

Al-Haq Briefing Paper

**70 Years On: Palestinians Retain Sovereignty
Over East and West Jerusalem**

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“[A] collective amnesia has descended to obliterate all its antecedents in the distant, intermediate, and more immediate pasts.”¹

-Walid Khalidi

Throughout history, Jerusalem has been targeted by colonial aspirations. This pervasive dismissal of the rights of the native Palestinian population by foreign powers continues to resonate and drive the discourse on the city. As a result, Jerusalem is either characterized as the “capital for two peoples” by the international community, or as the “undivided capital” by Israel; both imposing a fixed outcome for Palestinians in disregard of their connection and legitimate claims to the city.

In this vacuum, Israel has implemented a 70-year campaign to erase Palestinian presence from and establish full control over Jerusalem. Indeed, Israel’s actions towards the city, whether through beginning to move its ministries in 1949 to west Jerusalem, to redrawing the municipal boundaries of the city in 1967, have all been aimed at establishing “facts on the ground” before concrete action is taken by the international community.² Accordingly, the policies witnessed today in East Jerusalem, ranging from residency revocations to home demolitions, are part of a continuing forcible transfer of Palestinians from Jerusalem: a continuing Nakba, which began in 1948.

This path has undoubtedly been paved by both the failure of third states to take action against Israel’s violations of international law, and also by the willingness of third states to directly facilitate violations of international law during and after the mandate period. Now, 70 years later, and as the international community continues to fail to act, the United States and Guatemala have [relocated](#) their embassies to Jerusalem,³ giving approval to Israel’s crimes. Honduras and the Czech Republic

¹ Revisiting the UNGA Partition Resolution, Walid Khalidi, *Journal of Palestine Studies*, Vol. 27, No. 1, Autumn 1997, p.6.

² For example, Eyal Weizman writes in *Hollow Land*, “The new delimitations were designed by a military committee with the aim of redrawing the state’s 1949 borders, prior to any evacuation of occupied territories that might have been forced on Israel by international agreement.” *Hollow Land: Israel’s Architecture of Occupation*, Verso, 2007, p.25.

³ Paraguay has stated its intention to move its embassy back to Tel Aviv in September 2018.



have indicated that they may also move their embassies.⁴ Notably, the State of Palestine instituted proceedings against the United States before the International Court of Justice alleging that the US Embassy move constituted a violation of the Vienna Convention on Diplomatic Relations, 1961.⁵

This paper not only seeks to examine Israel's occupation moving from west to east Jerusalem, but also more broadly examines how the international community has enabled the current status quo. The colonial underpinnings of the mandatory period and partition plan will be analyzed, as well as the so-called "peace" process. This paper argues that Palestinian leadership should insist that Palestinian rights to Jerusalem (east and west) are maintained and recognized *in toto* by the international community.

I. The British Mandate, Self-Determination, and the Status of Jerusalem

From approximately 1516 until 1918, Palestine was under Ottoman administration. Following World War I and the break up of the Ottoman Empire, the Versailles Treaty sought to establish a system where mandatories provided "tutelage" to peoples in colonies or territories formerly governed under the empire.⁶ This system created three classes of mandates, which differed in character according "to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances."⁷ Palestine was categorized as class A: a stage where it could be provisionally recognized as an independent nation "subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."⁸ Further under Article 22 of the Covenant of the League of Nations (Versailles Treaty) the selection of the Mandatory had to take into account the wishes of the communities; after the mandate was established, mandatory powers were also supposed to administer the territory in the interests of the indigenous population.⁹ Notably, other "class A" mandates, Iraq, Syria, and Lebanon, all became independent nations.

⁴ Guatemala opens embassy in Jerusalem after US move, Al Jazeera, 16 May 2018, available <https://www.aljazeera.com/news/2018/05/guatemala-opens-embassy-jerusalem-move-180516082355162.html>; Czech Republic Considering Moving Embassy to Jerusalem, Haaretz, 13 September 2018, available at <https://www.haaretz.com/israel-news/czech-republic-considering-moving-embassy-to-jerusalem-1.6468901>

⁵ The State of Palestine institutes proceedings against the United States of America, International Court of Justice, 28 September 2018, available at <https://www.icj-cij.org/files/case-related/176/176-20180928-PRE-01-00-EN.pdf>

⁶ Versailles Treaty June 28, 1919, The Covenant of the League of Nations, Part I, Article 22, available at <http://avalon.law.yale.edu/imt/parti.asp>.

⁷ Id.

⁸ Id.

⁹ Article 22 of the Versailles Treaty guided the Mandates, and declared that certain territories were able to become independent nations with "advice and assistance" by a Mandatory. In these situations, "the wishes of these communities must be a principal consideration in the selection of the Mandatory." Other territories were deemed to require greater administration and control by the

The Right to Self-Determination

The principle of self-determination can be traced to political documents and movements, including the 1776 Declaration of Independence of the United States,¹⁰ and was prominently examined by the League of Nations in the case of the Aaland Islands. The International Committee of Jurists examined the issue in 1920, prior to the League of Nations settlement of the dispute. The Committee noted that while the right of self-determination may be the most important principle “governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace.”¹¹

Nearly 20 years after the Aaland Islands case, the Atlantic Charter of 1941, a joint declaration of common principles between the United States and the United Kingdom asserted the right to self-determination. Importantly, the Charter stated that the parties hoped to “see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned,” and that they respected 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.”¹² A few months later, on 1 January 1942, the Atlantic Charter was included in the “Declaration by the United Nations.”¹³ The Charter of the UN, which came in to force on 24 October 1945, affirmed that one purpose of the

Mandatory, subject to certain limitations, which should be “in the interests of the indigenous population.” Both cases described in Article 22 recognized the position of the native communities present in the territory.

In its Advisory Opinion on the Status of South-West Africa, the International Court of Justice affirmed “The Union Government was to exercise an international function of administration on behalf of the League, with the object of promoting the well-being and development of the inhabitants.”

International Status of South-West Africa, Advisory Opinion of July 11th, 1950, p.132, available at <https://www.icj-cij.org/files/case-related/10/010-19500711-ADV-01-00-EN.pdf>.

¹⁰ Self-Determination, Daniel Thürer, Thomas Burri, Oxford Public International Law, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>

¹¹ Report of International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, October 1920, available at <https://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>

¹² The Atlantic Charter, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, 14 August 1941, Principles 2 and 3 of the Atlantic Charter, available at https://www.nato.int/cps/en/natohq/official_texts_16912.htm

¹³ Declaration of the United Nations, 1 January 1942, available at <https://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&page=36&searchType=advanced>

UN was “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”¹⁴

Although Palestinians had the right to self-determination in mandatory Palestine, and the Mandatory was required to administer the territory in the interest of the Palestinian population, these principles were contravened when Great Britain was given the Palestine Mandate. The League of Nations incorporated pledges made to Zionists by Britain under the Balfour Declaration in the Palestine Mandate. Article 6 of the Mandate, for example, affirmed that the Administration would “facilitate Jewish immigration under suitable conditions and shall encourage...close settlement by Jews on the land, including State lands and waste lands not required for public purposes.”¹⁵ The Palestine Mandate’s acknowledgment of the rights of “non-Jewish communities” and “natives,”¹⁶ was secondary to its objective of establishing “a national home for the Jewish people.”¹⁷ These provisions effectively contradicted Article 22 of the League of Nations, which solely emphasized the “indigenous population,” peoples inhabiting the “colonies and territories,” and the “wishes of these communities.” Indeed, a plain reading of Article 22 in no way condones prioritizing the wishes of foreigners to colonize.¹⁸ This conflict was recognized in the period leading up to 1948, with Arab states asserting that the Mandate for Palestine was illegal, and that its terms were “inconsistent with the letter and spirit of Article 22 of the Covenant of the League of Nations.”¹⁹

Irrespective of such protests, as Mandatory, Britain was able to change the course of Palestine by obstructing the right to self-determination of Palestinians and instead prioritizing non-residents and more broadly, the country’s colonization.²⁰ This

¹⁴ Article 1, UN Charter, entered into force 24 October 1945, available at <http://www.un.org/en/sections/un-charter/chapter-i/index.html>

¹⁵ Article 6, Palestine Mandate, 24 July 1922, available at http://avalon.law.yale.edu/20th_century/palmanda.asp

¹⁶ See, for example: Preamble of Palestine Mandate stating “nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine,” and Article 9, “the judicial system in Palestine shall assure to foreigners, as well as to natives, a complete guarantee of their rights.” and Article 9

¹⁷ Preamble of the Palestine Mandate. Supra at note 14.

¹⁸ The inconsistency between the Mandate and the League of Nations Covenant was also noted by the UN Sub Committee. Ad Hoc Committee on the Palestinian Question, Report of Sub-Committee 2, 11 November 1947, A/AC.14/32, Chapter I, para. 11, available at <https://unispal.un.org/pdfs/AAC1432.pdf>

¹⁹ Official Records of the Second Session of the General Assembly, Supplement No. 11, United Nations Special Committee on Palestine, 3 September 1947, A/364, para.160, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/07175DE9FA2DE563852568D3006E10F3>

²⁰ In describing the inconsistency between Article 22, the Balfour Declaration, and the Palestinian right to self-determination, Professor William Hocking noted “[t]he Declaration makes such a mandate impossible. There can be no provisional independence in a land subject to a protected immigration. The A-mandate considers the welfare of the residents; whereas the Declaration considers also the welfare of a nation of non-residents, making the Jewish people of the world as a



occurred even in the face of internal British government reports calling for the limitation of Jewish immigration.²¹ During British rule, the Jewish population increased from less than 10 percent in 1917 to over 30 percent by 1947 in mandate Palestine.²² Immigration inevitably also materially impacted the demography of Jerusalem, where the Jewish population tripled from 33,971 in 1918 to 99,400 in 1947.²³

Crucial to the current status of Jerusalem, irrespective of the power it held to facilitate the demographic shift as Mandatory, sovereign rights over Palestine were not transferred from the Ottoman Empire to the mandatory authority, Great Britain.²⁴ As noted in a separate opinion of the International Court of Justice (ICJ) on the Status of South-West Africa “Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State.”²⁵ The ICJ also elucidated two principles in regards to the mandates systems, that of non-annexation and “the principle that the well-being and development of such peoples form ‘*a sacred trust of civilization*.’... The two fundamental principles...apply to all former mandated territories which have not gained independence.”²⁶

The inhabitants of the Mandate, the people of Palestine, thus “had a right to sovereignty based on its connection to the territory, and on the principle of self-determination.”²⁷ Even after Israel forcibly took control of the western part of the

whole virtual or potential citizens of the state to be.” The Right of Self-Determination of the Palestinian People, United Nations, 1979, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/b987b5db9bee37bf85256d0a00549525/e72c9bc38a5e62568525721b007a7729?OpenDocument>

²¹ The 1929 Shaw Commission concluded that the mandatory administration limit Jewish immigration, and protect “Arab peasants from eviction by Jewish land purchases,” amongst other recommendations. A 1930 report by agricultural economics expert Sir John Hope Simpson reached the same conclusion. Although the British Colonial Secretary ratified the findings in a white paper, they were not implemented. See *The Palestinian Catastrophe*, Michael Palumbo, Quartet Books 1987, p.16.

²² *The Origins and Evolution of the Palestine Problem: 1917-1988*, Part II, 30 June 1979, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/D442111E70E417E3802564740045A309>

²³ Jerusalem, Henry Cattan, St. Martin’s Press New York, 1981, p.35.

²⁴Supra at note 6, Article 22.

²⁵ Separate Opinion by Sir Arnold Nair, *International Status of South West Africa*, International Court of Justice, 11 July 1950, p.150, <https://www.icj-cij.org/files/case-related/10/010-19500711-ADV-01-01-EN.pdf>

²⁶ Summary of 1950 judgment in: Separate opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, p.251, available at <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-06-EN.pdf>

²⁷ Sovereignty in Jerusalem, John Quigley, *Catholic University Law Review*, Volume 45, Issue 3 Spring 1996, p.778, available at <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1576&context=lawreview>



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city and changed the demography of the city, it did not attain sovereign rights. This continues to be reflected in statements and resolutions by the United Nations.

II. United Nations Resolutions & Israeli Consolidation of Jerusalem

Following Britain's announcement in February 1947 that it would withdraw from Palestine, the UN formed the Special Committee on Palestine (UNSCOP) in April 1947. While UNSCOP quickly recommended that Palestine be partitioned into an Arab State and a Jewish State, there was clear acknowledgement of the possible violations of international law that were taking place. In its Report to the General Assembly, UNSCOP itself noted:

“With regard to the principle of self-determination, although international recognition was extended to this principle at the end of the First World War and it was adhered to with regard to the other Arab territories, at the time of the creation of the "A" Mandates, it was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish National Home there. Actually, it may well be said that the Jewish National Home and the *sui generis* Mandate for Palestine run counter to that principle.”²⁸

Even with such an acknowledgment, the UNSCOP report went on to recommend a partition plan. Following the UNSCOP report, two committees were formed by the UN Ad Hoc Committee on the Palestinian Question, with Sub-Committee 2 tasked with examining legal questions arising from the “Palestine problem.”²⁹ In its report, Sub-Committee 2 affirmed that UNSCOP “failed to consider and determine some issues and juridical aspects of the Palestine question, and came to wrong and unjustified conclusions in relation to other matters which it did not consider.”³⁰ The Sub-Committee affirmed that the partition proposal was “contrary to the principles of the [UN] Charter, and the United Nations have no power to give effect to it.”³¹ The report further stated “The imposition of the partition of Palestine against the expressed wishes of the majority of its population can in no way be considered as respect for, or compliance with, any of the principles of the Charter.”³² The Sub-Committee report also noted “A refusal to submit this question for the opinion of the International Court of Justice would amount to a confession that the United Nations are determined to make recommendations in a certain direction, not because those recommendations are in accord with the principles of international justice and fairness, but because the majority of the delegates desire to settle the problem in a

²⁸ Official Records of the Second Session of the General Assembly, Supplement No. 11, United Nations Special Committee on Palestine, 3 September 1947, A/364, para.176, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/07175DE9FA2DE563852568D3006E10F3>

²⁹ Ad Hoc Committee on the Palestinian Question, Report of Sub-Committee 2, 11 November 1947, A/AC.14/32, Introduction, para. 4, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/BA8F82C57961B9FC85257306007096B8>

³⁰ Id. at para. 7.

³¹ Id. at para. 24

³² Id.



certain manner, irrespective of what the merits of the questions, or the legal obligations of the parties, might be.”³³

Indeed, prior to the partition vote, delegations from Arab states called for an advisory opinion by the International Court of Justice on issues including in part, whether partition was consistent with the principles of the UN Charter and “whether it lay within the power of any UN member or group of members to implement partition without the consent of the majority of the people living there.”³⁴ Colombia also called for the issue of competency to go before the Court.³⁵ The draft resolution requesting the opinion, however, was not approved.

Irrespective of the detailed arguments put forth by the Sub-Committee, on 29 November 1947, the United Nations General Assembly passed Resolution 181 calling for a partition of Palestine. Although the Palestinian Arab population reached two-thirds of the population and owned the majority of the land, the plan allocated to them only 45.5 percent of their country; on the other hand, the Jewish population was allotted 55.5 percent.³⁶ The Jewish population owned approximately 7 percent of the land, and the majority of that community was recent immigrants at that time.³⁷

The plan also called for Jerusalem to be established as a *corpus separatum*, an international city administered by the United Nations via the Trusteeship Council.³⁸ The unusual plan was a way for third states to guarantee access to the holy sites in Jerusalem.³⁹ The borders of the City of Jerusalem under *corpus separatum* were established as 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.”⁴⁰ The resolution also offered guidelines as to how

³³ Id. at para. 40.

³⁴ Supra at note 1, p.9.

³⁵ Ad Hoc Committee on the Palestinian Question, Summary Record of the Thirty-Second Meeting, 24 November 1947, A/AC.14/SR.32, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F16FFB0D40BEF49085256E6D006C9FBC>

³⁶ Supra at note 1, p.11.

³⁷ Id.

³⁸ Resolution 181 (II). Future Government of Palestine, United Nations General Assembly, 29 November 1947, A/RES/181(II), Part III, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>

³⁹ “Moreover, Catholic countries persuaded the UN to make Jerusalem an international city given its religious significance, and therefore UNSCOP also rejected the Zionist claim for the Holy City to be part of the future of the Jewish State.” The Ethnic Cleansing of Palestine, IlanPappe, Oneworld, 2006, p.32.

⁴⁰ Plan of Partition with Economic Union, Part III City of Jerusalem, Resolution 181 (II). Future Government of Palestine, United Nations General Assembly, 29 November 1947, A/RES/181(II), Part III, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>



the city would be governed, including instructions on citizenship for the residents of Jerusalem.

After the resolution was passed, the Arab Delegations continued to voice their condemnation of it, and the manner that the resolution was approved- including the role of the United States government and others in pressuring states to vote in favor.⁴¹

Israel's Annexation of West Jerusalem

While the Jewish Agency accepted the partition plan but not its “territorial limits,”⁴² the plan was rejected by the Palestinian population and Arab States on the grounds that it “violated the provisions of the United Nations Charter, which granted people the right to decide their own destiny.”⁴³ Violence erupted throughout Palestine, as Zionist groups began implementing Plan Dalet to ethnically cleanse Palestine.⁴⁴ Jerusalem and its environs became a prime target of Jewish terrorist groups.⁴⁵ While Jerusalem was already the target of Jewish immigration, these attacks hastened the changing landscape of the city through the expulsion of Palestinians.

Arab villages included in the western area of the *corpus separatum*, including Ein Karem, Deir Yasin, Al Malha, and Lifta, were violently emptied of their Palestinian residents, and in most cases razed. The massacre of 110⁴⁶ Palestinian men, women, and children in Deir Yasin in particular created deep fear and terror causing the flight of many Palestinians from Jerusalem and surrounding villages.⁴⁷ It is

⁴¹ “It is an established fact that strong pressure was put on the Philippines Government by the United States Government and, according to reliable information, the United States Government threatened the Philippines Government that it will not grant it the loan it is asking for if its delegation fails to support partition. In this way the Arabs lost the Philippines vote.” United Nations Palestine Commission, Statement of 6 February 1948 Communicated to the Secretary-General by Mr. Isa Nakhleh, Representative of the Arab Higher Committee, para. 2(c), available at <https://www.un.org/unispal/document/un-palestine-commission-partition-recommendation-statement-from-the-arab-higher-committee/>

⁴² The Plan of Partition and End of the British Mandate, available at <http://www.un.org/Depts/dpi/palestine/ch2.pdf>

⁴³ The Question of Palestine and the United Nations, 2008, p.9, <https://unispal.un.org/pdfs/DPI2499.pdf>

⁴⁴ The 1948 Ethnic Cleansing of Palestine, Ilan Pappé, Journal of Palestine Studies, Vol. 36, No. 1 (Autumn 2006), p.6-7.

⁴⁵ “Although Jewish terrorists struck in various parts of Palestine, their worst deeds were perpetrated in and around Jerusalem which was their prime target.” Supra at note 22, p.44.

⁴⁶ Testimonies from the Censored DeirYassin Massacre: ‘They Piled Bodies and Burned Them’, Haaretz, 16 July 2017, <https://www.haaretz.com/israel-news/MAGAZINE-testimonies-from-the-censored-massacre-at-deir-yassin-1.5494094>

⁴⁷ The Fall of the New City, Nathan Krystall, Jerusalem 1948- The Arab Neighborhoods and Their Fate in the War, p.100-101, available at http://www.badil.org/phocadownloadpap/Badil_docs/publications/Jer-1948-en.pdf



estimated that nearly 60,000 Palestinians from Jerusalem became refugees.⁴⁸ Notably, the majority of urban refugees from Jerusalem ended up living within a close distance from their homes- in East Jerusalem, Ramallah, and Bethlehem.⁴⁹ In contrast, Palestinians from rural areas of Jerusalem predominantly fled to Jordan.⁵⁰

Within this context of planned, deliberate violence, on 14 May 1948, the last day of the British Mandate, the Jewish Agency declared the establishment of the State of Israel without declaring the State's borders.⁵¹ By this time, it had controlled the western part of Jerusalem, two-thirds of which had been inhabited by Palestinians.⁵² It was further estimated that Jews owned under 31 percent of the land that was included in the west Jerusalem municipality.⁵³ Within a few months, Israel implemented the Absentee Property Regulation of 1948 and confiscated "all Arab homes, including any contents that had not already been looted, as well as lands and businesses."⁵⁴ Within the "New City" of Jerusalem alone, Israel took possession of some 10,000 Palestinian homes and their contents.⁵⁵

The separation of Jerusalem according to the November 1948 Cease-Fire Agreement, and as included in the Armistice Agreement of April 1949 between Jordan and Israel, was therefore not reflective of any historical division of the city between Palestinians and Jews. Notably, the Agreement between the two parties was only for military consideration, and affirmed that it would not "prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question."⁵⁶ The Agreement affirmed, "The injunction of the Security Council against resort to military force in the settlement of the Palestine question shall henceforth be scrupulously respected by both Parties."⁵⁷

The following month, and after two previous failed applications, on 11 May 1949, the UNGA granted Israel admission to the United Nations.⁵⁸ Importantly, the resolution granting admission recalled Resolutions 181 and 194(III), which

⁴⁸ "By late 1948, three quarters of a million Arabs had left Palestine, and the Arab population of Jerusalem, which at the start of the year stood at 65,000, was less than 4,000." Supra at note 26, p.771-772.

⁴⁹ Jerusalem 1948: The Phantom City, Salim Tamari, Jerusalem Quarterly, 1999, Issue 3, available at <http://www.palestine-studies.org/jq/fulltext/78215>

⁵⁰ Id.

⁵¹ Israel has yet to declare its borders.

⁵² Supra at note 23, p.48

⁵³ The Politics of Jerusalem, Michael Dumper, Columbia University Press, 1997, p.36.

⁵⁴ The De-Arabization of West Jerusalem 1947-1950, Nathan Krystall, Journal of Palestine Studies Vol. 27, 1997/98, p.15, available at <http://www.palestine-studies.org/jps/fulltext/40506>; The Regulation formed the basis for the 1950 Absentees' Property Law.

⁵⁵ Supra at note 23, p.61.

⁵⁶ Israel-Jordan Armistice Agreement, 3 April 1949, Article 2(1) and 5(1)(b)

⁵⁷ Id at Article 1(1).

⁵⁸ Resolution 273 (III), Admission of Israel to membership in the United Nations, UN General Assembly, 11 May 1949, A/RES/273, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/044/44/IMG/NR004444.pdf?OpenElement>

reaffirmed the determination of the UN to place the Jerusalem area under an international regime.⁵⁹ It also recalled “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.”⁶⁰ Importantly, the expressed Israeli position in the Political Committee was one amenable to the plan of the internationalization of Jerusalem.⁶¹ This was likely to ensure that its application was accepted, but was not representative of Israel’s genuine intent.⁶² A few months later, on 5 December 1949 and after its UN membership was accepted, all Israeli pretenses were dropped when Israeli Prime Minister Ben Gurion proclaimed Jerusalem as Israel’s capital.⁶³

In response, on 9 December 1949, the UNGA passed Resolution 303 (IV) affirming that “The Trusteeship Council shall not allow any actions taken by any interested Government or Governments to divert it from adopting and implementing the Statute of Jerusalem.”⁶⁴ It further called on concerned states, in line with their obligations as UN members, to “approach these matters with good will.” In blatant disregard of Resolution 303 and others, on 13 December, Ben-Gurion addressed another statement to the Knesset, asserting that the decision of an international regime for Jerusalem was “utterly incapable of implementation- if only because of the determination and unalterable opposition of the inhabitants of Jerusalem themselves.”⁶⁵ This was in reference to the Israeli civilians transferred in, not the

⁵⁹ Resolution 194 (III), Palestine- Progress Report of the United Nations Mediator, UN General Assembly, 11 December 1948, A/RES/194 (III), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/c758572b78d1cd0085256bcf0077e51a?OpenDocument>

⁶⁰ Supra at note 58.

⁶¹ “The Israeli Government had suggested at the first part of the current session that the problem might be solved by limiting the area in which the international régime operated, so that it would apply not to the entire city but only to that part of it which contained the largest number of religious and historic shrines. Another possibility was to envisage an international régime applying to the whole city of Jerusalem but restricted functionally, so that it would be concerned only with the protection of the Holy Places and not with any purely secular aspects of life and government.” 54. Application of Israel for admission to membership in the United Nations (A/818) (*continued*), UN General Assembly, A/AC.24/SR.45, 5 May 1949, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1DB943E43C280A26052565FA004D8174>

⁶² Supra at note 23, p.58-61.

⁶³ Statement to the Knesset by Prime Minister Ben-Gurion, 5 December 1949, Israel Ministry of Foreign Affairs, <http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/5%20statement%20to%20the%20knesset%20by%20prime%20minister%20ben-g.aspx>

⁶⁴ UNGA Resolution 303 (IV) Palestine: question of an international regime for the Jerusalem area and the protection of the Holy Places, 9 December 1949, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/2669D6828A262EDB852560E50069738A>

⁶⁵ Statement to the Knesset by Prime Minister Ben-Gurion, 13 December 1949, Israel Ministry of Foreign Affairs, available at <http://www.israel.org/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/7%20Statement%20to%20the%20Knesset%20by%20Prime%20Minister%20Ben-G.aspx>

Palestinian inhabitants that were unable to return. Ben-Gurion went on to hope that “the General Assembly will in the course of time amend the error.”⁶⁶

West Jerusalem as Occupied and Annexed Territory

The history of west Jerusalem’s status as unlawfully annexed territory has largely been obscured by recent discourse on Jerusalem as a “shared” capital. However, the manner in which Israel and the international community discussed the city remains relevant to its current status. For example:

- On 2 August 1948, Israel declared Jerusalem as “Israel-occupied territory.”⁶⁷ A few months later on 2 February 1949, and after UN Resolution 194 which called for an international regime in Jerusalem, the Israeli government abolished military rule in Jerusalem and instead instituted a civil administration.⁶⁸ Israel further took actions to cement and formally signal its de facto annexation of west Jerusalem.⁶⁹
- In 1949, during discussions on Israel’s membership to the UN, the representative of Lebanon noted that Israel had not only taken “territories which had been allotted to the Arabs, but upon what might be termed United Nations territory....While it could claim, rightly or wrongly, that Western Galilee, Jaffa, Lydda and Ramleh had been annexed as a result of war gains, there was no justification for the annexation of part of the proposed international territory of Jerusalem.”⁷⁰

⁶⁶ Id.

⁶⁷ 2 Jerusalem Declared Israel-Occupied City- Government Proclamation, Israeli Ministry of Foreign Affairs, 12 August 1948, available at <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/2%20Jerusalem%20Declared%20Israel-Occupied%20City-%20Governm.aspx>

⁶⁸ 4 Jerusalem-s Military Government Abolished- Government Proclamation, Israeli Ministry of Foreign Affairs, 4 February 1949, available at <http://mfa.gov.il/MFA/ForeignPolicy/MFADocuments/Yearbook1/Pages/4%20Jerusalem-s%20Military%20Government%20Abolished-%20Gover.aspx>

⁶⁹ “On 14 February 1949, the first Knesset convened in Jerusalem symbolizing the political significance of the city and signaling the de facto annexation of West Jerusalem to the new state. Military rule was subsequently abolished and the Israeli government declared that it no longer considered the city to be occupied territory. As a final measure, the cabinet decided to transfer officially the government to the city, declaring effectively West Jerusalem as the political capital of Israel. The Cabinet decree which declared Jerusalem as the capital of Israel came on 11 December 1949, one year to the day following the adoption of UN Resolution 194.” Dispossession and Restitution, Terry Rempel, Jerusalem 1948, ed. Salim Tamari, 2002, p.221-222, available at http://www.badil.org/phocadownloadpap/Badil_docs/publications/Jer-1948-en.pdf

⁷⁰ Application of Israel for admission to membership in the United Nations (A/818) (continued), A/AC.24/SR.45, 5 May 1949, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1DB943E43C280A26052565FA004D8174>

- In 1952, the non-recognition of Israel's annexation was highlighted in the case of the *Heirs of Shababo v. Roger Heilen, the Consulate General of Belgium and the Consul General of Belgium in Jerusalem*. In the deliberation, the respondents (Heilen, et al) "denied the jurisdiction of the Israeli courts over the accident since it had taken place in Jerusalem."⁷¹

Expanding Annexation

Due to the international community's failure to implement countless UN resolutions, and within the context of Israel's annexation of west Jerusalem and prohibition against the return of Palestinian refugees,⁷² the Jewish population in the defined *corpus separatum* area of Jerusalem expanded from 99,690 in 1947 to 194,000 in 1967.⁷³

Following the start of Israel's occupation of the West Bank, including East Jerusalem and the Gaza Strip in 1967, UN Security Council Resolution 242 called for Israel's withdrawal from the territory and emphasized Member State commitments under Article 2 of the UN Charter (respect for the principle of equal rights and self-determination of peoples).⁷⁴ As with previous UN resolutions, Resolution 242 was also disregarded by Israel. The Thalman Report on Jerusalem to the UN Secretary General immediately following the 1967 war, noted that Israeli officials reported that as of "29 June municipal processes started to function according to Israeli law."⁷⁵ It was apparent to the UN Special Representative that "Israel was taking every step to place under its sovereignty those parts of the city which were not controlled by Israel before June 1967."⁷⁶

Israel continued to deepen its grasp over the city, including through forcible and radical alteration of the demography. Between 1967 and 1971 alone, Israeli Mayor of Jerusalem Teddy Kollek claimed that 4,000 Palestinians were evacuated from

⁷¹ Jerusalem and the Peace Process, Ruth Lapidot, Israel Law Review, Vo. 28, Nos. 2-3, Spring-Summer 1994, available at <http://www.mfa.gov.il/mfa/mfa-archive/1994/pages/jerusalem%20and%20the%20peace%20process%20-%20jul-94.aspx>

⁷² The UN General Assembly adopted Resolution 194(III) declaring 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.*" Supra at note 59.

⁷³ Supra at note 23, p.81.

⁷⁴ UN Security Council Resolution 242 (1967) of 22 November 1967, S/RES/242 (1967), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136>

⁷⁵ Report of the Secretary-General Under General Assembly Resolution 2254 (ES-V) Relating to Jerusalem, 12 September 1967, S/8146, para. 28, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/B78930C63D3BB4D285256265005EC4E1>

⁷⁶ Id. at para. 33.



their homes in Jerusalem.⁷⁷ In continuing to affirm its control, in 1980, Israel issued the Basic Law declaring “Jerusalem, complete and united”⁷⁸ as the capital of Israel. The Israeli Knesset member who proposed the bill stated that it was “designed to ensure that there will never be any compromise over the sovereignty of Jerusalem.”⁷⁹ In response, the UN Security Council issued Resolution 478 which affirmed that all 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...are null and void and must be rescinded forthwith.”⁸⁰ Resolution 478 further called on “States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City.”⁸¹ Israel has continued to act in total disregard of these resolutions, including by working towards a 70:30 demographic majority of Israeli Jews to Palestinians in Jerusalem⁸² via the expansion of settlements in and surrounding Jerusalem and the transfer of Palestinians outside of the city.

Most recently, on 21 December 2017, in response to Trump’s declaration on Jerusalem, the UN General Assembly passed a resolution on the Status of Jerusalem, again reaffirming that all “decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded,” and echoed Security Council resolution 478 calling on States to abstain from establishing diplomatic missions in Jerusalem.⁸³ It further called on States to comply with all other Security Council Resolutions regarding Jerusalem.⁸⁴ A UN Security Council resolution calling for the withdrawal of US recognition was vetoed by the US; all other 14 members of the Council voted in favor.⁸⁵

III. Jerusalem in “Peace” Proposals

The strictures of the “peace” process have failed to recognize the past failings of the international community to protect Palestinian presence in and claims to Jerusalem.

⁷⁷ Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, 5 October 1971, A/8389, para. 48(c)(i), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/858C88EB973847F4802564B5003D1083>

⁷⁸ Basic Law: Jerusalem, Capital of Israel (Unofficial translation), Knesset, https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm

⁷⁹ Supra at note 53, p.41.

⁸⁰ UN Security Council Resolution 478 (1980) of 20 August 1980, S/RES/478 (1980), para. 3, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/DDE590C6FF232007852560DF0065FDDB>

⁸¹Id. at para. 5(b).

⁸² Trapped by Planning, Bimkom, p.20, available at <http://bimkom.org/eng/wp-content/uploads/TrappedbyPlanning.pdf>

⁸³ UN General Assembly Resolution ES-10/19. Status of Jerusalem, para. 1, available at <http://ask.un.org/faq/214435>

⁸⁴Id. at Para. 2

⁸⁵ U.S. Vetoes U.N. Security Council Resolution Voiding Trump's Jerusalem Move, NPR, 18 December 2017, available at <https://www.npr.org/sections/thetwo-way/2017/12/18/571653304/u-s-vetoes-u-n-security-council-resolution-voiding-trumps-jerusalem-move>



Instead, negotiations have largely conformed to Israel's unlawful policies and practices, and their resultant "facts on the ground." A short review of the past three decades of negotiations illustrates the transgression of the right to self-determination and sovereignty over Jerusalem for Palestinians.

Although the November 1988 Palestinian Declaration of Independence affirmed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem,"⁸⁶ within a few years and during the 1993 Oslo Accords, Jerusalem became a final status issue.⁸⁷ While Oslo aimed to establish a Palestinian Interim Self-Government Authority ("Council"),⁸⁸ and granted Palestinians living in Jerusalem the right to vote in the elections,⁸⁹ the Council would not have jurisdiction over Jerusalem.⁹⁰ The Oslo framework undoubtedly helped to deepen Israel's control over Jerusalem and Area C of the West Bank, its fragmentation of the OPT, and its ability to continue to unlawfully transfer Israeli settlers into these areas.

With the five-year transitional period under Oslo expired, the 2000 Camp David Summit also failed to provide a permanent solution. While the Summit has been misrepresented as Israel's most "generous" offer, it aimed to cement its settlement enterprise. For example, Abu Dis, a village in the Jerusalem governorate, was reportedly offered as the capital for Palestinians. Former Israeli Prime Minister Barak stated prior to the Summit "In any future settlement, Jerusalem will remain united as Israel's eternal capital. They [the Palestinians] will be in Abu-Dis and we will be in united Jerusalem."⁹¹

Following the failure of Camp David, US President Clinton invited Israeli Prime Minister Barak and Palestinian President Arafat to discuss a proposal that could be used as the basis for further negotiations.⁹² The so-called Clinton Parameters of December 2000 suggested the general principle of "Arab areas are Palestinian and

⁸⁶ Declaration of Independence, 15 November 1988, Palestine National Council

⁸⁷ Article V (3) notes "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." Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), available at https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciplesInterimSelf-Government%20Oslo%20Accords%29.pdf

⁸⁸ Id. at Article 1.

⁸⁹ Id. at Annex 1, Protocol on the Mode and Conditions of Elections, para.1.

⁹⁰ Supra at note 87, Article IV(1).

⁹¹ PM Barak's Statement at Cabinet Meeting regarding Abu-Dis, 15 May 2000, <http://mfa.gov.il/MFA/MFA-Archive/2000/Pages/Barak%20Statement%20to%20Cabinet%20on%20Abu-Dis%20-%20May%2015-%2020.aspx>

⁹² The Origins and Evolution of the Palestine Problem, Part V (1989-2000), United Nations New York 2014, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/3DF99D9DCCB3B21F85257C62004B782F>



the Jewish ones are Israeli” to apply to Jerusalem, including the Old City.⁹³ Given the amount of refugees from the Jerusalem area alone, it is important to note that the Parameters stated “The Israeli side could not accept any reference to a right of return that would imply a right to immigrate to Israel in defiance of Israel’s sovereign policies and admission or that would threaten the Jewish character of the state.”

The Palestinian negotiating team stated that the proposal would not meet “conditions required for a permanent peace,” including because of issues regarding territorial contiguity in the Jerusalem area due to Israel’s unlawful settlements, and access to Jerusalem more broadly.⁹⁴ Indeed, the parameters not only rewarded Israel for its violations of international law, including its annexation of Jerusalem, and disregard for the Palestinian right of return, but also provided the incentive for continued forcible transfer and settlement of the city.

Leaked documents, however, have claimed that Palestinian negotiators were willing to make even greater concessions on Jerusalem in 2008. PLO Chief Negotiator is reported to have stated, “We are offering you the biggest Yerushalayim in Jewish history.”⁹⁵ Following these leaks, a coalition of individuals from Jerusalem called on the PLO to end negotiations.⁹⁶ Most recently, PA President Abbas confirmed that Abu Dis was again being offered as the Palestinian capital under a US peace plan.⁹⁷ This followed the US declaration naming Jerusalem as Israel’s capital.⁹⁸

⁹³ It also delineated Palestinian sovereignty over the Haram and Israeli sovereignty over the Western Wall, with a commitment not to excavate unless based on mutual consent. Clinton Parameters, Clinton Proposal on Israeli-Palestinian Peace, 23 December 2000, available at

https://www.usip.org/sites/default/files/Peace%20Puzzle/10_Clinton%20Parameters.pdf

⁹⁴ Official Palestinian Response to The Clinton Parameters (and letter to the international community), 1 January 2001, available at <http://www.inss.org.il/he/wp-content/uploads/sites/2/systemfiles/palestinian%20response%20to%20the%20clinton%20parameters.pdf>

⁹⁵ Erekat offered 'biggest Yerushalayim in history', Maan News, 23 January 2011, available at <http://www.maannews.com/Content.aspx?id=353631>; This offer was reportedly made in a 2008 Trilateral Meeting, with Ahmad Qurei stating “We proposed that Israel annexes all settlements in Jerusalem except Jabal Abu Ghneim (Har Homa). This is the first time in history that we make such a proposition; we refused to do so in Camp David.” Meeting Minutes: Trilateral- United States, Israel and Palestine, 15 June 2008, Jerusalem, available at

<http://transparency.aljazeera.net/en/projects/thepalestinepapers/201218233143171169.html>

⁹⁶ Jerusalem figures demand end to negotiations, Maan News, 29 January 2011, available at <http://www.maannews.com/Content.aspx?id=355379>

⁹⁷ Abbas Confirms Palestinians Being Offered Abu Dis as Capital of Future State, 14 January 2018, Jerusalem Post, available at <https://www.jpost.com/Arab-Israeli-Conflict/Abbas-confirms-Palestinians-being-offered-Abu-Dis-as-capital-of-future-state-534738>

⁹⁸ Statement by President Trump on Jerusalem, 6 December 2017, available at <https://it.usembassy.gov/statement-president-trump-jerusalem-december-6-2017/>



Negotiations and International Law

If any legitimate negotiations take place in regards to Jerusalem in the future, key arguments and realities must be derived from the mandate period, UN resolutions, and provisions of international law.

First and foremost is the pervading character and acceptance of colonialism that underscored the mandate period and the creation of a *corpus separatum*. As previously noted, the British mandate, unlike other class A mandates, failed to establish a state for the inhabitants of Palestine, and willfully disregarded the right of Palestinians to self-determination. Irrespective of this, Palestinians retained sovereignty over Jerusalem, and more broadly, their right to self-determination.

Article 2(4) of the UN Charter affirms that Member States must “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.”⁹⁹ Moreover, under customary international humanitarian law, the transfer of civilians that “aims to change the demographic composition of a territory,” is prohibited.¹⁰⁰ Accordingly, neither Israel’s annexation of Jerusalem through use of force nor its unlawful transfer of its citizens into west and later east Jerusalem have conferred it sovereign rights over the city. This is reflected in countless UN resolutions, which have affirmed that all decisions and actions taken to alter the “character, status or demographic composition” of Jerusalem have no legal effect and are null and void.

Irrespective of the unlawful facts on the ground, Palestinian leadership must affirm Palestinian rights to Jerusalem. Indeed, the rights of the protected Palestinian population are inviolable. Palestinian negotiators, placing questions regarding the legitimacy of their authority aside, cannot lawfully deprive the Palestinian population of protections provided for in the Fourth Geneva Convention.¹⁰¹ As such, any agreement concluded while Palestine remains occupied, including one that provides for the transfer of occupied territory to the occupier, will be without any legal effect.¹⁰²

Conclusion and Recommendations

In his 2004 Separate Opinion, Judge Elaraby of the International Court of Justice concisely described the pathway that led to the current status quo. In recounting the

⁹⁹ Supra at note 14, Article 2.

¹⁰⁰ Rule 129. Act of Displacement and Rule 130. Transfer of Own Civilian Population into Occupied Territory. IHL Database Customary IHL, ICRC.

¹⁰¹ See Articles 7, 8, and 47 of the Fourth Geneva Convention. For a longer analysis of the inderogability of the protections afforded to the Palestinian population, see Exploring the Illegality of Land Swap, Agreements Under Occupation, Al-Haq, 2011.

¹⁰² Id. at Exploring the Illegality of Land Swaps, p.13.



historical and legal responsibilities towards Palestine, Elaraby stressed “Decisions with far-reaching consequences were taken on the basis of political expediency, without due regard for the legal requirements. Even when decisions were adopted, the will to follow through to implementation soon evaporated.”¹⁰³ Indeed, as highlighted by concerns raised by the UN Sub-Committee and others in 1947, and as countless UN resolutions have been issued and ignored, Jerusalem has become a model for effective annexation and occupation. Israel has proceeded in establishing Jerusalem as its “united capital,” while erasing Palestinian presence and ties to the city. Seventy years on, it is time for the international community to recognize the role it has played in these continued violations of international law, and begin to take effective action.

Al-Haq calls on the international community to:

- Ensure the realization of the right of permanent sovereignty of the Palestinian population to a united Jerusalem, recalling the basic legal principle *nemo dat quod non habet*.¹⁰⁴
- Ensure the implementation of international law and the protection of the Palestinian people, including through the implementation of sanctions and other measures, until Israel adheres to its obligations as a member of the United Nations and occupying power;
- Continue to not recognize Israeli sovereignty over Jerusalem, including by refraining from establishing embassies in the city, and abstaining from meetings or events at the US Embassy in Jerusalem;
- Abandon the Clinton parameters, which encourage forcible displacement and the radical alteration of the demography of Palestine; and
- Fully cooperate with the preliminary examination of the International Criminal Court.

It is evident that while Palestinian leadership holds on to Jerusalem in its discourse, it does not take direct measures to ensure the rightful Palestinian claim to the city, including by supporting the viability of Palestinians living there.¹⁰⁵ The negotiations have further represented a dangerous departure from international law.

Accordingly, Al-Haq calls on Palestinian leadership to:

- Provide support to strengthen Palestinian resilience in Jerusalem;
- Continue to assert Palestinians’ legitimate claim to all of Jerusalem; and

¹⁰³ Supra at note 26, p.247.

¹⁰⁴ You cannot give what you do not have.

¹⁰⁵ It was estimated that in 2015, the Palestinian Authority “planned to allocate only 0.44% of its budget to the Ministry of Jerusalem Affairs and to the Jerusalem governorate.” Against Israel’s Colonial Tide: Palestinian Initiatives to Shape Their Future, The Jerusalem Fund, 11 October 2016, available at <http://www.thejerusalemfund.org/13722/israels-colonial-tide-palestinian-initiatives-shape-future>



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- Ensure that any future agreements do not contravene international law, including by not recognizing Israel's unlawful settlement enterprise through [land swaps](#), and ensuring the right of return for all Palestinians.

Further, Al-Haq calls on the State of Palestine to:

- Accede to the Statute of the International Court of Justice; and
- Seek a Security Council resolution establishing a special United Nations Compensation Commission for Jerusalem, to not only compensate Palestinians for their dispossessed property, but to also ensure a right of return of all refugees, including to their properties in West Jerusalem.