

**CASE NO. 186**

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

**(REQUEST FOR ADVISORY OPINION)**

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**WRITTEN STATEMENT OF  
THE EUROPEAN LEADERSHIP NETWORK AND  
UK LAWYERS FOR ISRAEL**

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## Summary

1. The European Leadership Network (ELNET) is a leading NGO dedicated to strengthening Europe-Israel relations. UK Lawyers for Israel (UKLFI) is an association of lawyers who support Israel and seek the proper application of laws in matters relating to Israel.
2. In this statement ELNET and UKLFI seek to do four things: *first*, to draw attention to the unreliability of information provided to the Court and to analyse the options available to the Court for dealing with the case in the light of this unreliability; *second*, to provide a brief outline of the historical and legal context required to determine fundamental issues, including the rights of the Jewish people and the State of Israel; *third*, to analyse requirements for self-determination and problematic assumptions in the questions asked by the General Assembly; and *fourth*, to set out the position of ELNET and UKLFI in the light of the above.
3. One of many points which expose the inadequacy of information placed before the Court is evidence that an overwhelming majority of Arabs in Jerusalem would prefer a continuation of Israeli rule of the united city: see §78(a) below. This has obvious implications for self-determination and emphasises the need to resolve outstanding issues by a political process: see §§83-86, 92-93 and 97 below.
4. Our primary submission is that the Court does not have before it sufficiently reliable information to arrive at judicial conclusions on disputed questions of fact whose determination would be necessary for it to give an opinion in this case in conditions compatible with its judicial character. Moreover, the questions are not sufficiently specific to enable the Court to address them judicially - notably, they ask what are the legal consequences of policies and practices of Israel without specifying which policies and practices.
5. If, however, the Court decides to answer the questions asked by the General Assembly at all, ELNET and UKLFI submit that it should advise the General Assembly as follows:
  - (a) (i) There is no ongoing violation by Israel of the right of the Palestinian people to self-determination.
  - (ii) Israel has not adopted measures aimed at altering the demographic composition or character of Jerusalem and is entitled to exercise sovereignty over the united city of Jerusalem.
  - (iii) In order to realise self-determination of the Palestinian people in east Jerusalem, the West Bank and the Gaza Strip, Israel and representatives of the

Palestinian people must ascertain the will of the Palestinian people in these areas and must negotiate in good faith in accordance with the Oslo Accords to resolve remaining issues in a manner which accommodates the rights of Israel and the Jewish people as well as the rights of the Palestinian people.

(iv) The Court is not able to advise as to the existence (or otherwise) and legal consequences (if any) of alleged discriminatory legislation and measures to which the General Assembly refers in question (a), since these are not identified in the question.

(b) The Court is not able to advise as to the existence (or otherwise) and legal consequences (if any) of alleged policies and practices to which the General Assembly refers in question (b), since these are not identified in the question.

### **The European Leadership Network and UK Lawyers for Israel**

6. ELNET is a non-governmental, nonpartisan network that brings together leaders to foster close relations between Europe and Israel based on shared democratic values and strategic interests. It has offices for the UK, France, Germany, the EU and NATO, Central and Eastern Europe, and Israel.
7. ELNET provides platforms for European and Israeli policy makers to gain deeper insights into the mutual benefits of close relations; discuss geopolitical challenges; better understand the security threats Israel faces; explore Israeli solutions to European needs and European solutions to Israeli needs; and pursue new opportunities for partnerships in defence, trade, energy, food security and innovation,
8. ELNET staunchly supports a safe and secure Israel and the pursuit of peace in the Middle East through direct negotiations between Israel, the Palestinians and Arab countries. Recognising that the Abraham Accords have introduced a new era of partnership and opportunity, ELNET encourages Europe to seize the important role it can play in advancing stability and prosperity across the region and beyond.
9. UKLFI is an association of lawyers with members in the UK and other countries around the world. It frequently draws legal and factual considerations relevant to matters relating to Israel to the attention of public and private bodies in the UK and other countries, as well as international organisations and courts.

## **The problem of inaccurate and one-sided information**

### UNGA Resolution 77/247

10. The General Assembly's request for an Advisory Opinion of the Court is contained in its Resolution 77/247. That Resolution and the documents it cites make many allegations against Israel which we respectfully submit are incorrect, distorted, taken out of context, partisan and/or unbalanced.
11. Even the specific questions asked by the General Assembly in §18 of that Resolution presume facts and legal conclusions that we respectfully submit are incorrect. The questions asked are:
  - “(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?”*
  - “(b) How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?”*
12. These questions wrongly assume:
  - (a) that there is an ongoing violation by Israel of the right of the Palestinian people to self-determination;
  - (b) that Israel has adopted measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem;
  - (c) that Israel has adopted unspecified discriminatory legislation and measures; and
  - (d) that unspecified policies and practices of Israel affect the legal status of “the occupation”.
13. As this Court observed in its Advisory Opinion in Case No. 146 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International Fund for Agricultural Development*,

*“questions put to it for an advisory opinion ... should be asked in neutral terms rather than assuming conclusions of law that are in dispute. They should not include reasoning or argument.”*<sup>1</sup>

It is regrettable that the questions asked in this case depart from that standard.

#### UN Discrimination against Israel

14. Unfortunately, this bias conforms to a pattern of seriously discriminatory treatment against Israel on the part of the UN General Assembly and other UN bodies. Since 2015, the General Assembly has adopted 140 resolutions condemning Israel and a total of 64 resolutions condemning all other countries in the rest of the world combined; the Human Rights Council (UNHRC) has adopted 104 resolutions condemning Israel and 97 condemning all other countries combined; and the World Health Organisation has adopted 9 resolutions condemning Israel and none condemning other countries. Moreover, the resolutions condemning Israel are distinguished by their harsh tone and one-sided content.<sup>2</sup>
15. This discriminatory treatment is not just ad hoc, but also structural. The UNHRC devotes an item on its standing agenda to *“Human rights situation in Palestine and other occupied Arab territories”*. All other items of the UNHRC’s standing agenda are in general and inclusive terms.<sup>3</sup> Special bodies have been established by the UN to promote alleged rights of the Palestinian people and to undermine Israel, including the Committee on the Exercise of the Inalienable Rights of the Palestinian People, the Division for Palestinian Rights, and the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.<sup>4</sup>
16. This bias has been recognised, for example, by former UN Secretary General Ban Ki-moon, who admitted that

*“There are some bias against Israel, Israeli people, and government [in the UN]. ... Unfortunately because of all this conflict situation, you have been criticised and you have been suffering from this bias and sometimes discriminations”*.<sup>5</sup>

Regarding the adoption by the UNHRC of its standing agenda, his spokesperson issued a statement which said:

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<sup>1</sup> ICJ [Case No. 146](#) at §62. Full references to citations are contained in the Annex to this Statement.

<sup>2</sup> UNWatch, [Quantitative analysis of UN resolutions](#)

<sup>3</sup> UNHRC, [A Practical Guide for NGO Participants](#), p2

<sup>4</sup> Hillel Neuer, [Written Evidence to US House of Representatives Committee on Foreign Affairs](#), pp 2-3

<sup>5</sup> [Reply to question by Israeli student in Jerusalem on 16/8/2013](#)

*“The Secretary-General is disappointed at the Council’s decision to single out only one specific regional item, given the range and scope of allegations of human rights violations throughout the world.”*<sup>6</sup>

17. All 100 members of the US Senate, including strong critics of some Israeli policies such as Bernie Sanders, signed a letter to the current Secretary General in 2017, objecting that

*“Too often, the U.N. is exploited as a vehicle for targeting Israel rather than as a forum committed to advancing the lofty goals of its founders. These actions have at times reinforced the broader scourge of anti-Semitism, and distracted certain U.N. entities from their original missions ... continued targeting of Israel by the U.N. Human Rights Council and other U.N. entities is unacceptable”.*<sup>7</sup>

18. The US Permanent Representative to the UN, Ambassador Nikki Haley, commented in an address to the Security Council in 2018:

*“the UN has shown itself to be hopelessly biased, as we witnessed again just two weeks ago when the General Assembly failed to condemn Hamas’s terrorist activity against Israel. .... This UN obsession [with Israel] has been entirely unproductive. It’s actually worse than that. The UN’s obsession with this issue has been counterproductive. It has sent a loud and false message to the Palestinians that they just might be able to achieve their goals by relying on the UN, rather than through direct negotiations. And it has sent a loud and accurate message to the Israelis that they can never trust the UN. This biased obsession is not the path to peace. It is the path to an endless stalemate”.*<sup>8</sup>

19. A series of articles by Professor Anne Bayefsky has described the bias, racism and inaccuracies of the UNHRC’s Commission of Inquiry,<sup>9</sup> whose report was cited and evidently relied upon by the General Assembly in its resolution referring the present questions to this Court.<sup>10</sup>

20. In view of the pervasive bias against Israel of the UN in general, as well as in the questions asked of the Court and the General Assembly resolution containing them,

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<sup>6</sup> [Statement SG/SM/11053-HRC/8](#) (20/6/2007)

<sup>7</sup> [Letter from US Senators to UN Secretary-General Antonio Guterres of 27/4/2017](#)

<sup>8</sup> Nikki Haley, [Statement to the UNSC on 18/12/2018](#)

<sup>9</sup> [The UN Commission of Inquiry: An Exercise in Historical Revisionism; New UN Commission of Inquiry Report a Masterpiece of Modern Antisemitism; Lies and Unapologetic Antisemitism from the UN ‘Commission of Inquiry’; Pillay’s Latest Propaganda Crusade against Israel: The June 2023 UN Human Rights Council’s Commission of Inquiry Report](#). See also Hillel Neuer, [Written Evidence to US House of Representatives Committee on Foreign Affairs](#), pp 4-5; Rashkow, [UN violated its own rules, appointed biased commissioners against Israel](#).

<sup>10</sup> [UNGA Resolution 77/247](#), 8<sup>th</sup> recital and note 8

we respectfully submit that particular circumspection is required in relation to information provided to the Court in this case.

The Court's Advisory Opinion of 9 July 2004 in Case No. 131

21. We further note that the General Assembly requests the Court to answer the above questions considering its Advisory Opinion of 9 July 2004 in Case No. 131, titled *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>11</sup>
22. That Opinion was based upon inaccurate and one-sided information put before the Court by the UN Secretariat, as was cogently demonstrated by the decision of the Israeli Supreme Court of 15 September 2005 in *Mara'abe v The Prime Minister of Israel*.<sup>12</sup> We respectfully draw the Court's attention, in particular, to §§56-70 of the Judgment of President Aharon Barak and §§3-4 of the Judgment of Vice-President Mishael Cheshin.
23. President Barak observed at §§57-58

*“The basic normative foundation upon which the ICJ [in the “Wall” case] and the [Israeli] Supreme Court in the [earlier] Beit Sourik case based their decisions was a common one”*

but

*“Despite this common normative foundation, the two courts reached different conclusions”.*

He continued at §61:

*“The main difference between the two judgments stems primarily from the difference in the factual basis upon which each court made its decision. Once again, the simple truth is proven: the facts lie at the foundation of the law, and the law arises from the facts (ex facto jus oritur). The ICJ drew the factual basis for its opinion from the [UN] Secretary-General's report, his written statement, the Dugard report, and the Ziegler report. The [Israeli] Supreme Court drew the facts from the data brought before it by the Palestinian petitioners on the one hand, and the State [of Israel] on the other. In addition, the [Israeli] Supreme Court received an expert opinion by military experts who requested the opportunity to present their position as amici curie. Despite the fact that the data which each court received regarded the same wall/fence, the difference between each set of data is*

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<sup>11</sup> [ICJ Reports 2004, p136](#)

<sup>12</sup> HCJ 7957/04; [English translation](#)



*deep and great. This difference is what ultimately led to the contrary legal conclusions.”*

24. President Barak proceeded at §§62 et seq. to conduct a detailed comparison of how the facts were treated in this Court and the Israeli Court. He noted that this Court’s opinion stated

*“To sum up, the Court [ICJ], from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives.”*

He contrasted the extensive evidence of the security-military necessity of the fence presented to the Israeli Supreme Court in the *Beit Sourik* case with the minimal mentions of this necessity in the sources on which this Court had based its opinion. He further observed at [63]

*“This minimal factual basis is manifest, of course, in the opinion [of the ICJ] itself”.*

25. He then compared at §§66 et seq. the information provided to the Israeli court and this Court regarding the impact on Palestinian residents, finding serious errors in the information provided to this Court. In §67d, for example, he gave a striking illustration of the problematic nature of the evidence provided by the UN Secretary General:

*“The ICJ’s opinion held, on the basis of the Secretary-General’s report, that as a result of the building of the wall, a 40% drop in caseload at the UN hospital in Qalqiliya had been recorded. From a graph submitted to us by the State [of Israel] it appears that the number of hospitalization days in 2004 is higher than that of 2002. The conclusion is that it cannot be said that the separation fence brought to a decrease in the number of hospitalized patients. The graph also shows that in 2003 there was a considerable rise in the number of beds in hospitals. In addition, a new private hospital was opened in Qalqiliya in 2003, and the Palestinian Authority also opened a hospital in 2002. In the opinion of the State [of Israel], it is reasonable to assume that the opening of the new hospitals affected the caseload of the UN hospital in Qalqiliya.”*

26. At §69 he commented:

*“In the proceedings before the ICJ, the injured parties did not participate. Israel was not party to the proceedings. There was no adversarial process, whose purpose is to establish the factual basis through a choice between contradictory factual figures. The ICJ accepted the figures in the [UN] Secretary-General’s*

*report, and in the reports of the special rapporteurs, as objective factual figures. The burden was not cast upon the parties to the proceedings, nor was it examined. In contrast, the parties to the proceedings in the Beit Sourik case stood before the [Israeli] Court. An adversarial process took place. The burden of establishing the factual basis before the court was cast upon the parties. The parties' factual figures were examined and made to confront each other, as the factual basis which would determine the decision was established.”*

27. The following conclusions should, in our submission, be drawn from the fact that this Court was egregiously misinformed in Case No. 131:
- (a) Reliance should not be placed on this Court’s Opinions as to the merits in that case.
  - (b) Reliance should not be placed on any information contained in documents provided by the UN Secretariat in the present case or on any other information, unless this Court has been able to verify the information by a robust and impartial forensic examination.

#### Particular problems of obtaining reliable information relating to Israel

28. Obtaining reliable information relating to Israel does indeed present particular problems. Centuries of libels of the Jewish people<sup>13</sup> have resulted in a situation in which conclusions blaming Jews for misfortunes are readily drawn and false allegations against Jews are credulously accepted. In modern times prejudice against the Jewish people has been directed against Israel as the world’s only Jewish State. This prejudice has been compounded by the successful exploitation of UN bodies by members of the Organisation of Islamic Cooperation and their developing country allies to focus to an utterly disproportionate extent on criticism of Israel.<sup>14</sup>
29. The demonisation of Israel at the UN has in turn been facilitated by Israel’s complete exclusion from all regional groups of UN members from their formation in 1961 until 2000 (when it was admitted to the West European and Others Group (WEOG) in New York)<sup>15</sup> and its partial exclusion thereafter until 2014 (when it was eventually admitted to the WEOG in Geneva).<sup>16</sup> We respectfully submit that this exclusion was in clear breach of Article 2.1 of the UN Charter, under which

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<sup>13</sup> Julius, [Trials of the Diaspora](#), cap 2; Voigtlaender, [Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany](#); Küntzel, [Nazis, Islamic Antisemitism and the Middle East](#); Abbas, [Speech to Fatah’s Revolutionary Council](#), 24/8/2023.

<sup>14</sup> See §14 - §19 above

<sup>15</sup> [Lynch, After 40 years of Exclusion, Israel Allowed to Join U.N. Regional Bloc](#)

<sup>16</sup> [Lazaroff, Israel invited to join UN’s Western nations group in Geneva](#),

*“The [UN] Organization and its Members ... shall act in accordance with the following Principles.*

*1. The Organization is based on the principle of the sovereign equality of all its Members.”*<sup>17</sup>

30. Israel’s past exclusion from regional groups continues to affect Israel’s treatment at the UN, partly because alliances, agreements, understandings and voting patterns were developed and cemented during the long period of Israel’s exclusion;<sup>18</sup> and partly because of the misinformation that had already been produced and incorporated into resolutions and documents of UN bodies by 2014. It may take many years for these effects to be unwound.
31. Discrimination by UN bodies also continues against NGOs that present accurate information relating to Israel, effectively silencing them and facilitating the production and dissemination of false information relating to Israel.<sup>19</sup>
32. As well as leading to incorrect conclusions, misinformation about Israel promotes racist hostility and violence against Israel and Jewish people around the world, particularly as it lands on fertile ground formed by centuries of defamation and prejudice. This is itself a major barrier to peace in the Middle East and is a further reason why this Court should be especially careful not to give credibility to information relating to Israel that may be false.
33. In view of all these matters, we respectfully submit that documents of UN bodies and reports by UN appointees relating to Israel should not be taken to be accurate unless this Court has been able to verify the information by a robust and impartial forensic examination. Moreover, resolutions and other acts of UN bodies directed at Israel should not be treated as valid unless the Court is satisfied that they were not compromised as a result of unlawful discrimination against Israel.

### **The Court’s options for dealing with this case**

34. In these circumstances, the Court’s options for dealing with this case are all unattractive. There appear to be four main possibilities:
  - (a) The Court could try to provide an Advisory Opinion which does not assume any facts. However, this is problematic, because the questions asked by the

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<sup>17</sup> Jennings, [Opinion regarding the Exclusion of Israel from the United Nations Regional Group System](#)

<sup>18</sup> Holloway, [Forty Years of United Nations General Assembly Voting](#),

<sup>19</sup> See UNWatch, [Formal Complaint against Mr. Eric Tistounet](#)

General Assembly assume facts and there is also a significant risk that conclusions reached will be influenced by unstated factual assumptions.

- (b) The Court could provide an Advisory Opinion which assumes that facts provided to it are true and complete, even though they are likely to be false and partial. This would be liable to result in the Court reaching conclusions that are wrong in relation to the actual situation, and only right in relation to a non-existent, hypothetical situation. In our respectful submission, proceeding in this way would not be compatible with the Court's judicial character in line with its previous decisions.<sup>20</sup> It would also reward and encourage abuse of the Court's process by the posing of questions that assume disputed facts and by the submission of false and partial information.

In the particular circumstances of this case, we would further question whether proceeding in this way would be compatible with the Declaration made by Members of the Court to "*perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously*".<sup>21</sup> Members of the Court must realise that many people around the world would understand them to have verified the false facts which they only assumed to be true and to have reached valid conclusions applicable to the actual situation that only apply to an assumed, fictional situation. This would dangerously reinforce racist prejudice and hostility against the Jewish people and Israel.

- (c) The Court could try to investigate the facts itself. However, the breadth and vagueness of the allegations against Israel would make it a monumental exercise to carry this out with the robustness required to secure reliable and complete information.

As matters stand, there is no coherent charge sheet or statement of the case setting out specific allegations, as would be required for any fair judicial process, and no explanation linking specific allegations with the specific evidence relied on in support.

The UN Secretariat has already provided the Court with over 29,000 pages of documentation from the period since 1967. Numerous statements in these documents are disputed. The forensic examination of this material needed before it could be relied on would require very extensive resources and time,

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<sup>20</sup> Case No. 8 [Treaties with Bulgaria, Hungary and Romania](#) at pp71-72; Case No. 61 [Western Sahara](#) at §46; Case No. 131 [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#) at §56; Case No. 169 [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#) at §71

<sup>21</sup> [Rules of Court](#) (1978) Art. 4(1)

as well as confidence in the Court's process on the part of persons with the expertise and objectivity required for the examination to be effective.

At the same time, the UN Secretariat has not provided documentation published before 1967,<sup>22</sup> despite the importance of the history prior to 1967 in assessing the position and determining the rights and obligations of different parties since then. Indeed the failure to provide documents published before 1967 would appear to be non-compliant with Article 65(2) of the Court's Statute.

While the Court has various powers to obtain evidence and information,<sup>23</sup> it is not able to compel their provision. This would be a further, potentially insuperable, impediment to establishing critical facts reliably in this case.

- (d) The Court could decline to answer the questions submitted by the General Assembly. In recent years the Court has endeavoured to provide an Advisory Opinion requested by the General Assembly or another authorised UN organ or agency whenever possible. Nevertheless, the Court has stated that it has to decide in each case

*"whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character"*<sup>24</sup>

While the Court has previously referred to the sufficiency of the information provided, the reliability of the information is also critical. We respectfully submit that in the particular circumstances of this case, the Court lacks sufficiently reliable information to arrive at a judicial conclusion on disputed questions of fact whose determination is necessary for it to give an opinion in conditions compatible with its judicial character.

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<sup>22</sup> See the UN Secretariat's [Introductory Note of 31 May 2023](#) §5

<sup>23</sup> Art. 68 of the [Statute of the ICJ](#) provides that "*in the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable*". These would appear to include provisions of the Statute under which the Court can procure and take evidence (Arts. 44(2), 48, 51); call upon agents to produce documents and supply explanations (Art. 49); entrust an individual or organization to carry out an enquiry or give an expert opinion (Art. 50); and sit with assessors (Art. 30(2)). Similar provisions are also contained in the [Rules of Court](#) and Art. 9(1) of the Rules states explicitly that the Court may sit with assessors in advisory proceedings.

<sup>24</sup> Case No. 8 [Treaties with Bulgaria, Hungary and Romania](#) at pp71-72; Case No. 61 [Western Sahara](#) at §46; Case No. 131 [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#) at §56; Case No. 169 [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#) at §71

A further reason for not providing the advisory opinion requested by the General Assembly is that its Resolution 77/247 requesting the opinion appears to result from the unlawful discrimination against Israel described in §14 - §20 and §29 - §31 above. In our respectful submission, this illegality impeaches the validity of the request itself.

### **Historical outline**

35. As observed in §34(c) above, the UN Secretary-General has provided to the Court a large number of documents published since 1967, but has not provided documents published prior to that year. While there may be some information included in the documents provided to the Court on the history of the territory prior to 1967, it is likely to be fragmented, partial and unreliable. Furthermore the brief summary in §§70-77 of the Court's Advisory Opinion in Case No. 131<sup>25</sup> is insufficient for the purposes of this case. We therefore outline in this section some relevant aspects of the history of the territory prior to 1967 and their implications for the situation since 1967 down to the present date, which we respectfully submit the Court should take into account.

#### **From 1200 BCE to 1918 CE<sup>26</sup>**

36. The Judea and Samaria regions, now commonly called “the West Bank”, were the central part of the historic homeland of the Jewish people<sup>27</sup> from around 1200 BCE onwards. The history and vicissitudes of the Jewish people in the Land of Israel are recorded by the historian Josephus<sup>28</sup> and the Bible,<sup>29</sup> and corroborated by other ancient records<sup>30</sup> as well as modern archaeological findings.<sup>31</sup>
37. The territory controlled by the Jewish State or States fluctuated over time, but for the most part extended both west and east of the Jordan river and Dead Sea.<sup>32</sup>

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<sup>25</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

<sup>26</sup> We use the abbreviations BCE for “Before the Common Era” and CE for “in the Common Era” corresponding to the Christian terms BC and AD.

<sup>27</sup> The term “Jewish” is derived from “Judah”, one of the twelve ancient tribes of Israel, but has come to refer to the whole of the Israeli people and we use it in this sense. See [Gilead, \*Why are Jews Called Jews?\*](#), Haaretz 15/2/2017

<sup>28</sup> Josephus, *Antiquities of the Jews* books 5-20 and *The Wars of the Jews* books 1-6

<sup>29</sup> Particularly [Numbers cap 32](#) and the books of [Joshua](#), [Judges](#), [Ruth](#), [I Samuel](#), [II Samuel](#), [I Kings](#), [II Kings](#), [I Chronicles](#), [II Chronicles](#), [Ezra](#), [Nehemiah](#), and [I Maccabees](#)

<sup>30</sup> E.g. the Merneptah Stele l.27; Tel Dan Stele; Mesha Stele; Kurkh Monoliths; Siloam Inscription; Sennacherib's Annals; Lachish Relief; Lachish Letters; Arch of Titus

<sup>31</sup> See e.g. [Mazar, \*Archaeology and the Bible\*](#). Relevant archaeological sites include Tel Abel Beth Maacah, Tel Arad, Tel Beer Sheva, Tel Dan, Tel Gezer, Tel Hadid, Tel Hazor, Jerusalem – City of David and around the Temple Mount, Lachish, Tel Megiddo, Shiloh, Shomron.

<sup>32</sup> [Numbers cap 32](#); [Joshua caps 13-22](#); [II Samuel 8](#); [Josephus, \*Antiquities of the Jews\*](#) book 4 cap 7, book 5 caps 1-2, book 13 cap 15; [Netzer, \*Floating in the Desert\*](#)

Jerusalem was captured by the Israelites in about 1000 BCE from the Jebusites and made the capital in place of Hebron.<sup>33</sup> Some Palestinian politicians have claimed that today's Palestinians are descended from the Jebusites or other Canaanites, but this is a recent construct, unsupported by any evidence.<sup>34</sup>

38. Shechem (near Nablus) was another major Israelite centre and the initial capital of the northern Israelite kingdom after it seceded.<sup>35</sup> In the early part of the period the Gaza region was controlled by the Philistines, probably a Southern European people with no ethnic, cultural or religious links to today's Palestinian Arabs.<sup>36</sup> Gaza was captured by the Kingdom of Judah in about 700 BCE,<sup>37</sup> although it was later one of the last towns to be retaken by the Hasmonean Kingdom of Judea following intervening Greek rule.<sup>38</sup>
39. The area came under increasing control of the Roman Empire from 63 BCE onwards.<sup>39</sup> Following Jewish revolts in 66-70 CE and 132–135 CE Jerusalem was destroyed and many of the Jewish inhabitants were forced into exile.<sup>40</sup> The Romans merged Judea and Syria to form a province which they called Syria Palaestina.<sup>41</sup> However, Jewish communities remained in the area,<sup>42</sup> and Jews dispersed around the world maintained their hope to return to the land of Israel.<sup>43</sup> Prayers for their return and the rebuilding of Jerusalem have been a central part of Jewish liturgy since the Roman period.<sup>44</sup>
40. The area became part of the Byzantine Empire when the Roman Empire split at the end of the 4<sup>th</sup> century CE. It was captured by the Persian Empire with the assistance of a Jewish revolt in 613-614 CE,<sup>45</sup> but recovered by the Byzantine Empire in 629

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<sup>33</sup> [Josephus, \*Antiquities of the Jews\*](#), book 7 cap 3 et passim; Bible, [II Samuel](#) cap 5 et passim; Montefiore, [Jerusalem – The Biography](#) cap 3 et passim.

<sup>34</sup> Wenkel, [Palestinians, Jebusites, and Evangelicals](#). The claim is presumably made to assert a prior Palestinian right, but it admits a Jewish historical connection with Jerusalem and the Land of Israel of over at least 3000 years. See also Tzioni, [Erekat's latest lie](#) and [Inbari, Who Are the Palestinians?](#)

<sup>35</sup> See e.g. [Joshua 24](#), [1 Kings 12](#), [2 Chronicles 12](#); [Josephus \*Antiquities of the Jews\*](#) book 8 cap 8

<sup>36</sup> [Killebrew, \*The Philistines and Other "Sea Peoples"\*](#); [Feldman, \*Ancient DNA sheds light on the genetic origins of early Iron Age Philistines\*](#)

<sup>37</sup> [Josephus, \*Antiquities of the Jews\*](#), book 9, cap 13, §3

<sup>38</sup> [Josephus, \*Antiquities of the Jews\*](#), book 13, cap 13, §3; cap 15, §4

<sup>39</sup> [Josephus, \*Antiquities of the Jews\*](#), book 14, cap 3 onwards

<sup>40</sup> [Josephus, \*The Wars of the Jews\*](#), book 6, cap 10; [Montefiore, \*Jerusalem – The Biography\*](#) cap 14

<sup>41</sup> Feldman, [Some Observations on the Name of Palestine](#)

<sup>42</sup> Schwartz, [Jewish Settlement in Judea after the Bar-Kochba War](#); Ish-Shalom, [In the Shadow of Alien Rule](#); Vaad Leumi [Memorandum II](#)

<sup>43</sup> See Vaad Leumi, [Memorandum II](#) and [Memorandum III](#)

<sup>44</sup> e.g. Blessings 10, 14 and 17 of the [Amidah](#) (the central prayer of all main services); [Bircat Hamazon](#) (grace after meals); [Wedding Blessings](#) 5 and 7; [Blessing over the Fourth Cup](#) and [Nirtzah](#) in the Passover Haggadah; [Neilah](#) (the concluding service on the Day of Atonement, final part); [Liturgical References to Zion](#); [Peel Commission Report](#) cap I §22. The solemn fast day, Tisha B'Av, marks the destruction of Jerusalem by the Babylonians in 586 BCE and the Romans in 70 CE.

<sup>45</sup> Foss, [The Persians in the Roman Near East \(602-630 AD\)](#)

CE, before being conquered by Muslim Arabs in 634-640 CE.<sup>46</sup> The area was then ruled by a series of Arab dynasties<sup>47</sup> until it was taken by the Christian Crusaders in 1099 CE. Jerusalem and other cities were captured in 1187 CE by the Muslim Kurdish Sultan, Saladin, but parts of the area remained under Christian control until 1291 CE, when Acre fell to the Mamluk Sultan Al-Ashraf Khalil.<sup>48</sup> Mamluk dynasties controlled the area thereafter until 1517, when it was conquered by the Ottoman Turks. The Turkish Empire then ruled the area, apart from brief interludes, until 1917.<sup>49</sup>

41. Throughout these centuries, Jews in the diaspora supported Jewish communities in the Land of Israel<sup>50</sup> and significant numbers of Jews returned to join these communities or to establish new ones.<sup>51</sup> However, many Jews were massacred by the Byzantines in 630 CE following their recapture of Palestine<sup>52</sup> and by the Christian Crusaders when they conquered the area at the end of the 11<sup>th</sup> century CE.<sup>53</sup> Despite attempts to rebuild the Jewish presence in the Land of Israel, the remaining Jewish communities generally declined amid poor conditions and governance of the area<sup>54</sup> by a succession of foreign rulers. In the rest of the world, Jews were frequently massacred and persecuted in both Christian<sup>55</sup> and Muslim countries<sup>56</sup> and lacked any State of their own to protect them or give them refuge.
42. Jewish resettlement in the Land of Israel gathered momentum in the course of the 19<sup>th</sup> century<sup>57</sup> and Zionism emerged as the national liberation movement of the Jewish people.<sup>58</sup> Jews were already the largest religious denomination and about half of the total population of Jerusalem in the 1840s.<sup>59</sup> They became a substantial overall majority in Jerusalem by the late 19<sup>th</sup> century<sup>60</sup> and have remained a

<sup>46</sup> Gil, *A History of Palestine*, 634-1099

<sup>47</sup> Rashidun and Umayyad Caliphs 638–750 AD; Abbasid Caliphs 750–970 AD; Fatimid Caliphs 970–1099 AD

<sup>48</sup> Lambert, *God's Armies: Crusade and Jihad: Origins, History, Aftermath*

<sup>49</sup> Ben-Bassat, *Ottoman Jerusalem 1517-1918* in *Routledge Handbook on Jerusalem*

<sup>50</sup> Ya'ari, *Shluchi Eretz Yisrael*; *Rabbinic Emissary Collection*; *Lehman, Emissaries from the Holy Land*; *Barnai, The Jews in Palestine in the Eighteenth Century*

<sup>51</sup> Vaad Leumi, *Memorandum III*; *Bahat, Twenty Centuries of Jewish Life in the Holy Land*; *Peel Commission Report* cap I §23

<sup>52</sup> *Butler, The Arab Conquest of Egypt and the Last Thirty Years of the Roman Dominion*, pp134-5

<sup>53</sup> *Vaad Leumi, Memorandum II*

<sup>54</sup> *Vaad Leumi, Memorandum II*; *Peel Commission Report*, cap I, §11

<sup>55</sup> *Schama, The Story of the Jews – Finding the Words*, cap 7; *Vaad Leumi, Memorandum II*; *Peel Commission Report* cap I §§16-19, 21, 25

<sup>56</sup> *Gilbert, In Ishmael's House*; *Julius, Uprooted*, caps 2-3; *Rifkind, The Basic Equities of the Palestine Problem* pp16-17

<sup>57</sup> *Blumberg, Zion Before Zionism*; *Parfitt, The Jews in Palestine, 1800–1882*; *Vaad Leumi, Memorandum III*; *Peel Commission Report* cap I §23

<sup>58</sup> *Avineri, Zionism as a National Liberation Movement*

<sup>59</sup> *Schultz, Jerusalem – Eine Vorlesung* pp33-34; *César Famin, Histoire de la Rivalité et du Protectorat des Eglises Chrétiennes en Orient* p49; *Rafeq, Political History of Ottoman Jerusalem* p35

<sup>60</sup> *Kark, Jerusalem and its Environs* pp28-29; *Shaw, Review of Reviews* Vol IX p98



substantial majority at all times since then.<sup>61</sup> New Jewish communities were founded by the Zionist movement in many locations around the country.<sup>62</sup> Historic Jewish communities continued in Tiberias, Safed, Jaffa, Hebron, Gaza and other towns.<sup>63</sup>

43. The Turkish Empire participated in the First World War on the side of the Central Powers, Germany and the Austro-Hungarian Empire, against Britain, France, Italy, Russia, Japan and eventually the USA.<sup>64</sup> In 1917 and 1918 British Empire forces conquered the Land of Israel and other Middle East territories of the Turkish Empire. Under international law applicable at the time, the British Empire, or the British Empire and its allies jointly, thereby became entitled to determine the sovereignty of these territories.<sup>65</sup> Moreover, Turkey ceded any entitlement to these territories by the Treaty of Lausanne in 1923.<sup>66</sup>

### The San Remo Conference

44. Leaders of the principal successful allies in the First World War met in San Remo between 19 and 26 April 1920 to discuss the future of the former territories of the Turkish Empire in the Middle East. The allies had already agreed in the Covenant of the League of Nations, forming Part I of the Treaty of Versailles of 1919, that these territories should be placed under mandates of the League of Nations.<sup>67</sup> Many of them had also made official statements expressing support for the establishment in Palestine of a national home for the Jewish people.<sup>68</sup>
45. The principal allies resolved at the San Remo conference that

*“Syria and Mesopotamia shall ... be provisionally recognised as independent States, subject to the rendering of administrative advice and assistance by the mandatory until such time as they are able to stand alone”.*

By contrast, in relation to Palestine they resolved that

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<sup>61</sup> Census of Palestine [1922](#), [1931](#); [Jerusalem Statistical Yearbook 2019](#), table III/1.

<sup>62</sup> [Peel Commission Report](#) cap I §26; [Avneri, The Claim of Dispossession](#), Transaction Publishers (1982)

<sup>63</sup> [Vaad Leumi, Memorandum II](#)

<sup>64</sup> [Fromkin, A Peace to End All Peace](#)

<sup>65</sup> [Sharon Korman, The Right of Conquest](#); [Shaw, International Law, 9th edn.](#), p.425 and references cited there; and see also references cited at note 77 below

<sup>66</sup> [Treaty of Lausanne](#), 1923, Arts. 3, 4 and 16; [Crawford, The Creation of States in International Law, 2nd edn.](#) pp 428-9

<sup>67</sup> [Covenant of the League of Nations](#), 1919, Art. 22

<sup>68</sup> [Balfour Declaration](#); [Cambon](#), [Woodrow Wilson](#), [Marquis Imperial](#) and [Chinda Sutemi](#) letters, [Pichon message](#), and other expressions of support set out in [The American War Congress and Zionism](#) (Zionist Organization of America, 1919) pp.10-13; [Peel Commission Report](#) cap II §§13-14

*“the Mandatory will be responsible for putting into effect the declaration originally made on the [2<sup>nd</sup>] November, 1917, by the British Government and adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people”.*

The principal allies did not agree to recognise Palestine provisionally as an independent State, since they intended that the Jewish national home would be established there, and this would inevitably take some time.<sup>69</sup>

46. The principal allies chose France to be the Mandatory for Syria and Britain to be the Mandatory for Mesopotamia and Palestine. They also agreed to determine the boundaries and to formulate the terms of the mandates which would be submitted to the Council of the League of Nations for approval.<sup>70</sup>

#### The League of Nations Mandate for Palestine

47. The Mandate for Palestine was then formulated by the principal allies and duly approved by the Council of the League of Nations on 24 July 1922.<sup>71</sup> Its Preamble noted that the principal allies had

*“agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people”.*

It added that

*“recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country”,*

thereby reflecting the historical position outlined above. Notably, the phrase *“reconstituting their national home in that country”* signified international recognition of a right of the Jewish people to return to their original homeland and to self-determination as a people in that land.

48. Article 2 of the Mandate’s substantive provisions provided that

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<sup>69</sup> [San Remo Resolutions; Minutes of San Remo Conference](#) (the date of the Balfour Declaration is corrected in the quotation)

<sup>70</sup> Ibid.

<sup>71</sup> [Mandate for Palestine](#)

*“The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble”.*

Further provisions set out obligations and arrangements for putting this into effect. For example, Article 6 provided that

*“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 ... close settlement by Jews, on the land, including State lands and waste lands not required for public purposes.”*

In our submission, it is evident from a fair reading of the Preamble and substantive provisions of the Mandate as a whole that its primary object was the reconstitution of the Jewish national home in Palestine.<sup>72</sup>

49. The boundaries of Palestine subsequently determined by the allies extended substantially to the east of the river Jordan. However, Article 25 of the Mandate stated:

*“In the territories lying between the Jordan and the eastern boundary of Palestine as ultimately determined, 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, provided that no action shall be taken which is inconsistent with the provisions of Articles 15, 16 and 18”.*

50. Pursuant to Article 25, by a Memorandum approved by the Council of the League of Nations on 16 September 1922,<sup>73</sup> Britain disapplied the provisions of the Mandate for the establishment of the Jewish national home throughout the Mandate territory east of the Jordan river and Arava valley. This territory (representing 76% of the total area of the Palestine mandate<sup>74</sup>) subsequently became the Hashemite Kingdom of Jordan in 1946.<sup>75</sup>
51. Significantly, the fact that Article 25 stated that most of the Mandate’s provisions could be disapplied east of the Jordan clearly implied, in our submission, that they could not be disapplied west of the Jordan. If the Mandate’s provisions could be disapplied generally, there would be no need for Article 25 and the proviso in that

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<sup>72</sup> See [Matthijs de Blois, \*The Unique Character of the Mandate for Palestine\*](#).

<sup>73</sup> [Transjordan Memorandum; Approval of Transjordan Memorandum](#).

<sup>74</sup> Based on [CIA World Factbook](#) figures: see note 83 below.

<sup>75</sup> An [Agreement between Britain and Emir Abdullah](#) of 1928 had earlier recognised the independent government of Transjordan established by the latter in coordination with Britain.

Article preserving some of the Mandate's provisions would be meaningless. The Balfour Declaration had referred to "*the establishment in Palestine of a national home for the Jewish people*", which could be satisfied by the establishment of a national home in Palestine even if it did not extend to the whole of Palestine. The League of Nations Mandate allocated the whole of the territory of Palestine west of the river Jordan, including Judea, Samaria, Jerusalem and Gaza, for the reconstitution of the Jewish national home, while allowing the rest of the territory of Palestine to be reserved for a further Arab State.

52. The Mandate for Palestine was clearly a legally binding international agreement.<sup>76</sup> As discussed below, in our submission, certain rights and obligations specified in the Mandate continue to apply today.
53. The Balfour Declaration, San Remo resolutions and Mandate for Palestine all specified that "*nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine*". This phrase did not include national rights,<sup>77</sup> in contrast to the rights accorded to the Jewish people to reconstitute their national home. In our submission, it should be interpreted in the context of the "Millet" system that had been operating in the territory under Ottoman rule, under which different communities enjoyed considerable autonomy in a range of civil and religious matters.<sup>78</sup> The Declaration, Resolutions and Mandate contemplated that this would continue under British administration and any future Jewish State. The State of Israel has, in fact, broadly followed this approach in relation to education, family law and religion.<sup>79</sup>
54. Article 22 of the Covenant of League of Nations had referred to "*the principle that the well-being and development*" of the peoples inhabiting the Mandate territories "*form a sacred trust of civilisation*". The Mandate for Palestine was clearly intended, in our submission, to extend this principle to the long-suffering Jewish people scattered around the world who would return to reconstitute the Jewish national home in Palestine.<sup>80</sup> In short, it rightly treated the Jewish people as an indigenous people of Palestine, even though many of them were still in exile. This extension did not conflict with the principle expressed in the Covenant, but if it did, we submit that the Mandate as adopted superseded the principle in the Covenant,

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<sup>76</sup> Cases Nos. 46 & 47 [South West Africa Cases](#) ICJ Reports 1962 p.319 at pp.330-332

<sup>77</sup> This did not violate legal rights of the Arab population, since there was no legal right to self-determination at that date: [Crawford, \*The Creation of States in International Law\*, 2<sup>nd</sup> Edn.](#) pp.428-9; [Shany, \*Legal Entitlements, Changing Circumstances and Intertemporality\*](#) at p.397.

<sup>78</sup> [Shaw, \*The League of Nations Mandate System and the Palestine Mandate\*](#) at pp.295-6 and references cited there

<sup>79</sup> [Sezgin, \*The Israeli Millet System\*](#)

<sup>80</sup> [Shaw, \*The League of Nations Mandate System and the Palestine Mandate\*](#) at pp.300, 303; [de Blois, \*The Unique Character of the Mandate for Palestine\*](#); [Peel Commission Report](#) cap II §§25, 29-30

both as a later instrument (*lex posterior derogat priori*) and as a special case (*lex specialis derogat legi generali*).<sup>81</sup>

55. Article 22 of the Covenant of the League of Nations had identified three classes of mandate in its 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> paragraphs, and these have been referred to as class A, B and C respectively. However, these classes were not stated to be exhaustive; and, on the contrary, Article 22 indicated that situations varied. The 4<sup>th</sup> paragraph of Article 22 noted that

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

The San Remo Conference treated Mesopotamia and Syria as falling under this paragraph. However, Palestine was not treated in the same way, either at San Remo or in the Mandate for Palestine, since at least the part of Palestine west of the Jordan river / Arava valley was allocated for the future reconstitution of the Jewish national home. In unanimously approving the terms of the Mandate for Palestine, the Council of the League of Nations necessarily accepted that the existing communities of western Palestine would not be provisionally recognised as an independent nation.<sup>82</sup>

#### Overall view of the San Remo decisions

56. The result of the arrangements agreed at San Remo and approved by the Council of the League of Nations was that 96.3% of the Middle-East territories liberated by the allies from the Turkish Empire – Mesopotamia, Syria and Palestine east of the Jordan – were allocated for the creation of new Arab States, while a narrow strip of land between the Jordan river and the Mediterranean, amounting to a mere 3.7% of the liberated territories, was allocated for the reconstitution of the Jewish national home.<sup>83</sup> The State of Iraq was established in the territory allocated to the Mandate

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<sup>81</sup> [Crawford, \*The Creation of States in International Law\*, 2<sup>nd</sup> Edn.](#), p.429; [Shany, \*Legal Entitlements, Changing Circumstances and Intertemporality\*](#) pp.397-401.

<sup>82</sup> [Shany, \*Legal Entitlements, Changing Circumstances and Intertemporality\*](#) at pp.395-6; [de Blois, \*The Unique Character of the Mandate for Palestine\*](#); [Peel Commission Report](#) cap II §42(2).

<sup>83</sup> These percentages are based on [CIA World Factbook](#) figures for the land areas (in square km) of Syria (185,887), Lebanon (10,230), Jordan (88,802), Iraq (437,367), Israel (21,497), West Bank (5640), Gaza Strip (360). They do not take into account Hejaz (now part of Saudi Arabia), an Ottoman province at the start of the war which had become an independent Arab state in 1916 following an Arab revolt with British military support. Hejaz had an area of about 250,000 square km ([A.H. Keane, \*Asia\*, p 459](#)); if it is included, only 2.8% of the liberated territory was allocated to the Jewish national home.

for Mesopotamia in 1932. The States of Lebanon and Syria subsequently emerged out of the Mandate for Syria.<sup>84</sup> As mentioned above, the territory of the Palestine mandate east of the Jordan river and Arava valley became the Hashemite Kingdom of Jordan.

57. Prior to this time Arabs of Palestine did not have a separate national identity; they primarily viewed themselves as Syrian and their leaders sought the inclusion of Palestine in a greater Syria following the First World War.<sup>85</sup> Under the San Remo arrangements they would have the opportunity of working with the Jewish people in developing Palestine, with the prospect of benefiting from a major influx of expertise and investment into an impoverished and desolate area.<sup>86</sup> Previously sceptical British diplomat (and subsequently Nobel Peace Prize winner), Philip Noel-Baker, recalled the Arab leader, Emir Feisal, saying in 1919:

*“Of course we want Zionists to come into Palestine. We know what will happen. They will bring vast sums of American and other capital from abroad. They will bring in the greatest scientists in the world – all the greatest scientists are Jewish – and the territory of Palestine, now so arid and so much of it a desert, will be transformed. It will become a garden; it will blossom like the rose. We shall borrow their experts; we shall work together; we shall do the same in all the countries which we Arabs have turned into desert; we shall make them flourish again as they used to in the past”.*<sup>87</sup>

58. Overall, in our submission, the allocation of the Middle-East territories liberated from the Ottoman Empire in the First World War was fair and just to both Arabs and Jews. Emir Feisal had previously signed an agreement with the Zionist leader, Dr Chaim Weizmann, on 3 January 1919, supporting the implementation of the Balfour Declaration and the encouragement of large-scale immigration and settlement of Jews in Palestine.<sup>88</sup> Dr Weizmann, who attended the San Remo Conference, recorded that following the decisions regarding the Middle East,

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<sup>84</sup> [Shaw, \*The League of Nations Mandate System and the Palestine Mandate\*](#) at p296

<sup>85</sup> Khalidi, [Palestinian Identity – The Construction of Modern National Consciousness](#), particularly cap 7; [Hassassian, \*Palestine: Factionalism in the National Movement\*](#) cap II; Zipperstein, [Legal Framing and Lawfare in the Israeli-Palestinian Conflict](#) at 339-340; [Litvak, \*Palestinian Collective Memory and National Identity\*](#) p.2; [Foster, \*The Emergence of a Palestinian National Identity\*](#); [Peel Commission Report](#) cap I §12

<sup>86</sup> Mark Twain, [The Innocents Abroad](#), caps XLVI-LVI; H.B. Tristram, [The Land of Israel – A Journal of Travels in Palestine](#); [Peel Commission Report](#) cap IX §43; [British Statement of 15 May 1948](#) p3; Rifkind, [The Basic Equities of the Palestine Problem](#) pp18-19

<sup>87</sup> Israel Broadcasting Authority, [Pillar of Fire, Episode 1](#) (1981) at 39:43 – 42:20

<sup>88</sup> [Faisal-Weizmann Agreement, 1919](#). See also [Peel Commission Report](#) cap II §§24-27.

*“Anybody entering the dining-room of the Royal that evening would have found the Jewish and Arab delegations seated together at a really festive board, congratulating each other”*.<sup>89</sup>

59. The arrangements were also approved by the international community at the time, and were enshrined in legally binding international instruments, including the League of Nations Mandate for Palestine.
60. Substantial development of western Palestine ensued. Endemic malaria was eliminated through the pioneering efforts of the Zionist settler, Dr Israel Kligler.<sup>90</sup> The economy grew rapidly.<sup>91</sup> Healthcare and sanitation were enormously improved.<sup>92</sup> There was substantial immigration and settlement of Jews<sup>93</sup> until, in response to terrorism by a minority of Arabs and in violation of its obligations under the League of Nations Mandate,<sup>94</sup> Britain severely restricted the immigration of Jews from 1939 onwards<sup>95</sup> - when it was most needed, as Nazi policy towards the Jews descended from persecution to genocide.

#### Continuation of the rights and obligations of the Mandate

61. The League of Nations was dissolved and replaced by the United Nations in 1946. However, as the Court stated in its 1950 *South-West Africa Advisory Opinion* and reaffirmed in its 1971 *Namibia Advisory Opinion*, this did not terminate the object of a League of Nations Mandate nor the rights and obligations specified in it:

*“an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were complementary, and the disappearance of one or the other could not affect the survival of the institution.”*<sup>96</sup>

62. To the contrary, Article 80(1) of the UN Charter provided

*“Except as may be agreed upon in individual trusteeship agreements ... and until such agreements have been concluded, nothing in this Chapter shall be construed*

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<sup>89</sup> [Trial and Error](#) p.325

<sup>90</sup> [Alexander, The key to successful malaria eradication in Palestine/Israel 90 years ago](#)

<sup>91</sup> [Peel Commission Report](#) caps III, V and VIII; Rifkind, [The Basic Equities of the Palestine Problem](#) pp.43-53

<sup>92</sup> Rifkind, [The Basic Equities of the Palestine Problem](#) pp.50-52; [Peel Commission Report](#) cap III §6, cap XII; [British Statement of 15 May 1948](#) pp.3-4

<sup>93</sup> [Peel Commission Report](#) cap. X; [British Statement of 15 May 1948](#) pp.4-5

<sup>94</sup> League of Nations Permanent Mandates Commission Report to the Council, 1939 (Annex 14 to the [Minutes of the 36<sup>th</sup> Session](#) at pp.274-5)

<sup>95</sup> [1939 White Paper](#)

<sup>96</sup> [South West Africa \(1950\)](#) at p133; [Namibia \(1971\)](#) at §55.

*in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.”*

As the Court observed, this had the purpose and effect of keeping in force the rights of “any peoples” under the Mandates and Covenant of the League of Nations.<sup>97</sup> Moreover, in accordance with Article 103 of the UN Charter and Article 30(1) of the Vienna Convention on the Law of Treaties, obligations under Article 80(1) of the UN Charter prevail over obligations under any conflicting international agreement.

63. As set out above, in our submission, the primary object of the Mandate for Palestine was to reconstitute the national home of the Jewish people in Palestine.<sup>98</sup> The rights of the Jewish people under this Mandate were therefore preserved by Article 80(1) of the UN Charter. Moreover, since this central purpose of the Mandate involved immigration of Jews into Palestine, the Jewish people whose rights were preserved included Jews who had not yet returned to the national home – especially as many Jews had been and were still being prevented from doing so at the time this provision was adopted.<sup>99</sup>
64. No UN trusteeship agreement was concluded in respect of Palestine. On 29 November 1947 UN General Assembly Resolution 181(II) recommended a plan of partition of the remaining territory of the Palestine Mandate west of the Jordan/Arava line into a Jewish State, an Arab State, and a special international regime in Jerusalem and surrounding villages and towns. This plan was accepted by the Jewish Agency on behalf of the Jewish people in Palestine, but rejected by Arab States and by representatives of Palestinian Arabs, who set out to prevent its implementation by violence.<sup>100</sup> On 11 December 1947 the British government announced its intention to withdraw from the territory in 1948.<sup>101</sup> Violent attacks by Arabs on Jews and reprisals by Jews against Arabs escalated into a civil war.<sup>102</sup> The UN Security Council did not take the necessary measures to implement the plan as requested by the General Assembly in its Resolution 181(II), and the plan was not implemented.
65. Representatives of the Jewish community in the land of Israel declared the establishment of a Jewish State, to be known as the State of Israel, on 14 May 1948

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<sup>97</sup> [Namibia \(1971\)](#) §§58-63.

<sup>98</sup> See also the [Peel Commission Report](#) cap II §42(4)

<sup>99</sup> Rifkind, [The Basic Equities of the Palestine Problem](#) pp11-16

<sup>100</sup> CIA, [Possible Developments in Palestine, ORE 7-48](#), 28/2/1948, p.1

<sup>101</sup> [Hansard, 11/12/1947, vol. 445 col. 1207](#) et seq.

<sup>102</sup> [Herzog, The Arab-Israeli Wars \(2004\)](#), Book 1, cap 1; [Benny Morris, 1948](#) (Yale 2008) Caps 3-4



on the eve of the departure of the British forces and administration.<sup>103</sup> The Declaration of Independence recalled:

*“The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books*

*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.*

*Impelled by this historic and traditional attachment, Jews strove in every successive generation to re-establish themselves in their ancient homeland. In recent decades they returned in their masses. ...*

*In the year 1897 ... 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 the Land of Israel and to the right of the Jewish people to rebuild its National Home. ...”*

66. The document declared the establishment of the new State

*“by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly”.*<sup>104</sup>

However, it did not specify any boundaries. No new Arab State was constituted in Palestine at this time. In accordance with the doctrine of *uti possidetis juris*, as the only State formed within the remaining Mandate territory on the termination of British administration, Israel was entitled to sovereignty over the whole of that territory unless otherwise agreed.<sup>105</sup> This entitlement also accorded with the right of the Jewish people recognised in the League of Nations Mandate to reconstitute its national home throughout this territory.<sup>106</sup>

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<sup>103</sup> Provisional Government of Israel, [Declaration of Independence](#)

<sup>104</sup> §71 of the Court’s [Opinion in Case no. 131](#) appears to have overlooked the Declaration’s invocation of the natural and historic right of the Jewish people

<sup>105</sup> Bell, [Palestine, Uti Possidetis Juris, and the Borders of Israel](#)

<sup>106</sup> See §§44 to 55 above

## Israel's War of Independence and the Armistice Agreements

67. Several Arab States and some Palestinian Arabs sought to destroy the new Jewish State by force. To the surprise of many at the time, the new State beat back the Arab forces except in Judea and Samaria (the West Bank), where Jordan's Arab Legion overran and ethnically cleansed Jewish communities, including the Jewish quarter of the old city of Jerusalem, the Kfar Etzion area, Atarot, Neve Yaakov, Kalya and Beit HaArava.<sup>107</sup> During this international war and the preceding civil war, several hundred thousand Arabs fled areas that came under the control of the new State, to a large extent as a result of false Arab claims of Zionist atrocities.<sup>108</sup>
68. The hostilities were terminated by armistice agreements in 1949 which delineated *"the lines beyond which the armed forces of the respective Parties shall not move"*.<sup>109</sup> These became known as the "green lines". Article II.2 of the Israel-Jordan agreement

*"recognised that no provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations."*

Article VI.9 specified that these lines

*"are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto"*.

69. Similarly, in the Israel-Egypt agreement, Article IV.3 stated:

*"The provisions of this Agreement are dictated exclusively by military considerations";*

Article V.2 insisted that the demarcation line

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

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<sup>107</sup> Herzog, *The Arab-Israeli Wars (2004)*, Book 1. Some areas, such as Sheikh Jarrah, Silwan and Hebron, as well as Kfar Darom in the Gaza strip, had already been ethnically cleansed of Jews by Arab violence in 1929 and/or 1936. See also Shurat Hadin, *Written Observation on the Issue of Affected Communities* at §§13-22; Routtenberg, *The Etzion Block – in the Hills of Judea*

<sup>108</sup> Tauber, *The Massacre That Never Was*; Mandel, *Propaganda Exposed*; PBS, *The 50 Years War Israel and the Arabs Part I*, Interview of Hazem Nusseibeh at 13:58-15:40; [StandWithUs, Submission to UNHRC's "Commission of Inquiry"](#) pp7-8

<sup>109</sup> [Israel-Jordan Armistice Agreement](#) Art. IV.2; [Israel-Egypt Armistice Agreement](#), Art. V.3

and Article XI reiterated

“No provision of this Agreement shall in any way prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question”.

70. The Armistice Agreements left the new State of Israel in control of the majority of the Mandate territory west of the Jordan/Arava line, including west Jerusalem. The remaining Mandate territory west of the Jordan/Arava line was controlled by Egypt (Gaza Strip) and Jordan (Judea and Samaria, including east Jerusalem, subsequently called “the West Bank”). Jordan purported to annex the West Bank including east Jerusalem,<sup>110</sup> but this was not accepted by the international community<sup>111</sup> and subsequently rescinded.<sup>112</sup>
71. In the area under the control of the new State of Israel, the Mandate for Palestine had achieved its purpose of reconstituting the Jewish national home. This brought the “sacred trust” to an end in this area in accordance with the principles set out by the Court in its 1971 *Namibia Advisory Opinion*.<sup>113</sup> However, in the areas under Jordanian and Egyptian control, the Mandate remained unfulfilled; far from being able to settle on the land and establish the Jewish national home in these areas in accordance with the provisions of the Mandate, Jews had been ethnically cleansed.<sup>114</sup> In these areas, we submit that the rights of the Jewish people accorded by the Mandate remained in force, even though the Jordanian and Egyptian regimes did not comply with their obligations, as the administrations of these parts of Palestine, to give effect to them.

#### The 1967 war and peace agreements with Egypt and Jordan

72. In 1967 Egypt ordered UN peacekeepers to withdraw, massed troops on the border with Israel, blockaded Israel’s port at Eilat, and threatened to destroy Israel.<sup>115</sup> Israel responded in self-defence with a pre-emptive strike on Egypt’s air-force followed by a ground attack on Egyptian forces.<sup>116</sup> Jordanian forces shelled Israeli cities and advanced over the armistice lines on the flanks of west Jerusalem.<sup>117</sup> In the ensuing

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<sup>110</sup> [Resolution of Jordanian Parliament, 24/4/1950](#)

<sup>111</sup> The only country which formally recognised it was the UK.

<sup>112</sup> [Statement of King Hussein, 31/7/1988](#)

<sup>113</sup> Case No. 53 *Namibia Opinion* at §§55, 61

<sup>114</sup> Cohen-Levinovsky, *Jewish Refugees during the War of Independence*; Shurat Hadin, *Written Observation on the Issue of Affected Communities*; Routtenberg, *The Etzion Block – in the Hills of Judea*.

<sup>115</sup> Herzog, *The Arab-Israeli Wars* (2004) p.149

<sup>116</sup> *Ibid.* p.151 et seq.

<sup>117</sup> *Ibid.* p.169 et seq.

“Six Day War” Israel defeated the Egyptian and Jordanian forces and captured Sinai, the Gaza Strip and the West Bank including east Jerusalem.

73. Israel remained in control of these areas following the cessation of hostilities in 1967. It exercised and affirmed sovereignty over the re-united city of Jerusalem.<sup>118</sup> In our submission, it was fully entitled to do so, as the State of the Jewish people implementing the primary object of the Mandate of reconstituting the Jewish national home in western Palestine - in particular, in the capital city with which the Jewish people have had a special historical connection for some 3000 years<sup>119</sup> - as well as in accordance with the doctrine of *uti possidetis juris*,<sup>120</sup> and in line with the wishes and interests of a majority of the city’s residents.<sup>121</sup> Under international law in 1967, Israel was additionally entitled to exercise sovereignty over east Jerusalem having recovered it in a defensive war from the State that had unlawfully seized it by force 19 years earlier.<sup>122</sup>
74. Israel did not purport to exercise sovereignty in the other areas of the Mandate territory beyond the 1949 armistice lines. However, in our submission, the Israeli administration of these areas was entitled and bound to enable the exercise of the rights of the Jewish people recognised in the Mandate, while safeguarding the civil and religious rights of all inhabitants.<sup>123</sup> Civil and religious rights of Arabs and Muslims have been respected by the Israeli administration. Around 10 million Muslims now visit the Haram Al Sharif (Temple Mount) every year.<sup>124</sup> The standard of living and welfare of Arabs in the West Bank and the Gaza Strip improved enormously under Israeli rule, particularly in the period between 1967 and the mid-1990s.<sup>125</sup> Although progress has been less rapid following the transfer of powers to the Palestinian Authority in the mid-1990s and the subsequent takeover of Gaza by

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<sup>118</sup> [Law and Administration Ordinance \(Amendment No. 11\) Law](#) (1967); [Municipalities Ordinance \(Amendment No. 6\) Law](#) (1967); [Basic Law: Jerusalem Capital of Israel](#) (1980, amended 2000)

<sup>119</sup> See §§36 to 42 above

<sup>120</sup> See §66 above.

<sup>121</sup> In 1967, Jews and other constituted 74% and Arabs 26% of the total population of 267,000 of the united city: [Jerusalem Institute for Policy Research, Jerusalem Facts and Trends 2023](#) p14. Almost all of the former would have preferred Israeli rule. Since then, the Arab proportion of the total population (now 966,000) has increased to 39%, and an overwhelming majority of them now appear to favour Israeli rule of the united city: see §78(a) below.

<sup>122</sup> Schwebel, [What Weight to Conquest?](#); Kontorovich, [Resolution 242 Revisited: New Evidence on the Required Scope of Israeli Withdrawal](#)

<sup>123</sup> [Rostow, AJIL Note](#); [Rostow, "Palestinian Self-Determination"](#), section II.

<sup>124</sup> Shragai, [To Pray or Not to Pray on the Temple Mount](#)

<sup>125</sup> Karsh, [What Occupation?](#) The most comprehensive sources of information on the socioeconomic development of the West Bank and the Gaza Strip between 1967 and 1993 are the annual yearbooks of Israel’s Central Bureau of Statistics, *Statistical Abstracts of Israel* and the annual reports of the Administrator of Activities in the Territories: *The Administered Territories – Data on Civilian Activity in Judea and Samaria and the Gaza Strip*. Other valuable sources include the regular reports of World Bank (e.g. *World Development Indicators, West Bank & Gaza at a Glance*), as well as various UN reports: United Nations Statistics Division (e.g. *Indicators on Income and Economic Activity, Indicators on Literacy*); World Health Organization (e.g. *The World Health Report*).

Hamas in 2007, it has continued. For example, GDP per capita at purchasing power parity increased in the West Bank and Gaza from \$2302 in 1995 to \$6757 in 2022.<sup>126</sup>

75. Israel repeatedly sought peace with its neighbours following the 1967 war. Its initial overtures were rebuffed by the resolution of the Arab League summit in Khartoum on 1 September 1967 which reiterated the principles “*no peace with Israel, no recognition of Israel, no negotiations with it*”.<sup>127</sup> However, progress was gradually made in subsequent years. Agreements between Egypt and Israel of 17 September 1978 provided frameworks for the conclusion of a peace treaty between Egypt and Israel and for peace in the Middle East.<sup>128</sup> Peace treaties were subsequently made between Egypt and Israel on 26 March 1979 and between Jordan and Israel on 26 October 1994. These treaties confirmed the international borders between the respective States in accordance with the boundaries of the Mandate for Palestine in 1948, without prejudice to the status of the Gaza Strip<sup>129</sup> or the West Bank.<sup>130</sup>

#### The Oslo Accords

76. In the “Oslo Accords” of 13 September 1993 and 28 September 1995, Israel and the Palestine Liberation Organisation (PLO) agreed to strive to “*achieve a just, lasting and comprehensive peace settlement and historical reconciliation through the agreed political process.*”<sup>131</sup> Pursuant to these agreements, a Palestinian Authority was established and various powers of administration in Gaza, Judea and Samaria were transferred by Israel to it. The Oslo II Accord is now the main instrument governing the relationship between Israel and the Palestinian Authority and regulating the administration of the West Bank and the Gaza Strip. We respectfully submit that the Oslo Accords remain in force.
77. The Oslo Accords identified a number of remaining issues to be resolved in permanent status negotiations, including Jerusalem, refugees, settlements, security arrangements and borders.<sup>132</sup> The parties agreed that

*“Neither side will initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”*<sup>133</sup>

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<sup>126</sup> [World Bank, International Comparison Program](#)

<sup>127</sup> League of Arab States, [Khartoum resolution](#)

<sup>128</sup> [Framework for Peace in the Middle East](#)

<sup>129</sup> [Israel / Egypt Peace Treaty](#) Art. II

<sup>130</sup> [Israel / Jordan Peace Treaty](#) Art. 3(2)

<sup>131</sup> [Oslo I](#), Preamble; [Oslo II](#), Preamble para 3

<sup>132</sup> [Oslo I](#), Art V.3; [Oslo II](#), Arts. XVII.1a and XXXI.5

<sup>133</sup> [Oslo II](#), Art. XXXI.7

78. Resolution of these remaining issues is far from straightforward, and missteps could be very damaging and dangerous:

- (a) *Jerusalem*: Re-division of Jerusalem by transferring east Jerusalem to the Palestinian Authority would be liable to create a security nightmare and make it difficult or impossible for its inhabitants to reach places of work and facilities on the other side.

It would also be contrary to the wishes of overwhelming majorities of both of its main ethnic groups. In 2021, 61% of Jerusalem's total population of 966,000 were Jews and others (591,000) and 39% were Arabs (376,000).<sup>134</sup> It is reasonable to assume that an overwhelming majority of Jews living in Jerusalem would wish to remain under Israeli rule. A poll of 1200 Arabs of east Jerusalem conducted by the Palestinian news agency, SHFA, in December 2021 found that 93% of them preferred that the city remain under Israeli rule.<sup>135</sup> Anecdotal reports we have received are consistent with this finding.

Re-dividing the city would, in addition, be liable to result in Jews being prevented or seriously impeded from accessing their holiest religious sites and their most important historical and cultural sites, which are in east Jerusalem.<sup>136</sup>

- (b) *Refugees*: Palestinian leaders insist that alleged Palestinian “refugees”, as defined by the UN Relief and Works Agency (UNRWA), must be permitted to “return” to Israel.<sup>137</sup> However, this would be liable to result in Israel ceasing to exist as the world's only majority Jewish State, thereby denying the Jewish people self-determination.

UNRWA claims there are now 5.9 million Palestinian “refugees” according to its unique definition, which does not accord with the international Convention relating to the Status of Refugees.<sup>138</sup> In contrast to the international Convention, UNRWA's definition treats as “refugees” people

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<sup>134</sup> [Jerusalem Institute for Policy Research, \*Jerusalem Facts and Trends 2023\* p12](#)

<sup>135</sup> Palestine News Network SHFA, [إستطلاع رأي : 93% من العرب في القدس يفضلون بقاء الحكم الإسرائيلي](#), 13/12/2021. The 95% confidence limits are +/-1.5%

<sup>136</sup> Access by Jews to Jewish holy and historical sites in areas of the West Bank under Palestinian administration, such as Rachel's Tomb in Bethlehem and Joseph's tomb in Nablus, is currently only possible for groups protected by the Israeli army, which sometimes come under armed attack from terrorists, despite liaison with the Palestinian Authority. Israelis were not permitted to visit east Jerusalem during the period of Jordanian rule between 1948 and 1967, despite provision in Art. VIII of the armistice agreement to enable such access.

<sup>137</sup> Schwartz, [The War of Return](#)

<sup>138</sup> [Convention relating to the Status of Refugees \(1951\)](#) and the [Protocol relating to the Status of Refugees \(1967\)](#). See Lindsay, [UNRWA: Still UN-Fixed](#)

who moved without any well-founded fear of persecution and people who were internally displaced without crossing an international border, includes descendants of “refugees”, and does not exclude those who have acquired a new nationality or an equivalent status.<sup>139</sup> UNRWA’s definition greatly inflates the number of Palestinian “refugees”. Given the option, many of these “refugees” would be likely to move to the relatively successful and prosperous State of Israel, significantly impacting its demographic composition and character.

In any case, there is no right of Palestinian “refugees” to “return” to Israel. UN General Assembly resolution 194(III), which is commonly cited, was not binding and did not create legal rights. To the extent that a solution is required for those claiming to be Palestinian “refugees”, in our submission it must be found in some other way.

- (c) *Settlements*: The Israeli communities that have been reconstituted<sup>140</sup> or established in Judea and Samaria since 1967 take up some 1.5% of the total area.<sup>141</sup> Overall they provide substantial benefits to Palestinians. Tens of thousands of Palestinians are employed by Israeli businesses in the vicinity of these communities, receiving salaries several times higher than paid by Palestinian employers, as well as other benefits.<sup>142</sup> Many other Palestinians depend on these employees, whether as members of their families or as suppliers of goods and services to them. Their gainful employment makes a significant contribution to the Palestinian economy in the West Bank. Their working alongside Israelis also contributes to developing understanding and friendship between the peoples, which is an essential foundation for peaceful coexistence.<sup>143</sup>

These Israeli communities do not prevent Palestinian self-determination and their removal would not secure it. There have been no Israeli communities in the Gaza Strip since 2005. The removal of Israeli communities from the Gaza Strip and northern Samaria in 2005 did not advance Palestinian self-determination or peace. On the contrary, it enabled the takeover of the Gaza Strip by Hamas, an antisemitic terrorist organisation that seeks the destruction of the State of Israel,<sup>144</sup> resulting in an intensification of the conflict.

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<sup>139</sup> UNRWA, [Consolidated Eligibility and Registration Instructions](#).

<sup>140</sup> E.g. Kfar Etzion, Rosh Tsurim, Alon Shvut, Hebron, Kalya and Beit HaArava

<sup>141</sup> Shragai, [The settlements: all the data before the Trump plan](#)

<sup>142</sup> Tirza, [The Effects of BDS and Denormalization on West Bank Industrial Zones](#)

<sup>143</sup> Diker, [Defeating Denormalization: Shared Palestinian and Israeli Perspectives on a New Path to Peace](#)

<sup>144</sup> [Hamas Charter, 1988](#); [Hamas Charter, 2017](#).

We respectfully submit that the Israeli communities in Judea and Samaria have been legitimately established or reconstituted in accordance with the obligations and correlative rights laid down by Article 6 of the League of Nations Mandate, which have remained in force pursuant to Article 80 of the UN Charter and the principles affirmed by the Court, as discussed above.<sup>145</sup> Their future status is a matter to be resolved in the permanent status negotiations in conjunction with the issues of security and borders.

- (d) *Security arrangements:* The Palestinian Authority is clearly unable to control armed groups in the West Bank or Gaza Strip. It is highly unlikely that any degree of peace could be kept unless Israeli forces continue to be based in the West Bank, but we understand that this is opposed by Palestinian leaders. If Israeli forces were withdrawn from the West Bank, the situation would likely become similar to that currently in Gaza, but on a much larger scale and adjacent to Israel's major population centres. This would necessitate a reoccupation by Israel of the West Bank and would be a recipe for continuing conflict.
- (e) *Borders:* The 1949 ceasefire lines would not constitute secure boundaries for Israel. The Israeli territory within them is only 9 miles (14.4 km) wide at one point and not a great deal wider over most of the centre of Israel where a large part of its population is concentrated. There are no physical barriers between this coastal plain and the higher ground of Samaria beyond the armistice line. The corridor between Jerusalem and the rest of Israel within the ceasefire lines is only 5 miles (8 km) wide through terrain dominated by hills on either side.<sup>146</sup>

Treating these lines as borders would not comply with the principles identified in UN Security Council Resolution 242 (which refer to “*secure and recognized boundaries*”), particularly in the absence of robust security arrangements. In any event, it would not enable the creation of a contiguous Palestinian state.

- 79. The difficulty of resolving these issues has been compounded by the unfair treatment of Israel by UN bodies.<sup>147</sup> This has encouraged rejectionism and obduracy on the part of Palestinian leaders. It has also discouraged concessions by Israel, particularly any concessions that make its defence more difficult, including any withdrawal from the West Bank. As matters stand, Israel has to proceed on the footing that UN bodies will continue to treat it unfairly and inhibit its ability to

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<sup>145</sup> See §61 - §63, §71 and §74

<sup>146</sup> Israel Ministry of Foreign Affairs, Israel in Maps, [Israel - Size and Dimension](#)

<sup>147</sup> See §14 - §19 above



defend its citizens. In addition, the production and circulation of false allegations and biased narratives produced by UN bodies or resulting from their treatment of Israel promote racism and hostility against Israel and Jews, and make it even more difficult to reach agreements that accommodate relevant rights and requirements.

80. In spite of, and because of, the difficulty of these remaining issues, it has been widely accepted that they can only be resolved by an agreed political process.<sup>148</sup> Although this has not yet been achieved, the political process pursuant to the Oslo Accords remains the only realistic framework for resolving the conflict and enabling the exercise of rights of self-determination by the peoples concerned.

### The Abraham Accords and Israeli Arabs

81. Agreements to establish peace, diplomatic relations and normalization between Israel and the United Arab Emirates,<sup>149</sup> Bahrain,<sup>150</sup> Sudan<sup>151</sup> and Morocco<sup>152</sup> were signed in 2020 and have led to a series of further agreements.<sup>153</sup> Israel is ready to reach agreements with its neighbours whenever the opportunity presents to realise the vision expressed by Emir Feisal in 1919.<sup>154</sup>
82. Finally, we note here that the State of Israel has flourished in many ways since 1948, to the benefit of all its citizens. Arabs who chose to remain in Israel and their descendants enjoy greater rights and freedoms as citizens of Israel than Arabs in other Middle Eastern countries, and an average standard of living higher than in all but the richest oil-producing principalities.<sup>155</sup> Arab Israelis are overwhelmingly opposed to any transfer of their cities to a Palestinian State.<sup>156</sup> Despite its small size and population, Israel has also contributed significantly to the world economy and to human progress through innovations in many different fields.<sup>157</sup>

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<sup>148</sup> See e.g. Statements made in the Security Council, [9139<sup>th</sup> meeting](#) (28/9/2022, SC/15042)

<sup>149</sup> [Abraham Accords Peace Agreement: Treaty of peace, diplomatic relations and full normalization between the United Arab Emirates and the State of Israel](#) 15/9/2020

<sup>150</sup> [Joint communiqué on the establishment of diplomatic, peaceful and friendly relations between the State of Israel and the Kingdom of Bahrain](#), 18/10/2020

<sup>151</sup> [Joint Statement of the US, Sudan, and Israel](#), 23/10/2020

<sup>152</sup> [Joint Declaration of Morocco, the US and Israel](#) 22/12/2020

<sup>153</sup> E.g. [Agreement on mutual exemption of entry visa requirements](#); [MoU on cooperation in science and advanced technology](#); [Agreement on Promotion and Protection of Investments](#); [Convention for Avoidance of Double Taxation](#); [Comprehensive Economic Partnership Agreement](#)

<sup>154</sup> See §57 above

<sup>155</sup> See e.g. Arlosoroff, [Arabs are Israel's New Yuppies](#); Abu Toameh, [The Real Reason Arabs in Israel Do Not Want to Live in 'Palestine'](#)

<sup>156</sup> [Pipes, Israeli Arabs say no to Palestine](#); [Algazy, Israeli Arabs Prefer Israel to Palestinian Authority](#)

<sup>157</sup> See e.g. Senor, [Start-Up Nation – The Story of Israel's Economic Miracle](#); Roth, [The Committed Innovator: What has made Israel an innovation hub?](#); Wolff, [10 Innovations of Israeli Technology](#); Leichman, [5 Israeli technologies named TIME best inventions 2022](#); Siegel, [Let There Be Water](#)

## Self-Determination and the Assumptions in the General Assembly's Questions

### Need to establish the will of the people

83. The will of the people is central to the concept of self-determination. In order to give effect to a right of self-determination, the will of the people concerned must be fully established, as the Badinter Commission rightly held.<sup>158</sup> The Framework for Peace in the Middle East and the Oslo Accords all recognised this and contained fundamental provisions for the election of representatives who could express the will of Palestinian Arabs in the West Bank and Gaza Strip in the negotiation of the difficult issues identified above and on the conclusion of any agreements regarding them.<sup>159</sup>
84. The Palestinian Authority has not held a general election since 2006. This is a fundamental bar at the present time to self-determination of Palestinian Arabs. It is not a technicality. As mentioned above, a poll of 1200 Arabs of east Jerusalem conducted by the Palestinian news agency, SHFA, in December 2021 found that 93% of them preferred that the city remain under Israeli rule.<sup>160</sup> This indicates that the right of Arabs in east Jerusalem to self-determination has not been violated by any “*prolonged occupation, settlement and annexation of the Palestinian territory*” by Israel, as assumed in the question asked of the Court. On the contrary, it appears that their self-determination has been assisted by Israeli administration and exercise of sovereignty in east Jerusalem, and would be further advanced by international acceptance and recognition of this sovereignty. Conversely, transfer of east Jerusalem to rule by the Palestinian Authority would be a flagrant and dangerous violation of their right of self-determination.
85. It should also be recalled that Jerusalem has been regarded as a distinct area requiring special treatment in attempts to find a permanent solution to issues arising out of the League of Nations Mandate for Palestine. The UN General Assembly's Resolution 181(II) of 29 November 1947 recommended a special international regime for Greater Jerusalem, to last initially for 10 years, with the residents of the City then being free to express by means of a referendum their wishes as to the future regime.<sup>161</sup> Bearing in mind that the City has had a Jewish majority at all times since 1948<sup>162</sup> and such evidence as there is as to the wishes of Arab residents, it is

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<sup>158</sup> [Badinter Commission](#), Opinion No.4, §4 (English translation)

<sup>159</sup> [Framework for Peace in the Middle East](#), section A.1; [Oslo I](#), Arts. I, III; [Oslo II](#), Preamble paras 5-8, Arts. II-IV and Annex 2

<sup>160</sup> See §78(a) above

<sup>161</sup> Part III D

<sup>162</sup> See Jerusalem Institute for Policy Research, 2023 Yearbook, [Population of Israel and Jerusalem by Population Group, 1922-2021](#). The figures for 1948 and 1961 do not include east Jerusalem, but the number of Arabs in east Jerusalem in these years can be estimated by interpolation between the figures for 1945/6 and 1967.

highly likely that a referendum at any time would have returned a majority in favour of Israeli rule. As observed above, the Oslo Accords also treated Jerusalem as a distinct issue to be addressed in permanent status negotiations.<sup>163</sup> The need for special treatment of Jerusalem is further recognised in the 25<sup>th</sup> and 26<sup>th</sup> recitals of the General Assembly’s resolution 77/247.

86. The situation is different and other considerations apply in relation to the West Bank outside of east Jerusalem and in the Gaza Strip. About 88% of Palestinians in the West Bank outside east Jerusalem live in areas A and B under the jurisdiction of the Palestinian Authority.<sup>164</sup> Hamas, a Palestinian terrorist organisation, currently controls the Gaza Strip. However, there is still a fundamental need to establish the will of Arabs living in these areas in order to be in a position to resolve the remaining issues by a political process as envisaged in the Oslo Accords.

#### Need to accommodate other rights and requirements

87. Self-determination is properly regarded as a relative right, which needs to be accommodated with other rights and requirements.<sup>165</sup> These other rights and requirements include existing boundaries established in accordance with the doctrine of *uti possidetis juris*.<sup>166</sup> As the Badinter Commission observed,

*“whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise.”*<sup>167</sup>

88. In accordance with the doctrine of *uti possidetis juris*, the State of Israel was entitled to inherit the borders of the Mandate of Palestine as they existed on 14 May 1948, including the eastern boundary along the Jordan river and Arava valley.<sup>168</sup> These were also the borders of the Jewish national home recognised by the League of Nations Mandate.<sup>169</sup> The position was not altered by the armistice agreements of 1949 which delineated *“the lines beyond which the armed forces of the respective Parties shall not move”*. These agreements explicitly stated that that these lines

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<sup>163</sup> [Oslo I](#), Art. V.3; [Oslo II](#), Arts. XVII.1 and XXXI.5.

<sup>164</sup> The total population of the West Bank was 2.95 million in 2021: CIA [World Factbook 2021](#). We understand this to include 375,000 Arabs living in east Jerusalem but no Israelis, so the total Arab population of the West Bank outside east Jerusalem was 2,575,000. The Arab population of Area C of the West Bank (under Israeli administration) was about 300,000 in 2019: OCHA, [reliefweb, Addressing the Needs of Palestinian Households in Area C of the West Bank](#). Assuming a 1.7% annual increase in line with CIA estimates, the Arab population of Area C would have reached 310,000 by 2021 (12% of the total of 2,575,000) with 2,265,000 (88%) of that total in Areas A and B.

<sup>165</sup> Becker, [Self-Determination in Perspective: Palestinian Claims to Statehood and the Relativity of the Right to Self-Determination](#)

<sup>166</sup> Case No. 69 [Frontier Dispute \(Burkina Faso/Republic of Mali\)](#) at §§20-26

<sup>167</sup> §1 of Opinion No. 2 of the [Badinter Commission](#), and see also Opinion No.3

<sup>168</sup> Bell, [Palestine, Uti Possidetis Juris and the Borders of Israel](#)

<sup>169</sup> See §49 - §51 above

were without prejudice to any rights, claims or positions of the parties or the ultimate settlement of the Palestine question.<sup>170</sup>

89. New borders can be created by agreement and it was envisaged by the Oslo Accords that borders would be one of the subjects of final status negotiations.<sup>171</sup> However, the correct starting point is that Israel was entitled to inherit the borders of the Mandate of Palestine as at 14 May 1948 and that relinquishing part of the territory within them constitutes a concession by Israel in terms of territory, albeit that it may assist the resolution of other difficult issues.
90. The right of Palestinian Arabs to self-determination must also be accommodated with the right of the Jewish people to self-determination in their national home and the right of Israelis to live in peace within secure borders. As discussed above,<sup>172</sup> the need for these accommodations gives rise to a set of difficult issues that have to be resolved in final status negotiations, including Jerusalem, refugees, settlements, security arrangements and borders.
91. These accommodations also require an end to incitement of hatred and terrorism against Israelis by the Palestinian Authority and other actors. Without an end to this incitement, peace and security will not be possible, particularly given the proximity of the populations and the topography of the land. In particular, the Palestinian Authority needs to end policies of rewarding terrorists and their families by lavish salaries, pensions and other payments;<sup>173</sup> glorifying terrorism against Israelis in media<sup>174</sup> including children's television;<sup>175</sup> promoting terrorism in education<sup>176</sup> and in sport;<sup>177</sup> and punishing Palestinians who engage in activities or have normal relations with Israelis.<sup>178</sup>

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<sup>170</sup> [Israel-Jordan Armistice Agreement](#) Arts. II.2, IV.2, VI.9; [Israel-Egypt Armistice Agreement](#), Arts. IV.3, V.2, V.3 and XI

<sup>171</sup> [Oslo I](#), Art V.3; [Oslo II](#), Arts. XVII.1a and XXX1.5

<sup>172</sup> §77 - §80 above

<sup>173</sup> See Palestinian Media Watch, [PA Salaries to Terrorists & Payments to "Martyrs"' Families](#)

<sup>174</sup> See Palestinian Media Watch, [Media / Schoolbooks](#)

<sup>175</sup> See e.g. Palestinian Media Watch, [The Dark-Eyed \[Virgins\] yearn for me" - Martyrdom-death promoted to kids on PA TV children's program](#) (2/12/2019), [Ramadan series on PA TV teaches to shoot Jews, "your enemy", and to hate them](#) (May – June 2019), [How and why the PA kills its own children: Special Report for UN World Children's Day](#) (20/11/2022)

<sup>176</sup> See e.g. IMPACT-se, [Palestinian Authority Ministry of Education Study Cards 2021-22, Grades 1-11 – Selected Examples](#) and [The 2020-21 Palestinian School Curriculum Grades 1-12 – Selected Examples](#); Arnon Groiss, [Does UNRWA Educational System Prepare the Palestinian Children and Youth for a War against the Jews](#), Bedein Center for Near East Policy Research, May 2022; Palestinian Media Watch, [Schoolbooks](#) and [Educational System](#)

<sup>177</sup> Palestinian Media Watch, [Abuse of Sports & Culture](#)

<sup>178</sup> See e.g. Palestinian Media Watch, [PA officials: Israeli-Palestinian football match is "a crime against humanity"](#), [Fatah official: "There will be no youth or sports activity of any kind with the Israeli side"](#), [Rajoub rejects sports contacts with Israelis](#), [PA official Rajoub: Israelis are "new Nazis"](#), [Arab sports](#)

### The assumptions in the UNGA's questions

92. In the light of the above analysis, we respectfully submit that the basic assumption made in the UN General Assembly's questions, that there is an "*ongoing violation by Israel of the right of the Palestinian people to self-determination*", is wrong.
- (a) A large majority of Arabs in Jerusalem appear to prefer a continuation of Israeli rule of the united city.
  - (b) Most Palestinians in the West Bank outside Jerusalem live in areas already under the jurisdiction of the Palestinian Authority, while Palestinians in the Gaza Strip are under the control of Hamas.
  - (c) To the extent that the Palestinian Arab people have not yet fully achieved self-determination, this is because Palestinian Arab leaders and Israel have not yet reached agreement on essential matters that have to be agreed in order to enable that self-determination whilst also accommodating other fundamental rights and requirements.
  - (d) In any case, it is impossible at present to give effect to Palestinian self-determination, since the will of the Palestinian people has not been fully established. Incitement of hatred and terrorism against Israelis by the Palestinian Authority and other actors also constitutes a major obstacle to Palestinian self-determination.
93. The assumption that Israel has adopted "*measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem*" is also wrong.
- (a) Since 1967 Jerusalem has flourished under Israeli rule to the benefit of both Arabs and Jews, and even more so for Arabs than Jews. Between 1967 and 2021, the Arab population of the reunited city increased from 69,000 to 376,000, an increase of 445%. Over the same period, the population of Jews and others also increased, but not as fast: from 198,000 to 591,000, an increase of 198%. The Arab proportion of the total population increased from 26% to 39% over this period.<sup>179</sup> It is clear that Israel has not altered the overall demographic composition in favour of Jews, quite the opposite. At most, it might be said that Israel has attempted, rather unsuccessfully, to *preserve* the

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[\*leader "praised" athletes who refused to compete against Israeli teams, Abbas arrests Christian man and closes institution he heads because he hosted a Jew – "extremist settler Yehuda Glick"\*](#); Al Jazeera, [\*Palestinian sentenced to life for selling land to Israelis\*](#)

<sup>179</sup> Jerusalem Institute for Policy Research, [\*Jerusalem Facts and Trends 2023\*](#) pp12-14

large Jewish majority that existed in 1967 and had existed for the best part of a century prior to 1967.<sup>180</sup>

- (b) Israel has rebuilt the Jewish quarter of the old city of Jerusalem and reconstituted the Jewish community there. In doing so, it has *restored* the character of the old city that existed prior to the destruction of this quarter and the ethnic cleansing of this historic community following the violent capture of the quarter by Jordan's Arab Legion in 1948.
- (c) Israel has asserted and exercised sovereignty over the re-united city of Jerusalem, as it is entitled to do pursuant to the League of Nations Mandate, Article 80 of the UN Charter and the doctrine of *uti possidetis juris*.<sup>181</sup> This also accords with the will of the people of Jerusalem and their best interests.<sup>182</sup> Moreover, it is the position that would now exist if the recommendations in UN General Assembly resolution 181(II) had been implemented.<sup>183</sup>

- 94. The questions asked by the UN General Assembly next assume that Israel has adopted discriminatory legislation and measures. However, it is not clear what alleged discriminatory legislation and measures this is intended to cover. In our respectful submission, the court would not be acting judicially if it were to proceed on the basis of such an ill-defined charge.<sup>184</sup>
- 95. The questions asked by the UN General Assembly go on to assume that unspecified policies and practices of Israel affect the legal status of the alleged occupation. Again, it is not clear what are the alleged policies and practices to which this refers. Even if there have been infringements by Israel of any of its obligations, it does not follow that this changes the status of the territory.

## **Conclusions**

- 96. We respectfully submit that the Court does not have before it sufficiently reliable information to arrive at judicial conclusions on disputed questions of fact whose determination is necessary for it to give an opinion in this case in conditions compatible with its judicial character. Moreover, the questions asked by the General Assembly are not sufficiently specific to be capable of being answered judicially.

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<sup>180</sup> See references cited at note 61 above

<sup>181</sup> See §47 - §55 and §61 - §66 above

<sup>182</sup> See §78(a) above

<sup>183</sup> See §85 above

<sup>184</sup> See §34(c) above and the decisions of the Court cited in note 24 above

The General Assembly's request should also be declined on the further ground that it is vitiated by unlawful discrimination against Israel.

97. If, however, the Court decides to answer the questions asked by the General Assembly at all, we submit that it should advise the General Assembly as follows:

(a) (i) There is no ongoing violation by Israel of the right of the Palestinian people to self-determination.

(ii) Israel has not adopted measures aimed at altering the demographic composition or character of Jerusalem and is entitled to exercise sovereignty over the united city of Jerusalem.

(iii) In order to realise self-determination of the Palestinian people in east Jerusalem, the West Bank and the Gaza Strip, Israel and representatives of the Palestinian people must ascertain the will of the Palestinian people in these areas and must negotiate in good faith to resolve remaining issues including Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, in a manner which accommodates the right of the Jewish people to self-determination in their national home and the right of Israelis to live in peace within secure borders, and in accordance with the agreed political process pursuant to the Declaration of Principles on the Interim Self-Government Arrangements of 13 September 1993 and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995.

(iv) The Court is not able to advise as to the existence (or otherwise) and legal consequences (if any) of alleged discriminatory legislation and measures to which the General Assembly refers in question (a), since these are not identified in the question.

(b) The Court is not able to advise as to the existence (or otherwise) and legal consequences (if any) of alleged policies and practices to which the General Assembly refers in question (b), since these are not identified in the question.

**Marta Kubica**

CEO

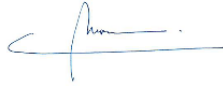
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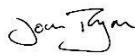
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