidate in municipal elections in a member state where he or she resides without being its national. A citizen has also the right to petition the European Parliament and to apply to the Ombudsman appointed by the European Parliament under Article 138e.[106] Dealing with maladministration, this article empowers the Ombudsman[107]

> to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member state concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

The Ombudsman is completely independent. He may only be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions for performing his duties or in the case of serious misconduct. If he establishes a case of mal-

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[105] *Id.*, 256, Article F.

[106] *Id.*, 259, Articles 8, a-8e.

[107] *Id.*, 288-289, Article 138e. The Court of First Instance will be attached to the Court of Justice "with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice in points of law only and in accordance with the conditions laid down by the Statute, certain classes of action or proceedings" determined by the Commission at the request of the Court of Justice and after consulting the European Parliament (Article 168a, *id.*, 292).

administration, he must refer the matter to the institution concerned which has to give its views within three months. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. He will also inform the complainant about the outcome of his inquiries.

The European Union may set a good example for the international community by promoting good governance in member states by means of adding to their national identities a supranational dimension through citizenship of the Union. If the idea catches on, it might enrich international cooperation at other regional levels, for instance in the Commonwealth of Independent States (CIS) and in the Middle East. The role of the future European Union in the former Yugoslavia may put a damper on too high expectations. However, one should not overlook the fact that unlike trade and transport a common foreign and security policy is quite a new area for the European Union.

5.2. *Democratization at the Global Level*

In his very first report on the work of the organization UN Secretary-General Boutros-Ghali reflected upon democratization and development in the aftermath of the cold war as follows:[108]

> The old international order has been swept away by a tidal wave of democratization. Thirst for democracy has been a major cause of change, and it will continue to be a force for the construction of a better world. The United Nations must foster, through its peace building measures, the process of democratization in situations characterized by long-standing conflicts, both within and among nations.

The process of democratization is very essential to steering the element of negotiation in international governance in the direction of a social and international order in which all universally recognized human rights can be fully realized.[109]

The element of negotiation in the UN as the embodiment of the horizontal structure of international society explains why the world organization has to rely more on persuading states than on putting them in the pillory. Introducing principles of (international) good governance may excite more sympathy than defining bad governance.

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[108] Boutros-Ghali (1992b), 67.

[109] 1948 UDHR, Article 28.

Be this as it may, discussion on good governance now seems to have a good chance thanks to the tidal wave of democratization in the aftermath of the cold war. What really matters is that states will not be content to leave it at fine words this time. After all, the seeds of democracy were present at the very beginning of the concept of the United Nations.

The parties to the 1942 Declaration of United Nations had already subscribed to the principle that all peoples have the right to choose the form of government under which they live. The exercise of this right should result in good governance. For it should enable all men in all lands to live out their lives in freedom from fear and want.[110]

The division of international society into the antagonistic Eastern and Western blocs with a group of non-aligned countries made a mockery of the principles of the Atlantic Charter. In any case the UN had hardly any other choice but to bow to the inevitable that the principle of non-intervention in domestic affairs took the lead, thus placing the protection of peoples second to the protection of states.

In 1965 the General Assembly solemnly declared that every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.[111] This right was confirmed in the 1970 Declaration on Principles of International Law.[112] The 1974 Charter of Economic Rights and Duties of States confirmed the right with the addition "in accordance with the will of its people".[113] It thus took up the theme of democracy in the 1969 Declaration on Social Progress and Development to some extent.[114] This Declaration was ahead of the present discussion

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[110] *Supra* section 1.2.

[111] UNGA res. 2121 (XX) of 21 December 1965, adopted by 109 votes in favour, none against, with one abstention (the UK).

[112] UNGA res. 2625 (XXV) of 24 October 1970.

[113] UNGA res. 3281 (XXIX) of 12 December 1974, adopted by 120 votes in favour, 6 against (Belgium, Denmark, the then Federal Republic of Germany, Luxembourg, the UK, the USA) with 10 abstentions (Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain). Article 1, however, did not meet any obstacles. See Stemberg (1983), 29.

[114] Dicke (1978), 133-134: "Nur am Rande sei der in diesem Zusammenhang nicht relevante Umstand erwähnt, daß es mehr als fraglich erscheint, daß alle Staaten, die dieser »Norm« zugestimmt haben und die deren Verbindlichkeit beabsichtigen, klar geworden ist, daß das in Aussicht genommene Recht nur demokratischen Staaten zustehen soll. Denn anders sind die Worte 'in

on good governance. For it took the concept of a just social order seriously by standing up for[115]

- founding social progress and development on respect for the dignity and value of the human person (Article 1);
- aiming at the elimination of hunger, malnutrition, poverty, illiteracy (Article 10) as a matter of high priority;
- stressing the need to ensure effective participation with a view to achieving a fully integrated national society, accelerating the process of social mobility and consolidating the democratic system (Article 15);
- promoting democratically based social and institutional reforms for change basic to the elimination of all forms of discrimination and exploitation (Article 18);
- providing full democratic freedoms to trade unions (Article 20).

The 1990 UN Consultation on the Right to Development as a Human Right included the 1969 Declaration in the instruments, in respect of whose implementation all states should renew their commitment.[116] The International Development Strategy for the Nineties reflected a growing convergence of views that democratic rights and freedoms are essential for effective approaches to a social and international order. Such rights should circumscribe the discretionary powers of states to give shape to international society through negotiation.[117]

Democracy within nations requires democracy within the family of nations, i.e. at global and regional levels. After all, democracy has

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accordance with the will of its people' nicht zu verstehen." [By the way, it should be mentioned that it is quite questionable whether it became clear to all states, which approved this 'Norm' and intended to accept its legally binding force, that this proposed right belongs to democratic states only. Otherwise the words "in accordance with the will of its people" are not understandable].

[115] UNGA res. 2542 of 11 December 1969. The DSPD has been seen as the single most important and coherent statement of Western liberal views on social progress and development. In 1987 the USA took the unusual action of withdrawing its support for the Declaration. In so doing it made out a case against providing massive social welfare programmes.

[116] Doc. E/CN.4/1990/9/Rev. 1, para. 186. This appeal was met with no response from the USA. See UNGA res. 45/87 of 14 December 1990, adopted by 146 votes in favour, 1 against (the USA), with 4 abstentions (the FRG, Israel, Japan and the UK). The dissenting USA vote was connected with the reaffirmation of the principles and objectives of the DSPD.

[117] UNGA res. 45/199 of 21 December 1990, paragraph 7.

been recognized as an essential element of international good governance. The UN does not itself excel as a classic example of democracy. Its decision-making is far from transparent in international economic and social cooperation. The maintenance of international peace and security has overshadowed it too much. It is a fact of life that the permanent SC members could leave their mark on international economic and social cooperation as well.[118] The NIEO idea, for instance, could not take root due to the opposition of the United States in particular.[119] The same applied to the right to development as a principle of interstate law and human rights law.[120]

The situation became even worse in the current post-cold war period. The Security Council put the General Assembly out of action. The International Court of Justice did not protect a democratic division of powers between the main organs of the UN.[121] It is really doubtful whether the old international order has been swept away. It is even more doubtful whether the tidal wave of democratization has already flooded the UN. It might even be feared that the UN is now less democratic than ever before. For the Security Council has effectively seized all power in the UN system under the pretext of security. The Council now seems to take the position which the Soviet Union had in mind in 1944.[122] It seems a whim of history that after the cold war the UN is increasingly revealing its initial character as a setting for the 'warm war' Moscow Four-Nation Declaration on General Security of 30 October 1943.[123]

The Security Council has placed itself, as it were, above the law. It is not liable to democratic control by the General Assembly. After

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[118] See also Cassese (1992), 25-26: "At the Dumbarton Oaks Conference, the initial opposition of the UK and the USSR led the US somewhat to water down its proposals on human rights and in fact the provision on the matter produced by the Four Powers (the USA, the USSR, the UK, and China) was rather weak."

[119] Franck (1989), 533.

[120] Kaufman/Whiteman (1988), 324; Chowdhury/de Waart (1992), 21-23.

[121] *Supra* section 1.3.

[122] Cassese (1992), 25: "It is well known that in 1944-5, while the USSR thought that the world organization soon to be set up should concentrate on security problems and therefore hinge on one main body, the Security Council, the United States suggested that the UN should also deal with other questions, in particular economic, social and humanitarian issues."

[123] *Supra* section 2.

all, the Security Council has the primary responsibility of maintaining international peace and security. The General Assembly may not make any recommendation on a dispute or situation if the Security Council is exercising the functions assigned to it. The post-cold war consensus among permanent members considerably diminished the secondary responsibility of the General Assembly. Moreover, the world community at large has to stand by helplessly. For there is no question of any real participation by the people.[124] It is true that non-governmental bodies may advise the Economic and Social Council of the UN, but in matters within its competence only.

An Agenda for Peace rightly looked for the answer in, according to all UN organs, a free rein to play their full and proper role "so that the trust of all nations and peoples will be retained and deserved."[125] Such a solution requires that the present flaw in the UN system be eliminated by the consistent, non-selective, application of the principles of the UN Charter. However, one should call to mind that the UN idea was born in the western democracies of the First World, i.e. the United Kingdom and the United States. They are the founders of the concept of the modern state and its inherent principle of sovereign equality. It is telling that the UN has been classified as 'power politics in disguise', not only as regards settlement of disputes and collective security but also economic and social cooperation as well as human rights.[126] Nevertheless there might be a small glimmer of hope in the emerging insight at regional levels that democracy is not only a matter of elections but also a democratic culture.

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[124] The UNGA consists of representatives of governments, not of national parliaments. Admittedly, each member may have five representatives, but together they only have one vote.

[125] Boutros-Ghali (1992a), 47.

[126] Schwarzenberger—(1964), 14—defined power politics in disguise as a system of power politics which is not actually replaced by an international community proper but continues on the same basis as before behind the cloak of the community. Power politics is "a system of international relations in which groups consider themselves as ultimate ends; use, at least for vital purposes, the most effective means at their disposal and are graded according to their weight in case of conflict."

5.3. *Principles of Good Governance*

The emerging context of good governance intends to reduce the risk of the element of negotiation being the plaything of government majorities. After all, a democratic state does not automatically go hand in hand with a democratic way of life. A state can claim to be democratic if it respects political participation and freedom of speech, press, assembly and association. The desire to have control over the impact of such rights may seduce governments into creating comfortable majorities. In doing so they may easily, consciously or not, overlook the fact that majorities do not automatically know everything when dealing with cultural traits which the members of groups in pluralist societies hold in common, such as language, religion, a common history, and national symbols.[127] That is why the development of a democratic culture has been accepted as a necessary element for the functioning of all democratic governments.[128]

Human rights, fundamental freedoms, democracy and the rule of law are seen as matters of international concern, "as respect for these rights and freedoms constitutes one of the foundations of the international order".[129] Despite the recognition of human rights as a legitimate international concern, no UN organ can as yet take binding decisions in the field of human rights. A first step to overcome this flaw should be that UN bodies and agencies, including financial and trade institutions, should respect the International Covenants on human rights and other basic conventions in the field of human rights in their daily operations as if they themselves were parties.[130]

UN Secretary-General Boutros Boutros-Ghali rightly stated that democracy within the family of nations means the application of principles of good governance within the world organization itself.[131]

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[127] Berting (1990), 100-101.

[128] Report to the CSCE Council from the CSCE Seminar of Experts on Democratic Institutions, 31 *ILM* 377 (1992).

[129] Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-finding of 30 October 1991, 30 *ILM* 1672 and 1683 (1991).

[130] Doc. E/CN.4/1990/Rev.1, 50.

[131] Boutros-Ghali (1992a), 47. See also Bull. EC 11-1991. The concept of good governance was launched by the Council of the European Commun-

These principles should include at the national and international levels:

- respect for the rule of law based on everyone's entitlement to a social and international order in which the universally recognized human right can be fully recognized;
- democratic decision-making;
- adequate governmental transparency;
- sensible economic and social policies;
- financial accountability;
- creation of a market-friendly environment for sustainable development;
- measures to combat corruption.

Respect for the rule of law in the UN system requires that the UN should interrelate the principles and purposes of its Charter in their interpretation and application in each other's context. The organizational principle of sovereign equality of member states is not an isolated one.

The inherent element of negotiation in the interpretation of the letter and spirit of the UN Charter should result in a proper balance between the right to self-determination of peoples and the prohibition of secession for peoples. In doing so the UN should be aware of the fact that prohibition of secession only applies to peoples in sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples "and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[132] An Agenda for Peace is still far away from creating a sense of confidence that the UN with respect to self-determination "will react swiftly, surely and impartially and that it will not be debilitated by political opportunism or by administrative or financial inadequacy."[133] The fate of the Palestinian people has been telling in that respect.

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ity (EC) on 28 November 1991, albeit within the framework of development cooperation only.

[132] UNGA res. 2625 (XXV).

[133] Boutros-Ghali (1992a), 47.

6. Inadequate UN Governance: the Question of Palestine

The most poignant example of the element of negotiation is responsible for the ups and downs of the Palestinian people in the Israeli-Palestinian dispute to this very day. This dispute is deeply rooted in the League of Nations mandate system and in the international law of the day. It became the main issue of the Arab-Israeli wars under the impact of the progressive development of international law after World War II with regard to non-self-governing territories. In doing so it has challenged the resilience of the UN system for the peaceful settlement of disputes. It also put to the test time and again the decisiveness of the Security Council as the guardian of international peace and security without respect for (member)states.

Finally, the dispute provoked serious doubts about the willingness and capability of the General Assembly to take responsibility as the competent authority in accordance with the advisory opinions and judgments of the International Court of Justice. Under international law the inadequacy of UN governance in the Question of Palestine is attributable to a misunderstanding of the legal status of the Arab state territory by the UN and all the parties involved. This misunderstanding mainly concerned the powers of the UN in respect of League of Nations mandates, the legality of the Palestine Mandate, the legal status of the territory of the Arab state and the right to self-determination of the Palestinian people.

6.1. *UN Powers over Mandated Territories*

As of 19 April 1946 the League of Nations was discontinued. In its pertinent resolution of 18 April 1946 the Assembly of the League of Nations recognized that the League's functions with regard to the mandated territories would come to an end. However, it also noted that the UN Trusteeship system embodied principles corresponding to Article 22 of the Covenant. According to the International Court of Justice this resolution presupposed that the supervisory functions of the League would be taken over by the UN.[134] The resolution took note that since the last meeting of the Assembly in 1939 the A mandates concerning Transjordan, Syria and Lebanon had been termi-

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[134] ICJ Rep. 137 (1950). See also *supra* section 4.

nated. Iraq having been admitted as a member of the League of Nations in 1932, Palestine remained in 1946 as the only A mandate still in force. All B mandates became UN trust territories.[135]

The Court was only in one case—the legal status of the C Mandate of South West Africa—requested to give its advisory opinion on the legal implications of the transfer of supervisory functions from the League of Nations to the UN. The Court then considered that a Mandatory Power, by submitting the question of the future international status of the mandated territory to the judgment of the General Assembly as the competent international organ, recognized its competence in the matter:[136]

> The General Assembly, on the other hand, affirmed its competence by Resolution 65 (I) of December 14th, 1946. It noted with satisfaction that the step taken by the Union [of South Africa, PdW] showed the recognition of the interest and concern of the United Nations in the matter. (...), the Court concludes that competence to determine and modify the international status of South-West Africa rests with the Union of South Africa acting with the consent of the United Nations.

The UN approved the transfer to its organs of only a limited list of powers and functions of the League of Nations.[137] This list did not include the supervision of mandates. The UN thus made it very difficult for itself. The Court tried to solve the problem by basing the supervisory powers of the General Assembly on the UN Charter:[138]

> [T]he General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12 [no recommendation when the SC is seized of a matter, PdW], may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions.

This way out seems a dead end because of the UN consent which a Mandatory Power needs for modification of the international status of its mandate. For the General Assembly may only make recommendations. Its drafting and interpretation provoked a grave crisis as

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[135] Raushning (1987), 289, 290.
[136] ICJ Rep. 142-143 (1950).
[137] Schermers (1980), 820.
[138] UN Charter, Article 10.

early has the UN Conference on International organization at San Francisco. The medium-sized and small(er) states were in favour of a General Assembly that could offer some resistance to the action-oriented Security Council.[139] By way of a compromise Article 10 was adopted:[140]

> The 'general scope' of this Article and the breadth of the powers of discussion which it confers on the Assembly have been referred to many times (...) by representatives who wished to stress the over-all responsibility of the Assembly as a world forum for the consideration of international problems and its role in the Organization as the only principal organ on which all State Members are represented. (...) In short, there is scarcely any field in which the Assembly has taken an interest where reference has not been made, at one time or another, to the provisions of Article 10.

Article 10 apparently might even result in a decision of the UNGA to terminate a mandate if the Mandatory Power has failed to fulfil its obligations in respect of the mandated territory.[141]

As for the A Mandate of Palestine the UN never raised the question whether it should terminate the British mandate because of the Mandatory's neglect of duty. Anyhow it did not uphold Palestine's international status. The UN apparently held the view that the mandate as a whole came to an end in 1948.[142] A 1990 UN study on the origins and evolution of the Palestine problem forced such a conclusion, albeit without any argument.[143]

The General Assembly should not have made light of the Palestine Mandate by behaving as if it were terminated lock, stock, and barrel. After all, it was an international institution "in the interest of the inhabitants of the territory". The interest "of humanity in general" was by no means an argument for ignoring the right to self-determination of the Palestinian people. This right should have kept the UN from terminating the international status of the territory of the Arab state.

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[139] Goodrich/Hambro/Simons (1969), 111 and 212; Bennani (1985), 250.

[140] Repertory of Practice of the United Nations Organs (vol. I 1957), 257.

[141] UNGA res. 2145 (XXI) of 27 October 1966 on the Question of South West Africa, adopted by 114 votes in favour, 2 against (Portugal and South Africa), with 3 abstentions (France, Malawi and the UK).

[142] *Infra* Chapter Three section 3.3.

[143] United Nations (1990), 132-140.

6.2. *Legality of the Palestine Mandate*

The 1917 Balfour Declaration had intended "the establishment of a national home for the Jewish people."[144] In line with that Declaration the 1922 Mandate for Palestine gave "recognition to the historical connection of the Jewish people with Palestine and to the ground for reconstituting their national home in that country".[145] This recognition was met with a wall of resistance due to[146]

> [T]he Arab belief that the Balfour Declaration implied a denial of the right to self-determination and their fear that the establishment of a National Home would mean a great increase in Jewish immigration and would lead to their economic and political subjection.

Palestine was one of the "[C]ertain communities formerly belonging to the Turkish empire [that] have reached a stage of development where their existence as independent nations can be provisionally recognized."[147] The British policy in Palestine fostered the establishment of a full measure of self-government in Palestine as early as 1922. However, "in the special circumstances of that country, this should be accomplished by gradual stages and not suddenly."[148] These special circumstances concerned the ambiguity of certain expressions in the Mandate, such as "a national home for the Jewish people", not the stage of development.[149] They were also attributable to "undertakings given at various times to various parties, which we [the British government, PdW] feel ourselves bound to honour."[150]

There was no question of Jewish emigration to a political, economic, religious and cultural vacuum. The thorough and extensive documentation *A Survey of Palestine,* prepared in December 1945 and January 1946 for the Anglo-American Committee of Inquiry, produced conclusive evidence of that.[151] It belied Jewish emigration to

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[144] Balfour Declaration of 2 November 1917.

[145] Mandate for Palestine of 24 July 1922.

[146] BMA (reprint 1991), 17.

[147] Covenant of the League of Nations, Article 22(4).

[148] White Paper of June, 1922, in BMA (reprint 1991), 89.

[149] White Paper of May, 1939, in BMA (reprint 1991), 91.

[150] Statement made in the House of Commons on 13th November, 1945, by the Foreign Minister E. Bevin, in BMA (reprint 1991), 102.

[151] BMA (reprint 1991), 20-21.See also Nakhleh (1991), 33-61.

Palestine as a matter of giving land without a people to people without a land. Moslem and Christian Arabs of all classes pulled no punches in this respect. They showed hostility to the concept of a Jewish national home and the inherent phenomenon of Jewish immigration in Palestine from the very beginning.[152] The British policy to treat economic absorptive capacity as the sole limiting factor aroused suspicion:[153]

> Although it is not difficult to contend that the large number of Jewish immigrants who have been admitted so far have been absorbed economically, the fear of the Arabs that this influx will continue indefinitely until the Jewish population is in a position to dominate them has produced consequences which are extremely grave for Jews and Arabs alike and for the peace and prosperity of Palestine.

For that reason the 'People of Palestine' did not accept the Balfour Declaration or the Mandate and already demanded their national independence before the Palestine mandate came into force.[154] How humanly pardonable that attitude might appear today, at that time, however, it was an error under international law. Conquest was still an important and generally accepted mode of acquisition of territory.

The Sykes-Picot Agreement between Britain and France of 16 May 1916 became, as it were, a chain letter on the classic partition of the Ottoman Empire after its defeat between Britain, France, Italy and Russia. The Balfour Declaration is a portrait of that era.[155] Only at the end of World War I did the legality of conquest as a means to acquire territory become somewhat questionable due to the emerging concept of the right to self-determination of peoples.[156]

The new international system of mandates was based on seven principles, i.e. non-annexation, tutelage by advanced nations, open

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[152] BMA (reprint 1991), 19.

[153] White Paper of May, 1939, in BMA (reprint 1991), 96.

[154] BMA (reprint 1991), 19. The Palestine Mandate formally came into operation on 29th September, 1923.

[155] Hourani (1991), 315-332. See also *infra* Chapter Two section 1 and Annex 11, Map 3.

[156] Kussbach (1982), 119-112. Brownlie (1990), 131: "Many of the textbooks, and particularly those in English, classify the modes of acquisition in a stereotyped way which reflects the preoccupation of writers in the period before the First World War. According to this analysis (if the term is deserved) there are five modes of acquisition—occupation, accretion, cession, conquest, and prescription."

door policy, military non-exploitation, consultation, self-government or independence, and international supervision.[157] Annexation of territory, however, has remained possible to this day when the conquest or occupation resulted from the legitimate use of force. Moreover, there was no immediate and complete rupture with former times when[158]

> new States where called into being by an international conference acting as a kind of supreme directing authority in European or even world affairs, such as (...) the Peace Conference of Versailles-Neuilly-Trianon-Sèvres of 1919/1920 (...); the establishment of (...), particularly the A-Mandates of the League of Nations in the Near and Middle East: Syria, the Lebanon, Palestine and Iraq, which emerged as a novel group of new prospective sovereign States *in fieri*.

In keeping with this practice the Principal Allied Powers agreed that the Mandatory for Palestine should be responsible for putting into effect the Balfour Declaration. The Council of the League of Nations derived from that agreement the authority to insert the concept of a Jewish national home both in the preamble and the operational part of the Palestine Mandate.[159] It did not need the approval of the Ottoman Empire. After all, the mandate system was still the brainchild of power politics in disguise.[160] This also appeared from the fact that the British dominions of Australia, New Zealand and South Africa considered 'their' mandates as annexations in disguise because

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[157] Schwarzenberger (1964), 469-47.

[158] Verzijl (vol. II 1969), 97-98. But see Jeffries (1939), 176. Jeffries' analysis of the Balfour Declaration clearly overlooked the international legal dimension. Though politically quite interesting, it is irrelevant under international law whether or not the Declaration was the outcome of an agreement between the British government and the Zionists. See also *infra* Chapter Three section 3.1.

[159] The Mandate for Palestine of 24 July 1922, Article 2: "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of a Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

[160] Schwarzenberger (1964), included the League of Nations experiment in the category "Power Politics in Disguise" (Part II of his classic work). He defined *power politics in disguise* as a system of power politics which is not actually replaced by an international community proper but continues on the same basis as before behind the cloak of the community (*id.*, 14).

the pertinent territory was looked upon as vital to their security.[161] As for Palestine, what is more, the concept of a Jewish home was supported by countries like Poland and Central-Eastern European states "which had 'demographic' problems, i.e. too many Jews and therefore favoured large scale immigration."[162]

The 1919 "happy blend between American idealism and Realpolitik" prevented the principle of the wishes of the populations of A-mandates from becoming the principal consideration on the selection of the Mandatory.[163] It also laid the foundation for the policy of the World War II victorious powers to make the concept of the national Jewish home subservient to the appalling tragedy of the homeless Jews in Europe. The League of Nations 'sacred trust of civilization' and the underlying Wilsonian principle of the right to self-determination of peoples were the result of a compromise giving "to the victorious Powers [of World War I, PdW] the substance of their territorial ambitions, but in the form and with the limitations, of League mandates."[164]

The genesis of the mandate system makes it difficult to stand by the opinion that the Palestine Mandate was incompatible with the Covenant of the League of Nations and *thus* invalid under international law.[165] It gave even less fuel to the view that the establishment of a mandate required a peace treaty with the defeated enemies of the Allied Powers, i.e. Germany and Turkey.[166] The misconceptions about the legality of the Palestine Mandate harmed the legal position of the Palestinian people. It brought them to share too easily

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[161] Van Ginneken (1992), 295. On the other hand, the supervision of the League of Nations Mandates Commission was mainly effective in preventing 'closer union' and annexation, "a common tendency with most Mandatories" (*id.*, 299).

[162] *Id.*, 299.

[163] Schwarzenberger (1964), 470.

[164] *Id.* See allso Thürer (1985), 471.

[165] But see Cattan (1988), 22-31 and van de Craen (1990), 275. According to the latter the UK was no more than a belligerent occupant until the 1923 Peace Treaty of Lausanne with Turkey: "The legal existence of the mandate could only be secured by the conclusion of a peace treaty with Turkey in which the latter relinquished any rights of sovereignty over the area."

[166] Binschedler (1982), 20-21. At the time the unilateral annexation of the territory of another state without contractual consent was only illegal if it was not preceded by war.

the view that the Palestine Mandate had been terminated in 1948 both as a method and a principle. It also caused inconsistency. The pretended invalidity of the mandate was used as an argument to dispute the legality of the Plan of Partition. However, at the same time it was argued that Israel was bound by the pertinent resolution.[167]

The Palestinian people overlooked the ambiguity of the concepts of "sacred trust of civilization" and self-determination of peoples. Its resulting denial of the legality of the Palestine mandate discouraged the formation of official and effective institutions to co-operate with the Government of Palestine. It undermined in 1943 attempts to establish some coherent local political body to work in the interests of the Palestine Arabs:[168]

> Owing to individual jealousies, divergence of opinions and the lack of any real leaders, these attempts (...) came to nothing and (...) there emerged a tendency on the part of local Arab politicians to rely on the neighbouring Arab rulers and States to champion the cause of the Palestinian Arabs.

The defeat of Egypt, Jordan and Syria in their 1967 war with Israel strengthened the sense of Palestinian identity.[169] The PLO, however, continued to stick to the opinion that the Balfour Declaration, the Palestine Mandate and everything that has been based upon them were null and void.[170] Legally speaking this opinion deprived the Palestinian people of the opportunity to avail itself of the possibility to claim international legal status for the territory of the intended Arab state in Palestine.

6.3. *International Status of the Occupied Territories*

Of old the judiciary is responsible for a solution worthy of man by regulating the discourse between the parties to a dispute. It is striking that of all UN organs only the International Court of Justice was never consulted on the Plan of Partition. It is true, Syria tried in vain

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[167] Cattan, 38, 42-46 and 51.

[168] BMA (reprint 1991) 65-66. See also Ben-Rafael (1987), 29.

[169] Hourani (1991), 414.

[170] The Palestinian National Charter as revised by the Fourth PNC Meeting, July 1968, Article 20. See Cobban (1984), 268.

to submit the Question of Palestine to the Court. However, its attempt was bound to fail for it did not concern the conflicting claims to self-determination. The main issues were the excess of authority of the UN in launching the Plan of Partition.[171] In that respect the subcommittee on legal aspects of the UN Special Committee on Palestine was on the wrong track. Its draft resolution on referring certain legal questions to the Court for an advisory opinion was of a too political nature, based as it was on the pretended illegality of the Balfour Declaration and the Palestine Mandate:[172]

> (a) Whether the indigenous population of Palestine has not an inherent right to Palestine and to determine its future constitution and government;
> (b) Whether the pledges and assurances given by Great Britain to the Arabs during the First World War (including the Anglo-French Declaration of 1918) concerning the independence and future of Arab countries at the end of the war did not include Palestine;
> (c) Whether the Balfour Declaration, which was made without the knowledge or consent of the indigenous population of Palestine, was valid and binding on the people of Palestine, or consistent with the earlier and subsequent pledges and assurances given to the Arabs;
> (d) Whether the provisions of the Mandate for Palestine regarding the establishment of the Jewish National Home in Palestine are in conformity or consistent with the objectives and provisions of the Covenant of the League of Nations (in particular Article 22), or are compatible with the provisions of the Mandate relating to the development of self-government and the preservation of the rights and position of the Arabs of Palestine;
> (e) Whether the legal basis for the Mandate of Palestine has not disappeared with the dissolution of the League of Nations, and whether it is not the duty of the Mandatory Power to hand over power and administration to a government of Palestine representing the rightful people of Palestine;
> (f) Whether a plan to partition Palestine without the consent of the majority of its people is consistent with the objectives of the Covenant of

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[171] United Nations (1990), 120. The Syrian representative proposed in the 1947 Ad Hoc Committee on Palestine a sub-committee of jurists "which would deal with the question of the competence of the UNGA to take and enforce a decision, and with the legal aspect of the Mandate. If that Sub-Committee's report were unsatisfactory, then the question of reference of the whole matter to the International Court of Justice could be discussed." See also doc. A\AC.14/32 and Add. I of 11 November 1947, Report of Subcommittee on Legal Issues of UNSCOP, in Khalidi (1987), 648-651.

[172] Khalidi (1987), 691-692.

> the League of Nations, and with the provisions of the Mandate for Palestine;
> g) Whether the United Nations is competent to recommend either of the two plans and recommendations of the majority or minority of the United Nations Special Committee on Palestine, or any other solution involving partition of the territory of Palestine, or a permanent trusteeship over any city or part of Palestine, without the consent of the majority of the people of Palestine;
> (h) Whether the United Nations, or any of its Member States, is competent to enforce or recommend the enforcement of any proposal concerning the constitution of Palestine, in particular, any plan of partition which is contrary to the wishes or adopted without the consent of, the inhabitants of Palestine (...).

In the light of its 1950 advisory opinion on the international status of South West Africa and its 1962 advisory opinion on certain expenses of the UN it is highly doubtful whether the Court would have given its opinion on any of these questions and even less so whether such an opinion would have satisfied the drafters. After all, the Court is not obliged to give its opinion:[173]

> [t]he Court can give an advisory opinion on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so.

If the questions would have been submitted to the ICJ, the Court most probably would have upheld the competence of the UN to determine the constitution of Palestine.[174] This might also have contributed to the morality of the UN Partition resolution.[175] Such a conclusion is not a matter of being wise after the event. For the rationale of the above questions clearly defined the policy of the Arab states

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[173] ICJ Rep. 155 (1962). See also Reservations to Genocide Convention, Advisory Opinion, ICJ Rep. 19 (1951): "The permissive provision of Article 65 of the Statute recognizes that the Court has the power to decide whether the circumstances of a particular case are such as to lead the Court to decline to reply to the request for an opinion."

[174] *Supra* section 6.1.

[175] But see Khalidi (1986), 121: "The morality of the UN partition resolution was compromised in Palestinian and Arab eyes by the UN General Assembly's rejection of relevant draft resolutions proposed by the Palestinian and Arab delegates."

towards Israel to this day.[176] Moreover, they led the UN astray. The UN was prevented from making the best use of the international status of mandates in order to safeguard the rights of the Palestinian people.

Be this as it may, the absence of a decision of the Court on the competing claims gave a free hand to a variety of legal conceptions. Unfortunately, this very variety mainly obscured the legal status of the territory of the Arab state. It made it all the worse, that the diversity of interests and views prevented the Palestinian people from claiming international protection in the Occupied Territories under current international law. It hampered the impact of the PLO's ultimate resignation to the Partition Plan and the inherent legitimacy of Israel in 1988:[177]

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

This impact could (should) have been the admittance of Palestine to UN membership if the view was widely held that the Occupied Territories still had international status. Unfortunately this has not been the case in legal doctrine to date. The view that the Palestine Mandate still exists in some form "has commanded very little support, especially among policymakers" and would go "against the weight of historical evidence".[178] This is partly due to the fact that the rare supporters include those who are using the argument in favour of the

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[176] Nakleh (1991), 915-916.

[177] Declaration of Independence of 15 November 1988, in Lapidoth/Hirsch (1992), 353.

[178] Roberts (1990), 722. According to Roberts the contrast "with the South West Africa mandate, the continuation of which can be traced like a continuous thread through the International Court of Justice and UN decisions is striking." If the continued existence of the Palestine Mandate "were to be advanced seriously on the diplomatic level, it would be interesting to see what line Israel and other UN members would take on certain key issues: (1) the measures taken to carry out its provisions over the years; (2) submission to the ICJ of any disputes about its interpretation or application; and (3) possible modifications of its terms." But see Boyle (1990), 301.

legitimacy of Jewish settlements in the Occupied Territories being "an unallocated part of the British Mandate".[179]
In defence of the UN failure to keep an eye on the legal status of the Occupied territories it may be evidenced that even the parties most concerned never claimed a partial mandate, and for obvious reasons. After all, as for the Arab states and the Palestinian people acceptance of the international status of the occupied Palestinian territories would imply that they give up their opposition to the Palestine Mandate as a whole. The Israeli government would drop its favourite opinion that the intended Arab state in the Palestine Mandate has already been realized by the creation of (Trans)Jordan.

In doing so all parties misjudged the element of negotiation in the mandate system under the then as well as under current international law. After Israel's admission to its membership in 1949 the UN allowed its efforts to do justice to the Palestinian people to degenerate into conciliation between the governments concerned considering that they have "the primary responsibility for reaching a settlement of their outstanding differences in conformity with the resolutions of the UNGA on Palestine."[180] This formulation overlooked the right to self-determination of the Palestinian people which had as yet no government.[181] This flaw became particularly obvious after 1967 because of Israel's persistent refusal to recognize the PLO as its negotiating

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[179] Rostow (1990), 719. Commenting on the article of Roberts [(1990), PdW] Rostow argues: "It is hard, therefore, to see how even the most narrow and literal-minded reading of the Convention [the Fourth Geneva Convention, PdW] could make it apply to the process of Jewish settlement in territories of the British Mandate west of the Jordan River. Even if the Geneva Convention could be construed to prevent settlements during the period of occupation, it could not terminate the rights conferred upon by the mandate. They can be ended only by the establishment of a new state or the incorporation of the territories into an old one."

[180] UNGA res. 512 (VI) of 26 January 1952. See Hamzeh (1963), 122-124, 140-145.

[181] See *infra* Annex 2. The Conciliation Commission for Palestine was established by resolution 194 (III). This resolution instructed the Commission to assist the governments *and authorities* concerned to achieve a final settlement of all outstanding questions. But see van de Craen (1990), 276. van de Craen points out that the Palestine Mandate did not contain a direct provision for the granting of independence. However, according to Article 1 the mandatory had complete powers so far as they were not restricted by the provisions of the mandate. These provisions did not exclude (provisional) recognition as an independent nation in accordance with Art. 22(4) of the Covenant of the League of Nations.

partner. Admittedly, between 1948 and 1967 the interests of the Palestinian people were the responsibility of the Egyptian and Jordanian governments respectively, albeit only *de facto* outside the framework of the Fourth Geneva Convention.

The mandate system and the right to self-determination only heralded one dimension of the time element in international law, i.e. change. They did not clearly opt for one of the other two main dimensions: the present—immediate effect—and the past, i.e. permanency.[182] In other words, legal opinions on the legal status of Israel and Palestine should not overlook the fact that movement and stability always compete for first place in a period of change. International law does not differ from national law in that respect, albeit that the important role of customary international law may give more weight to stability. This held true for Palestine in particular. After all, the recognition of the historical connection of the Jewish people with Palestine clearly favoured the past. The immediate effect of the right to self-determination of the Palestinian people was thus restricted by the Principal Allied Powers.

Under the international law of the day the two peoples had no other choice than to live together in one state or separately in two states. For the Jewish people there was no question of the Palestine mandate being a cession in disguise. For the Palestinian people, the recognition of its right to self-determination did not imply that it could deny the historical connection of the Jewish people as a claim to (a part of) the mandated territory.

The balancing of movement and stability in periods of transition is not a matter of negotiation on the creation of law in the abstract, which is the domain of the legislature. It requires a good insight into the concrete aspects of the mutual relations between the specific parties concerned. For that reason the determination of transitional law or 'intertemporal' law is a matter of negotiation concerning law in the concrete sense, which is the domain of the judiciary.[183] Neither party may take the law into its own hands. For physical might may never decide who is 'right'.

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[182] Tavernier (1970), 9-12, 308-309.

[183] *Id.*, 310.

The legal view that the ultimate fate of Palestine depended on the outcome of Arab-Israeli wars is, of course, absolutely incompatible with the nature of the mandate system.[184] As an arrangement under international law a mandate had two important features which are closely related but nevertheless separable. These features were the international status as a matter of principle and tutelage as a method to give effect to the principle. The gist of the nature of the mandate system was laid down in Article 22 of the Covenant of the League of Nations:[185]

> 1. 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 and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust civilisation and that securities for the performance of this trust should be embodied in this Covenant.
> 2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

Termination of the mandate as a method did not automatically imply the termination of the mandate as a principle. Admittedly, the Palestine Mandate differed from the other A-mandates in that "the provisions which are aimed at the practical realization of the promise made to the Zionists come first in the Mandate instrument."[186] This priority, however, could not justify the fact that the General Assembly acted as if its 1947 Plan of Partition terminated not only the method but also the principle.[187] A much more obvious conclusion

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[184] *Infra* Chapter Three section 4.3. But see Verzijl (vol. II 1969). 107-108: "However, the ultimate fate of Palestine did not depend on General Assembly resolutions or on proclamations, but on the outcome of the fierce armed conflict in which the young State of Israel had to defend itself against the combined forces of Egypt, Jordan, the Lebanon and Syria."

[185] Covenant of the League of Nations, Article 22.

[186] Verzijl (vol. II 1969), 559.

[187] See *infra* Chapter Three section 4 and Annex 1.

from the plan would have been that the territory of the Palestine Mandate was not indivisible once and for all.

The concept of partition implied, as it were, the possibility for terminating the international status of the mandated territory for one part while maintaining it for the other. Legally speaking the General Assembly might have terminated the mandate over the area of the proposed Arab state as a method only. It could have done so, for instance, by accepting administration by Egypt, Israel and Jordan, provided that the international status of the pertinent area would be secured. However, the United Nations never accepted such an administration.

6.4. *A Challenge to the Rule of Law*

The fate of the Palestine Mandate and the Palestinian people challenged the rule of (international) law. The key question has become whether international law can really provide an effective framework for managing the element of negotiation in international (good) governance in such a way that it can offer effective protection of peoples. The next Chapter will deal with self-determination as a principle of interstate law and as a universally recognized collective human right to that end. In doing so it will consider the necessity of a code of conduct for peoples in respect of self-determination. Chapter Three will expose the roots of the present territorial conflict between the Israeli and Palestinian peoples, i.e. the right to self-determination as the legal foundation of their statehood and the UN Partition Plan for Palestine. These roots appear to be offshoots of the element of negotiation. Chapter Four will deal with the legal aspects of the creation of Palestine. In doing so it will draw lessons from the Israeli-Palestinian Question for implementing self-determination in the post-cold war era.

CHAPTER TWO

SELF-DETERMINATION: PROTECTION AGAINST OPPRESSION

Among all actually pending international disputes on self-determination, the Israeli-Palestinian conflict stands out because of its deep rooting in international law from the early days of Zionism. After all, unilateral, bilateral and multilateral legal instruments—the Balfour Declaration, the League of Nations Palestine Mandate and the UN Plan of Partition—formed the birth certificates of the right to self-determination of the Jewish people and the 'non-Jewish communities' in Palestine. The inadequate protection of the Palestinian right of self-determination by the UN weakened the moral and legal authority of the organization to cope with the issue of self-determination at large in the post-cold war era. The organization could not effectively capitalize on the new spirit of the age characterized by a worldwide commitment to the process of democratization and a universal recognition of the rights of all peoples to self-determination and to development.

The World Conference on Human Rights in June 1993 at Vienna provided evidence of the new spirit of the age in respect of the international protection of human rights (section 1). The recognition of the right to self-determination by the Vienna Declaration and Programme of Action—hereafter the Vienna Declaration—made it a matter of the utmost urgency for the UN to develop a system for the international protection of peoples (section 2). The Palestinian question showed that self-determination should be governed by a code of conduct for peoples, states and intergovernmental organizations. As such may serve the limitation and derogation clauses in the International Bill of Human Rights, the provisions on secession in the 1970 Declaration on Principles of International Law as well as the right of peoples to development. Disputes on self-determination may require that the UN proclaims an international state of emergency in order to protect oppressed peoples (section 3). The Palestinian people were to learn about the failures of international law the hard way (section 4).

1. International Protection of Human Rights

The Vienna Declaration recommended to the General Assembly, as a matter of priority, the consideration of the question of a High Commissioner for Human Rights for the promotion and protection of all human rights.[1] However, the effectiveness of international protection of human rights will probably benefit more from the capacity of the bearers of these rights to bring international claims themselves. The key question is not if and to what extent human collectivities other than states are capable of possessing international rights but if and to what extent they have the capacity to maintain these rights themselves by bringing international claims.[2] This holds true the more so since the Vienna Declaration solemnly reaffirmed that human rights and freedoms are the birthright of all human beings. Their protection and promotion is the first responsibility of governments. However, they are also the legitimate concern of the international community:[3]

> The organs and specialized agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments.

The Vienna Declaration marked the end of Vattel's doctrine of a natural law for states which placed states as persons before the law of nature on an equal footing with human beings.[4] Vattel interpreted the post-Westphalian international order of sovereign states in such a way that the human being was effectively removed from the international stage.[5]

The Vienna Declaration showed the growing awareness on the part of the international community that Vattel's natural law for states did not support international supervision on the realization of a social and international order in which all universally recognized human rights

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[1] A/CONF.157/23, 16.

[2] Reparation for Injuries Suffered in the Service of the United Nations, International Court of Justice (ICJ), Advisory Opinion of 11 April 1949, ICJ Reports 1949, 178; Western Sahara, ICJ, Advisory Opinion of 3 January 1975, ICJ Reports 1975, 33.

[3] A/CONF.157/23, 4.

[4] Vattel (1758), Introduction, 5.

[5] *Id.*, part I 8. See also *supra*, Chapter One section 1.

can be adequately realized.[6] It has now again become beyond doubt that every human being has the right to recognition everywhere as a person before the law.[7] States may not derogate from this right even in a time of emergency.[8] However, it may still be questioned whether the international community recognizes collectivities of human beings other than states, such as peoples and minorities, as persons before international law.[9]

1.1. *Universal Recognition of the Right to Self-determination*

The right to self-determination of peoples differs substantially from the other collective rights in that its implementation may change the number of states. The 1993 World Conference on Human Rights at Vienna considered the denial of the right to self-determination as a violation of human rights and underlined the importance of the effective realization of this right.[10] In doing so the Conference settled a long matter in dispute between the West and the other quarters of the world in favour of the West. Unlike the latter the former other areas were originally of the opinion that the right to self-determination only applied to peoples under colonial or other forms of alien domination.

The above controversy resulted from confusing two dimensions of self-determination, i.e. the external dimension—freedom from foreign subjugation or occupation—and the internal one: freedom from tyranny. Both dimensions were rooted in eighteenth century Europe. The external dimension emerged in the American war of independence against Great Britain and the internal one in the French Revolution.[11] They still determine the hard core of self-determination, i.e. the right

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[6] UDHR, Article 28.

[7] UDHR, Article 6.

[8] ICCPR, Article 4. The ICESCR does not contain a provision on the proclamation of public emergency by states. Its corresponding Article 4, however, recognizes that the state "may subject these rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." It need no argument that a society ceases to be democratic as soon as it refuses to recognize individuals as persons before the law.

[9] *Infra* Chapter Four section 1.1.

[10] A/CONF.157/23, 4.

[11] Brownlie (1988), 4-5; Thürer (1985), 470.

of a people to determine freely, without external interference, its political status and to pursue its economic, social and cultural development.[12]

As for its external dimension, self-determination was interpreted by nineteenth century and early twentieth century nationalist movements as the right of each 'nationality' to have an independent state. This nationalistic view of self-determination placed the concept in a bad light from its very beginning, particularly its conclusion that only nationally homogeneous states could be legitimate.[13] The nineteenth century and the present one demonstrated the horrors of the doctrine of superiority based on racial differentiation with great violence.[14] The doctrine also stirred up religious intolerance as if the notion of brotherhood were not common to all religions.[15] Its most villainous European offspring—nazism—operated a political, economic, social and cultural system based on persecutions on political, racial or religious grounds as exemplified by the Third Reich. Nazism urged the UN from its very beginning to put a check on the hard core of self-determination.

The affirmation of the principles of international law recognized in the Charter of the Nuremberg Tribunal by the General Assembly in its first session is of great interest in that respect. It implied that no people may ever opt for nazism or any other form of racism or religious intolerance under the veil of self-determination.[16] The General Assembly adopted in 1965 unanimously the International Con-

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[12] ICESCR and ICCPR, Article 1(1); DPIL, Principle 5.

[13] Thürer (1985), 470. Nationality is defined as "a group of people who have the same racial origins, especially when they do not have their own independent country." See Collins Cobuild English Language Dictionary (1987), 956.

[14] Partsch (1985), 447.

[15] Capotorti (1991), 1.

[16] UNGA res. 95 (I) of 11 December 1946. Principle 6 of the Nuremberg Principles included crimes against humanity in the crimes punishable under international law. It defines crimes against humanity as "[M]urder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are carried on in execution of or in connexion with any crime against peace or any war crime." The linking of these inhuman acts to crimes against peace and war crimes related to the jurisdiction of the Tribunal.

vention on the Elimination of All Forms of Racial Discrimination which considered that[17]

> any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.

In doing so the UN prevented the self-determination of peoples from degenerating into an obstacle for the international promotion and protection of the universally recognized human rights. It paved the way for the universal recognition of self-determination as a human right of all peoples.

1.2. *Identification of Peoples*

International law does not define its subjects, be it states or human beings and their collectivities: family, tribe, minority or people. These concepts are, as it were, metalegal. That does not alter the fact that a people is more distinguishable from a state than from any other collectivity of human beings, including minorities.[18]

The right to self-determination intends to protect peoples by granting them the right freely to determine their political status and to pursue their economic, social and cultural development by means of the free disposal of their natural wealth and resources. If a people forms an oppressed minority within its state, it may secede as a new state or merge into another state. Other national minorities lack such an opportunity. The UN Charter does not speak about minorities at all. Neither does the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights only refers to ethnic, religious and linguistic minorities.[19] National minorities were

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[17] See UNGA res 2106 (XX) of 21 December 1965. The Convention entered into force on 4 January 1969. By mid-1993 136 states were parties to the Convention.

[18] Makinson (1988), 73: "A people is a kind of collectivity, or group of human beings; a State is a kind of governing and administering apparatus."

[19] ICCPR, Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities, shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

deliberately left to one side. They came into the picture again recently and then through the protection of persons only.[20]

According to (non-)binding international instruments peoples are bearers of collective human rights such as the right to development and the right to self-determination. Whether or not a certain population has a territorial claim as a people by virtue of the latter right should be decided by international society and not by individual states or peoples themselves.[21] This view that the concept of non-self-governing territories entered the domain of international law prevailed from the very beginning.[22]

Under the Covenant of the League of Nations the Council explicitly defined in each case the degree of authority, control, or administration to be exercised by the Mandatory, if not previously agreed upon by the members of the League. A permanent commission was constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.[23]

The permanent Mandates Commission successfully prevented the continuous efforts of Mandatories to enhance their grip on the mandated territories through annexation or 'closer union'.[24] In doing so it gave shape to the self-determination of the peoples in those territories identified as bearers of the right to self-determination by the Covenant of the League of Nations through its 'sacred trust of civilisation'.

The international trusteeship system of the UN pursued the same course. The peoples opting for self-government or independence were

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[20] UNGA res. 47/135 of 18 December 1992, adopted without a vote: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[21] The concept of peoples implies a relationship with a certain territory. See UN doc. E/CN.4/ Sub.2/404/Rev. 1, *The Right to Self-Determination: Historical and Current Developments on the basis of United Nations Instruments* by A. Critescu (1981), paragraph 279. The most striking example, which still stirs up feelings, is the 1923 Palestine Mandate in which the Council of the League of Nations confirmed the recognition of the historical connexion of the Jewish people with Palestine by the 1917 Balfour Declaration.

[22] *Supra* Chapter One section 4.

[23] Covenant of the League of Nations, Article 22 (8) and (9).

[24] Van Ginneken (1992), 299.

identified as those inhabiting territories held under mandate, detached from enemy states under the Second World War or voluntarily placed under the system by states responsible for their administration.[25] The ups and downs of the Jewish and Palestinian peoples were exemplary, albeit for different reasons. After all, the ease with which the Jewish population of the world was identified as a bearer of the right to self-determination in the Palestine Mandate contrasted sharply with the difficulties which the 'non Jewish communities in Palestine' had to overcome in that respect.

Outside the UN trusteeship system the identification of populations as bearers of the right to self-determination is a more complex process. According to the International Court of Justice, not all populations constitute a people:[26]

> The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a people entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of the special circumstances.

The Court did not answer the key question of when a population does *not* constitute a people entitled to self-determination. Whether or not a certain population has a territorial claim by virtue of the right to self-determination of peoples should be decided by an international organ. The recognition of Jews as a people by the Council of the League of Nations may serve as an example.

Taking into account that the right to self-determination also includes the establishment of a state, the UN now presents itself as the most appropriate forum to that end. After all, the admission of a new state to UN membership will be effected by a decision of the General Assembly upon the recommendation of the Security Council.[27] However, the UN should develop criteria for self-determination and

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[25] UN Charter, Article 77(1).

[26] Western Sahara, ICJ Rep. 33 (1975).

[27] UN Charter, Article 4. See also Articles 5 and 6 dealing with suspension and expulsion of states from the UN, respectively by the UNGA, upon the recommendation of the SC.

international protection of peoples as a matter of high priority so as to prevent arbitrariness affecting its moral and legal authority. The Kurds in Iraq and the Palestinians in the Occupied Territories know all about this.

2. International Protection of Peoples

Democracy within the UN implies consultation, participation and engagement of both states and peoples in the work of the organization. For peoples living in states, which form a truly democratic society, consultation, participation and engagement of governments in the work of the UN may suffice in order to enable all UN organs to play "their full and proper role so that the trust of all nations and peoples will be retained and deserved".[28] However, the UN should also find ways and means to protect oppressed peoples. This necessity is obvious from the present situation in which the number of peoples who are accorded separate and unequal treatment by their governments easily exceeds the present number of states.[29] Their position indicates that the conduct of 100-odd states from all quarters of the world is not as yet in conformity with principles of good governance. It also illustrates the principles of the UN Charter being applied selectively, not consistently, to the detriment of organizational transparency and truly democratic decision-making.

2.1. *Jewish People*

The Palestine Mandate all of a sudden upgraded the Jewish minorities in the world to the level of a people under international law by recognizing their historical connection with Palestine. At the time of the

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[28] Boutros-Ghali (1992a), 47.

[29] Gurr/Scarritt (1989), 375. The world population of five billion people may be divided into five thousand ethnic groups of whom approximately ten percent may be identified as actual or potential nations. They live in some 180 states. The survey focuses on 261 non-sovereign peoples as minorities at risk in 99 states. The total population of these peoples amounts to almost one billion. The numbers of minorities at risk by region are 21 in 13 Western European countries, 30 in 6 former Eastern European countries and in the former USSR, 63 in (17) Asian countries (including Japan), 114 in (43) African countries and 33 in the Americas (19, including 4 in North America).

first Zionist Congress, the concept of national minorities was part of international law, albeit without definition.[30] It served mainly the protection of religious minorities.[31] As for Jewish minorities this protection was not effective. Some European states even withheld any protection under the pretext that Jews had to be considered as foreigners.[32] This may explain that according to Zionists only the creation of a Jewish homeland could solve the problem of anti-semitism (anti-jewishness).[33] Be this as it may, such a homeland could have been created in any territory without a people (*terra nullius*). However, after the colonization of the nineteenth century extremely few 'no man's lands' were left, if any:[34]

> [W]hatever differences of opinion there may have been among jurists, the State practice of the relevant period [1884, PdW] indicates that territories inhabited by tribes or peoples having a social and political organization were not treated as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements with local rulers.

Therefore the Chosen People urgently needed recognition as a people under international law. Otherwise it would be difficult to clear the hurdle of getting the desired government assents.[35] The Zionists would then really run into a legal no man's land: no people without a land and no land without a people. After all, the concept of 'a

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[30] Tabory (1992), 195-198. See also *infra* Chapter Three section 2.

[31] The 1856 Peace Treaty between European Powers and Turkey proclaimed the equality of all nationalities and religions in the Ottoman Empire. The 1878 Treaty of Berlin obliged Bulgaria, Serbia and Turkey to guarantee religious freedom to their nationals.

[32] Shaw (1992), 20, 26-27; Verzijl (vol. V 1972), 183-187. One of the characteristics of minorities is that they consist of persons having the nationality of the state where they live. See also Beit-Hallahmi (1992), 35, quoting the founding father of political Zionism, Theodor Herzl: "In the countries of our birth (...) we are denounced as foreigners."

[33] Goldberg/Rayner (1989), 164.

[34] Western Sahara, Advisory Opinion of 3 January 1975, ICJ Rep. 48 (1975). See Oellers-Frahm (1981), 291; Franck (1976), 710-711. The Advisory Opinion implied that interested parties other than a local population—in this case Mauritania and Morocco—did not have a legal title since Western Sahara was no *terra nullius*. For at the time of the Spanish colonization in 1884 tribes were located in the Western Sahara. See also Verzijl (vol. III 1970), 349-355.

[35] *Infra* Chapter Three section 2.1.

national home for the Jewish people' did not explicitly identify the Jews as a people entitled to self-determination in Palestine.[36] The General Assembly untied the knot in 1947, as it were, when it launched its plan to split up the territory of the Palestine Mandate into an Arab and a Jewish state. As for the Jewish people, the right to self-determination was realized when Israel was admitted to UN membership in 1949. The statehood of the Palestinian people, however, is still the subject of much discussion.

2.2. *Palestinian People*

In the very first year of the British Mandate Palestine had a total population of 757,182 According to the first census by the British administration—in October 1922—, 78% of this population were Moslems, 11% Jews and 9.6% Christians. At the end of 1944 the total population amounted to 1.07 million, of whom 61% were Moslems, 30% Jews and 9% Christians and other religions. Two years later the percentage distribution of the total population of 1.14 million by religion was as follows: 59.8 Moslems, 31.8 Jews and 8.4 Christians and others.[37] The figures show that during the Mandate period the majority of the population remained largely Moslem and Christian. The expansion of the Moslem and Christian populations was mainly due to a natural increase, but that of the Jewish population was due to immigration.[38]

During the League of Nations mandate the non-Jewish majority of Palestine did not lose its identity as a people in the context of self-determination. Neither the League of Nations nor Great Britain as the mandatory Power identified the concept of a Jewish national home with a Jewish state in the whole of the territory.[39] The UN Plan of Partition was on the same wavelength. It was the military defeat of the Arab states in their wars with Israel that lowered the legal status of the 'non-Jewish communities' in Palestine to the position of refugees for quite some time.[40]

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[36] *Id.*, section 2.3.
[37] BMA Supplement (reprint 1991), 10.
[38] BMA (reprint 1991), 140.
[39] *Id.*
[40] *Id.*, section 5.

The 1973 Yom Kippur War became a turning point. The Arab world considered it as a military success against Israel, its very first. The PLO profited from the new Arab self-confidence in that it was widely recognized as the sole legitimate representative of the Palestinian people.[41] For the first time the General Assembly explicitly recognized the 'non-Jewish communities' in Palestine as the Palestinian people entitled to self-determination in accordance with the UN Charter.[42] However, it took another twenty years before Israel reconciled itself to the facts by accepting the PLO as its negotiating party.[43] This delay dramatically illustrated that states still have a much stronger position under international law than peoples in conflicts on self-determination, even when the UN considered the pertinent right of those peoples to be beyond question.

The expulsion of Palestinians by Kuwait after the Iraqi withdrawal could not be exposed by a Palestinian state despite Palestine's recognition by over 120 states. There was no Palestinian territory to which these refugees could return. In the aftermath of the Gulf War the Palestinian people thus had once again to face the truth that its lack of statehood prevented its 'nationals' from enjoying effective protection either by their state or by the UN. It needs no argument that the position of the Kurdish people was even worse since the UN has as yet not recognized its right to self-determination.

2.3. *Kurdish People*

Of old the Kurds have been recognized as a distinct people with Kurdistan as its territory.[44] Like other territories belonging to the Turkish Empire, Kurdistan was intended to become a British Mandate under the League of Nations after World War I. However, the pertinent 1920 peace treaty with Turkey—Treaty of Sèvres—did not come into force due to its rejection by the Turkish Nationalists who had

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[41] Ben-Rafael (1987), 77-78.

[42] UNGA res. 3236 (XXIX) of 22 November 1974, adopted by 89 votes in favour, 7 against (Bolivia, Costa Rica, Iceland, Israel, Nicaragua, Norway, the USA) with 37 abstentions (including all the other western states and Japan).

[43] *Infra* section 3.2.1.

[44] Lerner (1993), 92-93; Dinstein (1993), 225; van Walt van Praag (1993), 317.

overthrown the government of the Sultan, and to the withdrawal by the USA of its support.[45] By virtue of the 1923 Lausanne Peace Treaty Turkey retained sovereignty over parts of Kurdistan.[46]

According to the 1925 treaty between Great Britain, Iraq and Turkey the Mosul area was attributed to the then British Mandate Iraq. This area was the smaller part of the Kurdistan territory which was the source of dispute between Turkey and Iraq, but it was the one which was rich in oil.[47] All in all the Kurdish people was less 'lucky' than other "communities formerly belonging to the Turkish Empire" in that its territory did not acquire the international status of a mandate. This lack of statehood has played its part as regards the Kurdish people ever since.

Turkey and its former territories of Iraq and Syria, on the one side, and the Soviet Union and Iran, on the other, manipulated the Kurds in their territories time and again in order to thwart each other's political stability. The United States engaged in this regionally political jousting when its policy of containing the Soviet Union so required. Iran and the United States, for instance, renewed supplies of weapons to the Kurdish rebellion in Iraq at the beginning of the seventies.[48] This very rebellion urged Iraq and Iran to embark on a common cause against the Kurdish minorities in their territories. The resulting 1975 Treaty of Baghdad between both states of 6 March 1975 settled their border dispute.[49]

After the successful 1978 Islamic Revolution of Ayatollah Khomeiny against the Shah regime, Iraq deemed it fit to seize the opportunity of unilaterally denunciating this treaty. The hostilities resulting from this illegal act developed into the Iran-Iraq War, known as the —first—Gulf War.[50] Iran demanded that those guilty of a premeditated act of aggression against its territory be prosecuted and tried.[51] However, the spirit of the cold war played into the hands of the Iraqi

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[45] Grenville ((1974), 49. See also *infra* Chapter Three section 3.1.

[46] Weber (1982), 243. See also Verzijl (vol. II 1969), 45-46; Mostyn (1988), 465.

[47] Osmanczyk (1985), 448.

[48] Dekker/Post (1986), 82.

[49] Post (1992), 20-23.

[50] *Id.*, 32.

[51] Dekker (1992), 249.

Government. President Saddam Hussein was still one of the 'good guys' in the books of the United States.

Despite the close links between the Kurdish Question and the regional tensions the position of the Kurds in Iraq did not play any significant role in the decisions of the SC on the 1990 Iraqi aggression against Kuwait, although this second Gulf War was related to the first one. After all, Iraq invaded Kuwait not only under the pretext of historical territorial claims but also because of financial claims resulting from the war with Iran which it had waged also in the interest of the Gulf states, particularly Kuwait. The Security Council rightly rejected these arguments.[52] Whatever their legal value, the dispute should always have been settled by peaceful means only.

The protection of the Kurds and other minorities in Iraq, particularly the Shi-ites, was remarkably absent in the Security Council's consideration of the question whether its economic sanctions had proved to be adequate. Non-governmental organizations like Pax Christi International better understood the need to include the position of the Kurds.[53] The firmness of the Security Council against the Iraqi invasion of Kuwait contrasted sharply with the Council's inertia in the first Gulf War.[54]

Operation Desert Storm prevailed over and above the protection of the Kurds in Iraq. Only after the end of the operation did the Security Council, mindful of its duties and responsibilities under the UN Charter for the maintenance of international peace and security, become gravely concerned that the repression in Kurdish (and Shi-ite) populated areas of Iraq "led to a massive flow of refugees towards

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[52] Schachter (1991), 453.

[53] Statement of Pax Christi International of 2 October 1990 on the Crisis in the Gulf: " (...) The world community has been aware for years of the nature of the regime of President Saddam Hussein, with its restriction on political and social freedoms, its abuse of other human rights and its wilful use of chemical weapons against Iran and its own Kurdish people—without any apparent reduction of world trade, economic support and the continuing provision of military weapons by many countries. (...) While the build-up of a defensive military force against further territorial aggression by Iraq may be justifiable, it does not imply approval of one that threatens offensive military action against Iraq or Iraqi forces in Kuwait." See also the intervention by Pax Christi International at the 46th Session of the Subcommission on the Prevention of Discrimination and Protection of Minorities of August 1990 at Geneva.

[54] Bedjaoui (1992), 281.

and across international frontiers and to cross-border incursions, which threaten international peace and security in the region."[55]

The way in which Saddam Hussein tried to suppress the rebellion of the Kurds and the Shi-ites against his rule in the aftermath of the Gulf War, provoked by the allied powers, compelled the Security Council to condemn the repression of the Iraqi civilian population in many parts of Iraq and to demand that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately ends this repression. The Council insisted that Iraq "allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations."[56]

Unfortunately some allied forces spoiled the intended humanitarian effect of this decision somewhat. Despite the reference by the Security Council to Article 2(7) of the UN Charter which prohibits the UN from intervening in matters which are essentially within the domestic jurisdiction of any state, they employed armed forces to create and protect havens for Kurds in Northern Iraq. They overlooked the fact that this classical form of humanitarian intervention by states is no legal exception to the general rule of modern international law which prohibits the use of armed force between states unless in self-defence or by an explicit order of the Security Council.[57] Moreover, the allied powers concerned did not observe that the protection of victims of non-international armed conflicts shall not be invoked "as a justification for intervening directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."[58]

In comparison with the Kuwaiti people the international protection of the Kurdish people against the Iraqi government has been quite imperfect. It thus gives a poignant illustration of the still immature

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[55] SC res. 688 (1991) of 5 April 1991.

[56] *Id.*

[57] Mössner (1982), 212-213.

[58] Protocol additional to the Geneva Conventions of 12 Aug. 1949, and relating to the protection of victims of non-international armed Conflicts (Protocol II) of 12 Dec. 1977, Art. 3(2). Iraq is a party to the 1949 Geneva Conventions but not the 1977 Protocols. However, that did not alter the fact that the principle of non-intervention applied to the situation.

state of affairs of the implementation of international humanitarian law in respect of oppressed peoples for whom the UN does not deem secession from the oppressing state to be appropriate, for one reason or another. It has been said that the application of international law in the course of the Gulf War indeed reflected partiality.[59] There is a strong case for fearing that the UN will remain powerless in that respect when it will continue to forsake the 'sacred trust of civilization' towards the protection of the Palestinian people.

The desperate position of the Kurdish people after the Gulf War has shown that the UN should be more seriously concerned about increasing the effectiveness of the international protection of a people in a state not conducting itself in compliance with the right to self-determination of that people and thus not possessed of a government representing the whole people belonging to the territory without discrimination as to race, creed or colour. Anyhow, a UN (sponsored) military action against an aggressor should never itself contribute to worsening the position of that people, for instance by inciting the people to overthrow the government. After the second Gulf War the Security Council all of a sudden gave the impression that violation of human rights might endanger international peace and security in such a way that the Council may come into action regardless of the availability of supervision in the context of international human rights instruments. It is for the future to show whether the SC decision to remain seized of the Kurdish matter will be a trend-setter for a more effective protection of peoples or should be merely understood in the particular context of the Iraqi aggression.[60]

3. Code of Conduct on Self-determination

The basic elements for a code of conduct on self-determination for peoples, individuals, states and international organizations are embodied in the Declaration on Principles of International law and the International Bill of Human Rights, particularly the provisions on the prohibition of secession, the derogation clauses in a state of emer-

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[59] De la Pradelle (1991), 17.

[60] Malanczuk (1993), 17-20.

gency and the limitation clauses in everyday life.[61] The derogation and limitation clauses which are part of the International Bill of Human Rights relate to the rights of individuals and groups. The Universal Declaration of Human Rights did not include self-determination as a human right. Both the 1966 International Covenants on human rights placed this right in a separate part. This situation evokes the question whether the derogation and limitation clauses in the International Bill of Human Rights may be applied by analogy to self-determination as a human right of peoples. In the affirmative, these clauses may be only enacted, of course, in a democratic society. The same holds true for the prohibition of secession

3.1. *Democratic Society*

There is always a risk that a majority may degenerate into tyranny.[62] A true democracy, however, is characterized by a serious concern for the implementation of civil and political rights as well as economic, social and cultural rights. Respect for all universally recognized human rights is generally seen as essential to international good governance.[63] Good governance implies that a society imposing limitations on human rights must demonstrate that the limitations do not impair its democratic functioning.[64] The formulation "in a democratic society" has become a key concept in limitation clauses in international human rights instruments but its scope and content are still the subject of much discussion because there is no single model of a democratic society:[65]

> While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations

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[61] The 1948 UDHR and the 1966 ICCPR and ICESCR are collectively known as the International Bill of Human Rights.

[62] Humphrey (1985), 173.

[63] *Supra* Chapter One section 5.3.

[64] Chowdhury (1989), 14-15. See also Siracusa Princ., Principles 19 and 20, 7 *HRQ* 5 and 19 (1985); Limburg Princ., Principles 53 and 54, 9 *HRQ* 128 and 143 (1987).

[65] Siracusa Princ., Principle 21, 7 *HRQ* (1985), 5 and 19; Limburg Princ., Principle 55, 9 *HRQ* (1987), 128-129, 143. See also Kiss (1981), 306-308; Meron (1985), 173; Chowdhury (1989), 50.

> Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition [of a democratic society, PdW].

This definition brings to mind that in a democratic society everyone may exercise his or her rights subject to limitations determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others.[66] In other words, human rights should be of great concern not only to states but also to human beings, individually and collectively.[67]

A common denominator of the various models of democracy is that they recognize and respect the principles of the UN Charter and the human rights set forth in the International Bill of Human Rights.[68] Control over the tyranny of the majority may flourish in a truly democratic society, i.e. a society which does not only fulfil these conditions but also accepts non-selective, objective, impartial and effective supervision for that purpose.[69] It is understood that this supervision may not be used for political ends.[70]

The 1993 World Conference on Human Rights rightly reaffirmed that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing:[71]

> The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.

This support requires proper legislative, policy, administrative and other measures within and among nations. There is still a fair amount lacking in it. The *Human Development Report 1993* even included legal systems in the obstacles to participation:[72]

> Laws are often arbitrary and capricious and favour those with political influence or economic clout. In too many countries, legislation fails to measure up to ideals of transparency, accountability, fairness—and

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[66] UDHR, Article 29(2).

[67] UNDRD, Article 2(2).

[68] Kiss (1981), 306. See also Boutros-Ghali (1992a), 46 and de Waart (1992b), 194.

[69] CHR res. 1992/22, paragraph 5.

[70] UNGA res. 46/129 of 17 December 1991.

[71] A/CONF.157/23, 5.

[72] UNDP (1993), 28.

> equality before the law. Some countries' laws exclude the participation of women, for example, or of religious or ethnic minorities, or deny certain rights to workers.

The report reflected a mirror of an imperfect society. International law is part of that society in which the law of power may take the lead time and again. Only a truly democratic society may be able to check the law of power effectively both at national and international levels. In this connection one should not overlook that the present international movement towards democracy resulted not so much from inherent force as from the internal weaknesses of authoritarian regimes.[72]

Democracy cannot be accomplished overnight. At the national level it may be mainly a question of decentralization of power to the local level in order to increase democratic decision-making.[73] At the international level the opposite holds true. The organizational principle of equality of states prevented international organizations from becoming supranational insofar as might be necessary for achieving an international order in which all universally recognized human rights can be fully implemented including the right of peoples to self-determination.[74]

The *détente* of the post cold war era paved the way for decentralizing national governance to the local level. A successful decentralization of governance to the local level may also ripen the climate for developing a division of work between the UN and its members in accordance with principles of good governance. This ray of hope for a democratic international society justifies the elaboration of a code of conduct on self-determination. The recent discussion on the necessity for states and intergovernmental organizations to abide by principles of international good governance illustrates that the right to self-determination may enhance democratic societies as essential settings for the promotion and protection of all universally recognized human rights.[75]

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[72] *Id.*, 65.

[73] *Id.*, 66-67.

[74] UDHR, Article 29(1) junctis Vienna Declaration Paragraph 2(1).

[75] *Supra* Chapter One section 5(2).

3.2. *Principles of International Law*

The term democracy is very seldom found in treaties and even less so in manuals of international law which seem to identify it with self-determination. The UN Charter refers to it only implicitly in the basic objectives of the international trusteeship system. These objectives include progressive development towards self-government or independence as may be appropriate to the freely expressed wishes of the peoples concerned. Democracy is thus quite essential to a proper interpretation and application of the human right to self-determination in the context of self-determination as a principle of international law. This principle should be construed in the context of the other principles. For the code of conduct on self-determination the prohibition of secession, the prohibition of the use of force and the duty to settle disputes peacefully are particularly relevant.

3.2.1. *Prohibition of secession*

The hard core of self-determination is the right of peoples to freely determine, without external interference, their political status and to pursue their economic, social and cultural development. It is a principle of international law that states should respect this right of peoples. As long as their state acts accordingly peoples under its jurisdiction may not unilaterally secede by establishing a sovereign and independent state, associating or integrating with another state or emerging into any other political status freely determined by them.[77] Peoples should always keep in mind that self-determination can be implemented in several ways but that the choice is not merely at their discretion:[78]

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

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[77] UNGA res. 1514 (XV) of 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by 89 votes in favour, none against with nine abstentions. See Shaw (1992), 5-8; Klabbers/Lefeber (1993), 41-42.

[78] DPIL, Principle 5(4).

The previous limitation of the right to self-determination to the colonial context hid this fact from view for quite some time. Anyhow, current practice shows that peoples in plurinational states such as the former Yugoslavia and the former Soviet Union are still prone to identify their right to self-determination with only one of the modes of implementation, i.e. the creation of a sovereign and independent state. This practice may easily undermine international order. For that very reason international law has determined that peoples should not construe their right to self-determination as[79]

> authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the right to self-determination of peoples (...) and *thus* possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The provision clearly points to non-state actors, for the subsequent paragraph states that every state shall refrain from any action "aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

The prohibition of secession may, of course, never impede the hard core of the right to self-determination. As long as this will be the case, the prohibition of secession prevails over and above all modes of self-determination which imply secession.[80] In other words, the prohibition of secession freezes the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people as modes of implementing the right to self-determination.

When a certain people is being oppressed by its government it may secede whether or not it is a minority. National minorities which are not identified as a people lack such an opportunity.[81] The key

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[79] *Id.*, emphasis added.

[80] DPIL, Principle 5(7).

[81] The UN Charter does not speak of minorities. Neither does the UDHR. ICCPR, Article 27 only refers to ethnic, religious and linguistic minorities: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities, shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

question, therefore, is how to discern peoples from national minorities. The answer is commonplace: an internationally recognized legal claim to territory.[82] Otherwise it would be very difficult to relate the right to self-determination to the disposal of natural wealth and resources.

In a democratic society the unilateral claims of peoples for secession will usually fail a legal cause. Such a society may proclaim a public emergency under international law in order to prevent dismemberment. In an undemocratic society the government will usually not fulfil the conditions for the application of the prohibition of secession. Oppressed peoples may then ask the international community —the UN—to lift the prohibition of secession. The UN will be in a position to do so if it is itself a truly democratic society. For only then may it apply the limitation and derogation clauses of the International Bill of Human Rights to the right to self-determination and the developed standards for supervision and assessment by analogy.

3.2.2. *Prohibition of the use of force by states*

Like all rights, human rights are not ends in themselves. Their aim is, firstly, to prevent barbarous acts and, secondly, to realize the advent of a world in which human beings enjoy "freedom of speech and belief and freedom from fear and want [which] has been proclaimed as the highest aspiration of the common people."[83] Moreover, human rights should be protected by the rule of law to prevent people from being compelled "to have recourse, as a last resort, to rebellion against tyranny and oppression."[84]

When a people applies for participation in the Unrepresented Nations and Peoples Organization—hereafter also referred to as the UNPO—it must provide information about its history, the reasons for

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National minorities were deliberately left aside. They came into the picture again recently and then through the protection of persons only. See UNGA res. 47/135 of 18 December 1992, adopted without a vote: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See also van Walt van Praag (1993), 316-317.

[82] Shaw (1992), 5-6. The relationship between a people and territory also appears from the *de facto* definition of states as a population living on a territory under an organized government. See Doehring (1987), 424-425.

[83] UDHR, Preamble, para. 2.

[84] *Id.*, para. 3.

the desire to become a participant, adequate evidence of the recognition of the representative body as an organ of leadership by the people it claims to represent and a formal declaration of adhesion to the covenant.[85] In this connection it is important that the aim of the organization is to assist the participating peoples[86]

> to express their positions, needs and grievances in legitimate forums and by providing a community of support, to advance the fulfilment of the aspirations of Participating Nations and Peoples by effective *non-violent* means.

The universal recognition of the right to self-determination should now urge the international community to include peoples in the definition of aggression and to accept peoples as parties to the 1977 Protocols as a matter of high priority. In respect of states the definition of aggression explicitly excludes that it in any way prejudices[87]

> the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right (...); nor the right of these peoples to struggle to that end and to seek and to receive support (...).

As for the 1977 Protocols it should be noticed that oppressed peoples will not always have the possibility of implementing secession peacefully. However, acts of terrorism should always be forbidden.

3.2.3. *Prohibition of terrorism by liberation movements*

The prevention of terrorism has become a matter of great concern to the international community, partly under the influence of the question of Palestine. Western states, especially, have taken a strong interest in international cooperation to condemn and suppress terrorism. Developing countries have stressed the necessity to distinguish between terrorism and the struggle of oppressed peoples against foreign occupation and racist regimes. In 1985 the General Assembly succeeded in accommodating these differences of opinion. Since then

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[85] Van Walt van Praag (1993), 327.

[86] *Id.*, 325, emphasis added.

[87] UNGA res. 3314 (XXIX) of 14 December 1974, Article 7.

its successive resolutions on measures to eliminate international terrorism have unanimously declared that it[88]

> 1. *Once again unequivocally condemns*, as criminal and unjustifiable, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security; (...)
> 6. *Urges* all States, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism, and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and foreign occupation, that may give rise to international terrorism and may endanger international peace and security; (...).

Since 1987 the General Assembly has also inserted a provision to the effect that nothing in its pertinent resolutions can in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, the Declaration on Principles of International Law.[89] Of course, since 1993 reference should also be made to the Vienna Declaration stating[90]

> The acts, methods and practices of terrorism in all its form and manifestations as well as linkage in some countries to drug trafficking are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments. The international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

This development must be applauded. The distinction between terrorism and the struggle of oppressed peoples indeed cannot be overlooked .[91]

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[88] See lastly UNGA res. 46/51 of 9 December 1991.

[89] For that very reason Israel and the USA broke the consensus by voting against an otherwise widely supported resolution. See UNGA res. 42/159 of 7 December 1987, paragraph 14. In 1989 the consensus was restored on a resolution containing the same paragraph but stating in the very first paragraph the unequivocal condemnation of terrorism not only as criminal but also as 'not justifiable' (UNGA res. 44/29 of 4 December 1989).

[90] A/CONF.157/23, 7.

[91] According to the Global Consultation on the Right to Development as a Human Right, universal respect for the principle of the non-use of force is a fundamental condition for the full realization of the right to development

The crux of the matter in respect of the right to self-determination is the latter's close linkage not only with development but also with armed conflicts against foreign occupation and racist regimes. The references to alien occupation, racist regimes and the exercise of the right to self-determination in Protocol I to the Geneva Conventions of 1949 were intended to limit the scope of the provision. without affecting the legitimacy of the struggle of oppressed peoples for their self-determination[92]

The representative of the PLO called the 1985 resolution on terrorism a milestone in the struggle against terrorism. In doing so he declared that his organisation would continue to distinguish between criminal terrorism and the legitimate exercise of the right to self-determination. The struggle of the Palestinian people against the Israeli occupation fell under the latter category.[93] In his press conference of 14 December 1988 in Geneva the PLO chairman, Yasir Arafat, paved the way for discussions between the PLO and the United States by distancing himself from terrorism:[94]

> As for terrorism, I renounced it yesterday in no uncertain terms and yet I repeat it for the record that we totally and absolutely renounce all forms of terrorism, including individual, group and state terrorism.

In all fairness it has to be admitted that the Israeli-Palestinian conflict has not been characterized by acts of terrorism on the part of Palestinians only. According to objective observers Jewish terrorist groups have also been active in the struggle of the Jewish people to establish the State of Israel.[95]

It should be recalled that under current international law the prohibition of force is addressed to states only, apparently with the view that the regulation of the use of force by individuals and their associations, including peoples, is a matter for national law. Anyhow,

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(Doc. E/CN.4/1990/9, 4).

[92] Kalshoven (1987), 73-74. UNGA Res. 3103 (XXVIII) of 12 December 1973, Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Régimes, paragraph 1.

[93] Ministerie van Buitenlandse Zaken 138, Algemene Vergadering der Verenigde Naties, veertigste zitting [General Assembly of the United Nations, fortieth session] (1986), 208 - 209.

[94] I&P (Israel & Palestine Political Report), No. 147 December 1988, 6. See also Schiff/Ya'ari (1990), 302 - 305.

[95] Gerson, (1987), 6, 113-115, 151.

the definition of aggression relates to states only.[96] In so doing it restrains the UN's—and particularly the Security Council's—room for manoeuvre in dealing with the use of armed force by peoples. This is quite a flaw in the system of maintaining international peace and security for outside a colonial context there is no question of wars of liberation. Outside a colonial context the individuals belonging to a people usually have the nationality of the state where they live. In other words, there is no question of *alien* domination. Nevertheless, the pertinent people may become oppressed and may thus apply to the UN to lift the prohibition of secession in their case.

3.2.4. *Peaceful settlement of disputes*

The UN should develop a system of sponsoring peoples in order to enable them to submit their claim for secession to an international forum. Such a system might be based on cooperation between the ECOSOC and non-governmental organizations like the Unrepresented Nations and Peoples Organization. It is imaginable that, for instance, the ECOSOC may recommend the General Assembly to take a people's claim to secession seriously. In such a case the General Assembly should request an advisory opinion from the International Court of Justice.[97]

Another solution is that 'multipeople' states themselves take self-determination as a principle of international law and as a human right of peoples so seriously that they make arrangements for the international settlement of disputes arising from claims to secession. Such a solution would respond to the appeal of the Vienna Declaration upon states to provide an effective framework of remedies to redress human rights grievances or violations. An independent judiciary and legal profession were considered to be essential to the full and non-discriminatory realization of human rights.[98]

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[96] UNGA res. 3314 (XXIX) of 14 December 1974, adopted by consensus: 'Aggression is the use of armed force by as State against the sovereignty, territorial integrity or political independence of another State (...).'

[97] *Supra* at note 26.

[98] A/CONF.157/23, 10. The constitutions of the former USSR and the former Yugoslavia did not provide for peaceful settlement of disputes between the federation and the individual republics on withdrawal or secession. If this would have been done a great deal of trouble might have been prevented.

The Vienna exhortations were addressed to states. There is already abundant experience on the settlement of disputes between states and foreign investors by international conciliation or arbitration. The problem of identifying foreign investors has been solved by sponsoring and/or ad hoc recognition through pertinent provisions in international development contracts. According to the 1982 Law of the Sea Convention the Seabed Disputes Chamber will have jurisdiction with respect to disputes "between parties to a contract, being State Parties, the Authority or the Enterprise, state enterprises or natural or juridical persons."[99]

In 1962 the Permanent Court of Arbitration at The Hague adopted the Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a state. States may consider the possibility of applying these rules to their disputes with peoples under their jurisdiction. Such a step may give a meaningful scope and content to provisions in national constitutions or other fundamental national laws regarding secession. From time to time peoples submit complaints in vain to the International Court of Justice. Thanks to the 'cohabitation' of the Permanent Court of Arbitration and the International Court of Justice in the Peace Palace, the latter may then easily refer the complaints to the former.[100] For disputes between states and peoples on self-determination it may break new ground without competition.[101]

Regarding the UN system, the Vienna Declaration apparently thought of coordinating system-wide attention on human rights. It focused on the role of the UN Centre for Human Rights in that respect.[102] For the promotion and protection of individual human rights such a strategy may be in conformity with the organizational principle of the sovereign equality of all UN members. This principle carries with it the fact that the main responsibility for the implementation of human

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[99] UN Convention on the Law of the Sea, Article 187, XXI *ILM* (1982), 1306.

[100] The strength of the PCA settlement system may lie in the fact that it can serve as a valuable complement to judicial settlement of disputes outside the jurisdiction of the ICJ such as adversarial proceedings between states and IGOs or between states and private companies. See Jonkman (1993), 201.

[101] Otherwise, the PCA has to compete with fora such as the ICSID, the ICC and the UNCITRAL.

[102] A/CONF.157/23, 15-16.

rights rests with the states. For that reason individuals should always exhaust all available domestic remedies.[103] For collective human rights the situation might be different.

Since the Vienna Declaration the right to self-determination is no longer a matter exclusively within the domestic jurisdiction of any state. Institutions like the Unrepresented Nations and Peoples Organization and the Permanent Court of Arbitration may enable the UN to fulfil its duty by providing means by which to identify peoples and to settle disputes on self-determination between a state and a people, the UN and a state and even the UN and a people. Such a development would be wholly in line with good governance at national and international levels.

Violations of the right to self-determination may result in claims to secession. Such claims can easily degenerate into civil wars and thus create a situation which endangers international peace and security. In *An Agenda for Peace* the UN capacity for preventive diplomacy, peacemaking and peace-keeping is still considered too much from the angle of a gathering of sovereign states whose room for manoeuvre "depends on the common ground that they create between them."[104] The Palestinian Question is a tragic example of what may happen if the UN fails to act properly in disputes arising from conflicting territorial claims of peoples under their right to self-determination.

3.3. *Right to Development*

The right to development embodies the legal claim of[105]

> (a) all individuals and peoples towards states for adoption of proper legislative, policy, administrative and other measures at the national and international levels to promote and protect an economic, social, cultural and political order in which all human rights and fundamental freedoms can be fully realized;
> (b) the poor(est) people towards states, the international community as a whole and individuals to be saved from the scourges of malnutrition, illiteracy and decease as obstacles to development.

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[103] Optional Protocol to the ICCPR, Article 2.
[104] Boutros-Ghali (1992a), 1.
[105] Chowdhury/de Waart (1992), 411.

It completes the picture of the connection between self-determination, the struggle of liberation movements and development by stating[106]

> States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from *apartheid*, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Both the 1986 Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order of the International Law Association and the UN Declaration on the Right to Development relate development to the right of peoples to self-determination.

As a principle of international law in general and human rights law in particular the right to development affects the right to self-determination.[107] Peoples should implement their right to self-determination in such a way that it will not cause substantial harm to the right to development of other peoples. The same holds true for states. They may not dispose of natural wealth and resources to the detriment of other states.[108]

In the context of development as a human right and as a right of states the right of peoples to self-determination urges governments to face the fact that the[109]

> mere formation of a State does not in itself fully realize the right to self-determination, unless its citizens and constituent peoples continue to enjoy the right to their own cultural identity and to determine their own economic, social and political system through democratic institutions and actions, and the State genuinely enjoys continuing freedom of choice, within the bounds of international law.

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[106] UNDRD, Article 5.

[107] The Seoul Declaration brought the right to development to the fore as a principle of both international law and human rights law. In the former case the right to development relates to states; in the latter to collectivities other than states, in particular to peoples. See also Vienna Decl., paragraphs 10 and 11 (A/Conf.157/23, 4)

[108] Seoul Decl., Principle 3.

[109] Doc. E/CN.4/1990/9 (Part III) of 6 February 1990, 4.

In other words, in any society, pluralist or otherwise, a government should represent all peoples belonging to its territory. As long as this is the case no people in such a territory may claim by virtue of the right to development the right to self-determination and proceed to the use of armed force to dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[110] For that reason the international community did not support the right of self-determination of, for example, the peoples of Katanga and Biafra.[111] However, the intended partition of the Palestine Mandate in an Arab and a Jewish state was a different matter.[112]

3.4. *International Bill of Human Rights*

Everyone may exercise his or her rights and freedoms subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.[113] The states parties to the International Covenant on Economic, Social and Cultural Rights recognize that they may subject economic, social an cultural rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.[114]

The International Covenant on Civil and Political Rights connects specific limitation clauses with specific rights only.[115] These clauses

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[110] UNGA res. 2625 of 24 October 1970, Principle of equal rights and self-determination of peoples, paragraph 2: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

[111] Thürer, (1985), 474.

[112] *Infra* Chapter Three section 3.

[113] UDHR, Article 29(2).

[114] ICESCR, Article 4.

[115] ICCPR Articles 12 (liberty of movement), 14 (public trial), 18 (freedom to manifest one's religion or belief), 19 (freedom of expression), 20 (peaceful assembly) and 22 (freedom of association).

contain a number of elements from the following list: prescribed by law, in a democratic society, public order (*ordre public*), public health, public morals, national security and rights and freedoms/reputations of others.[116] What is more, the above Covenant authorizes the parties to take measures derogating from their obligations under the Covenant in time of public emergency 'which threatens the life of the nation and the existence of which is officially proclaimed.'[117] However, no derogation may be made from a number of rights.[118]

Unlike the 1966 International Covenants on human rights, the 1948 Universal Declaration of Human Rights did not include the right to self-determination. Neither did the Proclamation of Teheran of the (first) International Conference on Human Rights which otherwise solemnly declared that the Universal Declaration

> states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all the members of the human family and constitutes an obligation for the members of the international community.

As a matter of course, the democratic character of a society should restrict the authority of governments to invoke derogation and limitation provisions in respect of individual human rights.[119] The inclusion of the rights of peoples to self-determination and development in the International Bill of Human Rights in 1993 by the Vienna Declaration raised the question whether their implementation might also be subject to derogation or limitation.

3.4.1. *Derogation*

The fact that unlike economic, social and cultural rights the implementation of civil and political rights does not depend on the avail-

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[116] Siracusa Princ., Principles 15 to 38, 7 *HRQ* (1985), 5-7.

[117] ICCPR, Article 4(1).

[118] ICCPR, Article 4(2). Non-derogable are the rights to life (Article 6), recognition as a person before the law (Article 16) and freedom of thought, conscience and religion (Article 18), and the prohibitions of torture (Article 7), slavery and servitude (Article 8), imprisoning for debt (Article 11) and retroactive criminal legislation (Article 15).

[119] Siracusa Princ., Principles 19 and 20, *HRQ* 7(1985), 5 and 19; Limburg Princ., Principles 53 and 54, *HRQ* 9(1987), 128 and 143. See also Chowdhury (1989), 44-45.

ability of resources explains why the pertinent Covenant authorizes a state party to take measures derogating from its obligations in time of public emergency. The so-called non-derogable civil and political rights do not include the right to self-determination of peoples. An eventual inclusion should take into account that self-determination has two dimensions, i.e. freedom from foreign subjugation or occupation—and freedom from tyranny.[120] The latter or internal dimension pertains to the hard core of self-determination, i.e. the right of a people to freely determine its political status and to freely pursue its economic, social and cultural development. The former, or external dimension, concerns the modes of implementing the hard core.

It is evident that claims of peoples to secede from their state may threaten the life of that nation and thus create a time of public emergency. In other words, the proclamation of a state of emergency might offer a government an attractive way out to prevent peoples under its jurisdiction from implementing their right to self-determination as a civil and political right through creating their own state. However, the government should immediately inform the other state parties to the ICCPR, through the intermediary of the UN Secretary-General, of the derogation and of the reasons by which it was actuated.[121]

More specifically, the government should justify that the derogation from the right to self-determination is not inconsistent with its other obligations under international law and does not involve discrimination. This condition may be viewed as fulfilled when the state concerned has acted in compliance with the hard core of that right, i.e. when the government has represented the whole people belonging to the territory without distinction as to race, creed or colour. Such a state may be considered as a democratic society.[122]

Nowadays people's participation is becoming the central issue.[123] Oppression seriously affects the internal dimension of self-determination. It usually implies that the government of the state concerned is not fulfilling the conditions under which the prohibition of secession prevails. There is thus a strong case for considering the internal di-

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[120] *Supra* section 1.2.

[121] ICCPR, Article 4(3).

[122] *Supra* section 3.1.

[123] UNDP (1993), 1. *The Human Development Report 1993* focused on democracy as a way of life.

mension of the right of peoples to self-determination—its hard core—as non-derogable. After all, the main purport of the universal recognition of the human right to self-determination is the promotion and protection of democracy.

3.4.2. *Limitation*

States may be less hasty to proclaim a state of emergency in order to prevent secession when the general limitation clause of the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights as well as the specific limitation clauses of the International Covenant on Civil and Political Rights apply by analogy to the human right to self-determination. However, since the Universal Declaration does not include the right to self-determination, the limitation clause does not cover that right. The International Covenants on human rights lay down the right to self-determination in the very first article, which is the sole subject of their common Part I. The general limitation clause of the former covenant and the derogation clause and specific limitation clauses of the latter have no bearing on the right to self-determination.

Nevertheless, it is unlikely that the right to self-determination would have no limitations at all. The right should not be interpreted, for instance, as implying for any other people the destruction of its right to self-determination.[124] One might also presume that any application of the right to self-determination which would result in any form of 'ethnic cleansing' does not meet the just requirements of morality, public order and general welfare in a democratic society.

The pertinent clauses in the International Bill of Human Rights require that the limitations are determined or provided by law. The 1966 International Covenants on human rights are treaties between states. The references in the limitation clauses of those treaties to law and to the concepts of morality, public order, public health, national security and democratic society are first and foremost connected with

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[124] This conclusion may be drawn from the common Article 5(1) of the ICESCR and ICCPR: "Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."

national legislation.[125] National legislation should, of course, abide by international obligations.[126] The right of peoples to development underlies a similar view. It recognizes the human person as the central subject of development but in the context of the community.

At the national level the right to self-determination should include to that end limitations as are determined by national law for the purpose of securing the recognition of the right to self-determination of other peoples in the same territory and of meeting the just requirements of morality, public order and general welfare in a democratic society. That is not the end of the story, however. For no people should pursue its economic, social and cultural development at the expense of peoples in other states. The recognition of self-determination as a universal human right now urges the UN as a matter of priority to qualify the right to self-determination by limitations under international law in a democratic international society. It is worth mentioning that the Universal Declaration of Human Rights as a resolution of the General Assembly provides a basis therefor.[127] The inclusion of the prohibition of secession in the Vienna Declaration may be seen as an indication that from now on the reference to law in the limitation clause of the Universal Declaration may be understood as covering international law as well.

3.4.3. *People's participation*

According to the 1969 Declaration on Social Progress and Development not only all human beings but also all peoples "shall have the right to live in dignity and freedom and to enjoy the fruits of social progress and should, on their part, contribute to it."[128] Governments,

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[125] Siracusa Princ., Principle 15, 7 *HRQ* 5 (1985); Limburg Princ., Principle 48, 9 *HRQ* 128 (1987). See *supra* Chapter One section 5.1.

[126] ICCPR, Article 5(2).

[127] With a view to exceptions concerning questions of membership, budget and the like, the resolutions of the UNGA are recommendations only. The UDHR, however, is generally considered as a legally binding instrument. Salcedo (1985), 307.

[128] UNGA res. 2542 (XXIV) of 11 December 1969, Article 1. The DSPD has been seen as the single most important and coherent statement of Western liberal values on social progress and development. In 1987 the USA withdrew its support to the Declaration making out a case against providing massive social welfare programmes. See de Waart (1992b), 194-196.

peoples and people could hardly find better words to express the idea of social justice. The Declaration was also quite ahead of its time by considering national independence based on the right of peoples to self-determination as a primary condition of social progress and development.[129] Moreover, it stressed that social progress and development require[130]

> the active participation of all elements of society, individually or through associations, in defining and achieving the common goals of development with full respect for the fundamental freedoms embodied in the Universal declaration of Human Rights.

People's participation now is the order of the day. In 1990 the UN Development Programme seized "the irresistible wave of human freedom (...) sweeping across many lands" to publish its first Human Development Report.[131] It introduced the human development index based on peoples' deprivation in life expectancy, literacy and income for a decent living standard, i.e. the purchasing power to buy commodities for satisfying basic needs.[132] In doing so the report highlighted freedom as the most vital component of human development strategies.[133]

The 1993 Vienna Declaration based democracy on the full participation of people in all aspects of their lives.[134] The 1993 Human Development Report focused on increased influence and control as requirements for people's participation:[135]

> In economic terms, this means being able to engage freely in any economic activity. In social terms, it means being able to join fully in all forms of community life, without regard to religion, colour, sex or race. And in political terms, it means the freedom to choose and change governance, from presidential level to the village council.

Among Arab states Palestine intends to emerge as a trend-setter in that respect. The demand for people's participation already resounded

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[129] DSPD, Article 3(a).
[130] *Id.*, Article 5(c).
[131] UNDP (1990), iii. See also UNDRD, Article 8(2).
[132] UNDP (1990), 13.
[133] *Id.*, 84.
[134] A/CONF.157/23, 5.
[135] UNDP (1993), 21.

loudly before the beginning of the period of political transition provided for in the 1993 Declaration of Principles on Interim Self-government Arrangements.[136] The historical agreement of 13 September 1993 between the Israeli Government and the PLO was seized by Palestinian non-governmental organizations in the occupied Palestinian territory to discuss the problems and opportunities of political transition in respect of a Palestinian human rights agenda.[137]

The discussion focused on the need for the Palestinian leadership to consult with qualified people in various fields, and to effectively employ the energies of Palestinian society, away from the method of merely dictating decisions on the political level.[138] In line with the Vienna Declaration and the *Human Development Report 1993* the role of non-governmental organizations was elaborated in respect of co-ordinating a continued dialogue with the official Palestinian authorities

Palestinian non-governmental organizations are well aware that the strength of civil society is to be found in the ability to limit government authority and to influence policy. A truly civic society requires, in other words, an organized political opposition.[139] The agreed period of political transition in the occupied Palestinian territory evoked a number of important questions in respect of the application of international humanitarian law and the availability of international supervision on the realisation of the right to self-determination of the Palestinian people and of other human rights.

3.5. *International Humanitarian Law*

The body of international law dealing with civil wars does not distinguish between revolution, rebellion and self-determination. The 1977 additional Protocols to the 1949 Geneva Conventions are appli-

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[136] *Infra* Annex 10, Article I.

[137] The Land and Water Establishment for Studies & Legal Services in Jerusalem to that end convened a conference(from 9 to 11 December 1993) of Palestinian human rights specialists, delegates from Palestinian human rights organizations and international experts on the protection and implementation of human rights and civil liberties in other contexts of political transition. The proceedings will be published during the course of 1994.

[138] Press Release of 11 December 1993, published by the Land and Water Establishment for Studies & Legal Services.

[139] Giacaman (1993), 5.

cable in international and non-international armed conflicts. However, only states can become parties to the Protocols.[140] For that reason, the Vienna Declaration rightly called upon states and *all parties* to armed conflicts[141]

> strictly to observe humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions.

3.5.1. *Non-international armed conflicts*

The prohibition of humanitarian intervention by states in non-international armed conflicts in other states does not imply that international law leaves the latter states to their own devices, as it were, in dealing with peoples in their territory. On the contrary, the common Article 3 of the four Geneva Conventions dealing with non-international armed conflicts lays down that the following acts are and shall remain prohibited at any time and in any place whatsoever:[142]

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

It is a matter of non-international armed conflict only when a conflict takes place[143]

> in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

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[140] Kalshoven (1987), 71-72.
[141] A/CONF.157/23, 10.
[142] Kalshoven (1987), 59-60.
[143] Protocol II, Article 1(1).

For the sake of completeness it should be noted that the above mentioned minimum standards apply even in "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nation".[144] For these standards are laid down in the 1948 Universal Declaration of Human Rights.[145] They also underlie the articles of the 1966 International Covenant on Civil and Political Rights, from which no derogation may be made even in a time of public emergency which threatens the life of the nation.[146] The 1993 recognition of the right of peoples to self-determination as a universal human right now challenges the international community to reconsider the scope and content of this right with regard to the protection of oppressed peoples.

An effective protection of oppressed peoples in (non-) international armed conflicts concerning self-determination requires that the Security Council and the General Assembly shall cast the weight of their joint responsibility in respect of admitting a new state to membership or suspending an existing one from the exercise of rights and privileges of membership or to expel it from the UN.[147] Of course, in order to make full use of its authority by virtue of that responsibility it is absolutely necessary that the UN boasts great respect among states and peoples.

In situations such as the one which has arisen in Iraq after the Gulf War the Security Council should from now onwards use its authority to include the international protection of peoples in the territory of the aggressor in the cease-fire agreement. The Council should supplement it unilaterally if tensions emerge afterwards. Such protection may result in either lifting the prohibition of secession at once or creating an autonomous territory guaranteed by the SC in cooperation with the UNGA. In the latter case the possibility of lifting the prohibition of secession remains open as an *ultima ratio*.

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[144] *Id.*, Article 1(2).

[145] UDHR, Articles 1, 3, 5 and 10.

[146] ICCPR Article 4(2). See Chowdhury (1989), 146-148.

[147] UN Charter, Arts. 5 and 6. These articles explain that unlike the Covenant of the League of Nations—Article 1(3)—the UN Charter does not contain a provision for withdrawing from membership. Frowein (1983), 279 and Schermers (1980), 63-64.

The misfortunes of oppressed peoples like those in the Middle East are not in accordance with any reasonable interpretation and application of the right of peoples to self-determination both as a principle of interstate law and as a universal human rights. The UN should develop a code of conduct on self-determination for states, peoples and international organizations in order to solve and—preferably, of course—to prevent them.

3.5.2. *Occupied territories: the case of Palestine*

Egypt, Israel and Jordan are parties to the 1949 Fourth Convention relative to the protection of civilian persons in time of war.[148] Only Jordan is a party to the 1977 Protocols.[149] According to the Security Council and the General Assembly the latter Convention is applicable to the Arab territories which has been occupied by Israel since 1967, including Jerusalem.[150] The opponents of this position point to the fact that the UN never raised the issue between 1948 and 1967 when the Gaza Strip and the West Bank were administered by Egypt and Jordan respectively.[151]

The Palestinian people might have considered the Egypt/Jordan administration as a transitional period on the way to the creation of an Arab state in the whole of the mandated territory.[152] Anyhow, it apparently did not need protection against Egypt and Jordan as occupying powers, probably because there was no 'time of war' between these parties.[153] Be this as it may, legally speaking the Gaza

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[148] This Convention came into force for Jordan on 29 November 1951, for Israel on 17 June 1952 and for Egypt on 10 May 1953.

[149] Protocols 1 and 2 Additional to the Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts and of Non-international Armed Conflicts respectively of 12 December 1977.

[150] SC res. 465 (1980) of 1 March 1980 and most recently UNGA res. 44/48 B of 8 December 1989.

[151] Egypt and Jordan were not legitimate sovereigns because they could not change unilaterally the international status of the West Bank, the Gaza Strip and East Jerusalem, being the remaining part of the mandated territory.

[152] However, the relations between Jordan and the West Bank have never been friendly. See Rubin (1981), 205-216 and Mendelsohn (1989), 73.

[153] Had that been the case, then the UN should have had the obligation to act through a member state party to the Fourth Convention. The UN could have called upon the United Kingdom to that end to act on its behalf as the (former) Mandatory Power.

Strip and the West Bank were occupied territories in those days as well, taking into account their international status.

It was said that the international law of belligerent occupation is to protect the rights of the sovereign from the occupant. In that view Israel cannot be regarded as an occupying power in the West Bank and the Gaza Strip within the meaning of the Fourth Geneva Convention because[154]

> the circumstances envisioned by the Fourth Geneva Red Cross Convention do not exist because the situation here is not one in which a legitimate sovereign and an occupying power are confronting one another.

However, the nature of state authority over a mandated territory is not describable in terms of sovereignty.[155] The Fourth Convention does not define territory. Moreover, it applies to "all cases of partial or total occupation of the territory of the High Contracting Party, even if the said occupation meets with no armed resistance."[156]

The main stream in international legal thinking is that Israel should apply the Fourth Geneva Convention not only *de facto* but also *de jure*. Applicability to the West Bank and the Gaza Strip has been affirmed by the UN, the International Committee of the Red Cross, and most States.[157] The Palestinians invoked protection under the Fourth Convention after the Israeli occupation. It is said that[158]

> Israel's policy of balancing security measures with economic, cultural, social and civil liberties can be taken as a paradigm for future occupa-

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[154] Testimony of Y.Z. Blum, Professor of international law, Hebrew University, Hearing before the Immigration and Naturalization Subcommittee of the Committee on the Judiciary, United States Senate ninety-fifth congress, first session on the question of the West Bank Settlements and the treatment of Arabs in the Israeli-occupied territories, October 17 and 18, 1977, 26. But see Roberts (1990), 64-65.

[155] Brownlie (1990), 118 and 178-179.

[156] Fourth Geneva Convention, Article 2(3).

[157] Cohen (1985), 35-65; J.J. Paust (United States), G. von Glahn (United States) and G. Woratsch (Austria), *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, Report of a Mission of the International Commission of Jurists (1989), 9-12. See also the joint publication by the Labour Middle East Council and the Conservative Middle East Council, *Towards a Strategy for the Enforcement of Human Rights in the Israeli Occupied West Bank and Gaza*, a working symposium London, 25th July 1989.

[158] Cohen (1985), 289.

> tions. It is important to keep in mind that belligerent occupation is not peacetime democracy.

The 1987 uprising (intifada) has outdated that conclusion. Israel has failed to preserve humanity in the face of the reality of war as appears from the rebellion of 'the enraged proletariat'.[159] The testimony of the rioters themselves "leads almost inexorably to the conclusion that the rebellion was kindled by the depressing conditions in which Israel kept the inhabitants of the territories."[160]

Israel's tenacious rejection of the PLO as a negotiating partner in the peace process apparently was not dictated by an otherwise wholly justified aversion to terrorism but by an ostrich attitude. The Palestinians 'simply did not exist in the political consciousness of most Israelis' as a factor in the Middle East equation.'[161] With regard to self-determination, after the Camp David Accords even the moderate faction opposed the creation of an independent Palestinian state,[162]

> although it seemed genuinely committed to making autonomy something, to offering the Palestinians an autonomy that involved land as well as people and gave them control over their own affairs in at least some important areas.

From that perspective it is hardly surprising—albeit improperly—that Israel has chosen to leave open the question of *de jure* applicability of the Fourth Geneva Convention to its occupation, but to observe it only *de facto*.[163] The agreed period of interim self-government in the Gaza Strip and the area of Jericho evoked the question concerning the applicability of the Fourth Geneva Convention. It has been said that the International Committee of the Red Cross should address the Palestinian authorities after the entering into force of the interim self-government arrangements. However, it might then not be able to invoke the Geneva Conventions when there would no longer be a question of occupation.[164]

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[159] Schiff/Ya'ari (1990), 79-101.

[160] *Id.*, 80-81. See also Ben-Rafael (1987), 59-61.

[161] Schiff/Ya'ari (1990), 41.

[162] Lesch/Tessler (1989), 146.

[163] Gerson (1987), 114.

[164] R. Meister, *The ICRC and Humanitarian Challenges Ahead*, paper submitted to the 1993 Conference "Towards a Palestinian Human Rights Agenda: the Problem and Opportunities of Political Transition".

It remains to be seen how the agreement will be implemented. Anyhow it should be avoided that the UN lifts the international status of the Gaza strip and Jericho until Palestinian authority has been restored in the 1967-occupied Palestine territory as a whole. The PLO might now consider the possibility of requesting the UN to create a UN Commission for Palestine and to appoint a UN High Commissioner for Palestine in order to protect the peace process and the creation of Palestine as an independent state.

Israel, to date, has opposed UN intervention. The explanation for this position is that the UN is the only competent body to solve the problem and to remove the designation Occupied Territories from the UN vocabulary. The 1988 decisions of the PLO urged Israel to take sides. The former Israeli government obstructed any peace initiative in order to protect its notion of Eretz Israel. The present government rightly gave up on that idea. It still opposes, however, American intervention in the ongoing direct negotiation and, even more, UN intervention. However, the present international context seems to be more favourable for recognizing the role of the UN not only in preventive diplomacy, peacemaking and peace-keeping, but even in post-conflict peace building.

Both the Jewish and Palestinian peoples considerately ignored the authority of the UN for obvious reasons. The Arab states and the Palestinian people refused to recognize Israel's legitimacy. Israel considered the UN as an obstacle to realizing its policy towards annexing the Occupied Territories. Both peoples reconsidered their position irreversibly after recognizing each other's right to self-determination. It might be more than symbolic that the September 1993 White House handshake between Prime Minister Rabin and Chairman Arafat sealed this happy change of minds only a few months after the UN-sponsored World Conference on Human Rights solemnly adopted the Vienna Declaration and Programme of Action.

4. Failures under International Law

Since 1952 the General Assembly has dealt with the Palestinian Question as if it were a refugee problem only and that it is for the governments concerned to deal with it. It appeared that any other approach to the Arab (Palestinian)-Israeli conflict could not obtain the

required two-thirds majority. In other words, the General Assembly ran away from its responsibility by leaving the matter to the parties themselves and to the superpowers. Not until 1974 was the 'Question of Palestine' again listed as a separate agenda item in the context of the right to self-determination.[165]

The "non-Jewish communities in Palestine" have thus become the victims of an international neglect of duty to recognize their identity as a people which is the bearer of the right to self-determination in the area of the proposed Arab state defined in the Plan of Partition. The UN failed utterly in passing "the first real test of the organization's capacity to take a position and make it stick".[166] The Jewish revolt against the Mandatory power in Palestine in 1946 and the civil war between the Jews and Palestinians in 1947-1948 offered no excuse.[167] By virtue of the international status of the territory there was no question of a matter essentially within the domestic jurisdiction of Great Britain or any other state.

The armed struggle might explain why the General Assembly accompanied its recommendation with a request to the Security Council to take the necessary measures provided for in the plan for its implementation and to consider,

> if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Article 41 of the Charter, to empower the United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution.

However, the Security Council response was far from adequate. It acted as if the plan was a mere recommendation so that it was for its discretion whether or not to supplement the authorization of the General Assembly. Only in resolutions 42 and 44 of 5 March and 1 April 1948, respectively, did the Council consider it necessary to refer to

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[165] *Supra* section 2.2.

[166] Lash (1972), 124-125. See also Cohen (1990), 152, 180-181.

[167] Cohen (1986), 82-85; Khalidi (1986) 126-123.

the UNGA Plan of Partition. In resolution 42 it called upon its permanent members[168]

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

This was quite a remarkable move, the legality of which is doubtful in the context of the division of work between the General Assembly and the Security Council with respect to non-self-governing countries.[169] On the basis of the report of the permanent members, the Council requested the Secretary-General in its resolution 44 to convoke a special session of the General Assembly "to consider further the question of the future government of Palestine." This session was convened on 16 April 1948. It was closed on 14 May 1948 when Great Britain unilaterally renounced its Mandate as from the following day and the representatives of the Jewish Community unilaterally proclaimed Israel as a sovereign state in the area of the Jewish state, defined in the Partition Plan.[170] Israel was almost immediately recognized by both the Unites States and the then Soviet Union without taking into consideration the international status of the territory.[171]
It is a fact of life that a just and lasting peace requires an international order which puts respect for international law before gun-boat diplomacy. The Middle East is no exception in that respect. A just and lasting peace between Israel and Palestine requires the recognition by all actors involved that the legitimacy of the Jewish state of

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[168] The then USSR remained in favour of partition. The UK refused to cooperate with the UN in implementing the partition resolution. The USA considered a provisional UN trusteeship for Palestine as an alternative to partition. See Louis (1986), 26; Smolansky (1986), 70; Cohen (1990), 190.

[169] Gromyko challenged the authority of the Council to deal with the Palestine problem at the time. See Cohen (1990), 190. In its 1971 Advisory Opinion to the SC on the legal consequences for states of the continued presence of South Africa in Namibia, the ICJ stated that the UNGA has the right to terminate a mandate but that it needs the cooperation of the SC to ensure the implementation of its decision. See ICJ Rep. 16 (1971).

[170] Verzijl (vol. II 1969), 564.

[171] The USA recognized Israel on 6.11 p.m. on 14 May 1948 (12.11 a.m., 15 May in Israel). The USSR offered Israel a *de jure* recognition on 15 May 1948. See Cohen (1990), 219 and Smolansky (1986), 73.

Israel and the Arab state of Palestine is rooted in the international status of the territory of the Palestine Mandate under international law and not in the military supremacy of either Israel in the region or the United States in the world.

The UN made a terrible mistake when it ended the Palestine Mandate. It confused the Palestine Mandate as a method by which to implement the international status of the territory of Palestine with the principle that the well-being and development of the Jewish and (non-Jewish) Palestinian communities form a sacred trust of civilisation. The resulting tragic course of events in the Israeli-Palestinian territorial conflict seriously affected the UN authority to protect peoples effectively.

CHAPTER THREE

CONFLICTING TERRITORIAL CLAIMS OF PEOPLES TO PALESTINE

States are generally seen as the original subjects of international law and the original bearers of international rights and duties.[1] In other words, states do not derive their existence from international law. It is simply the other way round, albeit to a certain extent only. After all, international law should take into account that everyone has the right to recognition everywhere as a person before the law.[2] As for states, it has been accepted that it is a person of international law:[3]

> The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.

International law does not define these four qualifications. The final one is understood as a reference to the sovereign equality of states as a fundamental of international law and international relations.

The present chapter will test the statehood of the Palestine Mandate in the time of the establishment of the mandate (section 1) against the qualifications of states. Statehood is closely related to nationalism. The latter concept expresses, amongst others, the identification of a people with a given territory. For various reasons Zionism became a significant example in that respect. It succeeded in laying a legal claim of the Jewish people to the 'Promised Land'. However, this success was substantially limited by the competing claim of the "existing non-Jewish communities in Palestine".[4] Moreover, Zionism could not compete with "the rights and political status

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[1] Doehring (1987), 424.

[2] UDHR, Article 6. See also *infra* Chapter Three, section 1.

[3] Montevideo Convention on Rights and Duties of States, Article I. See Brownlie (1990), 72.

[4] The Mandate for Palestine, Preambular Paragraph 2.

enjoyed by Jews in any other country".[5] The fortunes of Zionism will be outlined insofar as they throw some light on the genesis of the 1947 UN Plan of Partition (section 2).

The previous history of the Plan of Partition seriously affected its implementation. The gist of the follow-up was that the parties took the law into their own hands. This development was the more deplorable since the key for a lasting settlement of the territorial conflict lay in the legality of the plan (section 3). Anyhow, Israel owed it its international legitimacy within its pre-1948 boundaries. Moreover, the plan fully supported the creation of an Arab state on the territory of the Palestine Mandate (section 4). Unfortunately all parties and other actors involved, including the UN itself, misjudged the legal force of the Plan of Partition. In doing so they went from bad to worse, to the detriment of international order and to the disgrace of the UN system (section 5).

1. The Statehood of the Palestine Mandate

Of old the demarcation of state territory is a perilous undertaking. The protection of territorial integrity under international law results mainly from the experience that conflicting territorial claims are the most frequent origin of disputes *between* states.[6] Apart from wounded honour, insecurity, damaged prestige, ideology and 'the sense of justice', the distribution of natural resources are at issue in territorial disputes.[7] For that very reason territorial integrity has become a fundamental attribute of states under international law. Its legal validity is beyond doubt.[8] The 1970 Declaration on Principles of International Law codified that the territorial integrity of a state is inviolable.[9] Like political independence, territorial integrity is now the basic facet of state sovereignty in the context of the UN ban on force:[10]

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[5] *Id.*

[6] Northedge/Donelan (1971), 70.

[7] *Id.*, 91.

[8] Zu Dohna (1973), 173, 178; Šahovic (1972), 55.

[9] UNGA res. 2625 (XXV) of 24 October 1970. See also *supra* Chapter One at note 51.

[10] UN Charter, Article 2 (4). Rozakis (1987), 481-487.

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The right to self-determination is a principle of international law concerning friendly relations and cooperation between states and a human right. In both forms it implies the right of peoples "freely to determine, without external interference, their political status and to pursue their economic, social and cultural development".[11] As a human right it also lays down that

> [A]ll peoples may, for their own ends, freely dispose of their natural resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

This provision postulates that peoples are able to lay any claim to territory as a public property. The international legal principle of self-determination takes this up by stating:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by that people.

In other words, territory is highly essential to the sovereignty of states and the right to self-determination of peoples. The Palestine Mandate has become an eventful example in respect of all the constituents of statehood: territory (section 1.1), people (section 1.2), government (section 1.3.) and independence (section 1.4)

1.1. *Territory*

The Arab-Jewish conflict in Palestine became one of the most classic illustrations of the importance of territory in the context of the right to self-determination of peoples. Moreover, it was the plaything of changing circumstances.[12] In explanation it may be stated that the

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[11] UNGA res 2625 (XXV) *supra* note 9; UNGA res. 2200 A (XXI) of 16 December 1966, adopted unanimously, ICESCR and ICCPR, Article 1(1).

[12] Northedge/Donelan (1971), 69: "There were, it is true, from the very outset of Jewish immigration, some Zionists who looked to the eventual

conflicting rights to self-determination of the Arab and Jewish sections of the Palestinian population did not concern any piece of territory but the 'Promised Land' (Jews) or 'Holy Land' (Christians).

The boundaries of the Old and New Testamentary Palestine cannot be determined accurately. Under Ottoman rule Palestine consisted of the independent 'Sanjak' (district) of Jerusalem and the Sanjaks of Balka (Nablus) and Acre.[13] The area East of the Jordan river known as Transjordan belonged to the Ottoman vilayet (province) of Syria.[14] However, it was not included in the French Mandate for Syria but in the British Palestine Mandate, albeit with a clearly separate status:[15]

> In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined [i.e. Transjordan, PdW], the Mandatory shall be entitled, with the consent of the Council of the League of Nations, to postpone or withhold application of such provisions of this mandate as he may consider inapplicable to the existing local conditions, and to make such provision for the administration of the territories as he may consider suitable to those conditions, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18.

In its session of 23 September 1922—i.e. before the Palestine Mandate entered into force—the Council of the League of Nations approved a British proposal of 16 September 1922 to exempt Transjordan from the application of the following provisions of the Palestine Mandate. In the course of the thirties, plans were raised to divide Palestine among the Jewish and Arab population. These plans had

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creation of a Jewish State; but there were others who were intent only on the creation of a national home for the Jews in Palestine under British rule, seeing nothing in this incompatible with the rights of the Arabs already there. (...) the state of Israel, and therewith the sense of injustice of the Arabs, was less the outcome of an original, deliberate intention than the outcome of action and interaction over many years, culminating in the mid-1940s in the problem of how to react to the withdrawal of the British and to the threat of war with the Arabs."

[13] BMA (reprint 1991) 1. The independence of the Sanjak of Jerusalem meant that this district was subject immediately to the Ottoman government. The districts were units of the Villayet (province) of Beirut. See *infra* Annex 11 Map 1.

[14] Cattan (1988), 23.

[15] The Mandate for Palestine of 24 July 1922, Article 25. Articles 15, 16 and 18 dealt with freedom of conscience and free exercise of worship, supervision over religious and eleemosynary bodies of all faiths, and the prohibition of discrimination respectively.

nothing to do with Transjordan.[16] Legally speaking the Balfour Declaration never applied to Transjordan.[17] For that reason the creation of Jordan cannot be considered as meeting the right to self-determination of the Palestinian people in whatever historical perspective.[18] Any reference to Transjordan and the remaining part of the Palestine Mandate as 'Arabian Transjordan' and 'Jewish Palestine', respectively, is without legal foundation.[19]

1.2. *People*

The British policy in Palestine considered as early as 1922 expectations which were totally impracticable, such as the one that by virtue of the Balfour Declaration Palestine would have to become "as Jewish as England is English". In 1939 the view was expressed that the drafters of the Mandate in which the Balfour Declaration was embodied "could not have intended that Palestine should be converted into a Jewish State against the will of the Arab population of

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[16] BMA (reprint 1991), 13-14; Verzijl (vol. II 1969), 557-558. But see van de Craen (1990), 275: "Originally the Palestine Mandate also comprised 70,000 square kilometres east of the Jordan River. Under Article 25 of the Mandate Charter, the Council of the League of Nations approved on September 16, 1922 Britain's proposals to designate this portion of the Mandated territory as Transjordan. *De facto*, however, after the agreement of February 1928 between the British Government and the Emir of Transjordan, Transjordan was separated from Palestine (...)." The *de jure* separation, however was already realized by the approval of the Council of the League of Nations to exempt Transjordan from the obligation of the Mandatory Power to establish a Jewish national home in Palestine.

[17] Van Ginneken (1992), 17.

[18] Verzijl (vol. II 1969), 98-99 mistakenly wrote: "Unlike the nascent States under an A-Mandate mentioned above which successively attained sovereignty in 1932 (Iraq), 1946 (Syria and the Lebanon) and 1948 (the Jewish area of Palestine proper as Israel, its Arab area, united with the Trans-Jordan region, as Jordan), the territories under a B-Mandate had still a long way to go before they were able to attain statehood."

[19] Verzijl (vol. II 1969), 557-558 wrote in 1924: "The present political division of the country in a sense corresponds with that dual foundation [the Balfour Declaration and Article 22 of the League of Nations, PdW]: since the Memorandum of the British Government of 16 September 1922 relative to Article 25 of the mandate, as approved by the Council in its session of 23 September 1922, Palestine in its wider sense is now officially divided into two parts: Jewish Palestine in the narrower sense, west of the River Jordan and Arabian Transjordan east of that river, (...) ."

the country."[20] In the closing days of the Ottoman Empire the total population of Palestine—a territory of 27,000 square kilometres—was estimated to be 690,000, of whom 92% were Moslem and Arab Christians and 8% Jews.[21] Over 10,000 square kilometres had to be classified as uncultivatable.[22] The relation of population to territory was not such that Palestine ranked among the obvious immigration lands at the time.

According to Article 6 of the Palestine Mandate, the Administration of Palestine,

> while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and wastelands not required for public purposes.

From the very beginning, it was laid down as a matter of policy "that economic absorptive capacity was the sole criterion. This interpretation has been supported by resolutions of the Permanent Mandates Commission."[23] However, this criterion had to be interpreted in the context of the Mandate as a whole. In doing so the Mandatory Power was aware of the necessity to avoid Jewish domination. After all, Arab fear in that respect had produced[24]

> consequences which are extremely grave for Jews and Arabs alike and for the peace and prosperity of Palestine. (...) If in these circumstances immigration is continued up to the economic absorptive capacity of the country, regardless of all other circumstances, a fatal enmity between the two peoples will be perpetuated, and the situation in Palestine may become a permanent source of friction amongst all peoples in the Near and Middle East.

This quotation from the White Paper of May, 1939, illustrates that the duty of the Mandatory Power to facilitate the immigration of Jews had its limits. The interests of the Arab population remained normative in that respect. This was even true to a large extent for the

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[20] White Paper of May, 1939, in BMA (reprint 1991), 92.

[21] Nakleh (1991), 25; BMA (reprint 1991), 103.

[22] BMA (reprint 1991), 105.

[23] *Id.*, 96; van Ginneken (1992), 142.

[24] BMA (reprint 1991), 96.

efforts to solve the problem of Jewish displaced persons in post-war Europe.

In 1945 the then American president, Harry Truman, favoured the speedy immigration of 100,000 Jewish displaced persons into Palestine.[25] This situation caused the Mandatory Power to propose the setting up of a joint Anglo-American Committee of Inquiry, "to examine the question of European Jewry and to make a further review of the Palestine problem in the light of that examination".[26] The terms of reference, agreed upon between the American and British governments explicitly stated that the political, economic and social conditions of Palestine should be examined "as they bear upon the problem of Jewish immigration and settlement therein, and the wellbeing of the peoples now living therein."[27]

In its report of 20 April 1946 the Anglo-American Committee of Inquiry recommended the early issue of 100,000 Jewish immigration certificates by the end of 1946, if possible. In doing so it 'expressly disapproved' that Palestine had in some way been ceded or granted as their state to the Jews of the world. It also laid down that Arabs and Jews in Palestine should not dominate each other.[28]

1.3. *Government*

Under the Ottoman municipal law of 1877 Palestine consisted of twenty-two municipalities:[29]

> In practice the Turkish Governors interfered directly in municipal affairs; the municipal councils were little more than ciphers and it was not until the British occupation that they began to develop their responsibilities in the administration of local affairs.

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[25] Cohen (1990), 109-110; Louis (1986), 7-10; Bevin acknowledged "his blunder in refusing to heed the Truman initiative." See Grose (1986), 44: "If I [Bevin, PdW] could get back to the contribution on purely humanitarian grounds of 100,000 into Palestine, and this political fight for a Jewish state could be put on one side, and we could develop self-government by the people resident in Palestine, without any other political issue, I would be willing to try again."

[26] BMA (reprint 1991), 82.

[27] *Id.*, 100.

[28] Williams (1961), 567-568; Cohen (1990), 127.

[29] BMA (reprint 1991), 128.

The administration of local affairs in the rural areas was in practice carried out by the direct representatives of the central government:[30]

> In theory the village elders cooperated with the *mukhtar* [representative of the central government, PdW] in the administration of village affairs through a village council, but normally the *mukhtar* monopolised all local functions.

Before the Palestine Mandate entered into force, the British administration as the occupying power in 1921 enacted the Local Councils Ordinance which, together with its successor of 1941, proved to be "useful vehicles for the development of autonomy in the Jewish areas." However, they were not suitable for application to Arab rural communities. The position of the 1921 Ordinance was criticised by the 1936 British Royal Commission because of the fact that insufficient use was made "of such inherent self-governing impulses and institutions as the people possess."[31] Such impulses and institutions were a fact of life as appeared from the boycott by the majority of Arabs of the 1923 elections for the proposed Legislative Council, Arab general strikes, Arab congresses acting through their Palestine Arab Executive, Arab political parties and the successive Arab Higher Committees.[32]

The British mandatory administration felt forced to intervene in Arab local government. The first Arab Higher Committee was declared unlawful in 1937, its members being arrested and deported.[33] This Committee was formed in 1936

> to co-ordinate the work of the national committees which had been formed in the different towns of Palestine for the purpose of dealing with questions of major policy regarding the Arab cause.

Not until 1945 was a new Arab Higher Committee established. This delay was caused by internal tensions between Arab political parties. Be this as it may, from time to time such tensions may happen even in long-standing democracies. Anyhow, they gave no conclusive evidence that Arab (self-)government was lacking as an element of Palestinian statehood at the time.

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[30] *Id.*

[31] *Id.*

[32] BMA (reprint 1991), 21-22, 26, 31, 54, 946-954.

[33] *Id.*, 950.

The main difference between the Arab local government and Jewish local government at the time of the Mandate was that unlike the latter the former refused to cooperate with the British mandatory administration because it did not recognize the legality of the Palestine Mandate.[34] The Arab section of the Palestinian population thus might have failed to avail itself of its rights under the Palestine mandate (more) effectively. However, the refusal to cooperate did not estop the legal claim of the Arab section to the Palestinian territory as an essential element of its right to self-determination. According to the Mandate it was the Mandatory Power who was obliged to encourage local autonomy "so far as circumstances permit" and not the other way round.[35] In other words, the Arab section—Palestinian people—should keep a concurring claim on the territory of Palestine as an element of its statehood.

1.4. *Independence*

The 1916 Sykes-Picot agreement provided for the creation of an independent Arab state or Confederation of Arab states in the Arabic territory under Ottoman domination. However, Britain and France were allowed "to establish such direct or indirect administration or control as they desire and as they may think fit to arrange with the Arab State or Confederation of Arab States."[36] Palestine was exempted from this arrangement as an international sphere of interest.[37] According to the Sykes-Picot Agreement, in this area would be established

> an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the

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[34] *Supra* Chapter One section 6.2. See also Ben-Rafael (1987), 29.

[35] Palestine Mandate, Article 3.

[36] United Nations (1990), 81; Grenville (1974), 20, 30-34. During the course of 1916 the governments of Britain, France, Italy and (Czarist) Russia made secret arrangements on the partition of the Ottoman Empire after its defeat in the then raging World War. The arrangements were brought into the open by the Soviet Union after the 1917 October Revolution. The secret exchange of notes was named the Sykes-Picot Agreement after the diplomats Sykes (Britain) and Picot (France). The Agreement laid down that Russia could annex certain territories. It also stated that Britain and France would cede part of 'their' areas to Italy. See also *infra* Annex 11 Map 2.

[37] Grenville (1974), 20, 30-32.

> other Allies, and the representatives of the Shereef of Mecca [Sherif Prince Faysal ibn Hussayn, PdW.].

The Sherif of Mecca had to be consulted, for his correspondence with the British High Commissioner in Egypt, Sir Henry McMahon, in 1915 had achieved that Great Britain was "prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca."[38] This achievement was in reward for the assistance of the Sheriff's Arab army in the war against the Ottoman Empire.[39]

In 1937 McMahon felt it his duty to state that "it was not intended by me in giving this pledge to King Hussein to include Palestine in the area in which Arab independence was promised."[40] Be this as it may, the British and the Arabs were unable to reach agreement upon the proper interpretation of the correspondence. The British government was of the opinion that the whole of Palestine west of the Jordan was excluded from McMahon's pledge.[41] Nevertheless, it considered it to be proper[42]

> that the people of the country should as early as possible enjoy the rights of self-government which are exercised by the people of neighbouring countries. (...) It should be a State in which the two peoples in Palestine, Arabs and Jews, share authority in government in such a way that the essential interests of each are secured.

Of course, the proposal "for the establishment of the independent State would involve consultation with the Council of the League of Nations with a view to the termination of the Mandate." After all, "His Majesty's Government would keep constantly in mind the international character of the Mandate and their obligations in that respect."[43]

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[38] Lapidoth/Hirsch 1992, 8.

[39] Mostyn(1988), 85-86; Hourani (1991), 316-317

[40] Grenville (1974), 19.

[41] Lapidoth/Hirsch (1992), 8: "The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded." See also *infra* Annex 11 Maps 2 and 3.

[42] BMA (reprint 1991), 89, 93, 94. But see Barbour (1987), 468.

[43] *Id.*, 48, 94.

2. Zionism as a Historical Claim to the 'Promised Land'

The nineteenth century was dominated by nationalism. In its second half it generated a "cult of blood and soil, race and place."[44] This cult paved the way for distinguishing peoples from minorities. For unlike the latter, the former became recognized as bearers of the right to self-determination on the basis of their historical link to a given territory.[45]

At the time of the first Zionist Congress—August 1897 in Basel—there was still no question of the right to self-determination of peoples as a principle of international law and even less so as a universally recognized human right. The reference to public law in the Basel Program, adopted by the Congress, related to the role of Chartered Companies, modelled after the seventeenth-century East India Company. These companies could conclude feudal contracts with overseas princes or chiefs, either in their own name or on behalf of their national governments.[46] The first Zionist Congress had in mind a charter for negotiating with the Ottoman Empire on the creation of a Jewish home in Palestine.[47]

According to the Basel Program, the aim of Zionism was "to create for the Jewish people a home in Palestine secured by public law". In order to attain this object the Congress adopted the following means:[48]

1. The systematic promotion of the settlement of Palestine with Jewish agriculturists, artisans, and craftsmen.
2. The organisation and federation of all Jewry by means of local and general institutions in conformity with the local laws.
3. The strengthening of Jewish sentiment and national consciousness.
4. Preparatory steps for the procuring of Government assents as are necessary for achieving the object of Zionism.

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[44] Kamenka (1988), 132.

[45] Capotorti (1977), paragraph 568; Critescu (1981), paragraph 279; Sham (1992), 6-8; Ranjeva (1991), 103-105.

[46] Verzijl (vol. II 1969), 39-43. See also Kokkini-Iatridou/de Waart (1983), 101-104.

[47] Beit-Hallahmi (1992), 59.

[48] Lapidoth/Hirsch (1992), 1.

In line with this program Zionism has been characterized as the national liberation movement of the Jewish people.[49] That profile explained the Zionist claim that all Jews were members of a Jewish nation irrespective of their nationality.[50] Its political goal was "a government of Jews, for Jews and by Jews in Palestine."[51] Its legal aspects raised questions in respect of the significance of the intended government assents (section 2.1) and the achievement of the object of Zionism: the creation of a home in Palestine for the Jewish people (section 2.2).

2.1. '*Government Assents*'

The Palestine Mandate upgraded the Jewish minorities in the world to the level of a people under international law by recognizing their historical connection with Palestine. However, it remains to be seen whether this recognition effectively replaced the intended government assents.[52]

Palestine was certainly a territory inhabited by a people having a social and political organization. Therefore the acquisition of sovereignty by the Jewish people could only be effected through agreements with local leaders. This may explain why Herzl in 1899 asked for the co-operation of the then mayor of Jerusalem, Youssouf Zia Al-Khalidi, in order to obtain the necessary governmental assent of the Ottoman Government:[53]

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[49] Herzog (1984), 11.

[50] Beit-Hallahmi (1992), 55. The 1978 Longman Dictionary of Contemporary English defined Zionism as "the political movement to establish and develop an independent state of Israel in Palestine." According to the 1979 Oxford Paperback Dictionary zionism is "a movement founded in 1897 that has sought and achieved the founding of a Jewish homeland in Palestine." The 1987 Collins Cobuild English Language Dictionary interpreted the concept as "a movement which was originally concerned with establishing a political and religious state in Palestine for Jewish people and is now concerned with the development of Israel." The Concise Oxford Dictionary defines zionism as "the movement (...) that has thought and achieved the *re*-establishment of a Jewish nation in Palestine", emphasis added.

[51] *Id.*, 57. See also Shipler (1987), 71.

[52] *Supra* Chapter Two section 1.3.

[53] Letter from Th. Herzl of 19 March 1899 to Y.Z. Khalidi, Member for Jerusalem of the Ottoman Empire and Mayor of Jerusalem, published in Khalidi (1987), 91-93 at 92.

> You see another difficulty, Excellency, in the existence of the non-Jewish population in Palestine. But who would think of sending them away? It is their well-being, their individual wealth which will increase by bringing in our own. Do you think that an Arab who owns land or a house in Palestine worth three or four thousand francs will be very angry to see the price of his land rise in a short time, to see it rise five or ten times in value perhaps in a few months? Moreover, this will necessarily happen with the arrival of the Jews. That is what the indigenous population must realize, that they will gain excellent brothers as the Sultan will gain faithful and good subjects who will make this province flourish—this province which is their historic homeland.

In other words, it was a matter of take it or leave it. This was in conformity with Herzl's original view that without the required cooperation of the Ottoman government and the local leaders in Palestine such a home might be created everywhere else where governmental assents could be obtained.[54]

In 1903 the British government offered a peace of land in its colony Uganda. However, Herzl had to drop this alternative under pressure from the "East-European Jewry's tenacious yearning for Palestine" as the only acceptable territory for a Jewish national home.[55] This explains why from then on the securement by public—international—law had to be acquired from whatever governmental source might be of service to that end.

It happened that the British government once again appeared at the right moment, this time as the new 'ruler' of Palestine, albeit without the support of the non-Jewish population of Palestine. Also Zionism no longer looked for the latter's assent.[56] The consequences made themselves felt even more so as the original concept of a Jewish national home came closer to that of a Jewish state.

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[54] Beit-Hallahmi (1992), 36-39.

[55] Goldberg/Rayner (1987), 166-167.

[56] Beit-Hallahmi, 64: "Gaining the support of the world powers was the first priority. The challenge nobody was concerned about turned out to be the most serious in the long run. That was the existence and the resistance, of the Arab natives of Palestine, who at the end of the nineteenth century, and at the beginning of the twentieth, were too weak and insignificant, in Zionist eyes, to warrant much concern."

2.2. *'Home in Palestine'*

The Basel Program included in the means by which to create a Jewish national home in Palestine "the systematic promotion of the settlement of Palestine with Jewish agriculturists, artisans and craftsmen."[57] This meant required control over cultivable soil.[58] However, private ownership of land does not result in sovereignty by itself. The concept of a Jewish national home was ambiguous from its very beginning, as appears from the following provision of the Palestine Mandate:

- establishment of a Jewish national home (Article 2);
- recognition of and cooperation with an appropriate Jewish agency as a public counterpart of the Administration of Palestine (Articles 4 and 11 section 2);
- facilitation of Jewish immigration (Article 6));
- acquisition of Palestinian citizenship by Jews) (Article 7);
- protection of Holy Places (Articles 13 and 14);
- proclamation of English, Arabic and Hebrew as official languages of Palestine (Article 22) and
- recognition of holy days of the respective communities in Palestine as legal days of rest (Article 23).

These provisions indicated that a Jewish national home should not be identified with a Jewish state. On the contrary, they confirmed the British interpretation of the Balfour Declaration:[59]

> When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the further development of the existing Jewish community, with the assistance of the Jews in other parts of the world, in order that it may become a centre in which the Jewish people as a whole may take, on grounds of religion and race, an interest and a pride. But in

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[57] Lapidoth/Hirsch (1992), 1. According to Beith Hallahmi (1992), 58 the text reads: "the promotion, on suitable lines, of the colonization of Palestine by Jewish agricultural and industrial workers." See also Osmañczyk (1985), 956.

[58] Kimmerling/Migdal (1993), 32-35; Beit-Hallahmi (1992), 70; Said (1992), 96-98 at 98: "Even with all this sophisticated and farsighted effort, the JNF [Jewish Nation Fund, PdW] acquired only 93,6 dunams of land in the almost half-century of its existence before Israel appeared as a state; the total land area of mandate Palestine was 26,323,000 dunams."

[59] White Paper of June 1922, in BMA (reprint 1991), 88.

> order that this community should have the best prospect of free development and provide a full opportunity for the Jewish peoples to display its capacities, it is essential that it should know that it is in Palestine as of right and not on a sufferance. This is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognised to rest upon ancient historic connection.

In 1921 the World Zionist Organization expressed in an official statement of Zionist aims the determination of the Jewish people[60]

> to live with the Arab people on terms of unity and mutual respect, and together with them to make the common home into a flourishing community, the upbuilding of which may assure to each of its peoples an undisturbed national development.

The intention of both the Mandatory Power and the Council of the League of Nations to create an independent state for Jews *and* Arabs in Palestine is the red thread in an otherwise zigzag policy on the part of both bodies, resulting from undertakings given at various times to various parties.[61] It thus supported the statehood of the Palestine Mandate as a whole from the very outset. After all, the establishment of a 'Jewish national home' in Palestine did not imply that the territorial conflict between the Arab and Jewish sections of the population of the Mandate should be settled in favour of the latter at the expense of the former. It is telling in that respect, that the Anglo-American Committee of Inquiry recommended that Palestine should be neither a Jewish nor an Arab state.[62]

3. Legality of the UN Plan of Partition for Palestine

The political tension of the Plan of Partition divided the legal doctrine into two camps, one siding with Israel against Palestine, the other just the opposite.[63] It looked as if it would be impossible to

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[60] BMA (reprint 1991), 87.

[61] *Supra* Chapter One at note 150. In respect of Palestine both the Council and the Assembly of the League of Nations ran with the hare and hunted with the hounds time and again in order to avoid controversies. See van Ginneken (1992), 147.

[62] Cohen (1990), 127.

[63] *Supra* Chapter One section 6.2.

have both solutions: the legality of Israel side by side with that of Palestine. Legally speaking, this impossibility is attributable to a wrongful interpretation and application of international law by all parties involved, particularly in respect of self-determination of peoples.

3.1. *Unprejudiced International Law*

Under international law the unilateral annexation of Palestine by Great Britain and its acceptance by the other Principal Allied Powers after the defeat of the Ottoman Empire in World War I would not have been illegal. Annexation did not even require a plebiscite of the population affected.[64] In the event of annexation Great Britain might have decided on the immigration of people to Palestine and on the conditions of independence if such should be the case. From a legal point of view Great Britain could have favoured the establishment in Palestine of a national home for the Jewish people at that time.

Legally speaking, there was no need to include the Balfour Declaration in the Peace Treaty of Sèvres of 10 August 1920 with the then still existing Ottoman Empire. Consequently, the subsequent rejection by the Republic of Turkey of the Sèvres Treaty did not affect the legal validity of the Balfour Declaration or the Palestine Mandate.[65] Moreover, this rejection did not concern the loss of the Arab provinces as such but the imposition over the Ottoman Empire of a "virtual foreign tutelage".[66] For that reason the deletion of any reference to the Balfour Declaration in the Treaty of Peace with Turkey of Lausanne of 24 July 1923 did not support the opinion that Great Britain could not have disposed of Palestine before the conclusion of that treaty.[67]

However, politically speaking, Great Britain had been asking for trouble. Eager to attain the support of the Arabs against the Ottoman

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[64] Bindschedler (1982), 21.

[65] In 1922 the then Ottoman Sultan, Mehmed VI, was deposed. In 1923 Turkey became a republic with Kemal Pasha Atatürk as its first president.

[66] Hourani (1991), 316.

[67] Cattan (1988), 13: "The Balfour Declaration was also void because Turkey, as the legal sovereign at the time of the issue of the Balfour Declaration, did not consent to it."

Empire it had promised independence to the Arabs.[68] The British government had also made promises to the World Zionist Organization in order to gain support for bringing the United States into World War I on its side.[69] Due to these conflicting promises and their inherent territorial claims, the future of the Palestine remained mainly a British concern despite the League of Nations Mandate.[70]

3.2. *Shifting Positions*

The position of Zionism and Israel on the legality of the Plan of Partition *de facto* changed from acceptance to rejection, particularly after 1967. For the antipode of Zionism, i.e. 'Palestinianism'—the emerging movement toward a Palestinian homeland, based on the historical link of the Palestinian people with Palestine—the reverse stood out, particularly after the adoption of the much disputed 1968 Palestine National Charter by the Palestine National Council.

3.2.1. *Zionism*

In respect of Palestine Zionism skilfully explored the forerunners of shifting spheres of influence from the Ottoman Empire through Great Britain to the United States. However, it was so obsessed by its nineteenth century based legal approach of hegemonic protection that it failed to understand the quickly changing signs of the times: the growing awareness of other oppressed peoples. In doing so, it backed superpowers in such a way that it missed opportunities at local levels.[71] This situation continued during the second World War, albeit on a low profile.[72] President Roosevelt was in favour of opening the immigration gates of all nations to the beaten people of Europe.[73] The

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[68] *Supra* section 1.4.

[69] Manuel (1949), 165.

[70] Mandatory Powers could also keep control due to the vague clauses of the Covenant of the League of Nations and the mandate texts as well as the dissension in the competent bodies of the League of Nations, i.e. the Mandates Commission, the Council and the Assembly. See van Ginneken (1992), 299.

[71] *Supra* section 2.2.

[72] Schechtman (1966), 45.

[73] Ernst (1948), 489, 491.

United States did not yet act as a pioneer in supporting political Zionism's dream of a Jewish state in Palestine.[74]

In May 1942 an Extraordinary Conference of American Zionists in the Biltmore Hotel in New York adopted a resolution which denied the moral and legal validity of the White Paper of May, 1939, because of its rejection of the idea that the drafters of the Mandate had intended to convert Palestine into a Jewish state.[75] The Conference declared that[76]

> the new world order that will follow victory cannot be established on foundations of peace, justice and equality, unless the problem of the Jewish homelessness is finally solved. The Conference urges that the gates of Palestine be opened; that the Jewish Agency be vested with control of immigration into Palestine and with the necessary authority for upbuilding the country, including the development of its unoccupied and uncultivated lands; and that Palestine be established as a Jewish Commonwealth integrated in the structure of the new democratic world. Then and only then will the age-old wrong to the Jewish people be righted.

Three years later Zionist spokesmen at the inaugural meeting of the UN at San Francisco—UNCIO—urged the new organization in vain to place on its agenda the immediate recognition of "a Jewish commonwealth in Palestine".[77]

In 1946 the Zionist leadership dropped the 'Biltmore statement' in order to pave the way for partition, albeit unofficially.[78] However, it never gave up its claim to the whole of the territory. This became entirely clear from official Israeli statements after the occupation of the West Bank and the Gaza Strip in 1967, consistently referred to by Israel as Judea, Samaria and the Gaza district ever since. As early

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[74] Schechtman (1966, 117, quoting David Niles, assistant to both Roosevelt and Truman: "There are serious doubts in my mind that Israel would have come into being if Roosevelt had lived." See also Cohen (1990), 49: "(...) during the war Truman had adhered consistently to Roosevelt's hands-off policy toward Zionism and Palestine. (...) Although having every sympathy for Jewish suffering during the war, Truman did *not* favor the establishment of a Jewish state in Palestine."

[75] *Supra*, section 1.2.

[76] The Biltmore Program of 11 May 1942, paragraph 8. See Khalidi (1987), 497. See also Cohen (1986), 79 and (1990), 46.

[77] Roosevelt (1948), 523; Cohen (1986), 79.

[78] Cohen (1986), 84-87 and (1990) 138-140.

as August 1967, the then Israeli Prime Minister Eskhol stated in his outline of principles which guide Israel's policy in the aftermath of the 1967 June War:[79]

> After our military victory, we confront a fateful dilemma; immigration or stagnation. (...) By the end of the century, we must have five million Jews in Israel. We must work hard so that Israel may be able to maintain decent human, cultural, technical and economic standards. This is the test of Israel's existence as a Jewish State in the Middle East.

Israel's Minister for Foreign Affairs, Abba Eban, in 1968 criticised the four guiding principles of Egyptian policy. He was right in respect of the principles of no negotiation with Israel, no peace with Israel and no recognition of Israel. It is telling, however, that he also criticised the principle of making no transaction at the expense of the Palestinian territories or the Palestinian people. After all, he had clearly recognized that the obligations of Israel and the Arab states are governed by the UN Charter and the "traditional precepts of international law", albeit in one and the same breath with "constructive realism". The latter apparently did not include the right to self-determination of the Palestinian people on the basis of the Plan of Partition, "constructive realism" put on a par with international law.[80]

The following year Minister Eban stated in the Knesset that Israel would not waive a unified Jerusalem "despite concessions to Jordan over the Holy Places."[81] This opinion still prevails in the Israeli view on the peace process, although it lacks any foundation under international law. There is no legal argument whatsoever to make a distinction between the area of East Jerusalem and the other 1967 Occupied Territories.[82] Nevertheless, the 1976 Allon Plan for Peace did not rule out annexation of the latter territories as a legally valid option:[83]

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[79] Lukacs (1986), 79.

[80] *Id.*, 84 and 89.

[81] *Id.*, 89.

[82] Gerzon (1978), 214: "No valid distinction appears to exist between the legitimacy of Israeli claims to sovereignty over the West Bank and those made in regard to East Jerusalem. Both seem to stand or fall on the same merits. One searches in vain in the academic literature and history of diplomatic debates on the issue for any thesis advancing the claim that Israeli claims to sovereignty over East Jerusalem are doctrinally distinct from those pertaining to the West Bank."

[83] Lukacs (1986), 105.

> It should be clear from what I [the Israeli Foreign Minister, Yigal Allon, PdW] have said, that Israel does not hold most of the territories that fell into its hands in the war, which was imposed on it in 1967, as an end in itself. Despite the paucity of its territory compared with the vast areas of the Arab countries, and despite the historical, strategic and economic importance of these areas, Israel would be prepared to concede all that is not absolutely essential to its security within the context of an overall peace settlement. It is holding most of these territories now only as a means to achieve its foremost goal—peace with its neighbours.

The plan apparently did not include Palestine among Israel's neighbours. The 1981 fundamental policy guidelines of the Israeli government made no bones about its understanding of the 1978 Camp David Agreements under which the Occupied Territories would get provisional autonomy:[84]

> The autonomy agreed upon at Camp David means neither sovereignty nor self-determination. The autonomy agreements set down at Camp David are guarantees that under no conditions will a Palestinian State emerge in the territory of Western *Eretz Yisrael*. (...). At the end of the transition period set down in the Camp David agreements, Israel will present its claim, and act to realize its right of sovereignty over Judea, Samaria, and the Gaza district.

The 1989 peace initiative of the Israeli government reaffirmed as a basic premise Israel's opposition "to the establishment of an additional Palestinian state in the Gaza district and in the area between Israel and Jordan."[85] At best Israel might consider transferring part of the West Bank to Jordan in order to avoid the creation of Palestine as an independent state.[86]

According to the then presidents of the Soviet Union, Michael Gorbachev, and the United States, George Bush, the course of 'Operation Desert Storm' provided an historic opportunity to advance the prospects for genuine peace throughout the Middle East, albeit on the

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[84] *Id.* 107. See also *infra* Annex 8.

[85] Lapidoth/Hirsch (1992), 358.

[86] This option underlay the policy of the Israeli Labour Party. See Lukacs (1986), 116. In later years Dr. Abba Eban seemed to renounce the Jordan option suggesting that "the Benelux formula might offer us the possibility of reconciling statehood sovereignty with the inevitable modification of sovereignty necessary to ensure accessibility, economic and social, and above all human integration." See Mackay (1989), 36. But see van Leeuwen (1993), 160-161.

basis of SC resolutions 242 and 338 only, i.e. without any reference to the UNGA resolution on partition. No single trace appears to remain from the civil trust of civilization, embodied in the international status of a mandated territory:[87]

> With respect to negotiation between Israel and the Palestinians who are part of the Jordanian-Palestinian delegation, negotiations will be conducted in phases, beginning with talks on interim self-government arrangements. These talks will be conducted with the objective of reaching agreement within one year. Once agreed, the interim self-government arrangements will last for a period of five years. Beginning the third year of the period of interim self-government, negotiations will take place on permanent status. These permanent status negotiations, and the negotiations between Israel and the Arab states, will take place on the basis of resolutions 242 and 338.

The Israeli proposal on interim self-government of November 1992 was rejected by the Palestinians because it seemed to sow the seeds for making *de facto* annexation only more permanent. For it intended to introduce in the Occupied Territories four different types of administration, i.e. one for localities of Israeli settlers, one for security areas, one for Palestinian localities and the final one for state lands. As for the first area, the administration would be exercised by the Israeli government, for the second one by the Israeli military authorities, for the third by the Palestinian Administrative Council (PAC) and for the fourth by a joint operation of PAC and the Israeli government.[88]

3.2.2. *'Palestinianism'*

In 1975 the General Assembly determined that Zionism was a form of racism and racial discrimination.[89] This decision was *ultra vires* as far as it implied the illegality of Israel as the embodiment of Zionism. In respect of the Occupied Territories the General Assembly overreached its goal, i.e. to expose Israel's way of acting in the Occupied Territories. Legally speaking, it rightly decided to revoke its deter-

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[87] Lapidoth/Hirsch (1992), 384-385.

[88] Mansour (1993), 26. See also *New Outlook* 36/1 (1993), 42.

[89] UNGA res 3379 (XXX) of 10 November 1975, adopted by 72 votes in favour (including China and the USSR), 35 against (including the OECD member states except Japan), with 32 abstentions (including Japan).

mination.[90] However, the West and Israel should take it as a serious warning that the victims of Zionism voted against. Some of these victims are willing to consider the outcry in the West after the passing of the anti-Zionism resolution as a genuine one.[91] Their moderation provides evidence of a growing self-confidence, not of resignation:[92]

> But just as no Jew in the last hundred years has been untouched by Zionism, so too no Palestinian had been unmarked by it. Yet it must not be forgotten that the Palestinian was not simply a function of Zionism. His life, culture, and politics have their own dynamic and ultimately their own authenticity, to which we now must turn.

This turn concerned Palestinian self-determination. It would be a great failure on the part of the West and Israel if they kept their eyes closed to this making of a people.[93]

At its wits' end, as it were, Great Britain pushed the problem on to the General Assembly in 1947, albeit not by right of the organization but for recommendation. The UN failed to insist on its own right to this day in order not to be used as a cat's paw. All too eagerly it accepted the end of the Palestine Mandate in 1948, thus ignoring the international status of mandates under international law.

3.3. *UN Concern*

The UN concern was ambiguous from the very outset. Nevertheless, by some whim of fate the UN have become more heavily involved in the Palestinian Question than the League of Nations ever was.[94]

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[90] UNGA res 48/86 of 16 December 1991, adopted by 111 votes in favour, 25 against (Moslem states, including Jordan and Syria), with 13 abstentions (including Turkey). Among the 15 absent states were China, Egypt and Kuwait.

[91] Said (1992), 111.

[92] *Id.* 114.

[93] Kimmerling/Migdal (1993), 280: "What is unmistakable is that both Israelis and Jews worldwide have a significant role in determining the Palestinian future, as will Palestinians in determining that of the Israelis, and thus the Jews. History has linked the two peoples and national movements. Neither can make the other disappear, and neither can achieve peace without fulfilling some of the most deeply held aspirations of the other."

[94] The number of UN resolutions on Palestine and the Arab-Israeli conflict increased substantially over the course of years. They have been collected by the Institute of Palestinian Studies in Washington. Three volumes

However, this was not so much the result of a great élan of the new global organization as of a stalemate in the relations between the superpowers, particularly Great Britain and the United States.[95]

3.3.1. *Special session*

The very first special session of the General Assembly was convened in 1947 at the request of the United Kingdom as the Mandatory Power for Palestine. Both Arabs and Zionists considered the British decision to refer the Palestine problem to the UN and the inherent prospect of British withdrawal as a matter of bad faith, albeit from quite different perspectives. In the Zionist perspective the referral to the UN [96]

> was simply a machiavellian maneuver calculated to cause the international body to prick its fingers badly on this thorny, intractable problem, so much that it would ultimately, with great relief, hand Palestine back to the British, to do with it as they pleased [i.e. in conformity with the 1939 White Paper, PdW].

Arabs feared a British withdrawal from Palestine as being to the deliberated advantage of the Zionists.[97] In other words, neither party considered the UN as a ministering angel from the British evil. in 1945 the Jewish population in Palestine had already launched armed opposition to the Mandatory Power.[98] The Arabs believed that the intentions of the Zionists could only be stopped by a joint Arab military preparedness.[99] The referral to the UN could thus hardly result in a peaceful partitioning Judgement of Solomon.

The special UN session constituted UN Special Committee on Palestine (UNSCOP). All member states with a permanent seat in the Security Council voted in favour of the pertinent resolution, all states

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have been published up to now covering the periods 1947-1974, 1975-1981 and 1982-1986. Although the number of years decreased, the number of pages increased from 294 (vol. I) to 393 (vol. III).

[95] Khalidi (1986), 107.

[96] Cohen (1986, 89.

[97] Khalidi (1986), 118; Hourani (1991), 360.

[98] Herzog, (1984), 13.

[99] Khalidi (1986), 118-120.

in the region against.[100] UNSCOP recommended a plan of partition with economic union, albeit not unanimously.[101] At its second regular session the General Assembly adopted the majority proposal, i.e. the famous partition resolution, albeit also not unanimously. According to the resolution the Mandate for Palestine would terminate as soon as possible "but in any case not later than 1 August 1948". This time-limit seemed to be dictated by the declaration of the United Kingdom as the Mandatory Power that it planned to complete its evacuation of Palestine by 1 August 1948. Anyhow the resolution took note of this declaration. In doing so the General Assembly quite remarkably resigned itself to this evacuation and the resulting resignation of the United Kingdom as Mandatory Power.[102]

3.3.2. *Challenge of UN authority*

The legality of the UN Plan of Partition for Palestine was challenged on the ground that[103]

> the dissolution of the League of Nations, and the consequent removal of the legal basis for the Mandate, and the more recent declarations by the Mandatory of its intentions to withdraw from Palestine, open the way for the establishment of an independent government in Palestine by

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[100] UNGA res 106 (S-1) of 15 May 1947, adopted by 45 votes in favour, 7 against (Afghanistan, Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Turkey), with 1 abstention (Siam). UNSCOP consisted of representatives of Australia, Canada, Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay, and Yugoslavia.

[101] Canada, Czechoslovakia, Guatemala, the Netherlands, Peru, Sweden and Uruguay were in favour of a partition of Palestine into two politically separate and independent states with an economic union and Jerusalem as an international city; India, Iran and Yugoslavia favoured an independent Palestine with Jerusalem as its capital. Australia did not support either proposal. See United Nations (1990), 109. The study was made by the Special Unit on Palestinian Rights established by the UN Secretary-General under UNGA Res. 32/40/B of 2 Dec. 1977, adopted by 95 votes in favour, 20 against, with 26 abstentions.

[102] On the question whether or not the United Kingdom had the right to discharge itself unilaterally from its mandate in 1948, see Verzijl (vol. II 1969), 564: "Impatient of the lack of progress in the liquidation of the Mandate, the United Kingdom took the unusual and, in my opinion, illegal step of authoritatively renouncing her Mandate as from 15 May 1948, thus provoking the unilateral proclamation of the sovereign State of Israel by those controlling the Jewish people, along the lines of the Partition Plan of 1947, a concentric attack by the surrounding Arab countries on the new State (...)."

[103] Khalidi (1987), 653-654.

> the people of the country, without the intervention of the United Nations or of any other party.

Neither the dissolution of the League of Nations nor the intention of Great Britain to withdraw from Palestine removed the legal basis for the Palestine Mandate:[104]

> The League was not, as alleged by that Government [of the Union of South Africa, PdW], a 'mandator' in the sense in which this term is used in the national laws of certain States. It had only assumed an international function of supervision and control. The Mandate had only the name in common with the several notions of mandate in national law. (...) It is therefore not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law.

The UN did not substitute the League of Nations.[105] However, it could not be admitted that[106]

> the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.

The UN should have exercised the international function of supervision and control in respect of the Palestine Mandate without respect to people and state. The element of negotiation in international governance did not detract from the international status of the territory. It even added an extra dimension, i.e. that a Mandatory Power could only modify the international status with the consent of the UN.

3.3.3. *Recommendatory character*

The Palestine Mandate had been put on the UNGA agenda on the basis of a letter to the Secretary-General of 2 April 1947 in which the British government asked for recommendations under Article 10 of the UN Charter concerning the future government of Palestine.[107] It is said that Great Britain as the Mandatory Power had no other possibility but to refer the matter to the General Assembly since there was

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[104] ICJ Rep. 132 (1950).
[105] Hahn (1983), 166.
[106] ICJ Rep. 136 (1950).
[107] Cattan (1988), 32; Cohen (1990), 149; Grose (1986), 44.

no trusteeship agreement.[108] The Anglo-American Committee of Inquiry had recommended the conclusion of such an agreement in vain despite the original support of the United States.[109] Both Arabs and Jews opposed it vehemently. The former considered such a solution contrary to the A-status of the Palestine Mandate, the latter rejected it as a deviation from the UN plan to divide Palestine into an Arab and a Jewish state.[110] In other words, the Mandatory Power of Palestine was willing but unable to conclude a trusteeship agreement. Its position was thus quite opposite to the Union of South Africa which was able but not willing to conclude a trusteeship agreement. After all, such a step would have been contrary to its plan for annexation.[111] These different views do not prevent a comparison of the positions taken by the General Assembly in both cases.

The United Kingdom was a trend-setter with its submission under Article 10 of the UN Charter, for in its 1950 Advisory Opinion on the Mandate for South West Africa the International Court of Justice based the competence of the UN to exercise supervision on the mandate on that very article. The Union of South Africa on 9 April 1946—i.e. during the final session of the League of Nations Assembly—had already announced its intention to submit to the forthcoming session "its case for according to South West Africa a status under which it would be internationally recognized as an integral part of the Union."[112] However, it also stated that[113]

> The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard

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[108] UN Charter, Article 77 states: "The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a) territories now held under mandate; (...)."

[109] Cohen (1990), 127; Schechtman (1966), 268-271; Louis (1986), 18. The 'Bevin Plan' provided for a five-year trusteeship regime supervised by the UN in order to prepare an independent binational state.

[110] Louis (1986), 18; Schechtman (1966), 273-275; Cattan (1988), 43. According to Schechtman, Arab spokesman found fault with the American trusteeship proposal only for the record.

[111] Gill (1984), 22-24.

[112] South West Africa Cases, Judgment of 21 December 1962. ICJ Rep. 339 (1962).

[113] *Id.*, 340.

> the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time other arrangements are agreed upon concerning the future status of the territory.

According to the International Court of Justice there could have been no clearer recognition on the part of South Africa of the continuance of its obligations under the Mandate after the dissolution of the League of Nations.[114]

The step of the Great Britain to refer the matter of the Palestine Mandate to the General Assembly under Article 10 implied such a recognition as well.[115] The follow-up, however, was quite different. In the South West Africa case the General Assembly insisted on its rights and called the International Court of Justice in to assist in order to defend its supervisory function in respect of mandates.[116] In the present case it played the game of the Mandatory Power, i.e. it limited itself strictly to the request for a recommendation. Its resolution on a Plan of Partition took note "of the declaration by the mandatory Power that it plans to complete its evacuation of Palestine by 1 August 1948." Moreover, it *recommended*[117]

> to the United Kingdom, as the mandatory Power for Palestine, and to all other members of the United Nations the adoption and implementation, with regard to the future Government of Palestine, of the Plan of Partition with Economic Union set out below (...).

From a legal point of view it is striking that the General Assembly did not withhold its consent to the British withdrawal from Palestine, although it implied a modification of the international status of the Palestine Mandate. The General Assembly also did not take a binding decision on the Plan of Partition. It only recommended to the manda-

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[114] *Id.*, 340. See also Klein (1990), 233-243,

[115] See the Separate Opinion of Judge McNair, ICJ Rep 157 (1950): "The dissolution of the League on April, 19, 1946, did not automatically terminate the Mandates. Each Mandate has to be considered separately to ascertain the date and the mode of its termination. Take the case of Palestine. It is instructive to note that on November 29, 1947, the General Assembly of the United Nations adopted a resolution approving a plan of partition of Palestine, which was firmly based on the view that the Palestine Mandate still continued (...)."

[116] *Supra* Chapter One section 6.1.

[117] UNGA res. 181 (II) of 29 November 1947. *Supra* Chapter One section 6.1.

tory Power, and to all other members, "the adoption and implementation, with regard to the future Government of Palestine, of the Plan of Partition with Economic Union." The General Assembly thus overlooked its responsibility as the competent authority in the line of the mandate system. It allowed its authority to slide when it briefly recommended to *states* the termination of the Palestine Mandate. Of course, the General Assembly could have terminated the mandate as a *UN organ*. In doing so it should have satisfied itself, however, first and foremost that such a decision would not have jeopardized the interests of the Palestinian people.

Legally speaking, the General Assembly did not administer the Palestine Mandate with due diligence because of the fact that the recommendatory character of its Plan of Partition did not pay tribute to the sacred trust of civilization. In doing so, it lost the authority to prevent the Security Council, particularly its permanent members, from doing it their way without regard to the supervisory task of the General Assembly. The latter retired into its shell. The role of the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) prevailed in its debates for quite some time, i.e. until 1970, when the General Assembly condemned the denial of self-determination, especially to Southern Africa and Palestine. This lapse of time may have confused the perception of the UN, the parties and the superpowers as to the international dimension of the issue.

The Security Council never again referred to the Partition Plan in its resolutions on the Palestine Question. The General Assembly recalled it explicitly in its resolution on the admittance of Israel to UN membership in 1949.[118] Since then most references have been to the resolution on establishing a UN Conciliation Commission and on the decision to place Jerusalem under a permanent international regime and that the Palestinian refugees should be permitted to return to their homes.[119]

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[118] UNGA res. 273 (III) of 11 May 1949, adopted by 37 votes in favour, 12 against (Afghanistan, Burma, Egypt, Ethiopia, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria and Yemen), with 9 abstentions (Brazil, Denmark, El Salvador, Greece, Sweden, Turkey, the UK).

[119] UNGA res. 194 (III) of 11 December 1948, adopted by 35 votes in favour, 15 against (Afghanistan, Byelorussian SSR, Cuba, Czechoslovakia, Egypt, Iran, Iraq, Lebanon, Pakistan, Poland, Saudi Arabia, Syria, Ukrainian SSR, the USSR, Yemen and Yugoslavia), with 8 abstentions (Bolivia, Burma,

4. Actuality of the UN Plan of Partition for Palestine

The Camp David Accords in 1980 challenged the General Assembly to reaffirm explicitly its 1947 resolution on the Plan of Partition.[120] The next recall was in 1986.[121] From that time onwards the reaffirmation of the Plan of Partition became more or less standard procedure.[122] It paved the way for the proclamation of the state of Palestine in 1988. On that occasion the General Assembly not only recalled the Partition Plan but also explicitly stated that the pertinent resolution "called for the establishment of an Arab State and a Jewish State in Palestine."[123] It thus upheld not only the legality but also the actuality of partition for the realisation of the right to self-determination of the Palestinian people within the territory of the intended Arab state, and this remains its position to this day. Its scope and content, therefore, are still relevant for the determination of the legitimacy of both the state of Israel and the right of Palestine to exist as a sovereign state.

It has been argued that the best view on sovereignty over the area of the proposed Arab state since the adoption of General Assembly resolution 181 (II) is "that it remained in abeyance and vested in the local inhabitants:"[124]

> The Partition Resolution, as a mere recommendation of the UN General Assembly, was not binding as such without the consent of the parties involved. However, in reviving sovereignty in the territory of Palestine

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Chile, Costa Rica, Guatemala, India, Iran and Mexico).

[120] UNGA res. 35/169 A of 15 December 1980, adopted by 98 votes in favour, 16 against (including Australia, EC members, Israel and the USA), with 32 abstentions. See Annexes 1 and 11 Map 4.

[121] UNGA res. 41/43 A of 2 December 1986, adopted by 121 votes in favour, 2 against (Israel and the USA), with 21 abstentions (including OECD member states).

[122] See lastly UNGA res. 47/64 of 11 December 1992, adopted by 114 votes in favour (including Greece and Spain) 3 against (Micronesia, Israel,, USA), with 40 abstentions (including the remaining Twelve, the Baltic states, Australia, Croatia, Canada, Japan Norway, the Russian Federation, Slovenia, and Sweden).

[123] UNGA res. 43/177 of 15 December 1988, adopted by 104 votes in favour,2 against (Israel and the USA), with 36 abstentions (including EC members and other OECD member states). See also annex 11 Map 4.

[124] Malanczuk (1990a), 147.

> it constituted a sufficient legal basis upon which the Jewish State and the Arab State could be established

Israel argued that the Arab rejection of the Partition resolution created a legal vacuum in respect of the area for the proposed Arab state —as well as of Jerusalem—in which Israel had a better title by virtue of, amongst other things, its right to self-defence against Jordan and Egypt.[125] Under current international law, however, it is disputed whether the exercise of the right to self-defence of a state against an aggressor state can result in the acquisition of territory.[126] Even when the Security Council had identified Egypt and Jordan as aggressors, the conquest of the Gaza Strip and the West Bank, including East-Jerusalem, would not have given a legal title to Israel. For these territories were never recognized by the UN as being a part of Egypt and Jordan.[127]

This and other opinions overlook the fact that a League of Nations Mandate established a legal relationship between the League and the people(s) in the mandated territory—i.e. the international status—, the League and the Mandatory Power—i.e. supervision and accountability —as well as the Mandatory Power and the people(s) in the mandated territory, i.e. administration and tutelage. The revocation of the South-West Africa Mandate by the General Assembly did not terminate the international status of the territory. Neither did the resignation of the UN to the decision of Great Britain on ending its mandate imply the termination of the international status of Palestine.

4.1. *Scope and Content*

The UNGA 'recommendation' on a Plan of Partition with Economic Union for Palestine is divided into four parts: future constitution and government (I), boundaries (II), City of Jerusalem (III) and capitulations (IV). The final part only invited states to renounce the right to

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[125] For an excellent summary of the Israel, Arab and Palestinian positions on the current legal situation, see Malanczuk (1990b), 190. See also Malanczuk (1990a), 174.

[126] Malanczuk (1990b), 193; but see Bernardez (1987), 502: "The territory of a State cannot at present be the object of acquisition from an illegal threat or use of force, and no territorial conquest resulting from such threat or use of force can be recognized as legal."

[127] Malanczuk (1990a), 170 and 171.

re-establish in the proposed Arab and Jewish states and the City of Jerusalem any privileges and immunities enjoyed by capitulation or usage in the Ottoman Empire. This invitation has become obsolete.[128] The part on boundaries may have been partly superseded by subsequent events, particularly SC resolution 242 (1967) and its acceptance by the Palestine National Council in 1988.[129] However, the remaining parts seem to have retained their validity for a lasting peaceful settlement of the conflicting territorial claims to this day.[130]

4.1.1. *Boundaries*

The Partition Plan had allotted to the proposed Arab state about 44 percent of the territory and roughly 56 percent to the proposed Jewish state. Since the 1949 armistice agreements Israel occupied another 24 percent.[131] Its admission to the UN did not intend to validate this extension for the pertinent resolution explicitly referred to resolution 181 (II) and 194 (II). These resolutions and SC resolutions 242 (1967) and 338 (1973) are at the centre of the Palestinian issue in the UN.[132] For they have become the clue to a just and lasting solution of the Israeli-Palestinian territorial dispute.

The United States stated in its argument for the admission of Israel to the UN in 1949:[133]

> One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. (...) The reason for the rule that one of the necessary attributes of a State is that it possess territory is that one cannot contemplate a State as a kind of disembodied spirit. (...) [T]here must be some portion of the earth's surface which its people inhabit and over which its

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[128] By treaties or usage European states used to exempt their nationals staying in 'uncivilized' states from the rule that they felt under the territorial jurisdiction of the latter states. The pertinent treaties were called capitulations. They were generally abolished after World War I. As for Turkey this abolishment was included in the 1923 Peace Treaty of Lausanne. Part Four of the Plan of Partition, therefore, lost its significance for the parties to this treaty anyhow. As for other states it became outdated as well. See Oppenheim/Lauterpacht (vol. I 1955), 682-686.

[129] Khalidi (1992), 89-90.

[130] See *infra* Annex 1.

[131] Nakleh (1991), 907; United Nations (1990), 139.

[132] *Infra* Annexes 1 to 3. See also United Nations (1990), 144.

[133] Crawford (1979), 37. See also Cohen (1990), 261-263.

> Government exercises authority. No one can deny that the State of Israel responds to this requirement (...) [i.e. the 56 percent of Palestine under the Partition Plan, PdW].

What is more, the 1949 armistice agreements explicitly affirmed the recognition of the principle that no military or political advantage should be gained under the truce ordered by the Security Council.[134] However, these agreements were concluded between states, i.e. Israel and its Arab neighbours. The Palestinian people was not a party since the proposed Arab state was not yet established. For that reason the significance of the armistice agreements for the definition of the boundaries between the Arab and Jewish states is somewhat questionable. Egypt, Jordan and Israel could only be seen as kinds of trustees in respect of the territory of the proposed Arab state which each of them had conquered.[135]

In the 1967 war with its Arab neighbours Israel succeeded in conquering the remaining 20 percent of the territory of the Palestine Mandate. On 22 November 1967 the Security Council adopted its resolution 242 in which it unanimously affirmed that the establishment of a just and lasting peace required the withdrawal of "Israel armed forces from territories occupied in the recent conflict" as well as termination of "all claims of belligerency".[136] Since then the UN usage started to refer to the West Bank, including East-Jerusalem, and the Gaza Strip as Occupied Territories.

The General Assembly endorsed SC resolution 242 (1967) in 1970 and urged its speedy implementation.[137] It rightly recognized respect

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[134] Egyptian-Israeli Armistice Agreement of 24 February 1949, Article IV and Hashemite Jordan Kingdom-Israel of 3 April 1949, Article II. See Lapidoth/Hirsch (1992), 75 and 88.

[135] Van de Craen (1990), 278.

[136] SC res. 242 of 22 November 1967. The French text speaks of "des territoires occupés". This formulation includes all the territories: the Sinai, the Golan Heights, the Gaza Strip and the West Bank. The English text is said to leave open whether compliance with the resolution requires that Israel should withdraw from *all* territories. However, resolution 242 emphasized the inadmissibility of territory gained by war. Neither Israel nor the SC was empowered to change the legal status of the Palestinian territories unilaterally. See also Gerson (1978), 76.

[137] UNGA res. 2628 (XXV) of 4 November 1970, adopted by 57 votes in favour, 16 against, with 39 abstentions. The explicit reference to the rights of the Palestinians was lacking in resolution 242. Its addition explained why the votes on the UNGA res. were so divided.

for the rights of the Palestinians as an indispensable element in the establishment of a just and lasting peace in the Middle East. Any other view would have reduced international concern with the right to self-determination of the Palestinian people to international supervision of Israeli occupation under the 1949 Fourth Geneva Convention.[138] The 1978 Camp David Agreements between Egypt, Israel and the United States accepted SC resolution 242 (1967) in all its parts as "the agreed basis for a peaceful settlement in the conflict between Israel and its neighbours."[139] In its 1988 Declaration of Independence the Palestine National Council stated:[140]

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

The accompanying political communiqué accepted SC resolutions 242 (1967) and 338 (1973) as the basis for a peaceful settlement.[141] It remains to be seen whether these developments imply an amendment to the boundaries of the Arab and Jewish states in the 1947 Plan of Partition. If so they validated, as it were, Israel's pre-1967 boundaries. From a legal point of view it may be argued that the UN is competent to change the boundaries of the Arab and Jewish states as defined in its Plan of Partition. In doing so, it should not make an exception to the principle that acquisition of territory by force is inadmissible. As for Palestine this principle was affirmed explicitly by both the General Assembly and the Security Council in the above mentioned resolutions.

Under current international law the principle applies to states only and not to peoples. The definition of aggression speaks of the use of armed force by a state against the sovereignty, territorial integrity or

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[138] *Supra* Chapter Two section 3.5.2.

[139] Jureidini/Mclaurin (1981), 106; Partsch (1990), 147.

[140] *ILM* 27 (1988), 1669. See also *infra* Annex 4.

[141] *Id.*, 1665. SC res. 338 (1973) urged the implementation of SC res. 242 (1967).

political independence of another state.[142] Moreover, it does not intend to prejudice in any way the right of peoples under colonial and racist regimes or other forms of alien domination to struggle for self-determination and independence.

The principle thus applied to the Jewish people after the establishment of the state of Israel, i.e. after its Declaration of Independence in May 1948 and anyhow after its admission to the UN in May 1949. Even before May 1948 or 1949 the Jewish and Palestinian peoples could not decide upon their territorial claims by the use of armed force. After all, the UN could not accept that arms would decide upon the ultimate partition of the Palestine Mandate between the Israeli and Palestinian peoples. That would have been contrary to the international status which distinguished the Israeli-Palestinian territorial conflict from other civil wars between peoples such as the ones in the former Soviet republics and in the former Yugoslavia.

To sum up, it may be said that legally speaking the boundaries of the Arab and Jewish states as defined in part II of the Plan of Partition still stare the UN in the face since it ought to take the international status of the Palestine Mandate seriously. This implies that no changes are acceptable which result from the use of armed force between the Arab and Jewish peoples. The proposed division of land in UNGA resolution 181 (II) on the basis of roughly 3 to 2 already favoured the Jewish people. The element of negotiation in international governance will take its toll from all parties involved.[143]

Palestine and the Arab states may pay their toll by recognizing Israel unconditionally within the area defined in the Plan of Partition. Israel may do so by recognizing Palestine unconditionally within the

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[142] UNGA res. 3314 (XXIX) of 14 December 1974, adopted without a vote.

[143] Van de Craen (1990), 278: "(...) there is as yet no possibility to vest sovereign title in the Arab Palestinians over Palestinian territory, since this would mean a second partition of Palestine which cannot this time be effected within the framework of the mandate system. Such a partition would require that Israel give up control over illegally seized Palestine territories. On the other hand, the Palestinians would have to agree to such a second partition, which must include some type of statehood, with or without a union or a federation." However, it is not the framework of the mandate which is essential to the competence of the UN but the continuing international status of the area of the proposed Arab state. Within the latter context the UN may still decide upon the partition.

area of the Occupied Territories and the UN by admitting Palestine immediately as a member. However, in doing so the UN should instruct both Israel and Palestine to negotiate on the final partition of territory on the basis of principles to be formulated at the request of both the General Assembly and the Security Council by the International Court of Justice within the context of UNGA resolutions 181 (II) and 194 (III) and SC resolutions 242 (1967) and 383 (1973).

Parts I and III contain important elements which are still legally valid and highly relevant for a lasting peaceful solution of the conflicting territorial claims in line with the above approach, i.e. the proposals for an international status for Jerusalem and for the economic union between this city and the two states.

4.1.2. *Status of Jerusalem*

Part III of the Plan of Partition introduced a special regime for the City of Jerusalem within specified boundaries. It laid down the elements for a statute for the city.[144] These elements include the pursuance of the following special objectives:

> a) To protect and preserve the unique spiritual and religious interests located in the city of the three great monotheistic faiths throughout the world, Christian, Jewish and Moslem; to this end to ensure that order and peace and especially religious peace, reign in Jerusalem;
> b) To foster co-operation among all the inhabitants of the city in their own interests as well as in order to encourage and support the peaceful development of the mutual relations between the two Palestinian peoples throughout the Holy Land; to promote the security, well-being and any constructive measures of development of the residents, having regard to the special circumstances and customs of the various peoples and communities.

The proposed statute laid down the principles concerning local autonomy, security measures, legislative organization, administration of justice, economic regime, freedom of transit and visit, the relations with the Arab and Jewish states, the official languages, citizenship, freedoms of the citizens and the holy places. On the basis of these principles the Trusteeship Council elaborated the statute.[145] It is superfluous to state that it never came into operation. Its fate was

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[144] See *infra* Annex 2.

[145] Tomeh (1981), 261-269.

closely related to that of the Partition plan as a whole. However, the UN has never given up on the need to establish a special regime for the City of Jerusalem. As for the Israeli government, the statute was not disputed when it applied for UN membership. It blamed the failure of that project on "the armed resistance of the Arab states and the refusal of organs of the United Nations to ratify or assume obligations necessary for the fulfilment of the statute."[146]

At the same time it argued that integration of the Jewish part of Jerusalem into the life of Israel has taken place

> as a natural historical process arising from the conditions of war, from the vacuum of authority created by the termination of the mandate, and from the refusal of the United Nations to assume any direct responsibilities.

Moreover it considered such an integration, "which is paralleled by a similar process in the Arab area" as not incompatible with the establishment of an international regime charged with full juridical status for the effective protection of Holy Places, no matter where situated.

The special regime was supposed to be limited in time.[147] This time-limit applied to the content of its provisions but not to its main substance: the establishment of a *corpus separatum.* The latter should be considered as an integral part of the Plan of Partition on the same footing as the establishment of an Arab and a Jewish state. Both Israel and Jordan rejected the special regime since they occupied part of the City as of 1948. Unlike Jordan Israel was willing to accept some kind of functional internationalisation, i.e. international supervision of the Holy Places only. The Arab states, however, then gave their support to the establishment of a *corpus separatum.* This enabled the General Assembly to reaffirm that part of its resolutions 181(II) and 194 (III) with greater support than before.[148]

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[146] See *infra* Annex 5.

[147] The statute for the City of Jerusalem should have remained in force for a period of ten years beginning not later than 1 October 1948. After the expiration of this period—October 1958 at the latest—the whole scheme should have been subject to a re-examination by the Trusteeship Council in the light of the experience acquired with its functioning and on the basis of a referendum among the citizens of the City on desired modifications to the regime. Citizens of the City should have become *ipso facto* all the residents unless they opted for citizenship of the Arab or Jewish state.

[148] See *infra* Annex 3.

After the Six Day War in June 1967 the General Assembly convened a session which called upon Israel to rescind and desist from measures to change the status of Jerusalem.[149] Israel's 1980 basic law on Jerusalem met strong international opposition and provoked an unusually sharp resolution of the Security Council. According to the basic law Jerusalem, "complete and united", is the capital of Israel.[150] The Security Council censured "in the strongest terms the enactment by Israel of the 'basic law' on Jerusalem and the refusal to comply with relevant Security Council resolutions."[151] It called upon "those States that have diplomatic Missions in Jerusalem to withdraw such Missions from the Holy City." Since then Israel is the only UN member state whose capital has not been recognized by the UN and its individual members.

With a negligible number of exceptions, all states, including the permanent members of the Security Council, have their embassies in Tel Aviv. This situation illustrates how sensitive the status of Jerusalem still is. Its solution is critical to a durable and lasting peace in the Middle East between Israel and its Arab neighbours, including Palestine. From that perspective part III of the Plan of Partition has retained entirely its relevance to our times.

Regrettably the United States has succeeded in playing down the issue in the Security Council time and again since 1980. In 1990 Israel considered the prospect of receiving a mission of the Secretary-General to be "totally unacceptable "because of the fact that[152]

> Jerusalem is not, in any part, "occupied territory", it is the sovereign capital of the State of Israel. Therefore, there is no room for any involvement on the part of the United Nations in any matter relating to Jerusalem, just as the United Nations does not intervene in events, some even more severe, that occur in other countries.

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[149] UNGA res. 2253 (ES-V) of 4 July 1967, adopted by 99 votes in favour, none against, with 20 abstentions (including Australia, Italy, Portugal, South Africa and the USA). See also UNGA res. 2254 (ES-V) of 14 July 1967 deploring measures taken by Israel to change the status of Jerusalem, adopted by 99 votes in favour, none against, with 18 abstentions.

[150] Lapidoth/Hirsch (1992), 255.

[151] See *infra* Annex 6.

[152] Lapidoth/Hirsch (1992), 374: Israel's response to SC res 672 of 12 October 1990.

The Security Council limited itself to deploring the refusal and to urging the Israeli government to reconsider its decision.[153] In 1993 the United States launched a proposal for a draft joint Israeli-Palestinian Declaration of Principles to guide the negotiations on interim self-government. With regard to Jerusalem the draft merely stated[154]

> (...) The two sides agree that all options for permanent status [of the Occupied territories, PdW] within the framework of the agreed basis of the negotiations—UN Security Council Resolutions 242 and 338—will remain open. Once negotiations on permanent status begin, each side can raise whatever issue it wants, including the question of Jerusalem.

4.1.3. *Economic Union*

The Plan of Partition intended to establish an economic union between the two states and the City of Jerusalem. The objectives of this union were[155]

(a) A customs union;
(b) A joint currency system providing for a single foreign exchange rate;
(c) Operation in the common interest on a non-discriminatory basis of railways; inter-State highways; postal, telephone and telegraphic services, and ports and airports involved in international trade and commerce;
(d) Joint economic development, especially in respect of irrigation, land reclamation and soil conservation;
(e) Access for both States and for the City of Jerusalem on a non-discriminatory basis to water and power facilities.

These objectives have not lost their strength. This holds particularly true for joint economic development and non-discriminatory access to water and power facilities. The latter issue is crucial to any lasting peaceful solution of the Israeli-Palestinian conflict and with that of the Arab-Israeli conflict at large.[156] The 1967 Palestinian Occupied Territories became Israeli colonies.[157] Although economic interaction between the Israelis and Palestinians has thus taken a confrontational

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[153] SC res. 673 of 24 October 1990.
[154] *Mideast Mirror*, of 5 July 1993, 12.
[155] See *infra* Annex 1.
[156] Nakleh (1991), 563-566; Demant (1992), 24-25.
[157] Mendelsohn (1989), 50-52; Nakleh (1991), 568.

course, numerous studies demonstrate that both peoples might gain considerably by replacing economic confrontation with economic co-operation.

It is said that the economic policy of the state of Palestine should have aimed multi-sided integration in the region from the very beginning.[158] Admittedly, this opinion dated from before 'Operation Desert Storm' against Iraq. Initially, the region, as well as the international community as a whole, all too eagerly pilloried Jordan and the Palestinian people—Palestine—as allies of Iraq. As for Jordan, Israel played a lenient role in the interest of the Arab-Israeli peace process.[159] In respect of the PLO, however, there was no such need to understand its alliance-from-distress, if any, with Iraq.[160] On the contrary, it provided a welcome argument to keep the PLO away from the negotiations. The Palestinian question became not so high on the list, even on the Arab diplomatic agenda.[161] 'Operation Desert Storm' thus obscured once more the obstacle to a just and lasting solution to the Israeli-Palestinian conflict, i.e. the intransigence which prevented both parties from alternately accepting the 1948 Plan of Partition with Economic Union. The UN, the European Union and the United States deserve some of the blame, too. For they based their proposals for a just and lasting peace too one-sidedly on the pertinent SC resolution 242 (1967). In doing so, they gave the legally incorrect impression that the 1947 UNGA resolution 181 (II)no longer mattered.

The Security Council narrowed down the principles of a just and lasting peace to Israel's withdrawal from the 1967 occupied territories and the recognition of Israel by the Arab states. It thus added fresh

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[158] See Sha'ath (1990), 134. According to the chairman of the PNC Political Committee, the state of Palestine may have a better opportunity of integrating its electricity with the Saudi Arabian electric grid which has extremely cheap rates—the Saudi electricity is available and has much surplus capacity. It might well integrate itself with the Nile water from Egypt to meet some of its excessive need for water. It might, of course, build transit routes to Jordan and Iraq and act again in the capacity of a transit relationship with gas and oil pipelines from Iraq and Saudi Arabia into the Gaza Strip. "But obviously, it will have to depend on a road network with Israel. It might depend on an airport with Israel, and for sometime even on a deep see water port with Israel until a new deep water port is created."

[159] Alpher (1992), 18-19.

[160] Shamir (1992), 26-27; Hindi (1992), 36.

[161] Aruri (1992), 22.; Mendelsohn (1992), 42.

fuel to the misconception that Israel's pre-1967 boundaries were accepted by the UN as final and that the proposed Arab state was brushed aside. In its Venice Declaration on the Middle East of 13 June 1980 the EC seemed to have reconciled itself to this situation in its statement that

> the time has come to promote the recognition and implementation of the two principles universally accepted by the international community: the right to existence and to security of all the States in the region, including Israel, and justice for all peoples, which implies the recognition of the legitimate rights of the Palestinian people.

The definition of the purpose of Israeli-Palestinian negotiations in the 1993 USA-launched draft joint Israeli-Palestinian Declaration of Principles monopolized the SC resolutions in plain terms:[162]

> The two sides concur that the agreement reached between them on permanent status [.e. of the 1967 Occupied Territories, PdW] will constitute the implementation of resolutions 242 and 338 in all their aspects.

The PLO's rejection of the draft did not refer to the 1947 Plan of Partition. It only mentioned as flaws in the draft the treatment of Jerusalem and the issue of territorial jurisdiction.[163] As for the latter, the draft stated that the issue of jurisdiction will exclusively be resolved as an outcome of the permanent status negotiations:

> Thus, the inclusion or exclusion of specific spheres of authority, geographic areas, or categories of persons within the jurisdiction of the interim self-government will not prejudice the positions or claims of either party and will not constitute a basis for asserting, supporting or denying any party's claim to territorial sovereignty in the permanent status negotiations.

The sole reminder of the Plan of Partition—and that only indirectly so—was the section on cooperation and coordination:

> The two sides will conclude agreements and establish agreed arrangements in specific areas of mutual and common concern. These areas of cooperation and coordination will take into account the mutual needs of both sides. The two sides will also establish a joint committee to consider and deal with matters of common concern and to resolve outstanding problems that may arise between them.

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[162] *Mideast Mirror* of 5 July 1993, 10-11.

[163] *Mideast Mirror* of 6 July 1993, 13

The UN Plan of Partition with Economic Union was a Solomon effort to accommodate the conflicting territorial claims by splitting the land but not the economy.

4.2. *Legitimacy of the Jewish State of Israel*

Academic as it may seem, the creation of Israel did not result from the use of force or the recognition by states.[164] Any other conclusion would exclude the well-being and development of the 'non-Jewish communities' being taken seriously as a 'sacred trust of civilization' as well. Such a severe violation of Article 22 of the Covenant of the League of Nations, to which the Palestine Mandate explicitly referred, would only add fuel to the Arab notion that the Palestine Mandate is null and void.

Unlike the Jewish Agency for Palestine, the Arab Higher Committee did not accept the Plan of Partition.[165] However, the acceptance by the Zionists was more a matter of tactics than of substance. After all, the UN Plan implied an approval of the creation of a Jewish state.[166] The other essential elements of the Partition Plan—the creation of an Arab state and of Jerusalem as a *corpus separatum*—were never sanctioned by Israel.[167] The Declaration of the Establishment of the State of Israel of 14 May 1948 spoke only of 'Eretz Israel'. The resolution of the General Assembly on the Partition Plan was only mentioned insofar as it called "for the establishment of a Jewish State in Eretz Israel" and as an extra support for the unilateral proclamation of Israel as a sovereign state:[168]

> Accordingly, we, members of the People's Council, representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement, are here assembled on the day of the termination of the British Mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the United Nations General Assembly resolution, hereby

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[164] But see (Crawford 1979), 247: "[In addition] there is the rather exceptional case of Israel, which was created by force without the consent of the previous administration, and on territory vacated by it."

[165] Statements of 29 September and 2 October 1947 in the ad hoc Committee on the Palestinian Question. See Lapidoth/Hirsch (1992), 54-58.

[166] Cohen (1986), 90.

[167] *Supra*, section 4.1.2.; Beith-Hallahmi (1992), 77.

[168] Lapidoth/Hirsch (1992), 62.

> declare the establishment of a Jewish state in Eretz-Israel, to be known as the State of Israel. (...)

As for the intended economic union with the Arab state the Declaration stated that

> [T]he State of Israel is prepared to cooperate with the agencies and representatives of the United Nations in implementing the resolution of the General Assembly of the 29th of November, 1947, and will take steps to bring about the economic union of the whole of Eretz-Israel.

Whether or not Israel seriously intended to adopt the Plan of Partition, is not decisive. What really counts is that under international law the Jewish people could not unilaterally proclaim Israel as a sovereign state. The international status of the territory of the Palestine Mandate prevented it from doing so. It also prevented the UN and individual member states from resigning to such a unilateral step.

At the time of the Ottoman Empire a small Jewish community lived in Palestine. However, its existence was never used as an argument for establishing a Jewish national home—state—in Palestine. On the contrary, Zionism claimed Palestine as a land without a people for a people without a land.[169] Living outside Palestine the Jewish people barely needed international recognition and cooperation to create a Jewish state in Palestine.[170] After all, Zionism lacked the military means to achieve its aim by force.[171]

Without the recognition by the League of Nations of the historic connection of the Jewish people with Palestine, Israel could not have come into being as a sovereign state. Unlike the founding of other states, the creation of Israel, therefore, was not a matter of accomplished facts but of international law. Its legitimacy resulted from UN

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[169] Goldberg/Rayner (1989), 167; Beith-Hallahmi (1992), 72.

[170] Goldberg/Rayner (1989), 169. Currently three million out of 14 million Jews live in Israel (*id.*,xii); Beit-Hallahmi (1992), 193. See also Said (1992), 28: "As Weizmann explains it, the conflict in Palestine is a struggle to wrest control of land from natives; but it is a struggle dignified by an *idea*, and the idea was everything." According to Said—at 29—Zionism owes its success to the fact that "it corresponds so completely with Western ideas about society and man."

[171] Admittedly, the Zionists succeeded in building up a considerable military force in Palestine. However, it could not have done so and employed it successfully without having gained a firm foothold in Palestine thanks to the Palestine Mandate.

decisions in respect of partition of territory and admittance to UN membership. As a matter of fact this procedure was wholly in line with Herzl's intention to create a Jewish national homeland in Palestine, "guaranteed by international law".[172]

4.3. *Right to Exist of the Arab State of Palestine*

The Arab states and—in the language of the Mandate—"the existing non-Jewish communities in Palestine" refused to resign themselves to the Plan of Partition.[173] This course of events prohibited the implementation of the Plan of Partition and with that the termination of the Palestine Mandate in conformity with the letter and spirit of the mandate system. After all, the termination clause formed part and parcel of the 'Plan of Partition with Economic Union'. For that reason its significance was closely related to the realisation of the plan as a whole. It is obvious that their rejection of partition has not deprived the non-Jewish communities of their territorial claim. Any opposite view violates the letter and spirit of the Palestine Mandate and the international status of the territory.

Nevertheless there is remarkably and regrettably little support for the opinion that the area of the proposed Arab state still has an international status. Israel acted in the peace process for quite some time as if the Palestinian people had forfeited its territorial claim, if it ever had any.[174] Admittedly, the 1968 Palestine National Charter allowed no room for mistake about the Palestinian view that the "partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time". However, that view was supported by the Arab neighbours with whom Israel would like to conclude peace. Unlike these Arab states—Egypt excepted—the PLO recognized Israel:[175]

> We, the Palestinians of the intifada, the promotion of the Palestinian nation who bear the yoke of occupation rather than exile and dispersion,

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[172] Goldberg/Rayner (1989), 166; Beit-Hallahmi (1992), 33, 58.

[173] See the statements of the Arab Higher Committee, Iraq, Pakistan, Saudi Arabia, Syria and Yemen in the UNGA (Lapidoth/Hirsch (1992), 57, 58-61).

[174] Malanczuk (1990), 190.

[175] Lapidoth/Hirsch (1992), 380: Palestinian memorandum of 12 March 1991 to the American Secretary of State, James Baker.

> on the strength of our commitment to this new vision [of justice, peace and stability, PdW] affirm the following: (...)
> We confirm our commitment to the Palestinian peace initiative and political programme as articulated in the 19th PNC of November 1988, and maintain our resolve to pursue a just political settlement of the Palestinian-Israeli conflict on that basis. Our objective remains to establish the independent Palestinian state on the national soil of Palestine, next to the state of Israel and within the framework of a two-state solution.

The UN never claimed that the Palestine Mandate still applied to the area of the intended Arab state in Palestine as for the international status of the territory. This is quite surprising. For the Permanent Mandates Commission of the League of Nations already considered the possibility of two independent mandates in Palestine in 1937.[176] Illustrative of the prevailing confusion of principle and method is the idea of the Palestine Mandate being *sui generis* leaving the UN in 1948 with no room for manoeuvre in maintaining any longer an international mandate status or any other supervisory status for Palestine.[177]

The Palestine Mandate might have differed from others in that it its main issue was the establishment of a national home for the Jewish people and the promotion of the inherent immigration of Jews from elsewhere. However, it never intended to ride roughshod over the then international law by prejudicing the civil and religious rights of the non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country. In other words, the Palestine mandate provided safeguards for the civil and political rights of other peoples in Palestine, including the right to self-determination.[178] Resolution 186 (S-2) of 14 May 1948 only relieved the

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[176] BMA (reprint 1991), 42.

[177] Van de Craen (1990), 277. His interpretation of the pertinent UNGA res. 186 (S-2) would imply the UNGA clearly acting *ultra vires* in the light of the ICJ opinion on the international status of mandated territories. See also Crawford (1979), 247 at note 2: "The creation of Israel from the Mandated territory of Palestine, with its mixture of elements of secession, occupation and international dispositive authority, was undoubtedly *sui generis*."

[178] The expression civil rights in the Palestine Mandate might be understood as civil and political rights. The expression "has in English a political rather than a legal flavour, being close to the rotunder 'civil liberties' (...) to be maintained not so much against other individuals as against the community as a whole, and particularly against the State as the focus of its power."

Palestine Commission from the further exercise of responsibilities under the 1947 Plan of Partition resolution.[179] The territory of the Arab state did not become a 'sovereign vacuum'.[180] The UN would have acted *ultra vires* when the resolution resulted in Palestine becoming a *terra derelicta.* Such an effect would not have been in line with the resolution on the admittance of Israel to UN membership.[181] The creation of Israel terminated the Palestine Mandate effectively both as a principle and as a method in respect of the territory of the Jewish state. The concept of a national home for the Jewish people thus was effectuated once and for all. As for the territory of the Arab state the UN could not terminate the international status. Such a decision would have been *ultra vires* and thus legally invalid.

It would be in the interest of a just and lasting settlement of the conflicting territorial claims when all parties would admit frankly that under international law the Palestinian people just like the Jewish

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See Fawcett (1987), 134. This explains why the "expressions'civil rights' *or* 'civil and political rights'" have been adopted to describe the contents of the C.P.R. Covenant (...)" (*id.*, at 135, emphasis added). But see Jeffries (1939), 181-182: "But in fact the Arabs were not assured these at all. The effect, and the aim was to withdraw for the Arabs (...) these very rights of independence for which they had contracted; to say nothing of their natural title to them." However, this is a political interpretation on the part of a journalist, not a legal interpretation by a court of law.

[179] UNGA Res. 186 (S-2) Part. III of 14 May 1948, adopted by 31 in favour, 7 against, with 16 abstentions. Part II empowered a UN Mediator in Palestine, amongst others, to promote a peaceful, adjustment of the future situation in Palestine. The efforts of the mediator resulted in the appointment of the UN Conciliation Commission for Palestine, which was instructed, amongst other things, to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions between them According to Hamzeh (1963), 148: the main defect of the UN Conciliation Commission for Palestine "has been its tendency to consider itself, rather purposely, a sole organ of conciliation, at a time when it was invested with other functions of a mandatory character."

[180] Malanczuk (1990a), 174.

[181] UNGA res. 273 (III) of 11 May 1949, admitting Israel to UN membership by 37 votes in favour, 12 against (Afghanistan, Burma, Egypt, Ethiopia, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Yemen), with 9 abstentions (Belgium, Brazil, Denmark, El Salvador, Greece, Siam, Sweden, Turkey, the UK). In this resolution the General Assembly noted the declaration of Israel that it "unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of the United Nations." In doing so the UNGA took the pain to recall the Plan of Partition.

people has every right freely to choose the mode of implementing its right to self-determination, albeit—unlike other peoples—under UN supervision only.[182] There is no single reason why the Palestinian people should have to agree on interim self-government arrangements in order to accommodate Israel. After all, Palestine was an A-mandate. The inherent—high—level of development applied certainly to the "non-Jewish communities" in Palestine as well.

[182] UNGA res. 2625 (XXV), Principle V section 4: "The establishment of a sovereign and independent state, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people."

CHAPTER FOUR

DYNAMICS OF SELF-DETERMINATION: THE CREATION OF PALESTINE

The UN record in the Palestinian Question has not been impressive. However, the UN's room for manoeuvre was strongly limited by the parties most directly concerned: the Arab states, Israel and the Palestinian people. Moreover, unlike Israel, the Arab states and the Palestinian people were not able to reap any profit from the cold war. The Soviet Union and the United States were on the same track with respect to the necessity of recognizing Israel as a state. At the time both superpowers were eager to include Israel in their sphere of influence as a strategic asset in the Middle East.[1] In 1948 they even tried to take the wind out of each other's sails by being the first to recognize Israel.[2] In doing so, they left the UN, as it were, with no other choice than to reduce the Palestine Question to a refugee matter only for quite some time to come.[3]

The Iraqi invasion of Kuwait and the joint Arab-Western Operation Desert Storm fundamentally changed the international context of the Arab/Palestinian-Israeli conflict. The UN now has a fair chance to exonerate itself. After all, the main challenge for the UN in the post cold war era is to attune the organizational principle of sovereign equality of all UN members to the right of all peoples to self-determination. This holds true the more so since people seem to become more interested in living in a civil society rather than in a state. Palestine appears to be no exception. The means by which to relate the civil society to the state is the market, but on the basis of standards for human development only (section 1).

The success of its interrelating with sovereignty is essential to the implementation of the right to self-determination. Palestine illustrated

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[1] Cohen (1990), 99 and 271

[2] *Id.*, 221.

[3] *Supra* Chapter Two section 4.

the need to promote and protect human rights not only in armed conflicts but also in situations of prolonged military occupation. This is the more so as an effective international supervision was lacking. The means by which to fill this gap are not only humanitarian assistance, enforcement actions and intervention, but also the establishment of a criminal court (section 2).

The interpretation and application of the 1993 Israeli-Palestinian Declaration of Principles should not encroach upon the statehood of the Palestinian people. The dynamics of self-determination are inherent to tensions between the internal and external dimensions of self-determination. Outside a colonial context the main responsibility for handling such tensions rests with the actors most directly involved: peoples and governments. In the case of Palestine, however, the international civil society ought to secure that the art of diplomacy in the bilateral negotiations between the Israeli government and the Palestinian people will not argue away the statehood of the latter (section 3). Finally, some lessons will be drawn from the Israeli-Palestinian conflict under the perspective of the progressive development of international law (section 4).

1. Interrelating Sovereignty and Self-determination

The Vienna Declaration resulted in a political breakthrough in that it gave the right of peoples to self-determination a legal validity independent from the 1966 International Covenants. This development did not appear out of the blue. The eighties had highlighted the position of the individual not only in the context of his or her state but also in that of the international legal community. Human collectivities other than states—whether it be a family, tribe, trade union, minority or people—are now recognized as claimants and duty-bearers of group rights themselves in order to enhance the protection and promotion of individual human rights in a democratic society.[4]

The sovereignty of states is no longer the sole characteristic of the present international order. It shares its still prominent place with the right to self-determination of peoples. The latter right is not only a

[4] Chowdhury/de Waart (1990), 11-18.

human right but also a principle of international law concerning friendly relations between states in accordance with the UN Charter. The pertinent Declaration includes the principle of sovereign equality of states as well. For that reason the self-determination of peoples and the sovereign equality of states should be interpreted and applied in each other's context.[5] This task will require that all organs of the UN will acquire the trust of all nations and peoples:[6]

> The principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of that instrument. Democracy at all levels is essential to attain peace for a new era of prosperity and justice.

An international civil society may provide the proper setting for the implementation of the right to development as a principle of public international law and of human rights law by measuring human development as a fundamental of social progress and development.

It is said that the civil society is a more auspicious—because it is cultural—site for further democratizing the contemporary society than either the state or the market.[7] Anyhow, there is an increasing awareness that the free market may be as large a threat to the civil society as the state, be it a market economy or a centrally planned economy.[8] The post-cold war era thus challenged reformers to bring civil society, state and market into line with each other in both poor and rich states.[9]

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[5] *Supra* Chapter Two section 3.2.

[6] Boutros-Ghali (1992a), 47. See also *supra* Chapter One section 5.2

[7] Cohen/Arato (1992), 417. But see Binder (1993), 1528: "Cohen and Arato confront and illuminate the complex linkages between the cultural domain of civil society and the political domain of the state. Here they seem gratified to point out that the cultural construction of politics permits its further democratization. But they leave the linkages between civil society and market in the shadows and evade the question of how much economic change a more democratic culture would require."

[8] Maddigan (1993), 315: "As the state and the market assume more power, they may threaten to eliminate altogether the ability of civil society to shape values, mores, and decisions." See also Boyle (1992), 1501: "The writ of equality does not run to the marketplace."

[9] Berman (1991), 908: "The production and distribution of goods, of services, and of capital must be left, to a large extent though not entirely, in the hands of the civil society, operating (again, to a large extent) on market principles, and not subjected to stifling controls by state agencies." Binder

1.1. *'Civil Society'*

As a result of self-determination in the colonial context the number of states increased substantially after World War II. This expansion evoked a discussion on the universality of international law. After all, "every legal system must reflect the principles of the social order that it seeks to regulate".[10] The main issue was whether a technical adaptation of traditional international law would suffice or whether a fundamental adaptation of the content of rules was required.[11] The rise of so many poor states challenged international law to change its shift from diplomatic relations between states to distribution of wealth among people and peoples.[12] It urged the UN to become a welfare organization.[13] The turn was marked by the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[14] For accoring to this resolution inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

The UN turned words into action by designating the sixties as the —first—UN Development Decade. The need for concerted action became the leitmotif of the UN programmes for international economic cooperation in the successive development decades.[15] During the sixties and seventies the overall growth in developing countries averaged out at 5.5 percent and per capita growth 3 per cent. In the eighties these percentages dropped to 3 and 1 respectively. The re-

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(1993), 1494 warns that the simultaneous sustenance of markets and civil society for some may depend upon an international context in which these institutions are not available to all.

[10] Friedmann (1964) 3; Röling (1982), 181.

[11] Verwey (1985), 28-29.

[12] Friedmann (1964), 66.

[13] Röling (1982), 216.

[14] UNGA res. 1514 (XV) of 14 December 1960, adopted by 98 votes in favour, none against, with 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, South-Africa, the UK, the USA). The Netherlands voted in favour in order to defend the right to self-determination of the Papuan people in Western New Guinea against Indonesia. Previous to that it was of the opinion that self-determination did not deserve protection under international law. See Kuyper/Kapteyn (1980), 187-188 and 213.

[15] UNGA res. 1710 (XVI) of 19 December 1961 (DD I); 2626 (XXV) of 24 October 1970 (DD II); 35/36 of 5 December 1980 (DD III) and 45/199 of 21 December 1990 (DD IV). All resolutions were adopted by consensus.

duction of global poverty forms the main challenge for the nineties.[16] The present Development Decade "should witness a significant improvement in the human conditions in developing countries and in a reduction in the gap between rich and poor countries."[17] In doing so it devotes itself to the creation of what might be called an international 'civic order'. This appears from the objective to[18]

> help provide an environment that supports the evolution everywhere of political systems based on consent and respect for human rights, as well as social and economic rights, and of systems of justice that protect all citizens.

Such an objective is reminiscent of a civil society in the context of an international law of human dignity. The civic order then differs from public order in that it establishes and maintains the features of the social process[19]

> by recourse to relatively mild sanctions and that afford the individual person a maximum of autonomy, creativity, and diversity in the making of private choices, with the least possible governmental or private coercion or interference.

The old concept of a 'contrat social' comes to mind.[20] However, unlike men, states are artificial persons which do not possess natural liberty and therefore do not feel "the necessity of entering a civil society to relieve the perils of isolated existence."[21] For states it remains a matter of discretion whether to form an international society:

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[16] UNGA res. 45/199, Annex paragraphs 2 and 7. See also *World Development Report 1990*, 5-6.

[17] UNGA res. 45/199, paragraph 13.

[18] UNGA res. 45/199, paragraph 13. The formulation improperly concedes to the—American—view that social and economic rights are not fully-fledged human rights.

[19] McDougal/Lasswell/Lung-chu Chen (1980) 801. Public order differs from civic order in that it establishes and maintains the challenged features of the social process "by effective power, authoritative or other, through the imposition of severe sanctions" (*id.*, 800).

[20] Falk (1987), 59: "To achieve a social contract on the state level based on some notion of consensual rule it will be simultaneously necessary to reach a social contract on a global level." It is striking that McDougal & Co. did not include Jean-Jacques Rousseau in their otherwise very voluminous main index annexed to their book on the basic policies of an international law of human dignity.

[21] Murphy (1982), 493.

> The positivists believed that the potential chaos of interstate relations could be subject to legal rules. Grotius sought to establish juridical relations among nations without the institution of a political authority. Subsequent visions of world order would prove to be variations on these themes.

Among these visions the concept of good governance belongs to the new off-shoots.[22] It includes democratic entitlement with its components of self-determination, freedom of expression and free and open elections within the normative framework of the International Bill of Human Rights and related international and regional human rights instruments. The three components "aim at achieving a coherent purpose: creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work."[23] Such a society is taking shape increasingly in global and regional organizations as well as in non-governmental organizations.

The late Schwarzenberger made a meaningful distinction between a society and a community.[24] In a society the law of power prevails, in a community the law of coordination. In a hybrid of the two forms the law of reciprocity sets the tune:[25]

> On the basis of overwhelming historical material, it appears appropriate —until the contrary is proved—to understand international relations primarily as society relations and present them as, in essence, systems of open power politics or power politics in disguise.

The *Encyclopedia of Public International Law* defines international legal community, albeit it in a procedural way, i.e. as the legal aspect of international society.[26] Illustrative is that every state still has the fundamental right to choose its own political, economic and social systems and to define their scope and content.[27] However, nazism and

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[22] *Supra* Chapter One section 5.

[23] Franck (1992), 79.

[24] Schwarzenberger (1976), 10-11.

[25] Schwarzenberger (1975), 339.

[26] Mosler (1984), 309.

[27] Case concerning Military and Paramilitary Activities in and Against Nicaragua, Judgment of 27 June 1986, ICJ Rep. 131 (1986). See Hohmann/de Waart (1987), 187.

apartheid are noticeable exceptions to this right. In addition states may commit themselves to democracy:[28]

> However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.

Recently it was said that international lawyers "can ill afford to ignore the growing wealth of political science data on the world they seek to regulate. The measurements may be imprecise, the theories crude, but the whole offers at least the hope of a positive science of world affairs."[29] In this connection one might take heart from the worldwide consensus that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[30]

The inherent dignity of the human being is the hard core of individual and collective human rights. In order to enhance the human dignity of all human beings in all corners of the world, the global society has given priority to laying down human rights in international instruments, leaving the enactment of human duties to national and regional levels.[31] The 1948 Universal Declaration of Human Rights only stated that everyone has duties to the community "in which the free and full development of his personality is possible."[32] The 1966 International Covenant on human rights, however,

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[28] ICJ Rep. 131 (1986).

[29] Slaughter Burley (1983), 239.

[30] UDHR, Preamble, paragraph 1. See Chowdhury/de Waart (1992), 7-10.

[31] The Ninth International Conference of American States, held in 1948 in Bogotá, adopted the American Declaration of the Rights and Duties of Man. The 1969 American Convention on Human Rights includes a chapter on individual responsibilities which consists of one article dealing with the relationship between duties and rights (Article 32). According to the 1981 African Charter on Human Rights and Peoples' Rights every individual has duties towards his family and society, the State and other legally recognized communities and to the international community (Article 27(1)). These duties are briefly elaborated in the next two articles.

[32] UDHR, Article 29(1).

did not include a single reference to human duties. As for civil and political rights one may appreciate the reluctance to enact human duties at the global level. After all, these rights are rooted in the need for individuals to be protected against the overwhelming power of states. As for economic, social and cultural rights, however, there is every reason to lay down corresponding duties in international instruments. The implementation of these rights depends on international cooperation and assistance.[33] In doing so states have to rely on the cooperation of their nationals.

The mutual responsibility of the individual and the community on the basis of human rights *and* duties underlies the concept of the collective human rights of peoples to development and to self-determination.[34] These rights give shape to everyone's duties to the community. However, opinions still differ widely as to the relationship between the individual human being and his or her society within the framework of human rights.

The American and French revolutions paved the way in the western hemisphere for civil and political rights as a shield to protect the liberty of the individual against his or her government (state).[35] This may explain why little attention has been paid to human duties. Socialism (communism) rejected the western emphasis on individual liberty as well.[36] Rights, duties and liberties were seen as means to establish relations between the state and the individual on the basis of mutual responsibility.[37] In Islamic states the human duties of individuals towards God and the state as God's obedient servant prevail over human rights.[38] Thus Islam holds a view which differs widely from the Western one.[39] Islam considered itself as being "man's only hope of salvation from social and economic exploita-

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[33] ICESCR, Article 2(1).

[34] Burgers (1990), 72-74.

[35] Vasak (1990), 302.

[36] Chkhikvadze (1990), 253-263.

[37] *Id.*, 258.

[38] Recommendation 33 of the 1980 Seminar on Human Rights in Islam, International Commission of Jurists (1982), 18.

[39] Arzt (1990), 205-207. See also Sinaceur (1990), 154-155; Brohi (1980), 60.

tion."[40] This approach implied no room for looking at civil and political rights and economic, social and cultural rights as totally different categories of human rights. Every Islamic state is called upon to reform its economic system in order to achieve social justice and guarantee human dignity.[41] It should be recalled that a society may be viewed as democratic when it adheres to the International Bill of Human Rights.[42] Islam does not exclude such an adherence. Opposition to human rights in Islamic societies is not so much a matter of principle as of popular perception of the double standard of the West regarding Muslim concerns, particularly in relation to Palestine. Muslims have the feeling that the West is not so much interested in universal human rights when these rights do not serve its geo-political and economic interests.[43]

History has shown that democratic states are essential for creating a social and international order for the free and full development of individual human beings. Civil society is rightly considered as an essential ingredient of democratic government. However, it rarely happened—if ever—that a civil society brought forth a democratic state. Experience shows that the opposite holds true. The creation of a state precedes the birth of a civil society. Palestinians claim that their state will be an exception in that the Palestinian civil society exists before the creation of the Palestinian state:[44]

> This is a distinguishing feature of Palestinian society in contrast to the situation prevailing in most Arab countries where the state dominates and engulfs society. As a result, a majority of Arab countries languish under some form of dictatorship, either of the totalitarian or authoritarian variety.

The Palestinian civil society blossomed in adversity. This may explain why Palestinian non-governmental organizations are concentrating all their attention on ways and means[45]

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[40] Recommendation 1, in International Commission of Jurists (1982), 13.

[41] Recommendation 6, *id.* 13-14.

[42] *Supra* Chapter Two section 3.1.

[43] An-Na'im (forthcoming, 1994).

[44] Giacaman (1993), 4.

[45] Press Release of 11 December 1993, published by the Land and Water Establishment for Studies & Legal Services at Jerusalem. See also *supra* Chapter Two section 3.4.3.

> to encourage the civil society meet its needs and demands in the transitional period, through activities and forms which take into consideration, the principles of involving the largest possible sectors and classes in the Palestinian society. (...) Many participants also focused on the need for the present Palestinian leadership, to follow an approach of consultation with qualified people in various fields, and to effectively employ the energies of the Palestinian society, away from the method of merely dictating decisions on the political level.

When discussing the role of the international community Palestinian non-governmental organizations indicated that the UN and individual states, particularly from the West, should give every support to the Palestinian people during the transitional period, to construct a system that safeguards the rights of the Palestinians.[46] These rights unambiguously include the right to self-determination, both internally and externally.

Governments tend to neglect the values of their civil societies in the UN. They urge the UN to take sides with states in conflicts between states and other communities of peoples.[47] Since the end of the cold war citizens show an increasing preference to associate themselves more with their civil society than with their state.[48] Governments should take that as a warning. States—like other human collectivities such as peoples—are brainchilds and as such artificial persons only. From an institutional point of view, the sovereignty of states and the self-determination of peoples should be seen as the two sides of democracy. Their interrelationship should become less a matter of substitution than of complementarity. After all, the notion of the state is the legal design of the relationship between people(s), territory and government.

1.2. *State*

In the post-colonial era governments became more interested in the permanent sovereignty over natural wealth and resources of states than in the right of peoples to dispose of *their* natural wealth and resources. This policy was far from conducive to the development of democracy. Both the socialist and the capitalist systems should not

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[46] *Id.* See also *supra*, Chapter One section 5 at note 88.

[47] Riddell-Dixon (1993), 9.

[48] See also Riddell-Dixon (1993), 3.

throw stones at each other in that respect. It appeared to be anything but natural that self-determination of peoples implied an improvement of the participation of people(s) in the market. Economic independence of poor states as a mode of self-determination of their peoples did not pay.

In Central and Eastern European states, as well as in the West, anxiety arose that civil society would be too insulated from both state and market.[49] By some whim of history, the—alleged—victory of the market economy over the command economy did release self-determination as a form of nineteenth century nationalism in the East block. The Baltic states expected to become lands of plenty after their withdrawal from the Soviet Union. Slovenia, Slovakia and others had the same dream. Disposal of natural resources is one thing, access to international markets another. Secession was not accompanied by the creation of people-friendly international markets for trade, finance and labour. The increased participation of peoples in international affairs by virtue of their right to self-determination seemed to deter foreign investors instead of challenging them. The tragic 'Second October Revolution' of 1993 in Russia and the outcome of the subsequent December elections were telling, albeit it not unique, in that respect.

The rise of the nation state in the eighteenth and nineteenth centuries was accompanied by the introduction of nationality with France as the trend-setter.[50] From both 'French connections'—the emancipation of the state as the only person before (public) international law and the inherent regulation concerning nationality—it followed naturally, as it were, that the concepts of public and private international law were brought to light by the French language.[51] The latter concept drew from the former's fundamental principle of sovereign equality of states the conclusion that the rules on conflicts of laws are part and parcel of national legal systems. In other words, each state should have the sovereign right to determine which national legal system will govern transborder private law relations and which per-

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[49] Binder (1993), 1519.

[50] Randelzhofer (1985), 416-417.

[51] Nguyen Quoc Dinh/Daillier/Pellet (1980), 23-24.

sons under its jurisdiction are involved.[52] The Permanent Court of International Justice confirmed this development in 1929.[53] It is evident that such a division of labour between national legal systems and international law did not result in effective protection for the main non-state actors in development relations with states. These actors are now not only foreign investors but also peoples in either home or host states.

The universal recognition of the right to self-determination should imply that national and international orders are increasingly thrown together. Local and national societies and communities should be able and willing to put their own house in order. The international order mainly concerns the regulation of transboundary effects of local and national orders. The distinction between international and domestic affairs is losing its value. Nevertheless, states cannot give up sovereignty. For that reason the UN Charter deals with the maintenance of *international* peace and security. When these are at stake the Security Council can take binding decisions.[54]

Outside the field of peace and security states still pin much faith in reciprocity. They insist on determining the significance of reciprocity themselves in each case. Institutionalization of mutual agreement imposing constraints on this freedom may not be assumed but should be laid down explicitly. This situation gave rise to the principle of 'substitution'. This principle implies that what can be left to lower organizational levels should indeed be carried out there. Its use depends on the financial and organizational capacities of the higher level to assume the powers and duties of lower levels temporarily or otherwise if the need arises.

The UN cannot as yet compete with its member states either organizationally or financially. Nothing in the Charter authorizes the world organization to intervene, in matters within the domestic jurisdiction of any state, member or not. Neither are members obliged to submit such matters to settlement under the Charter. The only exception is the application of enforcement measures of the Security Council with respect to threats to the peace, breaches of the peace

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[52] Drobnich (1987), 331.

[53] Serbian (Brazilian) Loans Cases, PCIJ Series A Nos. 20/21 41 (1929).

[54] This section is based on de Waart (forthcoming, 1994).

and acts of aggression. In that respect the maintenance of international peace and security is more of a truly international concern than the maintenance of human rights.

The Security Council is the only UN organ that may adopt binding decisions against members and even against non-member states. However, binding decisions may only regard the maintenance of international peace and security. In view of this competence the Security Council is so organized that it functions continuously. Nevertheless, it is not an executive committee. For it does not cover the whole field of the organization but only the maintenance of international peace and security for which it has primary responsibility. The Security Council has no specific powers with respect to the supervision and enforcement of human rights, although the implementation of human rights is increasingly becoming a legitimate international concern. It is just as well, for the lack of democratic control as regards the decision-making process within the Security Council would be hardly compatible with the principles of non-selectivity, impartiality and objectivity.[55] This holds particularly true for the permanent members' right of veto.

Financially speaking, the UN is even less of a threat to the sovereignty of states. Some twenty years ago a group of experts stated that the UN budget bore no relation to its vast tasks.[56] The regular budgets of the UN and its specialized agencies are too modest to enable any functionalist intervention by these organizations in member states.[57] Member states are still not willing to improve the financial situation of the UN system, as if they fear creating a competing world government.

The financial situation of the UN has become substantially worse since the end of the cold war due to the increasing number of peace-

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[55] UNGA res. 46/129 of 17 December 1991, adopted without a vote.

[56] *A New United Nations Structure for Global Economic Co-operation*, Doc E/AC.62/9 of 28 May 1975, 3: "(...) it is useful to note that the expenditures of the United Nations system during the past three decades have amounted to only 0.4 per cent of the gross national product of member States in the single year of 1974 and that the Current United Nations expenditure barely equals the sum spent on armaments by Members in only 36 hours."

[57] Harrod (1988), 131-132.

keeping operations.[58] The *Agenda for Peace* quite understandably said that the[59]

> contrast between the costs of the United Nations peace-keeping and the costs of the alternative, war -between the demands of the Organization and the means provided to meet them- would be farcical were the consequences not so damaging to global stability and to the credibility of the Organization.

Thus a chasm has developed between the tasks entrusted to the UN and the financial means provided to it. Even after full realization of proposals to increase the annual budget the financial basis of the UN will remain quite narrow.[60] It will not support an effective role of the organization in promoting good governance, let alone in an active prevention of bad governance. For the latter responsibility would require that the UN could adequately equip itself for replacing temporarily civil administration in a state where bad governance obviously became the real root of public emergency, that threatens the life of the nation concerned. An interesting and courageous initiative in that connection is post-conflict peace-building which begins with[61]

> practical measures to restore the civil society, reinvigorate its economy, repair the land and restore its productivity, repatriate and resettle displaced people and refugees; it also entails reducing the level of arms in society, as a component of the volatility that induces violence. These steps, taken in the context of comprehensive humanitarian efforts, are all essential to set the stage for sustainable social, political and economic development.

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[58] Thirteen peace-keeping operations have been established since 1987, i.e. as many as the number of such operations established between 1945 and 1987. The costs of these operations up to 1992 have amounted to some $8.3 billion. The unpaid arrears in the funding of these operations stand at over $800 million, which represents the debt owed by the Organization to the troop-contributing countries. See Boutros-Ghali (1992a), 28-29.

[59] *Id.*: "Peace-keeping operations approved at present are estimated to cost close to $3 billion in the current 12-month period, while patterns of payment are unacceptably slow. Against this, global defence expenditures at the end of the last decade approach $1 trillion a year or $2 million per minute." See also Boutros-Ghali (1993), 33-34.

[60] The proposed budget for the biennium 1994-1995 proposed only a modest growth of 1 percent in the level of resources. See Boutros-Ghali (1993), 34.

[61] Boutros-Ghali (1993), 157.

It is doubtful whether states are prepared to accept this concept because it necessarily implies a substantial limitation of the prohibition of the UN to intervene in matters which are essentially within the domestic jurisdiction of any state. It is telling that little attention has been given to post-conflict peace-building, despite the otherwise "voluminous and very useful analysis and commentary" on *An Agenda for Peace.*[62]

The creation of a Palestinian state in the 1967 Palestinian Occupied Territories may be seen as an important test-case for the authority of the UN in respect of protecting, creating or restoring civil society within states. It will also be in line with the concept of good governance. This holds true the more so, since Palestine intends to become a secular state:[63]

> The Palestinian people are the source of authority and shall exercise it during the Transitional Period through the legislative, executive, and judicial authorities in accordance with this law.

Such a state will be in the interest of not only the Palestinian people but of all the states in the region, including Israel, and of the international community as a whole.

1.3. *Market*

It might be argued that the main purport of the universal recognition of the right to self-determination is to promote and protect democracy.[64] The much maligned 1974 Charter of Economic Rights and Duties of States included equal rights and self-determination of peoples as well as respect for human rights and fundamental freedoms in the fundamentals of international economic relations.[65] In so doing, it separated self-determination as a principle of international law from self-determination as a human right. This separation resulted in poor states pushing self-determination more as a principle of international—economic—law than of human rights. It was harmful to social progress and development in that it interfered with the

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[62] *Id.*, 156.

[63] Draft Law concerning the National Authority in the Transitional Phase, Article 3. See Special Palestinian Report of 1 January 1994, 3.

[64] *Supra* Chapter Two section 3.4.3.

[65] CERDS, Chapter I(g) and (k).

interrelationship between sovereignty and self-determination by preventing a (more) proper balance between civil society, the market and the state. Such a balance could be fostered by codes of conduct for state and non-state actors on self-determination, permanent sovereignty over natural wealth and resources and foreign investments. The usefulness of such codes may be enhanced by the development of generally accepted standards regarding social progress and development.

Codes of conduct for peoples and other non-state actors, including foreign investors, are useful ways and means for bringing civil society, the state and the market into line with each other. They are also appropriate instruments for interrelating self-determination of peoples, sovereignty of states and the free market economy.[66] Their legally non-binding force accepts each principle as it is, but in each other's context. One might have expected that the West would have seized the very beginning of the East-West *détente* in order to arrange the 'new' international order through codes of conduct for state and non-state actors. The opposite was done. Particularly the United States preferred, so to say, to foster at the international level the freedom of the market without due regard to the interests of foreign civil societies and their states.

In the seventies codes of conduct were drafted to improve the relationship between foreign investors and their host states—i.e. former colonies—but not with the peoples concerned. These peoples were not supposed to play a role of their own since they had consumed their right to self-determination when their colonial countries became independent. Nonetheless the end of the cold war also made very clear how essential political stability is to economic flexibility. It appeared that peoples may easily become obstacles to their development, if they improperly apply the right to self-determination outside a colonial context.

Development is now increasingly recognized as a people-centred process with participation in the free market as its main vehicle. The Western block, particularly the United States, has seized this changing state of mind. It successfully urged, amongst others, the UN General Assembly to remove the draft Code of Conduct on Trans-

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[66] *Supra* Chapter Two section 3.3.4.

national Corporations from its 1991 and following agendas despite the decision in 1990 to arrange intensive consultations aimed at achieving an early agreement on a code of conduct on transnational corporations.[67] The following sessions of the General Assembly allowed it to pass. After all, the end of the cold war was supposed to have paved the way 'for a distinct trend towards the economics of international relations shaping its politics', i.e. one averse from ideological rivalry and confrontational approaches to global issues.[68]

Since the UN Code of Conduct on Transnational Corporations was seen as quite essential to the UNCTAD Code on Transfer of Technology, the latter code will most probably share the fate of the former. It says a great deal that in 1992 the General Assembly invited the Secretary-General of UNCTAD[69]

> to continue his consultations with Governments on the future course of action on an international code of conduct and to report to the General Assembly at its forty-eighth session on the outcome of these consultations.

Consultations did not take place in 1992 and 1993. For that reason the report to the forty-eighth session could only be procedural. The explanation is that nowadays the UN can only think of flexibility in such a way that foreign investors should not be restrained by codes of conduct. The 1992 Guidelines on the Treatment of Foreign Direct Investment do not concern the good conduct of foreign investors but of their host states. From a political point of view this opinion might be understandable, legally speaking this euphoria might become more an obstacle than a true relief due to the expanding role of the Security Council in the post-cold war era.

From the sixties to the eighties the western permanent members of the Security Council could not rule the United Nations system at large.[70] The end of the cold war changed this situation quite radically at the expense of the developing countries. It enabled the western permanent members of the Security Council also to leave their mark on international economic and social cooperation. According to the

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[67] UNGA res. 45/186 of 21 December 1990, adopted without a vote.
[68] Boutros-Ghali (1992b), 23.
[69] UNGA res. 47/182 of 22 December 1992, adopted without a vote.
[70] Harrod (1988), 130-144.

UN Charter, however, the responsibility for the discharge of the function of the UN should have remained vested in the General Assembly and, under its authority, the Economic and Social Council.[71] This responsibility includes that international economic and social co-operation shall be based on respect for the principle of equal rights and self-determination of peoples. The Palestinian people know that the Security Council is not the proper forum to apply this principle objectively.

1.4. *International Standards for Human Development*

Universally recognized international standards should enable the international community to assist states and peoples in interrelating sovereignty and self-determination in order to foster human development. The Declaration on the Right to Development underlined the responsibility of all human beings, individually and collectively, for development *and* the primary responsibility of states for creating national and international conditions favourable to the realization of the right to development. Obstacles to development result from failures to observe civil and political rights, as well as economic, social and cultural rights.[72]

The World Bank has taken the lead in measuring human development, giving high priority to the eradication of poverty. In its 1980 World Development report the World Bank focused on absolute poverty, i.e. "a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency."[73] Ten years later the World Bank devoted its annual World Development Report entirely to the topic of poverty, for no task "should command higher priority for the world's policymakers than that of reducing global poverty."[74] The 1990 World Development Report made an assessment of the characteristics of the poor in order to help governments to reduce poverty and to judge their econ-

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[71] UN Charter, Article 55.

[72] UNDRD, Articles 2(2), 3(1) and 6(3).

[73] World Bank (1980), 32. The report observed room for disagreement about the correct way to calculate and compare incomes and living standards at different times and different places: "To compound these difficulties the data are inadequate" (*id.* 33).

[74] World Bank (1990), 5.

omic policies affect poverty. The report supported the scope and content of the 1969 Declaration on Social Progress and Development. Its evidence suggested that rapid and politically sustainable progress on poverty has been achieved[75]

> by pursuing a strategy that has two equally important elements. The first element is to promote the productive use of the poor's most abundant asset—labor. It calls for policies that harness market incentives, social and political institutions, infrastructure, and technology to that end. The second is to provide basic social services to the poor. Primary health care, family planning, nutrition, and primary education are especially important.

The 1990 World Development Report allowed no mistake to be made about the prospects for the poor depending on policy choices by domestic governments and the international community. Such choices "can make a critical difference for hundreds of millions of the poor."[76]

The first *Human Development Report*, published by UN Development Programme in 1990, highlighted freedom as the most vital component of human development strategies:[77]

> People must be free to actively participate in economic and political life —setting developmental priorities, formulating policies, implementing projects and choosing the form of government to influence their cultural environment. Such freedom ensures that social goals do not become mechanical devices in the hands of paternalistic governments. If human development is the outer shell, freedom is its priceless pearl.

The 1991 *Human Development Report* might be considered as an encouraging illustration that an "objective, reliable human freedom index" could become an important tool in measuring human freedom in the context of assessing good governance. This index elicited strong protest from states because of its implied pillory effect. The General Assembly took into account[78]

> the divergent views expressed by delegations at the thirty-eighth session of the Governing Council, during the deliberations on the annual report of the Administrator of the United Nations Development Programme for

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[75] *Id.*, 3.
[76] *Id.*, 138.
[77] UNDP (1980), 84.
[78] UNGA res. 46/218 of 20 December 1991.

> 1990, pertaining to the *Human Development Report 1991*, in particular to the incorporation of a human freedom index therein.

The *Human Development Report 1992* once again underlined the inevitability of much more conceptual and methodological work in order to quantify freedom in an objective and reliable way. However, it did not leave it at that but suggested a new methodology[79]

> for the construction of a political freedom index (PFI) to assess the status of human rights according to generally accepted concepts and values. (..) The debate on the nature and measurement of human development will continue in future Reports.

The *Human Development Report 1993* explored the requirements for a new people-centred world order. Security should become less based on armaments of states than on human development of people(s). New models for sustainable development should recognize that poverty is one of the greatest threats to the environment. Strategies of economic liberalization and privatization enhanced the need to create people-friendly markets. Institutions of civil society should be strengthened to accommodate the rise of people's aspirations and the steady decline of the nation state.[80] International cooperation should take seriously the threat that global poverty begins "to travel, without a passport, in many unpleasant forms: drugs, diseases, terrorism, migration."[81] Situations of public emergency and prolonged military occupation are excrescences of civilization which obstruct human development from every point of view.

2. Protecting Human Rights in Armed Conflicts

The democratic character of a society imposes restrictions on the authority of governments to invoke derogation provisions in respect of both categories of human rights.[82] The protection of human rights in times of armed conflict and military occupation has been generally

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[79] UNDP (1992), 3.
[80] UNDP (1993), 2-7.
[81] *Id.*, 8
[82] *Supra* Chapter Two section 3.4.1.

recognized as an integral part of the law of armed conflicts.[83] The implementation of the law of human rights and the law of armed conflicts requires the development of a more effective international supervision on the basis of generally recognized minimum standards for protecting human rights in times of emergency.[84] Prolonged military occupations have shown to be particularly detrimental to the hard core of the right to self-determination of peoples under occupation, i.e. the right to freely determine their political status, and to freely pursue their economic, social and cultural development.

According to the UN Declaration on the Right to Development the full exercise and progressive enhancement of the right to development require the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels. Such measures should ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and a fair distribution of income under effective international control.[85] In so doing, it embroidered on the theme of the 1969 Declaration on Social Progress and Development, i.e. the responsibility of the UN members to pursue internal and external policies designed to promote social development throughout the world.[86] The latter Declaration listed the standards for social progress in the constitutions, conventions and resolutions of the specialized UN agencies in a certain order of priority according to their central importance to the satisfaction of basic needs.[87]

Prolonged military occupation should never result in undermining the capacity of the people under occupation to satisfy basic needs relating to individual consumption—food, clothing, shelter etc.—; public services—education, health care, water supplies, public transport etc.—; human rights, including participation in the process of decision-making; and productive employment as a means to an end.[88] After

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[83] Proclamation of Teheran, Article 10; Vienna Declaration, paragraph 29. See also Cohen (1985), 8 and *supra* Chapter Two section 3.5.

[84] Cohen (1985), 8-9; Chowdhury (1989), 22-24.

[85] UNDRD, Articles 7, 8, 9 and 10. See also Chapter Two section 3.3.

[86] *Supra* Chapter Two section 3.4.3.

[87] The DSPD consisted of three parts: Principles (Articles 1-9), Objectives (Articles 10-13), and Means and Methods (Articles 14-27).

[88] ILO (1976), 32-33; National Advisory Council for Development Cooperation (1984), 33-35.

all, the fulfilment of basic needs is essential to the prevention of absolute poverty.[89]

2.1. *Prolonged Military Occupation*

Among the contemporary examples of prolonged military occupation —Germany, Cyprus, Namibia, Western Sahara, Kampuchea—Israel's occupation of the West Bank and the Gaza Strip in 1967 is unique as regards both its duration and its genesis.[90] The latter cannot be detached from the much disputed claim of a people without a land to a territory *with* a people. The occupation forced the international community to face the facts of either Israeli annexation or insisting on the intended partition of Palestine into an Arab and a Jewish state.

It appeared that the Western states who had supported the creation of Israel refused to resign themselves to more or less overt annexation of the Gaza Strip and the West Bank, including East Jerusalem, through the creation of Israeli settlements.[91] However, they prevented the UN from taking effective action against it. The prolonged military occupation thus became detrimental to Israel's status as a true democracy.

Even if the international community would have resigned itself to the more or less overt annexation of the whole territory of the intended Arab state, the then resulting demographic situation would hardly

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[89] World Bank (1980), 32: "The focus is on *absolute* poverty—a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency."

[90] Roberts (1990a), 47-53.

[91] Roberts (1990a), 75-79. During the last ten years the UNGA has annually confirmed the right to self-determination with an average number of 120 votes in favour, 17 against, with 15 abstentions. With the exception of Turkey (voting in favour) and Austria, Australia, Greece, Ireland, New Zealand, Portugal and Spain (abstaining), the OECD member states voted against. However, the OECD voting pattern does not imply that the OECD member states opposed the right to self-determination of the Palestinian people as such. After the convening of the Peace Conference on the Middle East in Madrid on 30 October 1991, the UNGA, for instance, requested the Secretary-General to consider ways and means of improving the living conditions of the Palestinian people in the occupied Palestinian territory "and, pending the exercise of their right to self-determination, to plan for concerted economic and social actions by the United Nations system." See UNGA res. 46/162 of 19 December 1991, adopted by 135 votes in favour, 2 against (Israel, the USA), with 5 abstentions (Belarus, Canada, the Ivory Coast, Dominica, the USSR).

make it possible to combine the demands of a civil society with the intention of being a Jewish state. This problem was the more difficult because of the fact that religious factions could become a deciding factor in the fragile balance of the political field of influence in respect of land for peace with Israel's neighbouring states.[92]

The Israeli peace movement became another gripping aspect of the Israeli civil society.[93] It dedicated itself to the creation of conditions for assuring Palestinian self-determination in a viable political entity.[94] It had to face strong opposition in Israeli society and from the Palestinians.[95] The main issue was whether concessions could result in accepting a two-state solution. After all, such a solution would imply the abandonment once and for all of the irreconcilable

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[92] A burning question is whose land for whose peace? The successive Israeli governments were prepared to settle territorial issues with Israel's neighbouring states, not with its neighbouring people. This appears from the sterile discussion on the interpretation of SC res. 242 and the *de facto* or *de jure* applicability of the Fourth Geneva Convention. See *supra* Chapters Two section 3.5.2. and Three section 4.1.1. See also Kimmerling/Migdal (1993), XVI recalling Golda Meir's 'popular' perspective that there was no such thing as an independent Palestinian people.

[93] See the 1957 Founding Statement of Purpose of *New Outlook*: "It is the desire of the Editors of *New Outlook* that this publication serve as a medium for the clarification of problems concerning peace and cooperation among all the peoples of the Middle East. It will therefore be open to the expression of opinions, however diverse, that have this general aim in view. *New Outlook* will strive to reflect those aspirations and accomplishments in the economic, social and cultural fields that are common to all the peoples and countries of the area and could, given the elimination of frictions and animosities, flourish and produce an ever greater abundance of well-being and happiness." By some whim of history the publication was terminated for financial reasons in 1993 when peace and cooperation among all the peoples in the Middle East was in sight.

[94] Van Leeuwen (1933), 370.

[95] J. Kuttab, "A Palestinian View of the Israeli Peace Camp", *New Outlook* (March 1990), 31: "Intransigent government leaders use Peace Now to show the rest of the world how liberal Israel is, how democratic, how desperately the country wants peace, and how humane their army is. The peace movement strives at all costs to gain credibility with Israeli public opinion and to avoid becoming politically marginal.". Two years later D. Leon expressed in the same periodical the Israeli view under the heading "Israeli Doves—New Prospects": "When Allied fortunes in the Second World War began at last to change for the better, Winston Churchill declared that while this was not the beginning of the end, it was at least the end of the beginning. Something may be said of the Israeli peace camp today, which at long last has come of age—presenting the voter with a united peace list committed to change the contours of Israeli politics (*New Outlook* (March/April 1992), 5."

political concepts of Eretz Israel and a Palestinian state in the whole of Palestine—'Great Palestine'. The 1987 intifada resulted in a breakthrough in that it enabled Israeli and Palestinian non-governmental organizations to cooperate on the basis of a two-state solution.[96] Illustrative is the active involvement of the Arab Thought Forum in Jerusalem and the International Center for Peace in the Middle East in Tel Aviv in the *Dynamics of Self-determination* project which was launched in 1988 with the goal being to discuss cultural, economic, political and security aspects of a two-state solution as a contribution to a lasting peace in the Middle East.[97]

On both sides the opinion gained support that a political solution is urgently need. Human rights work appeared to be a very good meeting ground: "The basic notion behind international law is that human beings everywhere are responsible for protecting each other's rights."[98] Israel was not a party to the International Covenants on human rights until 3 October 1991. However, this ratification did not concern the Palestinians in the Gaza Strip and the West Bank, including East Jerusalem because of the fact that the UN has not recognized the sovereignty of Israel over the Occupied Territories. In other words, the protection of the human rights of the Palestinians still rests on the main instruments of the international law of occupation, the 1907 Hague Regulations and the 1949 Fourth Geneva Convention. The key question is whether and to what extent the international community may demand that an occupying Power abides by the Universal Declaration of Human Rights as a binding standard of international law.[99]

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[96] Mendelsohn (1989), 67-68, which was launched in 1988 by the University of Ghent, the Free University of Amsterdam, the University of Nijmegen and the International Dialogues Foundation.

[97] *Dynamics of Self-determination* became a joint project of ATF, ICPME and the University of Ghent, the Free University of Amsterdam, the Catholic University of Nijmegen and the International Dialogues Foundation in The Hague. The project included a series of seminars on political aspects, economic relations, security issues and mutual understanding of obstacles and prospects. The proceedings were published in 1988, 1991 and 1992. See Denters et al. (1988), 29 and 31 and Introduction, and (1991), 12; Bartels (1991), and Cogen (1992), 9; Demant (1992), 25 and 27.

[98] Golan (1992), 183.

[99] Salcedo (1985), 306. But see Jennings/Watts (1993), 1001-1005. It should be recalled that the UDHR does not contain the right of peoples to self-determination (*supra* Chapter Two sections 1.2. and 3.4.).

According to the General Assembly states should effectively realize the human rights and fundamental freedoms proclaimed in the Universal Declaration. The very fact that this realization remained unsatisfactory in some parts of the world gave the General Assembly in 1963— i.e. before the adoption of the International Covenants on human rights—the idea to designate 1968 as the international year for human rights.[100] In 1968 the General Assembly solemnly proclaimed that the Universal Declaration of Human Rights[101]

> states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community.

The very same year the General Assembly established a special committee to investigate Israeli practices affecting the human rights of the population of the 1967 Occupied Territories.[102] In so doing, the General Assembly called upon the Israeli government to respect and implement in the Occupied Territories not only the Geneva Conventions of 12 August 1949 but also the Universal Declaration of Human Rights.[103]

The UNGA resolutions on the annual reports of the 1968 special committee were guided by the principles and purposes of the UN Charter and by the principles and provisions of the Universal Declaration on Human Rights.[104] The Israeli occupation policy of the Gaza

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[100] UNGA res. 1961 (XVIII) of 12 December 1963, adopted unanimously.

[101] UNGA res. 2442 (XXIII) of 19 December 1968, adopted by 115 votes in favour, none against, with one abstention.

[102] UNGA res. 2443 (XXIII) of 19 December 1968 adopted by 60 votes in favour (including Japan and Spain), 22 against (including Australia, Israel and the USA), with 37 abstentions (including the other OECD members).

[103] See also SC res. 237 (1967) of 14 June 1967 which called upon the Israeli government to ensure the safety, welfare and security of the inhabitants of the Occupied Territories. The SC considered that essential and inalienable human rights should be respected even during the vicissitudes of war and that the obligations of the Geneva Conventions should be scrupulously applied by the parties involved in the conflict.

[104] See lastly UNGA res. 47/70A of 14 December 1992, adopted by 83 votes in favour, 5 against (Israel, Marshall Islands, Romania, the USA and Uruguay), with 55 abstentions (including the members of the European Union). It is striking that the annual resolutions were adopted with a relatively large number of abstentions and only a small number of negative votes. The abstentions did not reveal any uncertainty on the significance of the

Strip and the West Bank, including East Jerusalem, has not been in conformity with that Declaration.[105] Admittedly, prolonged military occupation may be considered to some extent as a situation that is comparable to a time of public emergency in which governments may take measures derogating from certain obligations under the International Bill of Human Rights.[106] However, such an occupation should never violate the obligation of the Occupying Power under the Fourth Geneva Convention. As for Israel, the international community unanimously held that this Convention is *de jure* applicable to the Occupied Territories[107] The importance of the UN resolutions on human rights in the 1967 Occupied Territories is that the Universal Declaration of Human Rights is now generally seen as reflecting the rights of humanity and public conscience, referred to in the famous Martens clause of the 1907 Hague Regulations which reads:[108]

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.

Universal Declaration of Human Rights in situations of prolonged military occupation. They were due to the fact that the text was considered to be too hostile to Israel and therefore harmful to the peace process. This was the prevailing view among Western states at the time.

[105] This holds true, for example, for the right to life, liberty and security of the person (Article 3); prohibition of torture, or cruel, inhuman or degrading punishment or treatment (Article 5); the right to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted by the constitution or by law (Article 8); the prohibition of arbitrary arrest, detention or exile (Article 9); the prohibition of arbitrary interference with privacy, family, home or correspondence, nor to attacks upon honour and reputation (article 12); the right to a nationality (Article 15); the prohibition of arbitrary deprivation of property (Article 17(2)); the right to freedom of opinion and expression (Article 19); the right to take part in the government of the country (Article 21); the right to equal pay for equal work and to just and favourable remuneration ensuring an existence worthy of human dignity (Article 23(2) and (3)).

[106] *Supra* Chapter Two section 3.4.

[107] *Supra* Chapter Two section 3.5.2.

[108] Strebel (1982), 252. See UNGA res. 2444 (XXIII) of 19 December 1968 on respect for human rights in armed conflicts, adopted unanimously. See also Kalshoven (1987), 137.

By adopting the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions the international community turned away from the horrors of World War II in disgust.[109] The Israeli prolonged military occupation clearly showed the necessity of granting human rights, civil and political rights as well as economic and social rights.[110] It also illustrated the inherent risk of a prolonged military occupation frustrating social progress and development in such a way that the right to development of peoples will suffer.[111] The World Bank made no bones about it:[112]

> Although the coverage of services, particularly in the major urban areas is fairly high, quality is poor. This applies to urban water supply, solid waste collection and disposal, and the physical condition of the road network. In addition, electricity supply for villages is insufficient. Public provision of social services is also inadequate. Educational facilities, libraries and laboratories are in poor condition, the curricula need modernization, and the qualifications of educational personnel in almost all positions need to be upgraded. And while the occupied territories devote an unusually large share of their output to the health sector, the health impact is below what could be expected from this expenditure.

Admittedly, important gains in private incomes and consumption were made over the past twenty years.[113] However, no Israeli government ever formulated a conscious policy regarding its economic relationship with the Occupied Territories.[114] The rise in income was mainly due to a "parasitic subordination" to the Israeli economy and to transfers of Palestinian migrant workers in the Gulf states and

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[109] Cohen (1985), 29.

[110] *Id*, 286-287. Cohen selected a number of civil, political as well as social and economic rights which should be granted in a prolonged military occupation: participation in local government; freedom of opinion, expression, movement, speech and assembly, religion and education; the right to return; to have trade unions and to strike; to an adequate standard of living, including adequate food, clothing and housing as well as the continuous improvement of living conditions.

[111] The 1969 DSPD was adopted by consensus. Israel abstained from voting in respect of the 1986 UNDRD. It should be recalled that the USA was the only state voting against.

[112] World Bank (1993), 46.

[113] *Id.* See also Awartani (1990), 17.

[114] Kleiman (1990), 33.

Israel.[115] Moreover, Israel's taxation policy resulted in a "perceived disparity" between personal income tax rates, as they apply in the Occupied Territories and Israel, unfair pre-payment requirements and high tax rates on land.[116] The tax revenue collected in the Occupied Territories apparently did not benefit the Palestinian infrastructure.

According to a 1982 analysis of the economic effects of the Israeli occupation on the economies of the occupied territories, subsidies on Israeli agricultural goods were detrimental to local agriculture; uninhibited flow of Israeli industrial goods hindered the development of the manufacturing industries in the West Bank and Gaza Strip; the high customs barriers meant that residents had to pay high prices for imports from overseas or to purchase them from a high-cost Israeli supplier; the West Bank and the Gaza Strip lost the opportunity to develop markets outside Israel.[117] From that analysis the conclusion was derived that, "it seems clear that within the context of belligerent occupation, Israel was within the boundaries set by custom, convention and recent occupation practice."[118]

International customary and treaty law are said to be silent with regard to the powers of an occupant over business, industry and agriculture.[119] The international community is of a different opinion, certainly with regard to the right of the Palestinian people to dispose

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[115] Awartani (1990), 17; Kleiman (1990), 40: "The number of persons employed in the West Bank and Gaza remained practically the same between 1969 and 1987, though the same time the labour force residing there grew by nearly two thirds. Virtually all the increment to the labour force of the territories in the last two decades found employment in Israel." See also The World Bank (1993), Annex I 14 and 18.

[116] UNDP (1993), 66. According to the Hague Convention respecting the Laws and Customs of War of 18 October 1907, Article 48, the occupant, who collects the taxes, dues and tolls, is "bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound." If the occupant levies other monetary contributions in the occupied territory, "this shall only be for the needs of the army or of the administration of the territory in question" (Article 49). Israel adhered to the Convention in 1962. It refused, however, to recognize its basic rule of *status quo ante* because there would be no question of a "legitimate Government". See Gerson (1978), 114-115, Shehadeh/Kuttab (1980), 8 and 121.

[117] Cohen (1985), 246-247.

[118] *Id.*, 249.

[119] Cohen (1985), 247.

of its wealth, natural resources and economic activities. All UN resolutions[120]

> reflect the underlying principle that an occupying power, even in a prolonged occupation, has particularly to avoid drastic changes in the economy of the occupied territory—especially those which are of an exploitative character, or which would result in binding the occupied territory permanently to the occupying power.

Israel changed the economy in the Occupied Territories in such a way that it served its own interests.[121] The Israeli occupation diminished the productive base of the economy in the Occupied Territories.[122] It is saying a lot that the West Bank constituted an important part of the Jordanian production bases when it was occupied by Israel in 1967.[123]

It is doubtful whether the Israeli economy really benefited from the occupation. If so, the moral price was high, for Israel's social progress and development incurred heavy damage from an ethical and political point of view. Admittedly, belligerent occupation is not peacetime democracy.[124] However, allowing it to degenerate into *apartheid* is quite a different matter.[125] Israel's occupation policy should not be considered as a paradigm for future prolonged military occupations, if ever.[126] Anyhow, since the beginning of the eighties there has been no question of an "occupation-with-a-smile".[127] The intifada exposed the risk of a policy of keeping inhabitants of occupied territories in depressing conditions.

2.2. *International Supervision*

Monitoring human rights is still very difficult in peace time, let alone in times of public emergency. In a situation of prolonged military

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[120] Roberts (1990a), 87.

[121] Cohen (1985), 23-24 and Roberts (1990a), 86-88 and *supra* Chapter Two section 3.5.2.

[122] Demant (1992), 18-19.

[123] The World Bank (1993), Annex I, 11.

[124] Cohen (1985), 289.

[125] Kretzmer (1992), 113.

[126] *Supra* Chapter Two section 3.5.2.

[127] Kimmerling/Migdal (1993), 254.

occupation such as the West Bank and the Gaza Strip it has proved to be frustrating business because there are very few victories. Moreover, these victories, if any, are very small-scale.[128] The intifada has exposed the necessity of effective international supervision. Such supervision requires a close co-operation between all UN organs, particularly the General Assembly and the Security Council. If the latter fail to do so, peoples will be the losers. As for the Palestinian people in the Occupied Territories the General Assembly could, up to now, do not more than to state that it deplored[129]

> the continued refusal by Israel to allow the Special Committee access to the occupied Palestinian territory, including Jerusalem, and other Arab territories occupied by Israel since 1967, and demands that Israel allow the Special Committee access to those territories.

Western states voted against or abstained in the Security Council and the General Assembly under the pretext that their support would endanger the peace process. In so doing they did the cause of human rights an ill service for they forced the Palestinians to take the law into their own hands. The pretended 'profitability' of violence perpetuated the conflict.[130] The intifada appeared to become more effective than international supervision on the implementation of human rights:[131]

> In Israel the mentality of "don't tell the goyim (non-Jews)" is still the prevailing one, even within the peace movement. This should change. What is right to say in Israel, in Hebrew, is right to say anywhere, in any foreign language. If we take the liberal and universal notion of human rights seriously, we should use the international community to help us preserve basic human rights of the Palestinians under occupation.

Effective international supervision of the implementation of human rights—particularly economic, social and cultural rights—in times of public emergency is not yet well developed. Unlike the fate of the inhabitants of the Occupied Territories, the horrors of the Kurds in Iraq, the Somalis and the Moslems in Bosnia-Herzegovina provoked

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[128] Golan (1992), 180

[129] See lastly UNGA res. 47/70A of 14 December 1992.

[130] Ben-Rafael (1987), 135.

[131] Golan (1992), 183 and *supra* note 98.

the question of the legality of humanitarian intervention under international law in the form of either humanitarian assistance or the use of armed force for humanitarian purposes.[132]

2.2.1. *Humanitarian assistance*

In 1991 the General Assembly adopted a set of guiding principles for humanitarian assistance.[133] According to these principles humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality. Moreover, the[134]

> sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context humanitarian assistance should be provided *with the consent of the affected country* and *in principle* on the basis of an appeal by the affected country.

The effectiveness of humanitarian assistance thus depends on the consent of the country and not of the state, i.e. the government. The United Nations Protection Force (UNPROFOR) knows only too well what this means:[135]

> The experience of UNPROFOR in Bosnia and Herzegovina and, to a lesser extent, in Croatia has raised serious questions about the wisdom of deploying blue helmets in situations where the parties are unable or unwilling to honour commitments they enter into and where the peacekeepers themselves become the targets of attack.

The UN was faced with a wall of resistance, even more so in situations of prolonged military occupation. Occupying Powers have not shown a great willingness to care much about UN resolutions on the human rights of peoples under occupation.

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[132] Doc. EN\DT\240\240295 of 11 January 1994, Working Document on the Right to Humanitarian Intervention by J.W. Bertens, rapporteur of the Committee on Foreign Affairs and Security of the European Parliament, 2. The unequal treatment of the Palestinian people may be explained by the fact that Western support for Israel was uncritical for quite some time. This position changed after the Israeli action in Lebanon. The American support, however, remained strong (Ben-Rafael (1987), 177, 179).

[133] UNGA res. 46/182, adopted without a vote.

[134] *Id.*, emphasis added.

[135] Boutros-Ghali (1993), 153. See also SC res. 743 (1992) of 8 January 1992 on the establishment of UNPROFOR and UNGA res. 46/233 of 19 March 1992 on the financing of UNPROFOR, adopted without a vote.

It goes without saying that the UN should always concentrate its main efforts on preventing conflicts and on upholding the values of human rights by effective peaceful means in situations where these efforts fail. The UN should develop criteria for admitting states to UN membership and for continuing the membership. It should make clear that if peoples in their struggle for self-determination committed acts of aggression and/or violated non-derogable human rights, the states, created by them, are not peaceloving and cannot become members of the UN. As for members who committed similar crimes towards peoples under their jurisdiction the UN should give substance to the provisions on the suspension from the exercise of the rights and privileges of UN membership and on expulsion from the organization.[136]

Disputes on self-determination appear to be difficult to prevent. The spiritual father of self-determination, President Wilson, used to discuss a Jewish Palestine without the knowledge of his Secretary of State, Lansing.[137] This was probably no coincidence for the latter lamented in his diary of the 1919 peace negotiations:[138]

> The more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands (...). The phrase is simply loaded with dynamite (...). What a calamity that the phrase was ever uttered! What misery it will cause!'

The explosive character of self-determination of peoples is an argument for embedding it in international law but not for denying the existence of the pertinent right.[139] The legal framework should enable the UN to make the governments of states and the leaders of peoples responsible for respecting non-derogable human rights during the armed conflicts on self-determination and the resulting—prolonged—military occupation, if any, under 'sanction' of the use of force or being summoned in an international criminal court.

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[136] UN Charter Articles 5 and 6.

[137] Manuel (1987), 168-169.

[138] Quoted in Verzijl (vol. I 1968), 321.

[139] *Supra* Chapter Two section 3.

2.2.2. *Use of force for humanitarian purposes*

In the case of a failing state or Occupying Power the international community should take over the responsibility for upholding non-derogable human rights by all parties involved in the armed conflict. The UN may derive its authority from the duty of any state party to the International Covenant on Civil and Political Rights, availing itself of the right of derogation to[140]

> immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

The protection of human rights may as yet only take the form of arrangements for monitoring or ensuring as are provided for in the pertinent international instruments.[141] The international system for the implementation of human rights does not include the use of armed force by the United Nations or individual states:[142]

> In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.

In their struggle for self-determination peoples should always comply at least with (1) the prohibition of aggression; (2) the non-derogable human rights; and (3) the right to development. Moreover, the implementation of the right to self-determination should be assessed as to its impact on the promotion and protection of individual human rights.

If peoples or other parties involved in an armed conflict massively violate non-derogable human rights, the UN may face the necessity of not only humanitarian assistance but also enforcement actions. The

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[140] ICCPR, Article 4(3).
[141] ICJ Rep. 134 (1986).
[142] ICJ Rep. 134-135.

General Assembly should draft guidelines for such actions by the Security Council or member states. It may do so under Article 10 of the UN Charter according to which the General Assembly may make recommendations to UN members, to the Security Council or to both on any matters within the scope of the UN Charter.

The guidelines should state that massive violation of the non-derogable human rights is equal to a threat of international peace and security. They should strictly limit the use of force to situations of massive violations of such rights. The Security Council should be authorized to take enforcement actions by air, sea, or landforces as may be necessary to stop the massive violations of the non-derogable human rights.[143] To that end the General Assembly should henceforth only elect non-permanent members of the Security Council who at the time of their nomination fully comply with the purposes of the UN. A failure on the part of the Security Council to take enforcement action for humanitarian purposes does not deprive the General Assembly of its rights or relieve it from its responsibilities under the Charter to maintain international peace and security. The same holds true for the UN members.[144] The General Assembly may recommend these members to proceed to humanitarian intervention. Finally, the guidelines should secure proportionality, impartiality and unselfishness. When a state or a people feels that it is a victim of unjustified accusations of massive violations of non-derogable human rights, it should have the opportunity to submit its case to international arbitration or judicial settlement.

In short, the guidelines should provide every guarantee that the use of force for humanitarian purposes will be only applied in a last resort. In order to give prevention the utmost effectiveness, the UN should establish a permanent international criminal court.

2.2.3. *International criminal court*

During and after the second Gulf War the Security Council did not establish an international criminal tribunal for the trial of Iraqi war criminals or violators of international humanitarian law. The UN members, cooperating with the Government of Kuwait, were perhaps

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[143] Charriot/Lecureuil (1993), 33-34.

[144] See UNGA res. 377 (V) of 3 November 1950.

aware of the difference with the outcome of World War II. Unlike Germany and Japan, Iraq was not occupied by the victorious powers. A more high-minded explanation might be that these powers did not want to tarnish the reputation of the UN. After all, the bombing policy in Operation Desert Storm cast serious doubt on the observance of international humanitarian law by its participants.[145] The then UN Secretary-General, Perez de Cuellar, showed his dissatisfaction in his statement that he considered himself head of an organization which is first of all a peaceful organization and secondly a humanitarian one. Moreover, he let it be known in no uncertain terms that there was no question of UN control over Operation Desert Storm.[146]

The UN was even less successful in getting a grip on the situation in Bosnia and Herzegovina. This failure may be partly explained by the fact that the UN is still an organization of sovereign states and not of peoples. It is said that the reference in Chapter VII of the Charter to 'parties concerned' regarded directly states and indirectly other collectivities such as peoples.[147] Nevertheless, the definition of aggression was clearly confined to states only. Like individuals, peoples were supposed to be under the national jurisdiction of states. The UN Charter intended to protect this jurisdiction by prohibiting the organization from interfering in the domestic affairs of states. Admittedly, the pertinent principle did not prejudice the application of enforcement actions under Chapter VII, but unlike states the UN was not allowed to recognize an insurgent people as a belligerent party. Only liberation movements in colonial territories were considered as an exception in that respect albeit not undisputedly. Otherwise the UN could merely offer mediation and humanitarian assistance if the 'parties concerned' so agreed.

In Bosnia and Herzegovina the UN implicitly recognized the contending parties as belligerents by organizing and participating in a permanent negotiating forum for seeking a political solution to all the

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[145] Panel on Humanitarian Law and the Iraq-Kuwait Crisis, Remarks by P. Rowe, Proceedings of the 1991 Joint Conference of the American Society of International Law and the Netherlands Association for International Law (1992), 170-173.

[146] Weston (1991), 533.

[147] Simon (1985), 676-680.

problems of the former Yugoslavia. The Security Council decided to establish an international criminal court for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.[148] It is doubtful whether this step will suit the purpose of enhancing international peace and security or at least international criminal justice. As for the latter the international administration of justice is not entrusted to the Security Council. The Council availed itself of its competence to establish such subsidiary organs as it deems necessary for the performance of *its* functions.[149] According to Secretary-General Boutros Ghali in this particular case,[150]

> the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

It is striking that the life span of a court of law is linked to the restoration and maintenance of international peace and security. The main argument for the subsidiary organ approach was "that all States would be under a binding obligation to take *whatever action* is required to carry out a decision taken as an enforcement measure under Chapter VII."[151] The decision of the Security Council is contestable. The UN Charter does not deal with the establishment of an international criminal court. Moreover, no organ may delegate such powers to subsidiary organs other than those it itself possesses. Only with the agreement of the state(s) concerned, may the UN sometimes create subsidiary organs which could more directly deal with individuals than the delegating organ itself.[152]

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[148] SC res. 808 (1993) of 22 February 1993.

[149] UN Charter, Article 29.

[150] S/25704 of 3 May 1993, 8.

[151] *Id.*, 7, emphasis added.

[152] Schermers (1980), 204, 206.

One may appreciate that the situation in the former Yugoslavia caused the UN great anxiety:[153]

> If basic international requirements are not respected, human interactions quickly revert to lawlessness and barbarism. Daily, we witness the compelling tragedy of this principle. The cost is counted in lives and in the loss of a measure of our own dignity.

However, an ad hoc solution will not suffice, certainly not when its legal basis is so poor that it may cause a set-back to efforts to establish a permanent criminal court. Such a court requires the conclusion of a multilateral treaty or the amendment of an existing one, preferably the UN Charter, including the Statute of the International Court of Justice.[154] The latter step would require adoption by a two-thirds majority of the members of the General Assembly and ratification by two-thirds of the UN members, including all the members of the Security Council.[155] Only a permanent international criminal court may ensure "that international cooperation is a genuine commitment, and not merely a political slogan".[156]

3. The Creation of Palestine

Xenophobia appears to be an almost ineradicable evil. It surfaces particularly in times of massive migration for political or economic reasons. States then try to turn the tide by making their immigration policy even more restrictive than usual. Of old Europe knows only this too well. Its longtime xenophobia even urged the Jewish people during the last century to seek safety elsewhere. At present Europe is creative in interpreting the international instruments on refugees as restrictively as possible. It strongly opposes any efforts to include migration in the otherwise highly respected principle of the freedom of the market. Admittedly, labour is not a commodity.[157] However,

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[153] Address of Secretary-General Boutros-Ghali of 19 January 1994 at The Hague, *Staatscourant* of 20 January 1994, 8.

[154] Ferencz (1981), 100.

[155] UN Charter, Article 107 and ICJ Statute, Article 69.

[156] Boutros-Ghali, loc.cit. note 153.

[157] Declaration concerning the Aims and Purposes of the ILO of 10 May 1944, Principle I(a).

this principle intends to prohibit slavery and forced labour but not to withhold from people the human right to work. A free labour market could be helpful in realizing that human right for everybody everywhere.[160] It may also result in closer ties between civil societies and their states in the interest of social progress and development.[161]

The opposition of the "existing non-Jewish communities in Palestine" to the facilitation of Jewish immigration under the Mandate for Palestine fitted the then and present international migration order. This hold true even more so for the Palestinian opposition to Israeli settlements in the Occupied Territories. Mindful of their own restrictive immigration policy, Europe and the United States should have shown more understanding for the Arab states and the Palestinian people in that respect. Taking into account their support for the Jewish migration to the mandated territory of Palestine and the resulting creation of Israel, Europe and the United States should now make every effort to help the Palestinian people to realize its aspirations regarding the 1967 occupied Palestinian territory.

It would be of no UN concern to anticipate the substitution of the traditional sovereign state by the civil society in the case of the Palestinians. Of all people(s) this people has suffered most from the transformation of an intended civil society—'Jewish national home' in Palestine—into the legitimate Jewish state of Israel.[162] The UN should support now unambiguously the Israelis and Palestinians who devote themselves jointly to reconciliation from the perspective of a mutual understanding of each other's national aspirations in order to substitute the zero-sum politics of war for the peaceful two-state

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[160] Fischer et al. (1991), 154: "Opposition to migration therefore amounts to opposition to free trade, and in any case is inconsistent with a no-aid argument if a policy of free trade is based on the logic of compensation for migration barriers. In that sense the welfare gains from free migration is relevant in that it gives quantitative expression to the compensation to be paid to remain credible when advocating free trade but banning migration."

[161] *Id.*:"In a scenario in which nearly 300 million people were relocated over a 15-year period the global GDP at 1970 world prices at the end of that period (the year 2000) increased by more than 20%. This amounts to US $1000 billion." By way of comparison: the impact of abolishing trade barriers in respect of goods and services is only one tenth of this amount. See Tims (1990), 20.

[162] *Supra* Chapter Three section 4.2.

solution under international law.[163] The key question is whether the 1993 Declaration of Principles on Interim Self-government Arrangements between Israel and the Palestine Liberation Organization provide a firm basis for that.

3.1. *Interim Self-government: Opening or Final Stage?*

Israel interpreted the Camp David Agreements as if it excluded a two-state solution once and for all.[164] Palestinians and Arab states rejected Camp David because they would only validate "permanent Israeli control over the territories under the fig-leaf of a theoretical Palestinian autonomy."[165] The Declaration of Principles does not make explicit that it really marks the beginning of establishing the state of Palestine. Without a different frankly and freely expressed choice for the Palestinian people, the UN should resign itself to nothing less than the creation of the Arab state of Palestine as the peaceful neighbour of Israel. Under international law it is not up to Israel to determine that only a certain level of Palestinian autonomy is the attainable maximum of the negotiations on permanent status.

3.1.1. *From Camp David to Madrid*

The originator of Camp David, President Carter, emphasized that there was no question of a final goal but of a really transitional period.[166] After all, he had accepted the 1975 report of the Brookings Institution at Washington, *Towards Peace in the Middle East*, according to which[167]

> There should be provision for Palestinian self-determination, subject to Palestinian acceptance of the sovereignty and integrity of Israel within

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[163] Illustrative is the publishing of the first *Palestine-Israel Journal of Politics, Economics and Culture*. The founders are Ziad abu Zayyad, the former publisher of the Palestinian weekly in Hebrew *Gesher*, and Victor Cygelman, former deputy-editor of the former Israeli peace journal *New Outlook*. The topic of the first issue—Winter 1994—was "Peace Economics."

[164] Van Leeuwen (1993), 247-248. See also *supra* Chapter Two section 3.5.2. and Chapter Three sections 3.2.1. and 4.1.1. as well as *infra* Annex 8.

[165] Kimmerling/Migdal (1993), 246.

[166] Van Leeuwen (1993), 296.

[167] Jureidini/McLaurin (1981), 98; van Leeuwen (1993), 52-54.

> agreed boundaries. This might take the form of either an independent Palestine state accepting the obligations and commitments of the peace agreements or of a Palestine entity voluntarily federated with Jordan but exercising extensive political autonomy.

President Reagan decided to follow the Camp David framework for peace in the Middle East. However, in his presidential statement of 1 September 1982 on *United States Policy for the Middle East* he did not mince words:[166]

> Beyond the transition period [of Camp David, PdW], as we look to the future of the West Bank and Gaza, it is clear to me that peace cannot be achieved by the formation of an independent Palestinian state in those territories, nor is it achievable on the basis of Israeli sovereignty or permanent control over the West Bank and Gaza. So the United States will not support the establishment of an independent Palestinian state in the West Bank and Gaza, and we will not support annexation or permanent control by Israel. (...) It is the firm view of the United Sates that self-government by the Palestinians of the West Bank and Gaza in association with Jordan offers the best chance for a durable, just and lasting peace.

The 12th Summit Conference of Arab Heads of State at Fez rejected this view by return post, as it were, by agreeing in its Final Declaration of 9 September 1982, a set of principles, providing for the establishment of an independent Palestinian state in the 1967 Occupied Territories, including the Arab Al Qods (Jerusalem) with the latter as its capital. To that end the West Bank and the Gaza Strip should be placed under UN control, albeit only "for a transitory period non exceeding a few months."[167]

The 1991 Bush-Gorbachev peace initiative also supported the Camp David concept of interim self-government arrangements for a period of five years. The permanent status negotiations, and the negotiations between Israel and the Arab states, would take place on the basis of resolutions 242 and 338.[168] These resolutions, however, deal with the future of the 1967 Occupied Territories only in terms of "withdrawal of Israel armed forces from territories [*des territoires oc-*

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[166] *ILM* 21 (1982), 1201.

[167] *Id*, 1145.

[168] Lapidoth/Hirsch (1992), 385.

cupés] in the recent conflict."[169] In other words, they do not deal with the Palestinian people's right to self-determination.[170]

The Madrid format excluded the possibilities of imposing solutions or vetoing agreements. The very basis was the SC resolution 242 (1967) concept of bilateral peace negotiations between the states in the area, leaving for the representatives of the Palestinian people no other access to the conference tables than as members of a Jordanian-Palestinian delegation.The negotiations did not bring Palestinian statehood any closer:[171]

> It is thus not surprising that, among supporters of the negotiations, increasing numbers have been calling for a rectification of the inequitable rules set in Madrid.

The interim self-government strategy of Camp David was bound to fail due to its ambiguity. It did not clearly touch upon the heart of the matter: a two-state solution. If such a solution would be the final goal of Camp David and Madrid, a trial period of interim self-government could only harm the peace process. The sooner the Palestinian state could have entered the club of states in the area, the better it would have been for the success of the 242-strategy of securing the legitimacy of Israel in the region through bilateral peace treaties with its Arab neighbours, including Palestine.

Legally speaking, the implementation of the Palestinian right to self-determination did not require a trial period at all. Interim self-government looks like a means by which to keep the Palestinian people dangling under the pretext of testing its ability to engage in peaceful coexistence and to maintain control over its population.[172] It may also be something of a gamble that Israel's peace treaties with

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[169] *Infra* Annex 4. See Neff (1994), 76: "Les présidents, au moins en ce qui concern Reagan and Bush, ont attesté à haute voie que le retrait doit s'effectuer á partir des «trois fronts» et que la paix doit intervenir en échanges de terres. Mais eux-mêmes ou leurs fonctionnaires répondent par le silence lorsqu'on les presse de préciser si les Etats-Unis estimes toujours que le retrait doit inclure des modifications mineurs et réciproques." Legally speaking, it is not the United States but the General Assembly which should decide on the question of boundaries. See also *supra* Chapter Three section 4.1.1.

[170] Cassese (1993), 568.

[171] Mansour (1993), 30, 31. See also *supra* Chapter Three section 3.2.1.

[172] IPCRI (1993), 5 and 14.

existing Arab states in the region will render the two-state solution superfluous. It is saying a lot that in the early part of 1993 the president of the Jewish Peace Lobby, Segal, recommended the Palestinians not to establish an interim transitional government to run the occupation: "If the occupation is to continue, there will be no pretence."[173]

The legal and political significance of the 1993 Declaration of Principles on Interim Self-Government Arrangements lies not in the interim self-government but in the unambiguous recognition of each other by Israel and the Palestine Liberation Organization. For that reason PLO Chairman Arafat rightly stated that the signing of the Declaration marked a new era in the history of the Middle East. The UN should ensure that a new age really has begun. It would have been no good if President Clinton had accepted the Israeli position that the 1967 conquered Arab territories are not occupied but disputed.[174]

From a legal point of view this fine difference would amount to accepting the Israeli view that it is not an Occupying Power but a party in a dispute with the Palestinian people regarding sovereignty over the West Bank, including East-Jerusalem, and the Gaza Strip. In other words, the real issue would not be the termination of occupation but settling a claim for secession. The UN should leave no room for error about the legal framework for the interpretation and application of the Israeli-Palestinian Declaration of Principles, i.e. the right to self-determination of the Palestinian people and the inherent statehood of Palestine in the 1967 Occupied territories.

3.1.2. *Declaration of Principles*

The aim of the Israeli-Palestinian negotiations within the context of the current Middle East peace process is,[175]

> among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council, (the "Council") for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period

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[173] Segal (1993), 25.

[174] Neff (1994), 67-68 and 77.

[175] *Infra* Annex 10 Article I.

> not exceeding five years, leading to a permanent settlement based on Resolutions 242 and 338.
> It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

The Declaration does not refer to the right to self-determination or any other human rights. It is evident, however, that it should be interpreted and applied within the international legal context of Palestine. This implies that it is not at the mere discretion of the Israeli government to determine from which part of the occupied Palestinian territory it will finally withdraw and what the permanent status will be at the end of the transitional period of five years.[176]

In his letter to Israeli Prime Minister Rabin of 9 September 1993 PLO Chairman Arafat declared:[177]

> In view of the promise of a new era and the signing of the Declaration of Principles and based on Palestinian acceptance of Security Council Resolutions 242 and 338, the PLO affirms that the articles of the Palestinian Covenant which deny Israel's right to exist [see *infra* Annex 5, PdW], and the provisions of the Covenant which are inconsistent with the commitments of this letter are now inoperative and no longer valid. Consequently, the PLO undertakes to submit to the Palestinian National Council for formal approval the necessary changes with regard to the Palestinian Covenant.

In his response of the same day Prime Minister Rabin confirmed that,[178]

> in light of the PLO commitments included in your letter, the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people and commence negotiations with the PLO within the Middle East peace process.

This exchange of letters removed, as far as Israel was concerned, the final political obstacles to the adoption of the Declaration of Prin-

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[176] *Id.*, Article V(1). The transitional period was meant to begin upon withdrawal from the Gaza Strip and Jericho area. The withdrawal was scheduled for 13 December 1993, but postponement is the order of the day.

[177] *Palestine-Israel Journal of Politics, Economics and Culture*, 1 (1994), 24. See also Benvenisti (1993), 542.

[178] *Palestine-Israel Journal of Politics, Economics and Culture*, 1 (1994), 25.

ciples on Interim Self-Government Arrangements on 13 September 1993.[179] It is not obvious what the Palestinian side will get in return from the Israeli side in respect of the conflicting territorial claims. The exchange of letters and the Declaration only make it quite clear that there are no longer any conflicting claims with regard to the territory of the Jewish state provided for in the Plan of Partition. It may also be argued that the Declaration settled the conflict with regard to the pre-1967 Israeli territory as a whole. However, it is still uncertain whether Israel has given up its claim to the 1967 occupied Palestinian territory.[180]

Raja Shehadeh, who served the Palestinian delegation at the Israeli/Palestinian negotiations in Washington from November 1991 to September 1992, rightly stated that the failure of a final negotiated settlement based on respect of international law would be a failure of the international community:[181]

> The question is whether law shall govern relations between nations or whether it is power that will ultimately be the sole arbiter. If the interim arrangements, based as they are on the consolidation of the gains achieved by Israel in violation of the norms and prohibitions of international law, shall shape the permanent settlement and determine the division of the land between the occupied and the citizens of the occupier, the success of the Israeli occupier in avoiding the application of international law shall be confirmed.

Shehadeh certainly has a point, that the Declaration as a legal document is far from perfect. This might not be a serious flaw if the parties negotiated it from a mutually sincere peace policy while not trying to outwit each other. In the latter case, the Palestinian party may have to pay for the fact that during the secret Stockholm meetings its participants apparently did not avail themselves of legal advice to the same extent as their Israeli colleagues. From a legal

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[179] See *infra* Annex 10. The Knesset approved the agreement on 23 September 1993 by 61 votes in favour, 50 against, with 8 abstentions. See *Revue d'études Palestiniennes* Nr 50 (1994), 97-107. The Palestinian National Council did the same on 10 October 1993. In accordance with its Article XVII the agreement entered into force on 13 October 1993.

[180] This holds particularly true for East Jerusalem. It is said that in the English text the definite article 'the' was deliberately left out in order not to oblige Israel to withdraw from all the 1967 occupied territories, for instance, from East Jerusalem. See Rostow (1975), 283 - 284. See also *infra* Annex 4.

[181] Shehadeh (1993), 561.

point of view, the Declaration gives more leeway to the favourite topics of the Israelis than to those of the Palestinians. This holds particularly true for the provision that the Israeli and Palestinian delegations will negotiate an agreement for the interim period. It enables the Israeli party to have more than one finger in the pie:[182]

> The Interim Agreement shall specify, among other things, the structure of the Council, the number of its members, and the transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Council. The Interim Agreement shall also specify the Council's executive authority, legislative authority in accordance with Article IX below [*jointly* review of laws and military orders presently in force in remaining spheres, PdW], and the independent Palestinian judicial organs.

Moreover, Israel will continue to "carry the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order in the West Bank and the Gaza Strip."[183] Such provisions smell strongly of a continuing Israeli strategy of never allowing the permanent status to go beyond limited autonomy.

The Israeli restrictive interpretation of the dimensions of the area of Jericho in the interim period may also be seen as indicative of such an approach. In spite of this, in the first legal comments on the Declaration of Principles the view prevails that the mutual recognition of each other's legitimate and political rights is an important and irreversible breakthrough.[184] From a political point of view such a

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[182] *Infra* Annex 10 Article VII(2). According to the Agreed Minutes to the Declaration of Principles it is understood that the transfer of authority provides that the Palestinian side will *inform* the Israeli side of the names of the authorized Palestinians who will assume the powers to be transferred.

[183] *Id.*, Article VIII.

[184] Benvenisti (1993), 543: "The mutual recognition not only changes the nature of the struggle over the land of Israel from a legal-ideological confrontation to a pragmatic conflict, contoured by security grounds only, but it also transforms the sides into equal parties."; Center for Palestinian Research and Studies (1994), 40: "Recognizing Palestinian Nationalism represented in the PLO, Palestinian legitimate and political rights and the Palestinians as a nation, are all factors toward independence and sovereignty, regardless of future preference for independent existence."; Cassese (1993), 571: "For the time being, international lawyers must be content with emphasizing two things: firstly, that at long last, the path suggested by international norms, i.e. peaceful process of negotiation between the parties concerned, has been taken; secondly, that as an initial measure, provision has been made for the exercise of *internal* self-determination by the Palestinians, as a stepping-stone to external self-determination. No one could underestimate the importance of

conclusion may certainly enforce itself. From a legal point of view the UN should keep to the maxim that good faith on the part of both parties should be supposed, bad faith proven. As for Palestine this maxim implies that the UN should now take it for granted that Israel has been fully recognized by the Palestinian people once and for all.

With regard to Israel the UN should assume that this member state has now fully recognized the right to self-determination of the Palestinian people in a similar way. The implementation of the Interim Agreement should be assessed from that perspective at the international level. The delays in the negotiation urge the international community to remain alert in order to prevent the interim self-government and the agreed permanent status from serving to relieve Israel from its burden of Occupying Power without giving up its control. The provision on resolution of disputes[185] should not prevent the UN from intervening, if one of the parties so desires.

3.2. *Monitoring Permanent Status Negotiations*

The Declaration of Principles on Interim Self-government Arrangements is certainly a major political achievement in the bilateral relations between Israel and Palestine. It was rightly welcomed by the international community. However, we do not know what the future still has in store, after so much misery for the Palestinian people and Israel as well as the Arab world and the UN as a whole. At least one good thing about the past is that wars as a continuation of politics by other means have once again failed. The political achievement, reached at long last, should not be ruined by legal intricacies, let alone technicalities, such as the dimension of the Jericho area and—to a lesser extent—the Israeli control of the borders of the occupied Palestinian territory with its Arab neighbours. For these issues are not essential in the perspective of the transfer of the whole territory to the state of Palestine.

The basic principles and rules with respect to the right to self-determination of the Palestinian people and the legitimacy of Israel, are, of course, neither intricacies nor technicalities. Their violation was, so to say, the source of all evil. The UN should keep its finger

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these two elements."

[185] *Infra* Annex 10 Article XV.

firmly on the pulse in order to upkeep them. Otherwise, it runs the risk that the Israeli-Palestinian negotiations would not take them adequately into account. The UN should avoid such a development with all non-violent means, and to the greatest possible extent. There has been already too much bloodshed in the Middle East.

The General Assembly should stay on the safe side by reminding the parties to the Declaration of a number of fundamental legal aspects to be taken into account in their bilateral negotiations on permanent status. It may not be superfluous, for instance, that the General Assembly underlines its authority and responsibility by virtue of the international status of the occupied Palestinian territory under the mandate system. It might also be of benefit if the General Assembly were to reaffirm its position that the 1947 Plan of Partition remains the 'birth certificate' of Palestine. In other words the result of the permanent status negotiations is not at the discretion of Israel.

The Declaration of Principles on Interim Self-Governments should not be interpreted and applied in the context of SC resolutions 242 and 338 only. It should not be overlooked that these resolutions laid down the principles required for the establishment of a just and lasting peace in the Middle East between the Arab states and Israel. These principles rightly did not concern the legal status of the Palestinian people. Legally speaking, the Security Council had no authority to do so. Admittedly, the General Assembly endorsed the principles in 1970.[186] However, it did not as yet make clear that it intended to amend the Plan of Partition. It should explain whether the implementation of SC resolutions 242 and 338 will imply the UN membership of Palestine on the basis of the 1967 occupied territory and *thus* the determination of the boundaries of Israel and Palestine. It will be essential for the successful outcome of the bilateral negotiations that the General Assembly shall have removed the uncertainty of the dimensions of the pre-1967 Israeli territory.[187]

The UN should also indicate that the integration of the interim arrangements in the whole peace process does not mean that the establishment of the state of Palestine will be left to the conclusion of peace treaties between Israel, Jordan and Syria. Of course, such

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[186] *Supra* Chapter Three, at note 137.

[187] *Supra* Chapter Three section 4.1.1.

peace treaties are urgently needed. However, the implementation of the right to self-determination of the Palestinian people is at the discretion of neither Arab states nor Israel. After all, the right of the Palestinian people to establish its own state has the same legal roots as the right to statehood of the existing Arab states and of Israel, i.e. the League of Nations mandate system. Since there is no question of secession in the case of the Palestinian people, the only conditions that the UN may apply to the recognition of the Palestinian state are the ability and willingness to carry out the obligations contained in the UN Charter, including universal respect for, and observance of, human rights and freedoms.

3.2.1. *Palestinian interim authority*

The UN should guarantee the autonomy of the Gaza Strip and the area of Jericho as the first step to the creation of Palestine in the occupied Palestinian territories as a whole. Such a guarantee is also the responsibility of regional organizations which have traditional ties with the Middle East such as the Arab League and the European Union. Legally speaking, the scope and content of the Palestinian autonomy is not a matter of bilateral bargaining only. Of course, the willingness of Israel and the Palestine Liberation Organization to start negotiations on the autonomy of the Gaza Strip and the area of Jericho was a very important step because territory is essential to statehood.

States and international organizations may recognize the capacity of autonomous territories to enter into treaties with them.[188] The Declaration of Principles did not speak of the external relations of the Gaza Strip and Jericho area at large. It only stated that the permanent status negotiations covered issues including, amongst others, border relations and cooperation with other neighbours.[189] The Annex on the withdrawal of Israeli military forces from the Gaza Strip and Jericho

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[188] Broms (1987), 7. Autonomy was once seen as a means to protect minorities. However, the Palestinians in the Occupied Territories are not a minority but a people. In their case autonomy is not a matter of an Israeli constitutional arrangement but of international law. The scope and content of the powers of the Palestinian Self-Government Authority should be assessed from the same perspective.

[189] *Infra* Annex 10 Article V(3).

area said that the pertinent agreement should include "structure, powers and responsibilities of the Palestinian author in these areas, except: external security, settlements, Israelis, foreign relations, and other mutually agreed matters".[190] The UN might express the view that it will consider these exceptions only in their relation to the withdrawal of Israeli forces. After all, under international law Israel may not determine the foreign relations of international organizations and states with Palestine.[191] Neither is it decisive that the Palestinian Liberation Organization agreed to these exceptions. The status of the occupied Palestinian territory, the Palestinian people and the Palestine Liberation Organization is not a matter of Israeli domestic jurisdiction or of bilateral negotiations.

Palestine has already been recognized by two-thirds of the UN membership. Its admittance to UN membership has been mainly opposed by Western states because of the fact that Palestine has no effective power over its territory as yet. The Declaration of Principles has changed this situation. The Declaration of Principles attributed to the Palestinian interim authority responsibilities in the areas of education, health, social welfare etc., to which the International Covenants of human rights are clearly related. For that reason the General Assembly could invite Palestine to become a party to the International Covenants on human rights after the inauguration of Palestinian Authority in the Gaza Strip and the Jericho area so as to exclude any misunderstanding about its view on the status of the Palestinian interim authority under international law, i.e. as a government in the making.[192] Moreover, an invitation will pay tribute to the Palestinian determination to promote and protect human rights. It will also clarify

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[190] *Id.*, sub Annex II(1) and (3b).

[191] This seems to have been overlooked by Benvenisti (1993) 547: "(...), the agreement regarding Gaza and Jericho will delineate the powers of the Palestinian authority to be established in these areas. These powers are described in residual language, and they exclude from this authority matters of external security, foreign relations, settlements and Israelis."

[192] ICESCR Article 26(1) and ICCPR Article 48(1) read: "The present Covenant is open for signature by any State Member of the United Nations or member of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant." According to paragraph 3 of the same articles the Covenants are open to accession by any state referred to in paragraph 1.

that the possible failure of the bilateral permanent status negotiations cannot go back on the fact that the state of Palestine has been born.[193]

For political reasons the UN may prefer not as yet to admit Palestine to UN membership in order not to interfere with the bilateral negotiations on the permanent status of the occupied Palestinian territory. A positive bilaterally negotiated result on the permanent status will always be preferable over and above an internationally imposed solution. An invitation to accede to the International Covenants on human right might be a good interim solution for interim self-government.

3.2.2. *Palestinian interim territory*

The United States and other western states prevented the UN from taking a strong stand towards Israel's open or creeping policy of annexation in violation of SC resolutions 242 and 338 and subsequent resolutions of the Security Council and the General Assembly. It was obvious that the Palestinian refusal to recognize the legitimacy of Israel urged them to do so. Whatever reasons Western states might have had to be reluctant to accept previous Palestinian signs of recognition, the Declaration of Principles should urge them to reconsider their policy in order to give the bilateral negotiations a fair chance of being successful despite opposition from Israeli and Palestinian fanatics.

In the unlikely event of failure, the UN might be faced with the necessity of taking action in order to safeguard the progress made, i.e. the mutual recognition by Israel and the Palestine Liberation Organization of each other's legitimate and political rights. Such action could be the establishment of a temporary international administration of the Gaza Strip and the West Bank. The UN might then even consider the possibility of admitting Palestine to its membership in order to safeguard the Palestinian interim territory of the Gaza Strip and Jericho:[194]

> When the negotiations concerning the permanent status commence, Israel might be ready to accept that the establishment of a Palestinian state in Gaza and Jericho is unavoidable. But most probably, it will not

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[193] See also Benvenisti (1993), 551.

[194] CPRS (1994), 51.

be ready for the rest of the West Bank, Jerusalem, and settlements existing outside Gaza.

The Israeli persistence on checking the border between the West Bank and Jordan certainly supported this less optimistic Palestinian scenario. It also explained Shehadeh's insistence on the role of the international community.[195] Palestine being a member state, the UN would then be in a legally better position to protect the territorial claim to the remaining part of the West Bank. It would also discourage efforts to regress to the old politics of Eretz Israel or Great Palestine.

As for the settlements, it is evident that the Israelis who have settled in the Occupied Territories since 1967 have no right to remain there under Israeli jurisdiction. They may, however, stay as foreigners on an equal footing with other foreigners, or opt for Palestinian nationality. Discrimination in that respect will always be forbidden. After all, the 1947 Plan of Partition divided the territory, not the people living there. It did not imply any intention of 'ethnic cleansing'. Jews and members of the non-Jewish communities could stay where they were unless they themselves preferred to emigrate to the Jewish or the Arab State. This rule still applies, like the other rule which should be derived from the Palestine Mandate by analogy, i.e. that the rights and political status enjoyed by Palestinians in any other country will not be prejudiced by the establishment of the Palestinian state.

The agreed transfer of powers to the interim Palestinian self-government over the interim territory provoked the question whether Israel will still exercise effective control in the West Bank and the Gaza Strip in the sense of the 1907 Hague Regulations which state in that respect[196]

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[195] Shehadeh (1993), 563: "One of the factors that encouraged Israel to move towards a negotiated settlement on the West bank and Gaza was the bad name it was acquiring through the reports that were being issued accusing the Israeli administration of gross violations of human rights of the Palestinians. Human rights monitoring should continue, and should also include the violations to the right of property evidenced by the exclusion of the Palestinians from inhabiting over 60 percent of their territory, and the denial of the right to fair access to their water resources."

[196] Hague Regulation, Article 42; Benvenisti (1993), 545-546. A distinction has been made between occupation after an armistice, belligerent occupation and pacific occupation.The latter mode of occupation is not

> 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.

One may argue that this definition no longer applies after the transfer of powers to the Palestinian interim authority. It is even said that the termination of the status of occupied territory with regard to the Gaza Strip and the area of Jericho would prevent Israel from 'reoccupation' if the permanent status negotiations were to end in a deadlock.[197]

The 1907 definition of occupation is not decisive with regard to the legal status of the 1967 occupied Palestinian territory because the defeated belligerent parties—Egypt and Jordan—had no sovereignty whatsoever.[198] Be this as it may, as long as Israel might refuse to transfer powers and responsibilities with regard to settlements, military locations and Israelis, the West Bank and the Gaza Strip should anyhow retain their international status.

Taking into account its demand that its settlers in the interim territory and the remaining part of the West Bank will not be under the jurisdiction of the interim Palestinian Government, Israel will also remain responsible under the Fourth Geneva Convention. This will hold true the more so if Israel will use its control of the borders to keep Palestinians out of their country. The UN may only terminate the international status when Palestine has acquired the whole of its territory as a sovereign independent state or has freely agreed to an association or integration with an independent state or to emergence into any other political status freely determined by the Palestinian people. Only then may the UN withdraw its opposition establishing embassies in Jerusalem.[199]

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applicable to the occupied Palestinian territories as it is not based on mutual agreement. The first is also somewhat related to agreement between the belligerent parties or at least to their compliance with a SC resolution. The middle one is independent of agreement. See Bothe (1985), 63, 65 and 68.

[197] Benvenisti (1993), 546: "After relinquishing its control, as envisioned in the declaration, at least in Gaza and Jericho, Israel will have no effective control, and thus no right to reoccupy those areas."

[198] This situation detracts nothing from the *de jure* applicability of the Fourth Geneva Convention because of the fact that this Convention does not define territory. See *supra* Chapter Two section 3.5.2.

[199] *Infra* Annex 9 sub 5(b).

3.2.3. *Jerusalem, capital of two states?*

According to UN decisions Jerusalem should be placed under a permanent international regime.[200] The acceptance of this regime was one of the conditions for Israel's admittance to the UN. In its pertinent decision the General Assembly recalled its resolutions of 29 November and 11 December 1948 on the Plan of Partition and the permanent international regime of Jerusalem and took note [201]

> of the declarations and explanations made by the representative of the Government of Israel before the *ad hoc* Political Committee in respect of the implementation of the said resolutions.

After the occupation of East Jerusalem in 1967 all Israeli governments have taken numerous steps to ensure their permanent control over the city as a whole.[202] This policy raised the question whether the UN should stick to its decisions on the status of Jerusalem. After all, its main argument was not so much a judgement of Solomon on the partition of territory between the Arab and the Jewish state as a need to protect the association of Jerusalem with three world religions. After the recognition of Israel by the Arab states and the Holy See it might become easier for the three world religions to agree on other ways and means of securing free access to religious buildings and sites in Jerusalem. In that perspective the UN should think of withdrawing its decisions on the permanent international regime of Jerusalem when Israel and the Palestine Liberation Organization find a mutually acceptable solution.

In other words, as for the UN the Jerusalem area—unlike the Gaza Strip and the West Bank—might become the subject of an agreed settlement at the bilateral level, taking into account the need to secure free access to religious buildings and sites. This may explain why Israelis and Palestinians regularly racked their brains concerning an acceptable settlement of the question of Jerusalem. A number of solutions have been raised—split sovereignty, joint sovereignty or shared sovereignty. In the first case the Palestinians will have sovereignty over East Jerusalem and Israel over West Jerusalem. The

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[200] *Infra* Annex 3. See also *supra* Chapter Three section 4.1.2.

[201] UNGA res. 273 (III) . See also *supra* Chapter Three section 3.3.3. at note 118 and *infra* Annex 7.

[202] Kretzmer (1992), 105.

difference between the latter two is that joint sovereignty would exclude Israeli and Palestinian sovereignty over any part of the city while shared sovereignty provides for a joint administration of certain matters in addition to an otherwise split sovereignty.[203] If parties so agree, both joint and shared sovereignty will meet no obstacles under international law.

Whoever may have visited the 'physically united' Jerusalem by taxi may have had the strange experience that Israeli taxi drivers do not know the way in East Jerusalem with the opposite being the case for their Palestinian colleagues in West Jerusalem. They remain strangers in each other's Jerusalem. However, they rarely hesitate to ask each other the way. From that point of view a united Jerusalem may not have become a reality in the daily perceptions of the people in the street but not because they refuse any cooperation at the practical level. This may be symbolic for the settlement of the dispute over Jerusalem on the basis of reconciling logical possible, but politically inconsistent, points of departure, i.e. the need to designate Jerusalem as the capital of two states and securing its existence as a fully integrated city.[204]

4. Learning from Palestine

The historic link of a people with a territory has become part of the right to self-determination. With that, it is an essential feature for distinguishing peoples from minorities. From an historic point of view peoples may become minorities and minorities peoples. The recognition of a historic link and of the connected territorial claim(s) should be done by the UN and not by individual states. Resulting disputes should not be solved at the political level because of the implied inherent risk of war as a continuation of politics by other means. The International Court of Justice should be called in. Admittedly, unlike its pertinent advisory opinions its judgment in the South-West Africa Case was debatable, because of its rejection of an *actio popularis* as a means for states to protect the interests of a people under foreign

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[203] *Id.*, 106-108; Nusseibeh (1992), 103; Baskin/Twist (1993), 273-287.
[204] Nusseibeh (1992), 101.

domination on behalf of the international community.[205] However, international law has changed substantially since the introduction of the mandate system and also after 1966.

The universal recognition of the right to self-determination and to development of peoples as human rights will make it less probable that the UN will approve a historic link without firm guarantees that such a link will not interfere with the rights of other peoples. Moreover, the recognition of these rights may imply the recognition of *erga omnes* obligations which may enable states to submit a dispute to the International Court of Justice as an *actio popularis*. It will certainly be more effective if peoples may be a party before the International Court of Justice in disputes with states or international organizations on the realization of their right to self-determination. The UN should also seriously consider accepting the jurisdiction of the Court with regard to disputes between states and international organizations. The adoption of a code of conduct on self-determination would facilitate such a development.

South Africa finally had to give in to the right to self-determination of the Namibian people. It also had to abolish apartheid. In both cases South Africa had to change its policy under pressure from internal uprisings and external sanctions. Israel remained free of UN sanctions. The 1987 intifada finally urged it to discuss interim self-government in the occupied Palestinian territory. Both parties received substantial international support, i.e. the Palestinians from the Arab and socialist countries, the Israelis from the West. The latter support prevented the Palestinians and the Arab states from settling the dispute by military means. However, the persistent Arab and Palestinian resistance also left Israel with the impossibility of achieving a lasting and durable peace with its neighbours.

For both parties the existence of a UN code of conduct on self-determination and of legal protection by the International Court of Justice might have prevented much misery. Such a code could and should not have annulled the legitimacy of Israel within the area of the intended Jewish state. An internationally recognized historic link may not be reversed when it is no longer a matter of a treaty because of its being already accomplished by the creation and recognition of

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[205] Klein (1881), 266, 268-269. See also Jennings/Watts (1992), 5.

a state. The emergence of new peremptory norms do not deprive states of their existence as subjects of international law but only their treaties. Moreover, this provision of treaty law only applies to treaties concluded after the entering into force of the pertinent conventions.[206] The concept of a peremptory norm (*jus cogens*) did not exist in the first part of this century. The then prevailing international law was mainly, if not exclusively, based on the will of states.[207]

A code of conduct on self-determination and legal protection by the International Court of Justice could have prevented or reduced the impact of the ideologies of Eretz Israel or Great Palestine. Both ideologies have, until recently, prevented a peaceful solution of the Israeli-Palestinian conflict. One may only hope that the Declaration on Principles of Interim Self-government will have laid the basis for a peaceful and effective solution of the conflicting territorial claims. The above ideologies have already caused too much harm to both peoples due to the lack of adequate and effective international supervision of the promotion and protection of human rights in armed conflicts and prolonged military occupation. One should not think too much about the fate of having to live under occupation for such a long time!

In the light of the reality of so many oppressed peoples and of the rising evil of xenophobia and racism the UN should now give the highest priority to drafting a code of conduct on self-determination for peoples, states and international organizations. The guiding principles of such a code should be the prohibition of aggression of peoples; the prohibition of implementing the right to development at the expense of other peoples within the same state and in other states; and the implementation of the right to self-determination for the sake of promoting and protecting the universally recognized individual human rights.

If the UN can draw upon this lesson from the Israeli-Palestinian conflict, then the international community may witness some form of

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[206] Vienna Convention on the Law of Treaties of 23 May 1969—in force since 27 January 1980—Article 64; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, Article 71. This Convention, at the time of writing in February 1994, had not yet entered into force.

[207] Frowein (1984), 328; Brownlie (1990), 514-515; Jennings/Watts (1992), 7-8.

fruitful conclusion from the otherwise irreversible and disgraceful misery to which it has condemned the Israeli and Palestinian peoples for such a long time. It should then in any case do its utmost to prevent a failure of the permanent status negotiations. The delays in this process and the Israeli insistence on keeping control of the borders between the territory of Palestine and its Arab neighbours are not too promising in that respect. The tragedy of the peoples in the former Yugoslavia and in the former Soviet Union as well as of the Kurdish people in the Middle East should urge the Western centre of power to reflect on the price these peoples have had to pay for any indulgence in promoting violations of the right to self-determination by whatever state it might concern.

ANNEXES

Basic Legal Documents on the Israeli-Palestinian Conflict

Research on the legal background of the Israeli-Palestinian conflict has at its disposal numerous legal documents, i.e. resolutions and reports of the League of Nations, the Mandatory Power, the United Nations and the actors most directly involved: the Arab states, Israel, the PLO and the USA.

Particularly basic are the UN decisions on the partition of the territory of the Palestine Mandate between an Arab and a Jewish state, the status of Jerusalem, and the principles of a just and lasting peace in the Middle East as well as the Declarations of Independence of Israel and Palestine.

As for the status of Jerusalem are important the pertinent statement of the Israeli government in 1949—basic to the admittance of Israel to the UN—and the rejection of the Israeli basic law on the status of Jerusalem by the SC.

The grip of the Palestinian people and the Arab states on the partition of the territory of Palestine was substantially hampered by their psychologically understandable but legally untenable rejection of the Palestine Mandate and the creation of Israel. Characteristic for this unprofitable approach was the content of the 1968 Palestine National Charter.

Typical for the preponderant impact of the USA is the Camp David Agreement for it illustrates the American policy of trying to get Arab states to do its strategy of giving to Israel and taking from Palestine.

The present author considered these documents so crucial to a better understanding of the legal intricacy and persistency of the Israeli-Palestinian conflict that he decided to enable any reader of this book to read them himself in full or at least in their most essential parts. Therefore, these documents are reproduced— wholly or partly—in the following annexes.

Other important documents are quoted in the chapters only with reference to the sources.

ANNEX 1

UNGA RES. ON A PLAN OF PARTITION (1947, extract)

PART I—FUTURE CONSTITUTION AND GOVERNMENT OF PALESTINE

A. *Termination of Mandate, Partition and Independence*

1. The Mandate for Palestine shall terminate as soon as possible but in any case not later than 1 August 1948.

2. The armed forces of the mandatory Power shall be progressively withdrawn from Palestine, the withdrawal be completed as soon as possible but in any case not later than 1 August 1948.

The mandatory Power shall advise the Commission, as far in advance as possible, of its intention to terminate the Mandate and to evacuate each area.

The mandatory Power shall use its best endeavours to ensure that an area situated in the territory of the Jewish State, including a seaport and hinterland adequate to provide facilities for a substantial immigration, shall be evacuated at the earliest possible date and in any event not later than 1 February 1948.

3. Independent Arab and Jewish State and a Special International Regime for the City of Jerusalem set forth in Part III of this Plan, shall come into existence in Palestine two months after the evacuation of the armed forces of the mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be as described in Parts II and III below.

4. The period between the adoption by the General Assembly of its recommendation on the question of Palestine and the establishment of the independence of the Arab and Jewish States shall be a transitional period.

B. *Steps Preparatory to Independence*

1. A commission shall be set up consisting of one representative of each of five Member States. The Members represented on the Commission shall be elected by the General Assembly on as broad a basis, geographically and otherwise, as possible.[1]

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[1] On 29 November 1947 the General Assembly elected the following members of Commission referred to in Part I, Section B, Paragraph 1 (the UN Commission on Palestine): Bolivia, Czechoslovakia, Denmark, Panama and Philippines. On 14 May 1948 the Commission was relieved from the further

2. (...)

C. *Declaration*

A declaration shall be made to the United Nations by the provisional Government of each proposed State before independence. It shall contain, *inter alia*, the following clauses:

General Provision. The stipulations contained in the Declaration are recognized as fundamental laws of the State and no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.

Chapter 1: Holy Places, Religious Buildings and Sites

1. Existing rights in respect of Holy Places and religious buildings or sites shall not be denied or impaired.
2. In so far as Holy Places are concerned, the liberty of access, visit, and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens of the other State and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum.

Similarly, freedom of worship shall be guaranteed in conformity with existing rights, subject to the maintenance of public order and decorum.
3. Holy Places and religious buildings or sites shall be preserved. No act shall be permitted which may in any way impair their sacred character. If at any time it appears to the Government that any particular Holy Place, religious building or site is in need of urgent repair, the Government may call upon the community or communities concerned to carry out such repair. The Government may carry out itself at the expense of the community or communities concerned if no action is taken within a reasonable time.
4. No taxation shall be levied in respect of any Holy Place, religious building or site which was exempt from taxation on the date of the creation of the State.
No change in the incidence of such taxation shall be made which would either discriminate between the owners of Holy Places, religious buildings or sites, or would place such owners or occupiers in a position less favourable in relation to the general incidence of taxation than existed at the time of the adoption of the Assembly recommendations.

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exercise of its responsibilities under resolution 181 (II) (see UNGA res. 186 and 189 (S-2).

5. The Governor of the City of Jerusalem shall have the right to determine whether the provisions of the Constitution of the State in relation to the Holy Places, religious buildings or sites within the borders of the State and the religious rights pertaining thereto, are being properly applied and respected, and to make decisions on the basis of existing rights in cases of disputes which may arise between the different religious communities or the rites of a religious community with respect to such places, buildings or sites. He shall receive the full co-operation and such privileges and immunities as are necessary for the exercise of his functions in the State.

Chapter 2: Religious and Minority Rights

1. Freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals, shall be ensured to all.
2. No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex.
3. All persons within the jurisdiction of the State shall be entitled to equal protection of the laws.
4. The family law and personal status of the various minorities and their religious interests, including endowments, shall be respected.
5. Except as may be required for the maintenance of public order and good government, no measure shall be taken to obstruct or interfere with the enterprise of religious or charitable bodies of all faiths or to discriminate against any representative or member of these bodies on the ground of his religion or nationality.
6 The State shall ensure adequate primary and secondary education for the Arab and Jewish minority, respectively, in its own language and its cultural traditions.

The right of each community to maintain its own schools for the education of its own members, while conforming to such educational requirements of a general nature as the State may impose, shall not be denied or impaired. Foreign educational establishments shall continue their activity on the basis of their existing rights.
7. No restriction shall be imposed on the free use by any citizen of the State of any language in private intercourse, in commerce, in religion, in the Press or in the publications of any kind, or at public meetings.[2]

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[2] The following stipulation shall be added to the declaration concerning the Jewish State: "In the Jewish State adequate facilities shall be given to the Arabic-speaking citizens for the use of their language, either orally or in writing, in the legislature, before the Court and in the administration."

8. No expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes.[3] In all cases of expropriation full compensation as fixed by the Supreme Court shall be paid previous to dispossession.

Chapter 3: Citizenship, International Conventions and Financial Obligations

1. *Citizenship.* Palestinian citizens residing in Palestine outside the City of Jerusalem, as well as Arabs and Jews who, not holding Palestinian citizenship, reside in Palestine outside the City of Jerusalem shall, upon recognition of independence, become citizens of the State in which they are resident and enjoy full civil and political rights. Persons over the age of eighteen years may opt, within one year from the date of recognition of independence of the State in which they reside, for citizenship of the other State, providing that no Arab residing in the area of the proposed Arab State shall have the right to opt for citizenship in the proposed Jewish State and no Jew residing in the proposed Jewish State shall have the right to opt for citizenship in the proposed Arab State. The exercise of this right of option will be taken to include the wives and children under eighteen years of age of persons so opting.

Arabs residing in the area of the proposed Jewish State and Jews residing in the area of the proposed Arab State who have signed a notice of intention to opt for citizenship of the other State shall be eligible to vote in the elections to the Constituent Assembly of that State, but not in the elections of the Constituent Assembly of the State in which they reside.

2. *International conventions.* (a) The State shall be bound by all the international agreements and conventions, both general and special, to which Palestine has become a party. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by the State throughout the period for which they were concluded.

(b) Any dispute about the applicability of and continued validity of international conventions or treaties signed or adhered to by the mandatory Power on behalf of Palestine shall be referred to the International Court of Justice in accordance with the provisions of the Statute of the Court.

3. *Financial obligations.* (a) The State shall respect and fulfil all financial obligations of whatever nature assumed on behalf of Palestine by the mandatory Power during the exercise of the Mandate and recognized by the State. This provision includes the right of public servants to pensions, compensation or gratuities.

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[3] In the declaration concerning the Arab State, the words "by an Arab in the Jewish State" should be replaced by the words "by a Jew in the Arab State".

(b) These obligations shall be fulfilled through participation in the Joint Economic Board in respect of those obligations applicable to Palestine as a whole, and individually in respect of those applicable to, and fairly apportionable between, the States.

(c) A Court of Claims, affiliated with the Joint Economic Board, and composed of one member appointed by the United Nations, one representative of the United Kingdom and one representative of the State concerned, should be established. Any dispute between the United Kingdom and the State respecting claims not recognized by the latter should be referred to that Court.

(d) Commercial concessions granted in respect of any part of Palestine prior to the adoption of the resolution by the General Assembly shall continue to be valid according to their terms, unless modified by agreement between the concession-holder and the State.

Chapter 4: Miscellaneous Provisions

1. The provisions of Chapters 1 and 2 of the Declaration shall be under the guarantee of the United Nations, and no modifications shall be made in them without the assent of the General Assembly of the United Nations. Any Member of the United Nations shall have the right to bring to the attention of the United Nations any infraction or danger of infraction on any of these stipulations, and the General Assembly may thereupon make such recommendations as it may deem proper in the circumstances.
2. Any dispute relating to the application of the interpretation of the declaration shall be referred, at the request of either party, to the International Court of Justice, unless the parties agree to another mode of settlement.

D. *Economic Union and Transit*

1. The Provisional Council of Government of Each State shall enter into an undertaking with respect to the Economic Union and Transit. This undertaking shall be drafted by the Commission provided in Section B, Paragraph 1, utilizing to the greatest possible extent the advice and co-operation of representative organizations and bodies from each of the proposed States. It shall contain provisions to establish the Economic Union of Palestine and provide for other matters of economic interest. If by 1 April 1948 the Provisional Councils of Government have not entered into the undertaking, the undertaking shall be put into force by the Commission.

The Economic Union of Palestine

2. The objectives of the Economic Union of Palestine shall be:
(a) A customs union;
(b) A joint currency system providing for a single foreign exchange rate;

(c) Operation in the common interest on a non-discriminatory basis of railways; inter-State highways; postal, telephone and telegraphic services, and ports and airports involved in international trade and commerce;
(d) Joint economic development, especially in respect of irrigation, land reclamation and soil conservation;
(e) Access for both States and for the City of Jerusalem on a non-discriminatory basis to water and power facilities.

3. There shall be established a Joint Economic Board which shall consist of three representatives of each of the two States and three foreign members appointed by the Economic and Social Council of the United Nations. The foreign members shall be appointed in the first instance for a term of three years; they shall serve as individuals and not as representatives of States.

4. The function of the Joint Economic Board shall be to implement either directly or by delegation the measures necessary to realize the objectives of the Economic Union. It shall have all powers or organization and administration to fulfil its functions.

5. The States shall bind themselves to put into effect the decisions of the Joint Economic Board. The Board's decision shall be taken by majority vote.

6. In the event of failure of a State to take the necessary action the Board may, by a vote of six members, decide to withhold an appropriate portion of that part of the customs revenue to which the State in question is entitled under the Economic Union. Should the State persist in its failure to co-operate, the Board may decide by a simple majority vote upon such further sanctions, including disposition of funds which it has withheld, as it may deem appropriate.

7. In relation to economic development, the functions of the Board shall be the planning, investigation and encouragement of joint development projects but it shall not undertake such projects except with the consent of both States and the City of Jerusalem, in the event that Jerusalem is directly involved in the development project.

8. In regard to the joint currency system the currencies circulating in the two States and in the City of Jerusalem shall be issued under the authority of the Joint Economic Board, which shall be the sole issuing authority and which shall determine the reserves to be held against such currencies.

9. So far as is consistent with paragraph 2 (b) above, each State may operate its own central bank, control its own fiscal and credit policy, its foreign exchange receipts and expenditures, the grant of import licenses, and may conduct international financial operations in its own faith and credit. During the first two years after the termination of the Mandate, the Joint Economic Board shall have the authority to take such measures as may be necessary to ensure that—to the extent that the total foreign exchange revenues of the two States from the export of goods and services, permit and provided that each State takes appropriate measures to conserve its own foreign exchange

resource—each State shall have available, in any twelve months' period, foreign exchange sufficient to ensure the supply of quantities of imported goods and services consumed in that territory in the twelve months' period ending 31 December 1947.

11. All economic authority not specifically vested in the Joint Economic Board is reserved to each State.

11. There shall be a common customs tariff with complete freedom of trade between the States, and between the States and the City of Jerusalem.

12. The tariff schedules shall be drawn up by a Tariff Commission, consisting of representatives of each of the States in equal numbers, and shall be submitted to the Joint Economic Board for approval by a majority vote. In case of disagreement in the Tariff Commission, the Joint Economic Board shall arbitrate the points of difference. In the event that the tariff Commission fails to draw up any schedule by a date to be fixed, the Joint Economic Board shall determine the tariff schedule.

13. The following items shall be a first charge on the customs and other common revenue of the Joint Economic Board:

(a) the expenses of the custom service and the operation of the joint services;

(b) The administrative expenses of the Joint Economic Board;

(c) The financial obligations of the Administration of Palestine consisting of:

(i) The service of the outstanding public debt;

(ii) The cost of superannuation benefits, now being paid or falling due in the future, in accordance with the rules and to the extent established by paragraph 3 of Chapter 3 above.

14. After these obligations have been met in full, the surplus revenue from the customs and other common services shall be divided in the following manner: not less than 5 percent and not more than 10 percent to the City of Jerusalem; the residue shall be allocated to each State by the Joint Economic Board equitably, with the objective of maintaining a sufficient and suitable level of government and social services in each State, except that the share of either State shall not exceed the amount of that State's contribution to the revenues of the Economic Union by more than approximately four million pounds in any year. The amount granted may be adjusted by the Board according to the price level in relation to the prices prevailing at the time of the establishment of the Union. After five years, the principles of the distribution of the joint revenues may be revised by the Joint Economic Board on a basis of equity.

15. All international conventions and treaties affecting customs tariff rates, and those communications services under the jurisdiction of the Joint Economic Board, shall be entered into by both States. In these matters, the two

States shall be bound to act in accordance with the majority vote of the Joint Economic Board.

16. The Joint Economic Board shall endeavour to secure for Palestine's exports fair and equal access to world markets.

17. All enterprises operated by the Joint Economic Board shall pay fair wages on a uniform basis.

Freedom of Transit and Visits

18. The undertaking shall contain provisions preserving freedom of transit and visit for all residents or citizens of both States and of the City of Jerusalem, subject to security considerations; provided that each State and the city shall control residence within its borders.

Termination, Modification and Interpretation of the Undertaking

19. The undertaking and any treaty issuing there-from shall remain in force for a period of ten years. It shall continue in force until notice of termination, to take effect two years thereafter, is given by either of the parties.

20. During the initial ten-year period, the undertaking and any treaty issuing therefrom may not be modified except by consent of both parties and with the approval of the General Assembly.

21. Any dispute relating to the application of the undertaking and any treaty issuing therefrom shall be referred, at the request of either party, to the International Court of Justice, unless the parties agree to another mode of settlement.

E. *Assets*

1. The movable assets of the Administration of Palestine shall be allocated to the Arab and Jewish States and the City of Jerusalem on an equitable basis. Allocations should be made by the United Nations Commission referred to in Section B, Paragraph 1, above. Immovable assets shall become the property of the Government of the territory in which they are situated.

2. During the period between the appointment of the United Nations Commission and the termination of the Mandate, the mandatory Power shall, except in respect of ordinary operations, consult with the Commission on any measure which it may contemplate involving the liquidation, disposal or encumbering of the assets of the Palestine Government, such as the accumulated treasury surplus, the proceeds of Government bond issues, State lands or any other asset.

F. *Admission to Membership of the United Nations*

When the independence of either the Arab or the Jewish State as envisaged in this plan has become effective and the declaration and undertaking, as envisaged in this plan, have been signed by either of them, sympathetic consideration should be given to its application for admission to membership in

the United Nations in accordance with Article 4 of the Charter of the United Nations.

[PART II—BOUNDARIES]

PART III—CITY OF JERUSALEM

A. *Special Regime*

The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority in behalf of the United Nations.

B. *Boundaries of the City*

The City of Jerusalem shall include the present municipalities of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western, Ein Karim (including also the built-up area of Motsa); and the most northern Shu'fat, as indicated on the attached sketch-map (annex B).

C. *Statute of the City*

The Trusteeship Council shall, within five months of the approval of the present plan, elaborate and approve a detailed Statute of the City which shall contain, *inter alia*, the substance of the following provisions:[4]

1. *Government Machinery; Special Objectives.* The Administering Authority in discharging its administrative obligations shall pursue the following special objectives:

a) To protect and preserve the unique spiritual and religious interests located in the city of the three great monotheistic faiths throughout the world, Christian, Jewish and Moslem; to this end to ensure that order and peace and especially religious peace, reign in Jerusalem;

b) To foster co-operation among all the inhabitants of the city in their own interests as well as in order to encourage and support the peaceful development of the mutual relations between the two Palestinian peoples throughout the Holy Land; to promote the security, well-being and any constructive measures of development of the residents, having regard to the special circumstances and customs of the various peoples and communities.

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[4] See *infra* Annex 3.

2. *Governor and Administrative Staff.* A Governor of the City of Jerusalem shall be appointed by the Trusteeship Council and shall be responsible to it. He shall be selected on the basis of special qualifications and without regard to nationality. He shall not, however, be a citizen of either State in Palestine. The Governor shall represent the United Nations in the city and shall exercise on their behalf all powers of administration, including the conduct of external affairs. He shall be assisted by an administrative staff classed as international officers in the meaning of Article 100 of the Charter and chosen whenever practicable from the residents of the city and of the rest of Palestine on a non-discriminatory basis. A detailed plan for the organization of the administration of the city shall be submitted by the Governor to the Trusteeship Council and duly approved by it.

3. *Local Autonomy*

a) The existing local autonomous units in the territory of the city(villages, townships and municipalities) shall enjoy wide powers of local government and administration.

b) The Governor shall study and submit for the consideration and decision of the Trusteeship Council a plan for the establishment of special town units, consisting, respectively, of the Jewish and Arab sections of new Jerusalem. The new town units shall continue to form part of the present municipality of Jerusalem.

4. *Security Measures*

a) The City of Jerusalem shall be demilitarized, its neutrality shall be declared and preserved, and no para-military formations, exercises or activities shall be permitted within its border.

b) Should the administration of the City of Jerusalem be seriously obstructed or prevented by non-co-operation or interference of one or more sections of the population, the Governor shall have authority to take such measures as may be necessary to restore the effective functioning of the administration.

c) To assist in the maintenance of internal law and order and especially for the protection of the Holy Places, religious buildings and sites in the city, the Governor shall organize a special police force of adequate strength, the members of which shall be recruited outside of Palestine. The Governor shall be empowered to direct such budgetary provision as may be necessary for the maintenance of the order.

4. *Legislative Organization.* A Legislative Council elected by adult residents of the city irrespective of nationality on the basis of universal and secret suffrage and proportional representation, shall have powers of legislation and taxation. No legislative measures shall, however, conflict or interfere with the provisions which will be set forth in the Statute of the City, nor shall any law, regulation, or official action, prevail over them. The Statute shall grant to the Governor a right of vetoing bills inconsistent with the provisions referred to in the preceding sentence. It shall also empower him to promulgate

temporary ordinances in case the Council fails to adopt in time a bill deemed essential to the normal function of the administration.

6. *Administration of Justice*. The Statute shall provide for the establishment of an independent judiciary system including a court of appeal. All the inhabitants of the city shall be subject to it.

7. *Economic Union and Economic Regime*. The City of Jerusalem shall be included in the Economic Union of Palestine and be bound by all stipulations of the undertaking and of any treaties issued there-from, as well as by the decision of the Joint Economic Board. The headquarters of the Joint Economic Board shall be established in the territory of the city.

The Statute shall provide for the regulation of economic matters not falling within the regime of the Economic Union, on the basis of equal treatment and non-discrimination for all members of the United Nations and their nationals.

8. *Freedom of Transit and Visit; Control of Residents*. Subject to considerations of security, and of economic welfare as determined by the Governor under the directions of the Trusteeship Council, freedom of entry into, and residence within, the borders of the city shall be guaranteed for the residents or citizens of the Arab and Jewish States. Immigration into, and residence within, the borders of the city for nationals of other States shall be controlled by the Governor under the directions of the Trusteeship Council.

9. *Relations with the Arab and Jewish States*. Representatives of the Arab and Jewish States shall be accredited to the Governor of the city and charged with the protection of the interests of their States and nationals in connection with the international administration of the city.

10. *Official Languages*. Arabic and Hebrew shall be the official languages of the city. This will not preclude the adoption of one or more additional working languages, as may be required.

11. *Citizenship*. All the residents shall become *ipso facto* citizens of the City of Jerusalem unless they opt for citizenship of the State of which they have been citizens or, if Arabs or Jews, have filed notice of intention to become citizens of the Arab or Jewish State respectively, according to Part I, Section B, Paragraph 9 of this Plan. The Trusteeship Council shall make arrangements for consular protection of the citizens outside its territory.

12. *Freedoms of Citizens*

a) Subject only to the requirements of public order and morals, the inhabitants of the city shall be ensured the enjoyment of human rights and fundamental freedoms, including freedom of conscience, religion and worship, language, education, speech and press, assembly and association, and petition.

b) No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex.

c) All persons within the City are entitled to equal protection of the laws.

d) The family law and personal status of the various persons and communities and their religious interests, including endowments, shall be respected.

e) Except as may be required for the maintenance of public order and good government, no measure shall be taken to obstruct or interfere with the enterprise of religious or charitable bodies of all faiths or to discriminate against any representative or member of these bodies on the ground of his religion or nationality.

f) The city shall ensure adequate primary or secondary education for the Arab and Jewish communities respectively, in their own languages and in accordance with their cultural traditions.

The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the city may impose, shall not be denied or impaired. Foreign educational establishments shall continue their activity on the basis of their existing rights.

g) No restriction shall be imposed on the free use by any inhabitant of the city of any language in private intercourse, in commerce, in religion, in the Press or in publications of any kind, or at public meetings.

13. *Holy Places*

a) Existing rights in respect of Holy Places and religious buildings or sites shall not be denied or impaired.

b) Free access to the Holy Places and religious buildings or sites and the free exercise of worship shall be secured in conformity with existing rights and subject to the requirements of public order and decorum.

c) Holy Places and religious buildings or sites shall be preserved. No act shall be permitted which may in any way impair their sacred character. If at any time it appears to the Governor that any particular Holy Place, religious building or site is in need of urgent repair, the Governor may call upon the community or communities concerned to carry out such repair. The Governor may carry it out himself at the expense of the community or communities concerned if no action is taken within reasonable time.

d) No taxation shall be levied in respect of any Holy Place, religious building or site which was exempt from taxation on the date of the creation of the city. No change in the incidence of such taxation shall be made which would either discriminate between the owners or occupiers of Holy Places, religious buildings or sites, or would place such owners or occupiers in a position less favourable in relation to the general incidence of taxation than existed at the time of the adoption of the Assembly's recommendations.

14. *Special powers of the Governor in respect of the Holy Places, Religious Buildings or Sites in the City and in any Part of Palestine*

a) The protection of the Holy Places, religious buildings or sites located in the City of Jerusalem shall be a special concern of the Governor.

b) With relation to such places, buildings and sites in Palestine outside the city, the Governor shall determine, on the ground of the powers granted to him by the Constitutions of both States, whether the provisions of the

Constitutions of the Arab and Jewish States in Palestine dealing therewith and the religious rights appertaining thereto are being properly applied and respected.

c) The Governor shall also be empowered to make decisions on the basis of existing rights in cases of disputes which may arise between the different religious communities or the rites of a religious community in respect of the Holy Places, religious buildings and sites in any part of Palestine. In this task he may be assisted by a consultative council of representatives of different denominations acting in an advisory capacity.

D. *Duration of the Special Regime*

The Statute elaborated by the Trusteeship Council on the aforementioned principles shall come into force not later than 1 October 1948. It shall remain in force in the first instance for a period of ten years, unless the Trusteeship Council finds it necessary to undertake a re-examination of these provisions at an earlier date. After the expiration of this period the whole scheme shall be subject to re-examination by the Trusteeship Council in the light of the experience acquired with its functioning. The residents of the city shall be then free to express by means of a referendum their wishes as to possible modifications of the regime of the city.

[PART IV—CAPITULATIONS]

ANNEX 2

UNGA RES. ON CONCILIATION, STATUS OF JERUSALEM AND RIGHT TO RETURN (1948)[5]

The General Assembly,

Having considered further the situation in Palestine,

1. *Expresses* its deep appreciation of the progress achieved[6] through the good offices of the late United Nations Mediator in promoting a peaceful adjustment of the future situation of Palestine, for which cause he sacrificed his life (...);

2. *Establishes* a Conciliation Commission consisting of three States Members of the United Nations which shall have the following functions:

(a) To assume, in so far as it considers necessary in existing circumstances, the functions given to the United Nations Mediator on Palestine by resolution 186 (S-2) of 14 May 1948;

(b) To carry out the specific functions and directives given to it by the present resolution and such additional functions and directives as may be given to it by the General Assembly or by the Security Council;

(c) To undertake, upon the request of the Security Council, any of the functions now assigned to the United Nations Mediator on Palestine or to the United Nations Truce Commission by resolutions of the Security Council; upon such request to the Conciliation Commission by the Security Council with respect to all the remaining functions of the United Nations Mediator on Palestine under Security Council resolutions, the office of the Mediator shall be terminated;

3. *Decides* that a Committee of the Assembly, consisting of China, France, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, shall present, before the end of the first part of the present session of the General Assembly, a proposal concerning the names of the three States which will constitute the Conciliation Commission;[7]

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[5] UNGA res. 194 (III) of 11 December 1948 was adopted by 35 votes in favour, 15 against (Afghanistan, Byelorussian SSR, Cuba, Czechoslovakia, Egypt, Iraq, Lebanon, Pakistan, Poland, Saudi Arabia, Syria, Ukrainian SSR, the USSR, Yemen, Yugoslavia), with 8 abstentions (Bolivia, Burma, Chile, Costa Rica, Guatemala, India, Iran, Mexico).

[6] See UN Mediator's Progress report document A/648.

[7] The Conciliation Commission have been composed of France, Turkey and the USA.

4. *Requests* the Commission to begin its functions at once, with a view to the establishment of contact between the parties themselves and the Commission at the earliest possible date;

5. *Calls upon* the Governments and authorities concerned to extend the scope of negotiations provided for in the Security Council's resolution of 16 November 1948 and to seek agreement by negotiations, conducted either with the Conciliation Commission or directly, with a view to the final settlement of all questions outstanding between them;

6. *Instructs* the Conciliation Commission to take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them;

7. *Resolves* that the Holy Places—including Nazareth—religious buildings and sites in Palestine should be protected and free access to them assured, in accordance with existing rights and historical practice; that arrangements to that end should be under effective United Nations supervision; that the United Nations Conciliation Commission, in presenting to the fourth regular session of the General Assembly its detailed proposals for a permanent international regime for the territory of Jerusalem, should include recommendations concerning the Holy Places in that territory; that with regard to the Holy Places in the rest of Palestine, the Commission should call upon the political authorities of the area concerned to give appropriate formal guarantees as to the protection of the Holy Places and access to them; and that these undertakings should be presented to the General Assembly for approval;

8. *Resolves* that, in view of its association with three world religions, the Jerusalem are, including the present municipality of Jerusalem *plus* the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem, the most western, Ein Karim (including also the built-up area of Motsa); and the most northern, Shu'fat, should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control;

Requests the Security Council to take further steps to ensure the demilitarization of Jerusalem at the earliest possible date;

Instructs the Commission to present to the fourth regular session of the General Assembly detailed proposals for a permanent international regime for the Jerusalem area which will provide for the maximum local autonomy for distinctive groups consistent with the special international status of the Jerusalem area;

The Conciliation Commission is authorized to appoint a United Nations representative who shall co-operate with the local authorities with respect to the interim administration of the Jerusalem area;

9. *Resolves* that, pending agreement on more detailed arrangements among the Governments and authorities concerned, the freest possible access to

Jerusalem by road, rail or air should be accorded to all inhabitants of Palestine;

Instructs the Conciliation Commission to report immediately to the Security Council, for appropriate action by that organ, any attempt by any party to impede such access;

10. *Instructs* the Conciliation Commission to seek arrangements among the Governments and authorities concerned which will facilitate the economic development of the area, including arrangements for access to ports, airfields and the use of transportation and communication facilities;

11. *Resolves* that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;

Instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him, with the appropriate organs and agencies of the United Nations;

12. *Authorizes* the Conciliation Commission to appoint such subsidiary bodies and to employ such technical experts acting under its authority, as it may find necessary for the effective discharge of its functions and responsibilities under the present resolution;

The Conciliation Commission will have its official headquarters at Jerusalem. The authorities responsible for maintaining order in Jerusalem will be responsible for taking all the measures necessary to ensure the security of the Commission. The Secretary-General will provide a limited number of guards for the protection of the staff and premises of the Commission;

13. *Instructs* the Conciliation Commission to render progress reports periodically to the Secretary-General for transmission to the Security Council and to Members of the United Nations;

14. *Calls upon* all Governments and authorities concerned to co-operate with the Conciliation Commission and to take all possible steps to assist in the implementation of the present resolution;

15. *Requests* the Secretary-General to provide the necessary staff and facilities and to make appropriate arrangements to provide the necessary funds required in carrying out the terms of the present resolution.

ANNEX 3

UNGA RES. RESTATING THAT JERUSALEM SHOULD BE PLACED UNDER A PERMANENT INTERNATIONAL REGIME (1949)[8]

The General Assembly,
Having regard to its resolutions 181 (II) of 29 November 1947 and 194 (III) of 11 December 1948,[9]
Having studied the reports of the United Nations Conciliation Commission for Palestine set up under the latter resolution,
I. *Decides*
In relation to Jerusalem,
Believing that the principles underlying its previous resolutions concerning this matter, and in particular its resolution of 29 November 1947, represent a just and equitable settlement of the question,
1. To restate, therefore, its intention that Jerusalem should be placed under a permanent international regime, which should envisage appropriate guarantees for the protection of the Holy Places, both within and outside Jerusalem, and to confirm specifically the following provisions of General Assembly Resolution 181 (II) (1) the City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations; (2) The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority (...); and (3) the City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns, the most eastern of which shall be Abu Dis; the most southern, Bethlehem; the most western 'Ein Karim (including also the built-up area of Motsa; and the most northern, Shu'fat, as indicated on the attached sketch-map;
2. To request for this purpose that the Trusteeship Council at its next session, whether special or regular, complete the preparation of the Statute of Jerusalem, omitting the new inapplicable provisions, such as Articles 32 and 39, and, without prejudice to the fundamental principles of the international regime for Jerusalem set forth in General Assembly resolution 181 (II) introducing therein amendments in the direction of its greater democratiz-

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[8] UNGA res. 303 (iv) Of 9 December 1949, adopted by 38votes in favour, 14 against (Canada, Costa Rica, Denmark, Guatemala, Iceland, Israel, Norway, Sweden, Turkey, Union of South Africa, the UK, the USA, Uruguay, Yugoslavia), with 7 abstentions (Chile, Dominican Rep., Honduras, the Netherlands, New Zealand, Panama, Thailand).

[9] See *supra* Annexes 1 and 2.

ation, approve the Statute, and proceed immediately with its implementation. The Trusteeship Council shall not allow any actions taken by the interested Government of Governments to divert it from adopting and implementing the Statute of Jerusalem;[10]

II. *Calls upon* the States concerned to make formal undertakings, at an early date and in the light of their obligations as members of the United Nations, that they will approach these matters with good will and be guided by the terms of the present resolution.

[10] The Trusteeship approved the Statute of the City of Jerusalem in its resolution 232 (VI) of 4 April 1950. See also Tomeh (1981), 261-269. The references to Articles 32 and 39 relate to an earlier draft, approved by the Trusteeship Council in its resolution 34 (II) of 21 April 1948.

ANNEX 4

SC RES. ON PRINCIPLES OF A JUST AND LASTING PEACE IN THE MIDDLE EAST (1967 and 1973 respectively)[11]

The Security Council,

Expressing its continuing concern with the grave situation in the Middle East,

Emphasizing the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security,

Emphasizing further that all Member States in their acceptance of the Charter of the United nations have undertaken a commitment to act in accordance with Article 2 of the Charter,

1. *Affirms* that the fulfilment of the Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both of the following principles:

(i) Withdrawal of Israel armed forces from territories [*des territoires occupés*] in the recent conflict;

(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;

2. *Affirms further* the necessity

(a) for guaranteeing freedom of navigation through international waterways in the area;

(b) For achieving a just settlement of the refugee problem;

(c) For guaranteeing the territorial inviolability and political independence of every State in the area, through measures including the establishment of demilitarized zones;

3. *Requests* the Secretary-General to designate a Special Representative to proceed to the Middle East to establish and maintain contacts with the States concerned in order to promote agreement and assist efforts to achieve a peaceful and accepted settlement in accordance with the provisions and principles in this resolution;

4. *Requests* the Secretary-General to report to the Security Council on the progress of the efforts of the Special Representative as soon as possible.

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[11] SC res. 242 of 22 November 1967, adopted unanimously.

1973 SC RES. CALLING FOR CEASE-FIRE AND IMPLEMENTATION OF RES. 242[12]

The Security Council

1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the cease-fire, negotiations start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

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[12] SC res. 338 of 23 October 1973 adopted by 14 against none, with no abstentions.

ANNEX 5

THE PALESTINE NATIONAL CHARTER OF 17 JULY 1968 (extracts)[13]

Article 1—Palestine is the homeland of the Arab Palestinian people; it is an indivisible part of the Arab homeland, and the Palestinian people are an integral part of the Arab nation.

Article 2—Palestine, with the boundaries it had during the British mandate is an indivisible territorial unit.

Article 3—The Palestinian Arab people possesses the legal right to their homeland, and have the right to determine their destiny after achieving the liberation of their country in accordance with their wishes and entirely of their own accord and will

Article 4—The Palestinian identity is a genuine, essential and inherent characteristic; it is transmitted from parents to children. The Zionist occupation and the dispersal of the Palestinian Arab people, through the disasters which befell them, do not make them lose their Palestinian identity, and their membership of the Palestinian community, nor do they negate them.

Article 5—The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine, regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father—inside Palestine or outside it—is also a Palestinian.

Article 6—The Jews who had normally resided in Palestine until the beginning of the Zionist invasion will be considered Palestinians

Article 7—That there is a Palestinian community and that it has material, spiritual and historical connection with Palestine are indisputable facts (...).

Article 8—The phase in their history, through which the Palestinian people are now living, is that of national struggle for the liberation of Palestine. Thus the conflicts among the Palestinian national forces are secondary, and should be ended for the sake of the basic conflict that exists between the forces of

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[13] Cobban (1984), 267-268). See also Lukacs (1986), 139-143 and Lapidoth/ Hirsch (1992), 136-141.

Zionism and imperialism on the one hand, and the Palestinian Arab people on the other. On this basis the Palestinian masses, regardless of whether they are residing in the national homeland or in diaspora, constitute—both their organizations and the individuals—one national front working for the retrieval of Palestine and its liberation through armed struggle.

Article 9—Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to normal life in Palestine and to exercise their right to self-determination and sovereignty over it.

Article 10—Commando action constitutes the nucleus of the Palestinian popular liberation war. This requires its escalation, comprehensiveness and the mobilization of all the Palestinian popular and educational efforts and their organization and involvement in the armed Palestinian revolution (...).

[Articles 11-15 deal with national and Arab unity]

Article 15—The liberation of Palestine, from an Arab viewpoint, is a national duty and it attempts to repel the Zionist and imperialist aggression against the Arab homeland, and aims at the elimination of Zionism in Palestine. Absolute responsibility for this falls upon the Arab nation—peoples and governments—with the Arab people of Palestine in the vanguard (...).

[Articles 16 and 17 deal with the liberation of Palestine from a spiritual and human point of view.]

Article 18—The liberation of Palestine, from an international point of view, is a defensive action necessitated by the demands of self-defence. Accordingly, the Palestinian people, desirous as they are of the friendship of all people, look to freedom-loving, justice-loving and peace-loving states for support in order to restore their legitimate rights in Palestine, to re-establish peace and security in the country, and to enable its people to exercise national sovereignty and freedom.

Article 19—The partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their national right in their homeland, and inconsistent with the principles embodied in the Charter of the United Nations, particularly the right to self-determination.

Article 20—The Balfour Declaration, the mandate of Palestine and everything that has been based upon them, are deemed null and void. Claims of historical or religious ties of Jews with Palestine are incompatible with the facts of history and the true conception of what constitutes statehood. Judaism, being a religion, is not an independent nationality. Nor do Jews constitute a single nation with an identity of its own; they are citizens of the states to which they belong.

Article 21—The Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine. and reject all proposals aiming at the liquidation of the Palestinian problem, or its internationalization.

Article 22—Zionism is a political movement organically associated with international imperialism and antagonistic to all action for liberation and to progressive movements in the world. It is racist and fanatic in its nature, aggressive, expansionist and colonial in its aims, and fascist in its methods. Israel is the instrument of the Zionist movement, and a geographical base for world imperialism placed strategically in the midst of the Arab homeland to combat the hopes of the Arab nations for liberation, unity and progress. Israel is a constant source of threat *vis-à-vis* peace in the Middle East and the whole world (...)

Article 23—The demands of security and peace, as well as the demands of right and justice, require all states to consider Zionism as an illegitimate movement, to outlaw its existence, and to ban its operations, in order that friendly relations among peoples may be preserved, and the loyalty of citizens to their respective homelands safeguarded.

Article 24—The Palestinian people believe in the principles of justice, freedom, sovereignty, self-determination, human dignity, and in the right of all peoples to exercise them.

Article 25—For the realization of the goals of this Charter and its principles, the Palestine Liberation Organization will perform its role in the liberation of Palestine in accordance with the Constitution of this Organization.

[The remaining Articles 26-33 deal with the role of the PLO, the position of the Palestinian people in international relations and organizational matters.]

ANNEX 6

COMPARATIVE EXTRACT OF THE ISRAELI AND PALESTINIAN DECLARATIONS OF INDEPENDENCE (1948 and 1988 respectively)

STATE OF ISRAEL PROCLAMATION OF INDEPENDENCE OF 14 MAY 1948 (extract)	STATE OF PALESTINE DECLARATION OF INDEPENDENCE OF 15 NOVEMBER 1988 (extract)
Eretz-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	On the same terrain as God's apostolic missions to mankind and in the land of Palestine was the Palestinian people brought forth. There it grew and developed, and there it created its unique human and national mode of existence in an organic, indissoluble and unbroken relationship among people, land and history. Nourished by many strains of civilization and a multitude of cultures and finding inspiration in the texts of its spiritual and historic heritage, the Palestinian people has, throughout history, continued to develop its identity in an integral unity of land and people and in the footsteps of the prophets throughout this Holy Land, the invocation of praise for the Creator high atop every minaret while hymns of mercy and peace have rung out with the bells of every church and temple.
After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom	In the heart of its homeland and on its periphery, in its places of exile near and far, the Palestinian Arab people has not lost its unwavering faith in its right to return nor its firm belief in its right to independence. Occupation, carnage and displacement have been unable to dispossess the Palestinians

of their consciousness and their identity—their epic struggle has endured and the formation of their national character has continued with the growing escalation of the struggle.

Impelled by this historic attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. Pioneers *ma'pilim* [immigrants, PdW] and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community, controlling its own economy and culture, loving peace but knowing how to defend itself, bringing the blessings of progress to all the country's inhabitants, and aspiring towards independent nationhood.

From generation unto generation, the Palestinian Arab people has not ceased its valiant defence of its homeland, and the successive rebellions of our people have been a heroic embodiment of its desire for national independence. At a time when the modern world was fashioning its new system of values, the prevailing balance of power in the local and international arenas excluded the Palestinians from the common destiny, and it was shown once more that it was not justice alone that turned the wheels of history.

In the year 5657 (1897), at the summons of the spiritual father of the Jewish State, Theodore Herzl, the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country. This right was recognized in the Balfour Declaration of the 2nd November, 1917, and re-affirmed in the Mandate of the League of Nations which, in particular, gave international sanction to the historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.

The deep injury already done to the Palestinian people was therefore aggravated when a painful differentiation was made: a people deprived of independence, and one whose homeland was subjected to a new kind of foreign occupation, was exposed to an attempt to give general currency to the falsehood that Palestine was "a land without a people". Despite the falsification of history, the international community, in article 22 of the Covenant of the League of Nations of 1919 and in the Lausanne Treaty of 1923, recognized that the Palestinian Arab people was no different from the other Arab peoples detached from the Ottoman State and was a free and independent people.

The catastrophe which recently befell the Jewish people—the massacre of millions of Jews in Europe—was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of fully privileged member of the comity of nations. Survivors of the Nazi holocaust in Europe, as well as Jews from other parts of the world, continued to migrate to Eretz-Israel, undaunted by difficulties, restrictions and dangers, and never ceased to assert their right to a life of dignity, freedom and honest toil in their national homeland

The occupation of Palestinian territory and parts of other Arab territory by Israeli forces, the uprooting of the majority of Palestinians and their displacement from their homes by means of organized intimidation, and the subjection of the remainder to occupation, oppression and the destruction of the distinctive features of their national life, are a flagrant violation of the principles of legitimacy and of the Charter of the United Nations and its resolutions recognizing the national rights of the Palestinian people, including the right to return and the right to self-determination, independence and sovereignty over the territory of its homeland.

On the 29th November, 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their independent State is irrevocable

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

This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State

By virtue of the natural, historical and legal right of the Palestinian Arab people to its homeland, Palestine, and of the sacrifices of its succeeding generations in defence of the freedom and independence of that homeland,

Accordingly we, members of the People's Council, representatives of

Pursuant to the resolutions of the Arab Summit Conferences and on the basis

the Jewish community of Eretz-Israel and of the Zionist movement, are here assembled on the day of the termination of the British mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish state in Eretz- Israel, to be known as the State of Israel

of the international legitimacy embodied in the resolutions of the United Nations since 1947, and
Through the exercise by the Palestinian Arab people of its right to self-determination, political independence and sovereignty over its territory:
The Palestine National Council hereby declares, in the Name of God and on behalf of the Palestinian Arab people, the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem.

The State of Israel will be open for Jewish immigration and for the ingathering of the exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations

The State of Palestine shall be for Palestinians, wherever they may be, therein to develop their national and cultural identity and therein to enjoy full equality of rights. Their religious and political beliefs and human dignity shall therein be safeguarded under a democratic parliamentary system based on freedom of opinion and the freedom to form parties, on the heed of the majority for minority rights and the respect of minorities for majority decisions, on social justice and equality, and on non-discrimination in civil rights on grounds of race, religion, or colour or as between men and women,

We declare that, with effect from the moment of the termination of the Mandate, being tonight, the eve of Sabbath, the 6th Iyar 5708 (15th May 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional

under a Constitution ensuring the rule of law and an independent judiciary and on the basis of true fidelity to the age-old spiritual and cultural heritage of Palestine with respect to mutual tolerance, coexistence and magnanimity among religions.

Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel"

We appeal to the United Nations to assist the Jewish people in the building-up of its State and to receive the State of Israel into the comity of nations.

We appeal—in the very midst of the onslaught launched against us now for months— to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions.

We extend our hand to all our neighbouring states and their peoples in an offer of peace and good neighbourliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land. The State of Israel is prepared to do its share in a common effort for the advancement of the entire Middle East

We appeal to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream— the redemption of Israel

In the context of its struggle to bring peace to a land of peace and love, the State of Palestine calls upon the United Nations, which bears a special responsibility towards the Palestinian Arab people and its homeland, and upon the peace-loving States and peoples of the word and those that cherish freedom to assist it in achieving its goals, in bringing the plight of its people to an end, in ensuring the safety and security of that people and in endeavouring to end the Israeli occupation of Palestinian territory.

The State of Palestine further declares, in that connection, that its believes in the solution of international and regional problems by peaceful means in accordance with the Charter of the United Nations and the resolutions adopted by it, and that, without prejudice to the natural right to defend itself, it rejects the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other State.

To the spirits of our righteous martyrs, to the masses of our Palestinian Arab people and our Arab nation and to all free and honourable men, we give our solemn pledge to continue the struggle for an end to the occupation and the establishment of sovereignty and independence. We call upon our great

people to rally to the Palestinian flag, to take pride in it and to defend it so that it shall remain forever a symbol of our freedom and dignity in a homeland that shall be forever free and the abode of a people of free men.

On this momentous day, the fifteenth of November 1988, as we stand on the threshold of a new era, we bow our heads in deference and humility to the departed souls of our martyrs and the martyrs of the Arab nation who, by virtue of the pure blood shed by them, have lit the glimmer of this auspicious dawn and who have died so that the homeland might live.

Placing our trust in the Almighty, we affix our signatures to this Proclamation at this session of the Provisional Council of State, on the soil of the homeland, in the City of tel-Aviv, on this Sabbath eve, the 5th day of Iyar, 5708 (14th May, 1948).

ANNEX 7

STATEMENT BY THE ISRAELI GOVERNMENT ON THE STATUS OF JERUSALEM IN MAY 1949[14]

1. The Government of Israel co-operated to the fullest extent with the statute drawn up in November, 1947. It bears no responsibility for failure of that project which arose through the armed resistance of the Arab states and the refusal of organs of the United Nations to ratify or assume obligations necessary for the fulfilment of the statute.
2. The Government of Israel advocates and supports the establishment by the United Nations of an international regime for Jerusalem concerned exclusively with the control and protection of Holy Places and sites. If such a regime is establishment my Government will co-operate with it.
3. The Government of Israel will also agree to place under international control Holy places in other parts of its territory outside Jerusalem. We support the suggestion that guarantees should be given for what the representative of Argentina calls ' the protection of the Sacred Places in Palestine and for free access thereto.'
4. The Government of Israel is prepared to offer the fullest safeguards and guarantees for the security of religious institutions in the exercise of their functions. The Government of Israel is prepared to negotiate immediately with all religious authorities concerned with this end in view.
5. The Government of Israel will persevere in its efforts to repair the damage inflicted on religious buildings and sites in the course of the war launched by the Arab States.
6. The Government of Israel regards with pride and satisfaction its part in the restoration of peace and order which are the essential requisites of any reverent care for the Holy Places and sites.
7. Integration of the Jewish part of Jerusalem into the life of the State of Israel has taken place as a natural historical process arising from the conditions of war, from the vacuum of authority created by the termination of the Mandate, and from the refusal of the United nations to assume any direct responsibilities. This integration, which is paralleled by a similar process in the Arab area is not incompatible with the establishment of an international regime charged with full juridical status for the effective protection of Holy Places, no matter

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[14] UN Doc A/AC24/SR 45-48, 50 and 51. The statement was made by the representative of the Israeli government in the ad hoc Political Committee in May 1949 before the admission of Israel to the UN.

where situated. A proposal or alternative proposals for reconciling these interests will be submitted by Israel for the forthcoming Session of the General Assembly.

8. The Government of Israel will continue to seek agreements with the Arab interests concerned for the maintenance and preservation of peace and the reopening of blocked access into and within the City of Jerusalem. Such negotiations do not, however, affect the juridical status of Jerusalem which we seek to define by international consent.

9. The Government of Israel notes a disposition on the part of the Conciliation Commission and individual Member States to formulate new proposals for the effective and practical satisfaction of international interests to Jerusalem. The Government of Israel will give its most earnest study and attention to all such proposals, in the firm belief that the United Nations should only assume responsibilities which it is willing and able to exercise and which do not go beyond the limits required for the genuine fulfillment of universal religious interests.

10. The Government of Israel notes the resolution of the General Assembly of December 11th [UNGA res. 194 (III) of 11 December 1948, PdW] providing for the discussion of a lasting solution of the Jerusalem problem at the Fourth regular Session. The Government of Israel believes that the General Assembly should on that occasion discuss the final juridical status of Jerusalem. The Government of Israel hopes to contribute to that discussion, either by commenting on proposals put forward or by submitting proposals of its own for the approval of the Assembly.

11. The Government of Israel draws attention to the existence of profound Jewish religious interests, which give to Jerusalem a central and abiding place in Jewish spiritual life. All the sacred associations of Jerusalem derive ultimately from its Jewish origins. The preservation of synagogues, the right of access to the Wailing Wall and of residence within the Walled City require international guarantees and implementation.

12. These views of the Government of Israel on the future of Jerusalem are fully in accord with the principles of the Charter, with the General Assembly resolution of December 11 and with the views of many Members of the United Nations whose eligibility to retain their Membership has never been questioned. The conscientious and honest regard which the Government of Israel has shown and will continue to show both for international interests and for welfare of the population entitles it to present its record on Jerusalem as its highest credit.

ANNEX 8

A FRAMEWORK FOR PEACE IN THE MIDDLE EAST AGREED AT CAMP DAVID ON 17 SEPTEMBER 1978 (extract)

[PREAMBLE]

FRAMEWORK

Taking these factors into account, the parties [Egypt and Israel, witnessed by the USA, PdW] are determined to reach a just, comprehensive, and durable settlement of the Middle East conflict through the conclusion of peace treaties based on Security Council Resolutions 224 and 338 in all their parts. Their purpose is to achieve peace and good neighbourly relations. They recognize that, for peace to endure, it must involve all those who have been most deeply affected by the conflict. They therefore agree that this framework as appropriate is intended by them to constitute a basis for peace not only between Egypt and Israel, but also between Israel and each of its other neighbours which is prepared to negotiate peace with Israel on this basis. With that objective in mind, they have agreed to proceed as follows:

A. *West Bank and Gaza*

1. Egypt, Israel, Jordan and the representatives of the Palestinian people should participate in negotiations on the resolution of the Palestinian problem in all its aspects. To achieve that objective, negotiations relating to the West Bank and Gaza should proceed in three stages:

(a) Egypt and Israel agree that, in order to ensure a peaceful and orderly transfer of authority, and taking into account the security concerns of all the parties, there should be transitional arrangements for the West Bank and Gaza for a period not exceeding five years. In order to provide full autonomy to the inhabitants, under these arrangements the Israeli military government and its civilian administration will be withdrawn as soon as a self-governing authority has been freely elected by the inhabitants of these areas to replace the existing military government. To negotiate the details of a transitional arrangement, the Government of Jordan will be invited to join the negotiations on the basis of this framework. These new arrangements should give due consideration both to the principle of self-government by the inhabitants of these territories and to the legitimate security concerns of the parties involved.

(b) Egypt, Israel, and Jordan will agree on the modalities for establishing the elected self-governing authority in the West Bank and Gaza. The delegations

of Egypt and Jordan may include Palestinians from the West Bank and Gaza or other Palestinians as mutually agreed. The parties will negotiate an agreement which will define the powers and responsibilities of the self-governing authority to be exercised in he West Bank and Gaza. A withdrawal of Israeli armed forces will take place and there will be a redeployment of the remaining Israeli forces into specified security locations. The agreement will also include arrangements for assuring internal and external security and public order. A strong local police force will be established, which may include Jordanian citizens. In addition, Israeli and Jordanian forces will participate in joint patrols and in the manning of control posts to assure the security of the borders.

(c) When the self-governing authority (administrative council) in the West Bank and Gaza is established and inaugurated, the transitional period of five years will begin. As soon as possible, but not later than the third year after the beginning of the transitional period, negotiations will take place to determine the final status of the West Bank and Gaza and its relationship with its neighbours, and to conclude a peace treaty between Israel and Jordan by the end of the transitional period. These negotiations will be conducted among Egypt, Israel, Jordan, and the elected representatives of the inhabitants of the West Bank and Gaza. Two separate but related committees will be convened: one committee, consisting of representatives of the four parties which will negotiate and agree on the final status of the West Bank and Gaza and its relationship with its neighbours, and the second committee, consisting of representatives of Israel and representatives of Jordan to be joined by the elected representatives of the inhabitants of the West Bank and Gaza, to negotiate the peace treaty between Israel and Jordan, taking into account the agreement reached on the final status of the West Bank and Gaza. These negotiations shall be based on all the provisions and principles of UN Security Council Resolution 242. The negotiations will resolve, among other matters, the location of the boundaries and the nature of the security arrangements. The solution from the negotiations must also recognize the legitimate rights of the Palestinian people and their just requirements. In this way, the Palestinians will participate in the determination of their own future through:

1) The negotiations among Egypt, Israel, Jordan and the representatives of the inhabitants of the West Bank and Gaza to agree on the final status of the West Bank and Gaza and other outstanding issues by the end of the transitional period.

2) Submitting their agreement to a vote by the elected representatives of the inhabitants of the West Bank and Gaza.

3) Providing for the elected representatives of the inhabitants of the West Bank and Gaza to decide how they shall govern themselves consistent with the provisions of their agreement.

4) Participating as stated above in the work of the committee negotiating the peace treaty between Israel and Jordan.

2. All necessary measures will be taken and provisions made to assure the security of Israel and its neighbours during the traditional period and beyond. To assist in providing such security, a strong local police force will be constituted by the self-governing authority. It will be composed of inhabitants of the West Bank and Gaza. The police will maintain continuing liaison on internal security matters with the designated Israeli, Jordanian, and Egyptian officers.

3. During the transitional period, representatives of Egypt, Israel, Jordan, and the self-governing authority will constitute a continuing committee to decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern may also be dealt with by this committee.

4. Egypt and Israel will work with each other and with other interested parties to establish agreed procedures for a prompt, just and permanent implementation of the resolution of the refugee problem.

[B. *Egypt-Israel*]

[C. *Associated Principles*]

ANNEX 9

SC RES. REJECTING OF ISRAELI BASIC LAW ON STATUS OF JERUSALEM (1980)[15]

The Security Council,
Recalling its resolution 476 (1980) of 30 June 1980,
Reaffirming again that the acquisition of territory by force is inadmissible,
Deeply concerned over the enactment of a "basic law" in the Israeli Knesset proclaiming a change in the character and status of the Holy City of Jerusalem, with its implications for peace and security,
Noting, that Israel has not complied with Security Council resolution 476 (1980) [declaring null and void measures taken by Israel to change the character of Jerusalem, PdW],
Reaffirming its determination to examine practical ways and means, in accordance with the relevant provisions of the Charter of the United Nations, to secure the full implementation of its resolution 476 (1980), in the event of non-compliance by Israel,
1. *Censures* in the strongest terms the enactment by Israel of the "basic law" on Jerusalem and the refusal to comply with relevant Security Council resolutions;
2. *Affirms* that the enactment of the "basic law" by Israel constitutes a violation of international law and does not affect the continued application of the Fourth Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem;
3. *Determines* that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and, in particular, the recent "basic law" on Jerusalem are null and void must be rescinded forthwith;
4. *Affirms also* that this action constitutes a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East;
5. *Decides* not to recognize the "basic law" and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon all Members of the United Nations:
(a) to accept this decision;

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[15] SC res. 478 of 20 August 1980, adopted by 14 against none, with 1 abstention (USA).

(b) and upon those States that have established diplomatic Missions in Jerusalem to withdraw such Missions from the Holy City;

(c) *Requests* the Secretary-General to report to the Security Council on the implementation of this resolution before 15 November 1980;

(7) *Decides* to remain seized of this serious situation.

ANNEX 10

DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS (1993)

The Government of the State of Israel and the P.L.O. team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) (the "Palestinian Delegation"), representing the Palestinian people,agree that it 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 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. Accordingly, the two sides agree to the following principles:

Article I Aim of the Negotiations

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council, (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.
It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

Article II Framework for the Interim Period

The agreed framework for the interim period is set forth in this Declaration of Principles.

Article III Elections

1. In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation, while the Palestinian police will ensure public order.
2. An agreement will be concluded on the exact mode and conditions of the elections in accordance with the protocol attached as Annex I, with the goal

of holding the elections not later than nine months after the entry into force of this Declaration of Principles.
3. These elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.

Article IV JURISDICTION

Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.

Article V T TRANSITIONAL PERIOD AND PERMANENT STATUS NEGOTIATIONS

1. The five-year transitional period will begin upon the withdrawal from the Gaza Strip and Jericho area.
2. Permanent status negotiations will commence as soon as possible, but not later than the beginning of the third year of the interim period, between the Government of Israel and the Palestinian people representatives.
3. It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest.
4. The two parties agree that the outcome of the permanent status negotiations should not be prejudices or preempted by agreements reached for the interim period.

Article VI PREPARATORY TRANSFER OF POWERS AND RESPONSIBILITIES

1. Upon the entry into force of this Declaration of Principles and the withdrawal from the Gaza Strip and Jericho area, a transfer of authority from the Israeli military government and its Civil Administration to the authorised Palestinians for this task, as detailed herein, will commence. This transfer of authority will be of a preparatory nature until the inauguration of the Council.
2. Immediately after the entry into force of this Declaration of Principles and the withdrawal from the Gaza Strip and the Jericho area, with the view to promoting economic development in the West Bank and Gaza Strip, authority will be transferred to the Palestinians on the following spheres: education, and culture, health, social welfare, direct taxation, and tourism. The Palestinian side will commence in building the Palestinian police force, as

agreed upon. Pending the inauguration of the Council, the two parties may negotiate the transfer of additional powers and responsibilities, as agree upon.

Article VII Interim Agreement

1. The Israeli and Palestinian delegations will negotiate an agreement on the interim period (the "Interim Agreement").
2. The Interim Agreement shall specify, among other things, the structure of the Council, the number of its members, and the transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Council. The Interim Agreement shall also specify the Council's executive authority, legislative authority in accordance with Article IX below, and the independent Palestinian judicial organs.
3. The Interim Agreement shall include arrangements, to be implemented upon the inauguration of the Council, for the assumption by the Council of all of the powers and responsibilities transferred previously in accordance with Article VI above.
4. In order to enable the Council to promote economic growth, upon its inauguration, the Council will establish, among other things, a Palestinian Electricity Authority, a Gaza Sea Port Authority, a Palestinian Development Bank, a Palestinian Export Promotion Board, a Palestinian Environmental Authority, a Palestinian Land Authority and a Palestinian Water Administration Authority, and any other Authorities agreed upon, in accordance with the Interim Agreement that will specify their powers and responsibilities.
3. After the inauguration of the Council, the Civil Administration will be dissolved, and the Israeli military government will be withdrawn.

Article VIII Public Order and Security

In order to guarantee public order and international security for the Palestinians of the West Bank and the Gaza Strip, the Council will establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.

Article IX Laws and Military Orders

1. The Council will be empowered to legislate, in accordance with the Interim Agreement, within all authorities transferred to it.
2. Both parties will review jointly laws and military orders presently in force in remaining spheres.

Article X Joint ISraeli-Palestinian Liaison Committee

In order to provide a smooth implementation of this Declaration of Principles and any subsequent agreements pertaining to the interim period, upon the entry into force of this Declaration of Principles, a Joint Israeli-Palestinian Liaison Committee will be established in order to deal with issues requiring coordination, other issues of common interest, and disputes.

Article XI Israeli-Palestinian Cooperation in Economic Fields

Recognizing the mutual benefit of cooperation in promoting the development of the West Bank, the Gaza Strip and Israel, upon the entry into force of this Declaration of Principles, an Israeli-Palestinian Economic Cooperation Committee will be established in order to develop and implement in a cooperative manner the programs identified in the protocols attached as Annex III and Annex IV.

Article XII Liaison and Cooperation with Jordan and Egypt

The two parties will invite the Governments of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern will be dealt with by this Committee.

Article XIII Redeployment of Israeli Forces

1. After the entry into force of this Declaration of Principles, and not later than on the eve of elections for the Council, a redeployment of Israeli military forces in the West Bank and the Gaza Strip will take place, in addition to withdrawal of Israeli forces carried out in accordance with Article XIV.
2. In redeploying its military forces, Israel will be guided by the principle that its military forces should be redeployed outside populated areas.
3. Further redeployments to specified locations will be gradually implemented commensurate with the assumption of responsibility for public order and internal security by the Palestinian police force pursuant to Article VIII above.

Article XIV Israeli Withdrawal from the Gaza Strip and Jericho Area

Israel will withdraw from the Gaza Strip and Jericho area, as detailed in the protocol attached as Annex II.

Article XV Resolution of Disputes

1. Disputes arising out of the application and interpretation of this Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liaison Committee to be established pursuant to Article X above.
2. Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties.
3. The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee.

Article XVI Israeli- Palestinian Cooperation concerning Regional Programs

Both parties view the multilateral working groups as an appropriate instrument for promoting a "Marshall Plan", the regional programs and other programs, including special programs for the West Bank and Gaza Strip, as indicated in the protocol attached as Annex IV.

Article XVII Miscellaneous Provisions

1. This Declaration of Principles will enter into force one month after its signing.
2. All protocols annexed to this Declaration of Principles and Agreed Minutes pertaining thereto shall be regarded as an integral part hereof.

ANNEX I

PROTOCOL ON THE MODE AND CONDITIONS OF ELECTIONS

1. Palestinians of Jerusalem who live there will have the right to participate in the election process, according to an agreement between the two sides.
2. In addition, the election agreement should cover, amongst other thing, the following issues:
   a. the system of elections;
   b the mode of the agreed supervision and international observation and their personal composition; and

c. rules and regulations regarding election campaign, including agreed arrangements for the organizing of mass media, and the possibility of licensing a broadcasting and TV station.

3. The future status of displaced Palestinians who were registered on 4th June 1967 will not be prejudiced because they are unable to participate in the election process due to practical reasons.

ANNEX II

PROTOCOL OF WITHDRAWAL OF ISRAELI FORCES FROM THE GAZA STRIP AND JERICHO AREA

1. The two sides will conclude and sign within two months from the date of entry into force of this Declaration of Principles, an agreement on the withdrawal of Israeli military forces from the Gaza Strip and Jericho area. This agreement will include comprehensive arrangements to apply in the Gaza Strip and the Jericho area subsequent to the Israeli withdrawal.
2. Israel will implement an accelerated and scheduled withdrawal of Israeli military forces from the Gaza Strip and Jericho area, beginning immediately with the signing of the agreement on the Gaza Strip and Jericho area and to be completed within a period not exceeding four months after the signing of this agreement.
3. The above agreement will include, among other things:
   a. Arrangements for a smooth and peaceful transfer of authority from the Israeli military government and its Civil Administration to the Palestinian representatives.
   b. Structure, powers and responsibilities of the Palestinian authority in these areas, except: external security, settlements, Israelis, foreign relations, and other mutually agreed matters.
   c. Arrangements for the assumption of internal security and public order by the Palestinian police force consisting of police officers recruited locally and from abroad (holding Jordanian passports and Palestinian documents issued by Egypt). Those who will participate in the Palestinian police force coming from abroad should be trained as police and police officers.
   d. A temporary international or foreign presence, as agreed upon.
   e. Establishment of a joint Palestinian-Israeli Coordination and Cooperation Committee for mutual security purposes.
   f. An economic development and stabilization program, including the establishment of an Emergency Fund, to encourage foreign investment, and financial and economic support. Both sides will coordinate and cooperate jointly and unilaterally with regional and international parties to support these aims.

g. Arrangements for a safe passage for persons and transportation between the Gaza Strip and Jericho area.

4. The above agreement will include arrangements for coordination between both parties regarding passages:
   a. Gaza - Egypt; and
   b. Jericho - Jordan.
5. The offices responsible for carrying out the powers and responsibilities of the Palestinian authority under this Annex II and Article VI of the Declaration of Principles will be located in the Gaza Strip and Jericho area pending the inauguration of the Council.
6. Other than these agreed arrangements, the status of the Gaza Strip and Jericho area will continue to be an integral part of the West Bank and Gaza Strip, and will not be changed in the interim period.

ANNEX III

PROTOCOL ON ISRAELI-PALESTINIAN COOPERATION IN ECONOMIC AND DEVELOPMENT PROGRAMS

The two sides agree to establish an Israeli-Palestinian Continuing Committee for Economic Cooperation, focusing, amongst other things, on the following:

1. Cooperation in the field of water, including a Water development Program prepared by experts from both sides, which will also specify the mode of cooperation in the management of water resources in the West Bank and Gaza Strip, and will include proposals for studies and plans on water rights of each party, as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period.
2. Cooperation in the field of electricity, including an Electricity Development program, which will also specify the mode of cooperation for the production, maintenance, purchase and sale of electricity resources.
3. Cooperation in the field of energy, including an Energy Development program, which will provide for the exploitation of oil and gas for industrial purposes, particularly in the Gaza Strip and in the Negev, and will encourage further joint exploitation of other energy resources. This Program may also provide for the construction of a petrochemical industrial complex in the Gaza Strip and the construction of oil and gas pipelines.
4. Cooperation in the field of finance, including a Financial Development and Action program for the encouragement of international investment in the West bank and the Gaza Strip, and in israel, as well as the establishment of a Palestinian development Bank.
5. Cooperation in the field of transport and communications, including a Program, which will define guidelines for the establishment of a Gaza Sea Port Area, and will provide for the establishing of transport and communica-

tions lines to and from the West bank and the Gaza Strip to Israel and to other countries. In addition, this Program will provide for carrying out the necessary construction of roads, railways, communications lines, etc.

6. Cooperation in the field of trade, including studies, and Trade Promotion Programs, which will encourage local, regional and inter-regional trade, as well as a feasibility study of creating free trade zones,in the Gaza Strip and in Israel, mutual access to these zones, and cooperation in other areas related to trade and commerce.
7. Cooperation in the field of industry, including Industrial Development Programs, which will provide for the establishment of joint Israeli-Palestinian Industrial Research and Development Centres, will promote Palestinian-Israeli joint ventures, and provide guidelines for cooperation in the textile, food, pharmaceutical, electronics, diamonds, computer and science-based industries.
8. A program for cooperation in, and regulation of, labour relations and cooperation in social welfare issues.
9. A Human Resources Development and Cooperation Plan, providing for joint Israeli-Palestinian workshops and seminars, and for the establishment of joint vocational training centres, research institutes and data banks.
10. An Environmental Protection Plan, providing for joint and/or coordinated measures in this sphere.
11. A program of development coordination and cooperation in the field of communication and media.
12. Any other programs of mutual interest.

ANNEX IV

PROTOCOL ON ISRAELI-PALESTINIAN COOPERATION CONCERNING REGIONAL DEVELOPMENT PROGRAMS

1. The two sides will cooperate in the context of the multilateral peace efforts in promoting a Development Program for the region, including the West Bank and the Gaza Strip, to be initiated by the G-7. The parties will request the G-7 to seek the participation in this program of other interested states, such as members of the Organisation for Economic Cooperation and Development, regional Arab states and institutions, as well as members of the private sector.
2. The Development Program will consist of two elements:
   a) an Economic Development program for the West bank and the Gaza Strip.
   b) a Regional Economic Development Program.

   A. The Economic Development Program for the West bank and the Gaza Strip will consist of the following elements:

(1) A Social Rehabilitation Program, including a Housing and Construction Program.
(2) A Small and Medium Business development Plan.
(3) An Infrastructure Development Program (water, electricity, transportation and communications, etc.)
(4) A Human resources Plan.
(5) Other Programs.

B. The Regional Economic Development program may consist of the following elements:
(1) The establishment of a Middle East Development Fund, as a first step, and a Middle East development Bank, as a second step.
(2) The development of a joint Israeli-Palestinian-Jordanian Plan for coordinated exploitation of the Dead Sea area.
(3) The Mediterrean Sea (Gaza)—Dead Sea Canal..
(4) Regional Desalinization and other water development projects
(5) A regional plan for agricultural development, including a coordinated regional effort for the prevention of desertification.
(6) Interconnection of electricity grids.
(7) Regional cooperation for the transfer, distribution and industrial exploitation of gas, oil and other energy resources.
(8) A Regional Tourism, Transportation and Telecommunications Development Plan.
(9) Regional cooperation in other spheres.

3. The two sides will encourage the multilateral working groups, and will coordinate towards its success. The two parties will encourage intersessional activities, as well as pre-feasibility and feasibility studies, within the various multilateral working groups.

AGREED MINUTES TO THE DECLARATION ON PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS

A. General Understandings and Agreements

Any powers and responsibilities transferred to the Palestinians pursuant to the Declaration of Principles prior to the inauguration of the Council will be subject to the same principles pertaining to Article IV, as set out in these Agreed Minutes below.

B. Specific Understandings and Agreements

Article IV
It is understood that:

1. Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, military locations and Israelis.
2. The Council's jurisdiction will apply with regard to the agreed powers, responsibilities, spheres and authorities transferred to it.

Article VI(2)

It is agreed that the transfer of authority will be as follows:

1. The Palestinian side will inform the Israeli side of the names of the authorised Palestinians who will assume the powers, authorities and responsibilities that will be transferred to the Palestinians according to the Declaration of Principles in the following fields: education and culture, health, social welfare, direct taxation, tourism, and any other authorities agreed upon.
2. It is understood that the rights and obligations of these offices will not be affected.
3. Each of the spheres described above will continue to enjoy existing budgetary allocations in accordance with arrangements to be mutually agreed upon. These arrangements also will provide for the necessary adjustments required in order to take into account the taxes collected by the direct taxation office.
4. Upon the execution of the Declaration of Principles, the Israeli and Palestinian delegations will immediately commence negotiations on a detailed plan for the transfer of authority on the above offices in accordance with the above understandings.

Article VII(2)

The Interim Agreement will also include arrangements for coordination and cooperation.Article *VII(2)*

Article VII(5)

The withdrawal of the military government will not prevent Israel from exercising the powers and responsibilities not transferred to the Council.

Article VIII

It is understood that the Interim Agreement will include arrangements for cooperation and coordination between the two parties in this regard. It is also agreed that the transfer of powers and responsibilities to the Palestinian police will be accomplished in a phased manner, as agreed in the Interim Agreement.

Article X

In is agreed that, upon the entry into force of the Declaration of Principles, the Israeli and Palestinian delegations will exchange the names of the individuals

designated by them as members of the Joint Israeli-Palestinian Liaison Committee.
It is further agreed that each side will have an equal number of members in the Joint Committee. The Joint Committee will reach decisions by agreement. The Joint Committee may add other technicians and experts, as necessary. The Joint Committee will decide on the frequency and place or places of its meetings.

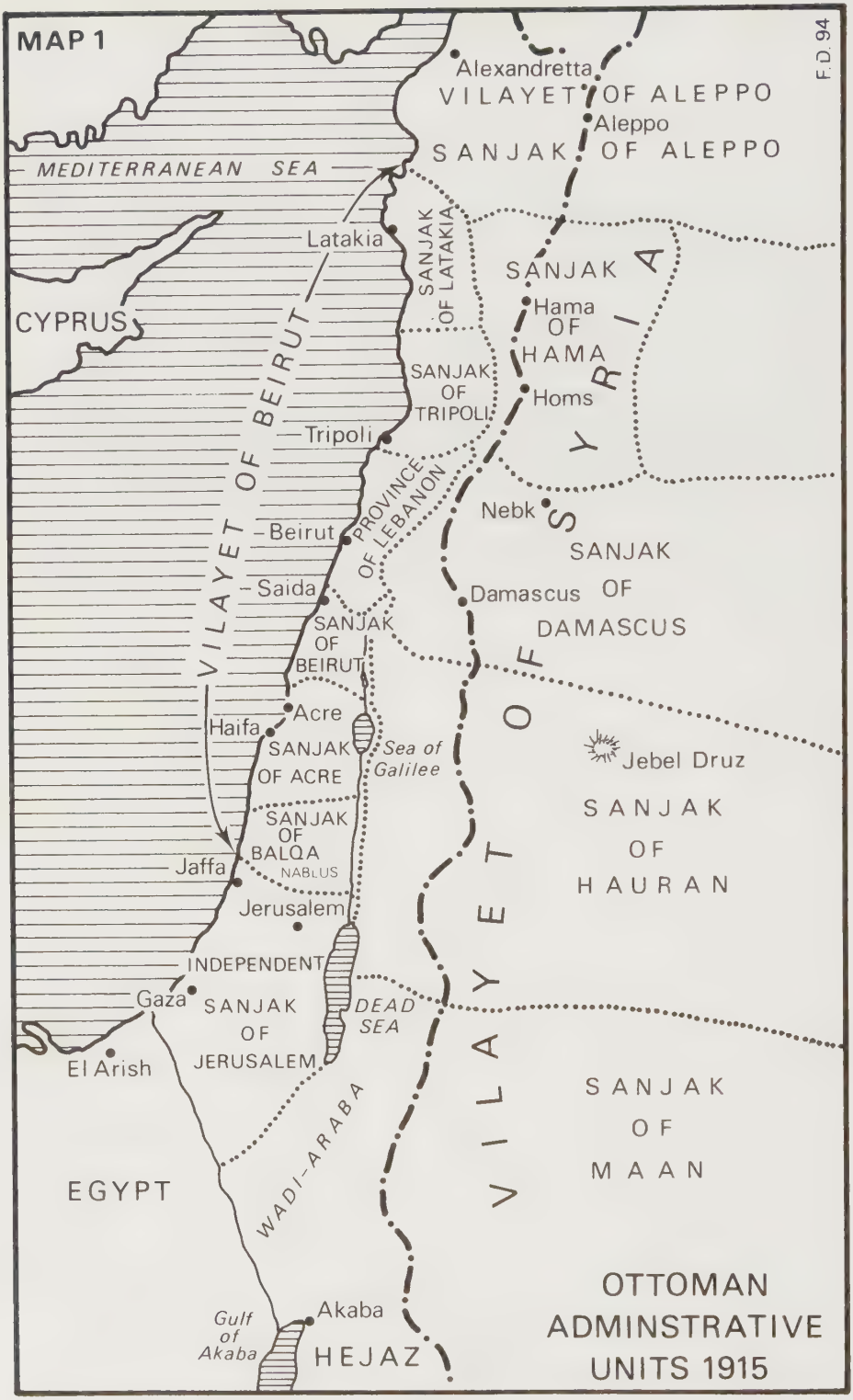
ANNEX II

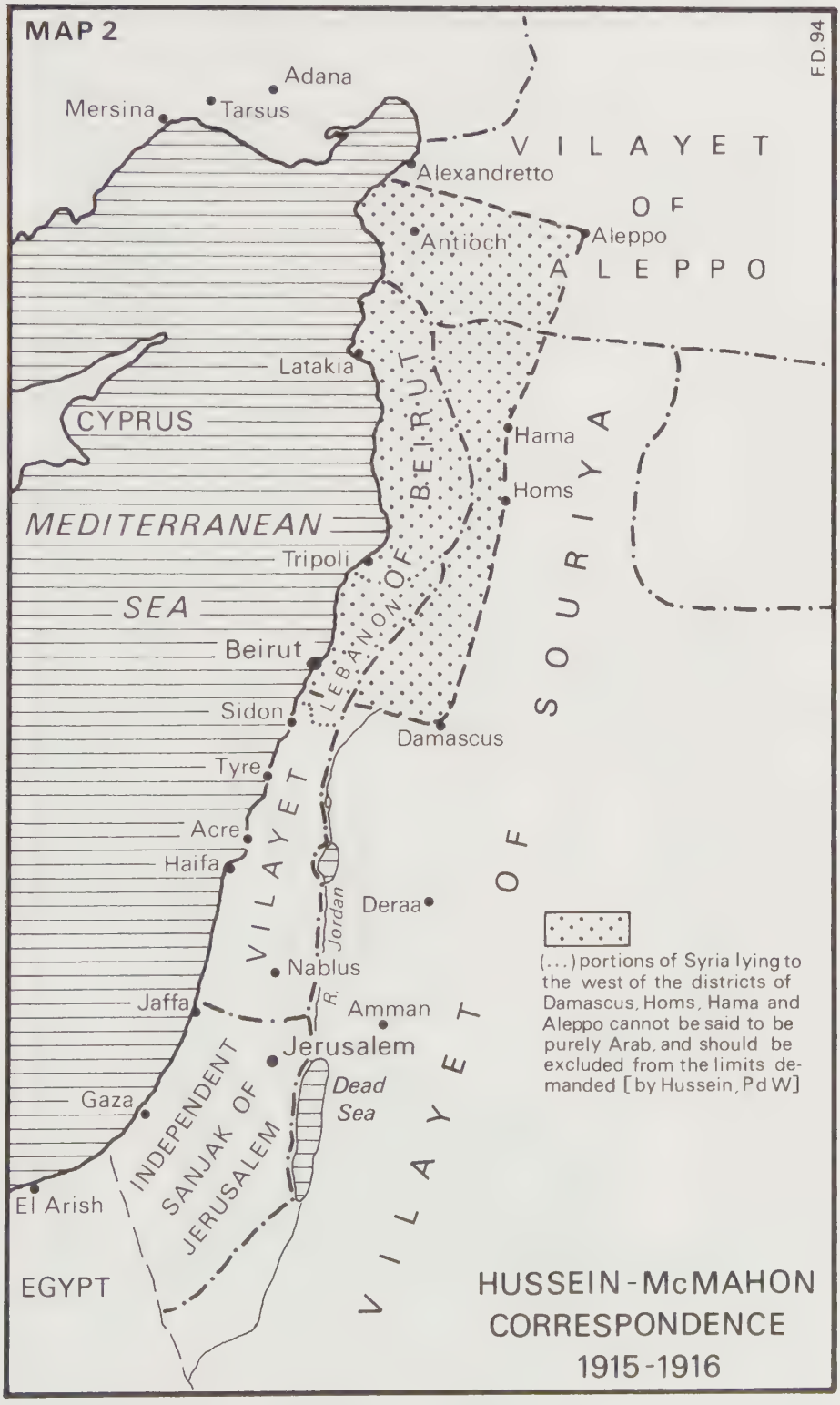
It is understood that, subsequent to the Israeli withdrawal, Israel will continue to be responsible for external security, and for internal security and public order of settlements and Israelis. Israeli military forces and civilians may continue to use roads freely within the Gaza Strip and the Jericho area.

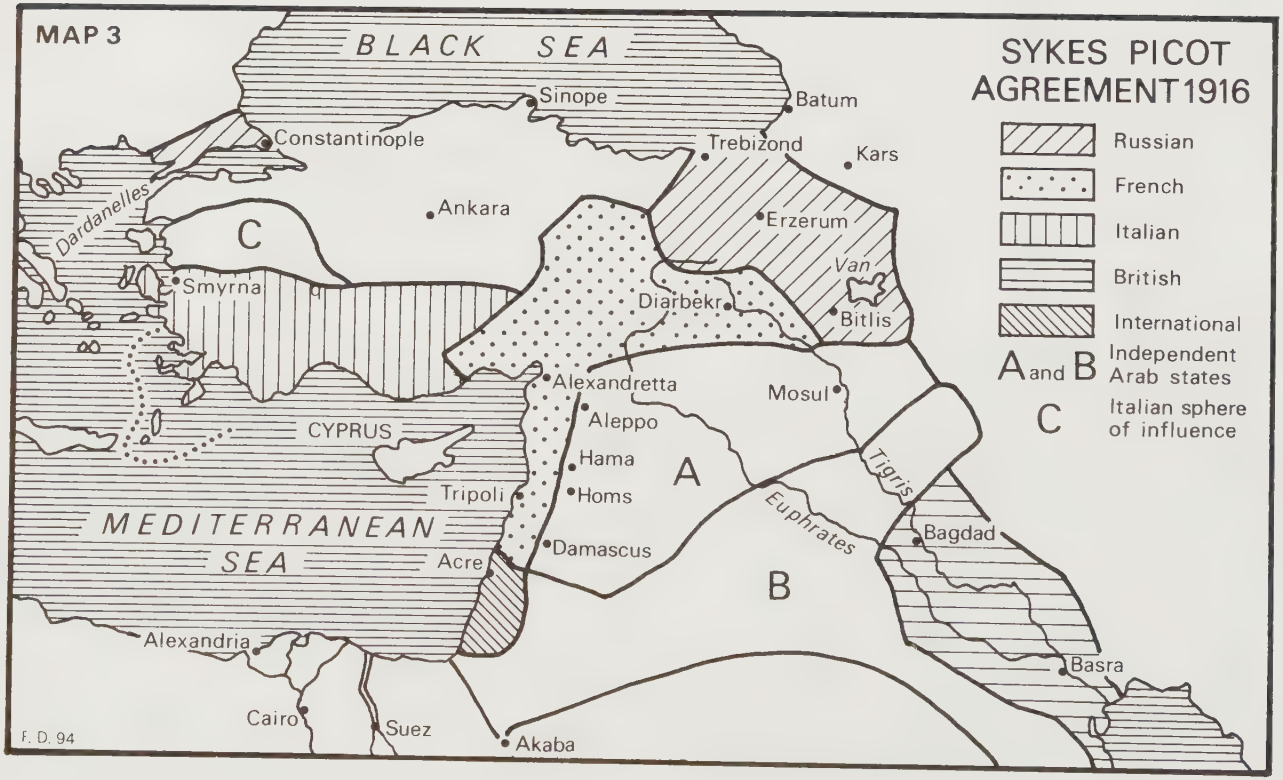
ANNEX 11

MAPS OF ISRAELI AND PALESTINIAN TERRITORY

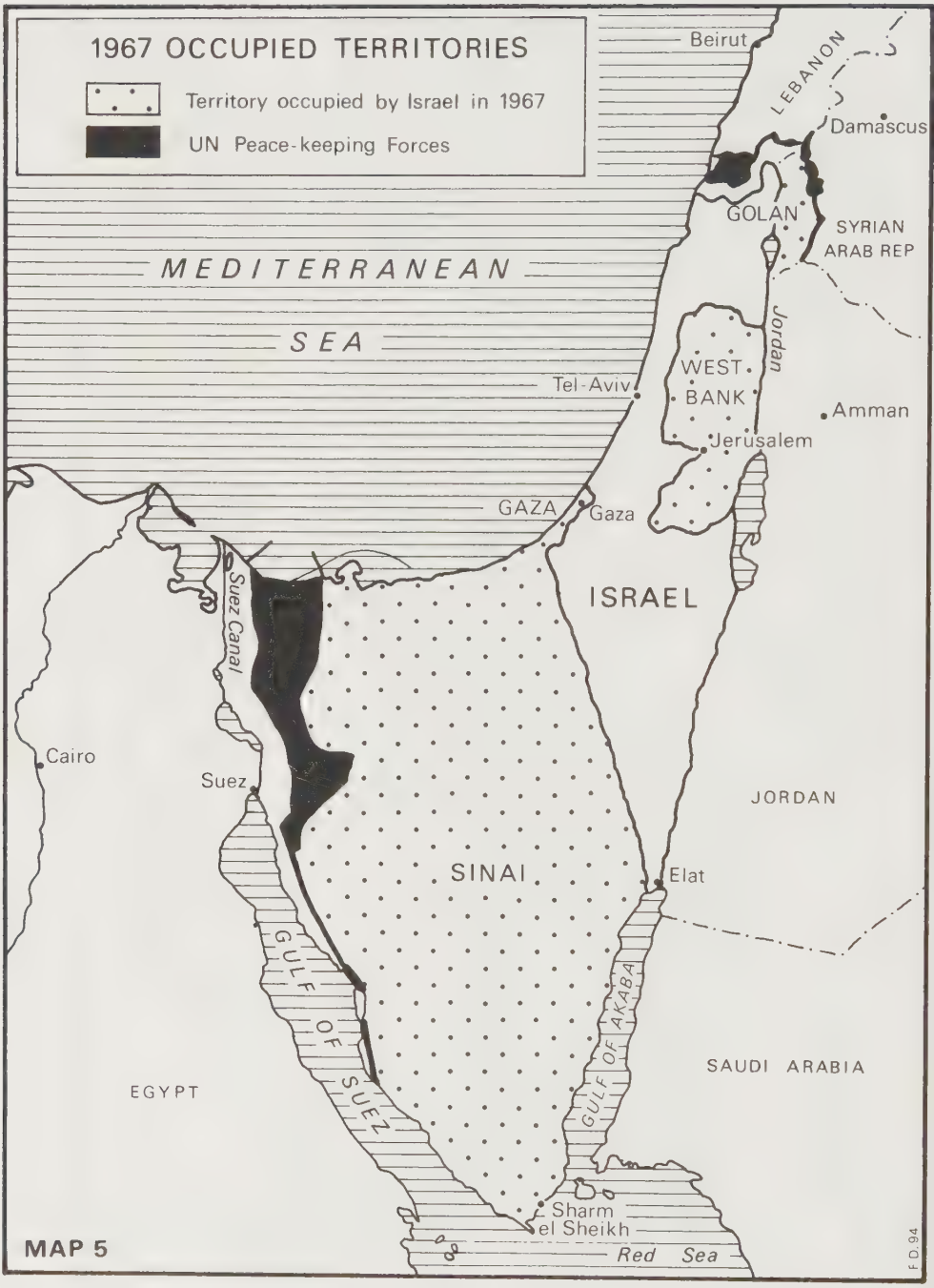
In the days of the Balfour Declaration Palestine was divided into Ottoman administrative units (Map 1). The Hussein-McMahon correspondence did not exclude explicitly Palestine from the territory of the intended Arab nation or confederation of Arab nations (Map 2). However, according to the British Government the whole of Palestine west of the Jordan was excluded from the McMahon pledge (see *supra* p. 107). The Sykes-Picot Agreement aimed at the creation of Palestine as an international sphere of interest (Map 3). The UN Plan of Partition divided the territory of the Palestine Mandate into an Arab and a Jewish state (Map 4). Israel occupied the territory of the Arab state in 1967 (Map 5). Since then it created a close network of Israeli settlements all over the West Bank and the Gaza Strip. By way of illustration the present situation in the West Bank is shown in Map 6.

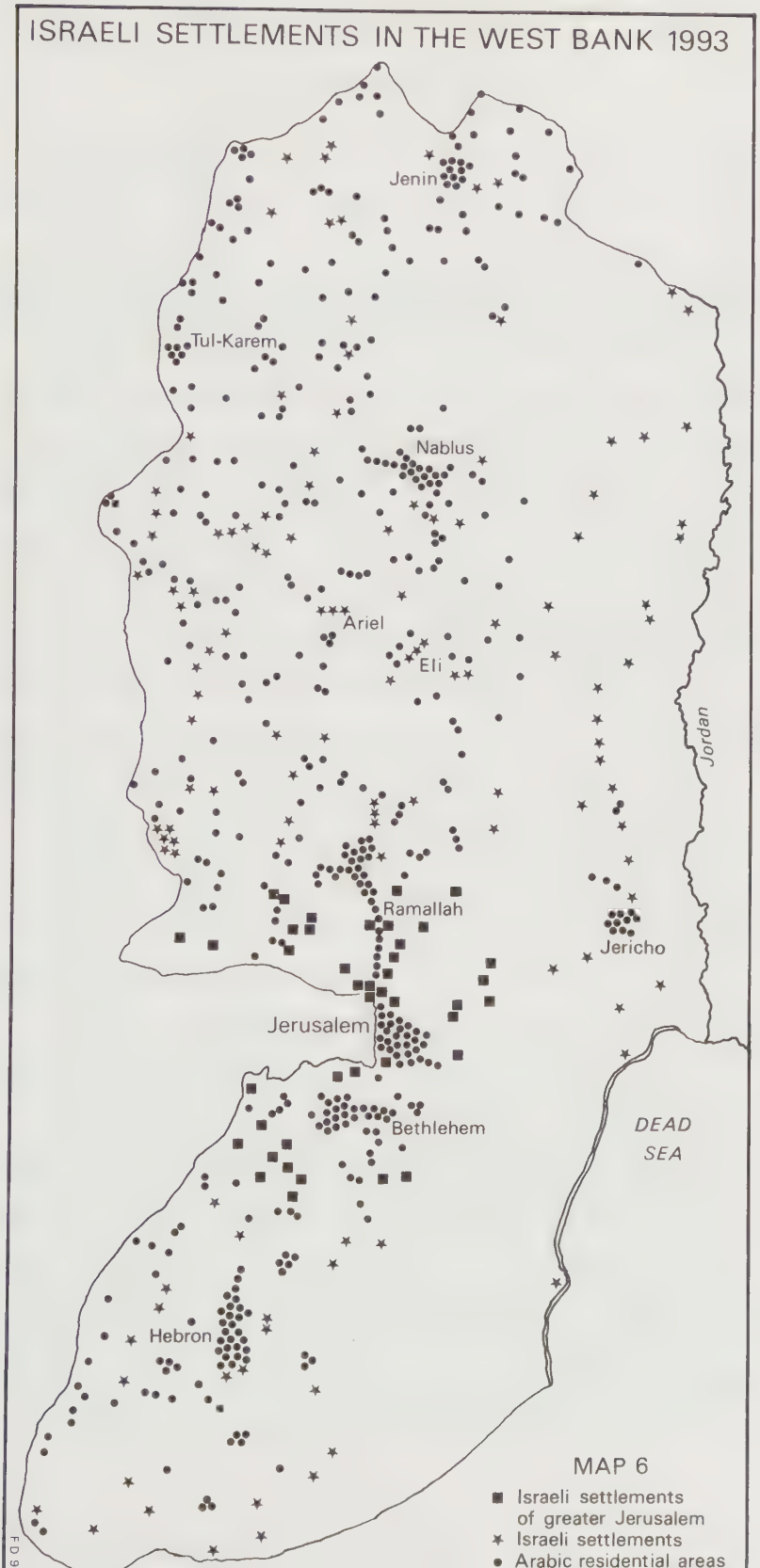

MAP 1
F.D. 94
Alexandretta
VILAYET OF ALEPPO
Aleppo
SANJAK OF ALEPPO
MEDITERRANEAN SEA
Latakia
SANJAK OF LATAKIA
SANJAK
Hama
OF
HAMA
CYPRUS
SANJAK OF TRIPOLI
Homs
VILAYET OF BEIRUT
Tripoli
PROVINCE OF LEBANON
Nebk
SANJAK
Beirut
Saida
Damascus
OF
DAMASCUS
SANJAK OF BEIRUT
Acre
Haifa
SANJAK OF ACRE
Sea of Galilee
Jebel Druz
SANJAK OF HAURAN
SANJAK OF BALQA
NABLUS
Jaffa
Jerusalem
INDEPENDENT
Gaza
SANJAK OF JERUSALEM
DEAD SEA
El Arish
SANJAK OF MAAN
WADI-ARABA
EGYPT
Gulf of Akaba
Akaba
HEJAZ
OTTOMAN ADMINSTRATIVE UNITS 1915


MAP 2
F.D.94
Adana
Mersina
Tarsus
VILAYET
OF
ALEPPO
Alexandretto
Antioch
Aleppo
Latakia
CYPRUS
MEDITERRANEAN
SEA
Tripoli
Beirut
Sidon
Tyre
Acre
Haifa
Jaffa
Gaza
El Arish
EGYPT
LEBANON
OF
BEIRUT
VILAYET
OF
SOURIYA
Hama
Homs
Damascus
Deraa
Jordan
R.
Nablus
Amman
Jerusalem
Dead
Sea
INDEPENDENT
SANJAK OF
JERUSALEM
VILAYET
OF
(...) portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded [by Hussein, P d W]
HUSSEIN - McMAHON
CORRESPONDENCE
1915 - 1916


MAP 3
BLACK SEA
Sinope
Batum
Constantinople
Trebizond
Kars
Dardanelles
Ankara
C
Erzerum
Van
Smyrna
Diarbekr
Bitlis
Alexandretta
Mosul
Aleppo
CYPRUS
Hama
A
Tripoli
Homs
Tigris
Euphrates
MEDITERRANEAN SEA
Damascus
Bagdad
Acre
B
Alexandria
Basra
Cairo
Suez
Akaba
F. D. 94
SYKES PICOT AGREEMENT 1916
Russian
French
Italian
British
International
A and B Independent Arab states
C Italian sphere of influence


MAP 4
MEDITERRANEAN SEA
Acre
Haifa
ACRE
Lake Tiberias
BEISAN
JENIN
TULKARM
JAFFA
Tel Aviv
Jaffa
NABLUS
RAMALLAH
RAMLE
Jerusalem
GAZA
DEAD SEA
HEBRON
Beersheba
NEGEV
UN PARTITION PLAN
1947
Arab State
Jewish State
City of Jerusalem
F.D. 94


1967 OCCUPIED TERRITORIES
Territory occupied by Israel in 1967
UN Peace-keeping Forces
Beirut
LEBANON
Damascus
GOLAN
SYRIAN ARAB REP
MEDITERRANEAN
SEA
Jordan
WEST BANK
Tel-Aviv
Amman
Jerusalem
GAZA
Gaza
ISRAEL
Suez Canal
Cairo
Suez
JORDAN
SINAI
Elat
GULF OF SUEZ
GULF OF AKABA
SAUDI ARABIA
EGYPT
Sharm el Sheikh
Red Sea
MAP 5
F.D.94


ISRAELI SETTLEMENTS IN THE WEST BANK 1993
Jenin
Tul-Karem
Nablus
Ariel
Eli
Jordan
Ramallah
Jericho
Jerusalem
Bethlehem
DEAD
SEA
Hebron
MAP 6
Israeli settlements of greater Jerusalem
Israeli settlements
Arabic residential areas

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