

**Zadání pro výběrový kurz mezinárodního práva veřejného**  
**Ak. r. 2004-2005**  
**PVP – Aktuální problémy mezinárodního práva veřejného**

Situace: Do 1.světové války bylo území dnešní Palestiny a Izraele součástí Osmanské říše. Roku 1916 se Velká Británie a Francie dohodly na rozdělení tureckého "dědictví" v tzv. **Sykesově - Picotově dohodě** (1916), podle níž měla Británie získat Irák a oblasti okolo Perského zálivu a Francie Sýrii, přičemž Palestina se měla dostat pod mezinárodní kontrolu. Rok nato Britové přislíbili Židům domovinu v Palestině v tzv. **Balfourově deklaraci**. Roku 1920 byl Brity ustaven mandát v Palestině, což Společnost národů potvrdila roku 1922. V průběhu celých 20.let dochází k masivní migraci Židů do Palestiny, což vede k rostoucímu napětí mezi oběma etniky. Situace vyústila roku 1936 v generální stávkou Arabů a právě po ní se v "**Peelově komisi**", která byla pověřena vyšetřit události, poprvé objevuje myšlenka na rozdělení Palestiny (na arabskou, židovskou a britskou oblast. S tím však Palestinci rozhodně nesouhlasili a v letech 1938-1939 proběhlo arabské povstání (zaměřené proti Židům i Britům). Ačkoliv se vzpouru nakonec podařilo potlačit, reagovala britská vláda vydáním "**Bílé knihy**" (květen 1939), která pohřbila návrhy "Peelovy komise", ale co bylo důležitější, přísně omezila židovské přistěhovalectví, což se rovnalo rozsudku smrti pro statisíce Židů prochajících před nacismem.

Ačkoliv se 2.světová válka území Palestiny až na výjimky bezprostředně nedotkla, měla dalekosáhlý význam. Na základě **rezoluce VS OSN č. 104** z 15.5.1947 byl zřízen vyšetřující výbor OSN. Většina jeho členů se nakonec rozhodla pro rozdělení Palestiny na dva nezávislé státy: arabský a židovský, Jeruzalém se měl dostat pod správu OSN. S tímto řešením Židé souhlasili, byť "odepsání" Jeruzaléma pro ně znamenalo těžkou ztrátu. Na druhé straně Liga arabských států, vytvořená v roce 1945, byla proti a otevřeně hlásala, že nepřipustí existenci samostatného židovského státu v Palestině. Velice choulostivá záležitost byla rozhodnuta 29.11.1947, kdy při hlasování Valného shromáždění OSN prošel jen těsnou většinou plán rozdělení (tzv. **Partition Resolution č.181**). Židovský stát měl mít rozlohu přes 15 000 km<sup>2</sup>, arabský pak přes 11 000 km<sup>2</sup>, hranice obou států byly vojensky neudržitelné, státům byla přiřčena řada oblastí obývaných druhým etnikem, nebylo zde síly, která by dodržela mezinárodní statut Jeruzaléma, atd. Bylo jasné, že po odchodu Britů, který byl naplánován na 14.5.1948, dojde k boji. Nevyhlášená válka však vypukla již v lednu 1948, když palestínští Arabové podporovaní dobrovolníky ze zahraničí útočili proti osamoceným židovským osadám, a především se jim podařilo odříznout židovskou komunitu v Jeruzalémě.

**14. května 1948** odešel z Palestiny poslední britský voják a ve stejný den vyhlásila prozatímní Státní rada (v čele s D.B. Gurionem) **samostatný Stát Izrael**. Následuje vpád sousedních arabských států (Egypt, Zajordánsko, Sýrie, Libanon + vojska Iráku), jejichž oficiálně proklamovaným cílem je pomoci palestinským bratrům a zlikvidovat židovský stát. Po odražení prvotního útoku vstoupilo 11.6.1948 v platnost první příměří zprostředkované OSN (resp. jejím vyslancem v Palestině Folke Bernadottem). Po ukončení prvního příměří (9.7. 1948) přešla izraelská armáda do protiútoků. Boje střídavě přerušované příměřími trvaly až do jara 1949 a byly dočasně ukončeny příměřím dohodnutým na ostrově Rhodos.

Izrael uhájil svou existenci a naopak získal část území, ze kterých měla vzniknout arabská Palestina (část Gazy a Západního břehu Jordánu včetně západní části Jeruzaléma, většinu Galileje). Neboť zbytek území zabralo Zajordánsko (Západní břeh Jordánu, Starý Jeruzalém), resp. pod správu převzal Egypt (Gaza), Palestinci nezískali vlastní stát. Problém vyřešen nebyl, většina arabských států se nesmířila s existencí Izraele a hodlala odčinit hořkou

porážku. Palestinci neměli vlastní stát a navíc z území samotného Izraele uprchlo přibližně 700 000 Arabů, které nikde nevíтали s otevřenou náručí.

Roku 1964 vznikla Organizace pro osvobození Palestiny (OOP), v jejímž programu se hovoří o vzniku Palestinského státu, návratu uprchlíků i likvidaci Státu Izrael. Na začátku roku 1967 dokončil izraelský generální štáb (Jicchak Rabin) plán vojenského útoku na sousední arabské země. 5. června 1967 v ranních hodinách začala leteckým úderem namířeným proti egyptským letištím **tzv. šestidenní válka**. Ve válce získal Izrael celý Sinajský poloostrov, pásmo Gazy, Západní břeh Jordánu a Golanské výšiny. Izrael však také "získal" spolu s územím přes 90 % Palestinců usazených v Gaze a na Západním břehu Jordánu. Válka měla dohru i na poli mezinárodním. OSN **rezolucí č. 242** (1967) zdůraznila nepřipustnost nabytí území válkou a vyzvala Izrael ke stažení z okupovaných území. Rada států přerušila s Izraelem diplomatické styky (včetně Československa).

Dalším milníkem v historii izraelsko-palestinského konfliktu se stala **tzv. Jom Kippurská válka** (Jom Kippur = Den smíření je největším židovským svátkem) roku 1973. Po počátečních úspěších arabských vojsk přešel Izrael do protiútoků: získal převahu ve vzduchu, na moři, překročil Suezský průplav a ohrožoval Káhiru i Damašek. Válka skončila bez jasného vítěze 24.10.1973. Po jednáních v Camp Davidu byla 26.3.1979 podepsána ve Washingtonu mírová smlouva, ve které se Izrael zavázal vrátit Egyptu Sinajský poloostrov (ve čtyřech etapách, do roku 1982). Rada bezpečnosti téhož roku v **rezoluci č. 446** vyzvala Izrael, aby se zdržel chování, jež má za následek změnu právního statusu, geografické povahy a demografického složení arabských zemí okupovaných od r.1967.

Další zlom přinesla **Válka v Zálivu** v letech 1990-1991 Již v říjnu 1991 se u jednacího stolu v Madridu scházejí delegace Izraele a arabských států. Do skutečného pohybu se proces dostává po izraelských volbách v červenci 1992, kdy nový premiér J. Rabin (Strana práce) vyzývá Palestince i ostatní sousedy k jednání a je zastavena židovská výstavba na okupovaných územích. Přes průtahy a pokračující potyčky je roku 1993 legalizována OOP a po tajných jednáních je 13.9. 1993 podepsána ve Washingtonu "**Deklarace o zásadách palestinské autonomie**", ve které se Izrael zaručil stáhnout vojska z okupovaných území a předat v Gaze a ve městě Jerichu (+ okolí) samosprávu zvoleným palestinským orgánům.

Následující události jsou Vám už jistě známy, a tudíž jsou uvedeny jen ve zkratce:

1994	Jásir Arafat, Šimon Peres a Jicchak Rabin získávají Nobelovu cenu míru
1995	zavražděn Jicchak Rabin
2000	jednání v Camp Davidu (Jásir Arafat odmítá návrh na řešení konfliktu)
Září 2000	zahájena Druhá intifáda Al-Aksa
2002	schválen plán na řešení konfliktu tzv. „Cestovní mapa“
30/06/2004	Rozhodnutí Nejvyššího izraelského soudu ve věci stavby zdi na obsazeném palestinském území
09/07/2004	Posudek MSD o právních následcích stavby zdi na obsazeném palestinském území
11/11/2004	umírá Jásir Arafat
08/02/2005	summit v Šarm El-Šejku - některými pozorovateli považován za konec intifády Al-Aksa

### Otázky:

- 1) Izrael
  - a. Jak hodnotíte vznik státu Izrael z hlediska mezinárodního práva? Byla rezoluce VS OSN č.181 aktem *ultra vires*?
  - b. Jakou roli hraje skutečnost, že některé arabské státy neuznávají subjektivitu státu Izrael v mezinárodním právu?
  - c. Má Izrael nárok na území, jež se nachází za hranicemi stanovenými v rezoluci VS OSN z roku 1947?
- 2) Okupovaná palestinská území
  - a. Jaký mají okupovaná palestinská území status v mezinárodním právu?
  - b. Mají Palestinci právo na sebeurčení? V jakém rozsahu?
  - c. Kudy by podle Vás měla vést v budoucnu hranice mezi oběma státy?
- 3) Jaký status přiznávala rezoluce VS OSN č.181 z roku 1947 Jeruzalému?

### Povinná literatura:

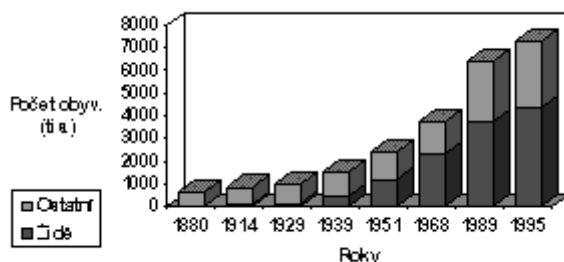
- 1) Tento dokument po str. 14.
- 2) Dále jen to co je vyznačeno v tomto dokumentu modře (status Jeruzaléma, str. 16-17).

### Doporučená literatura:

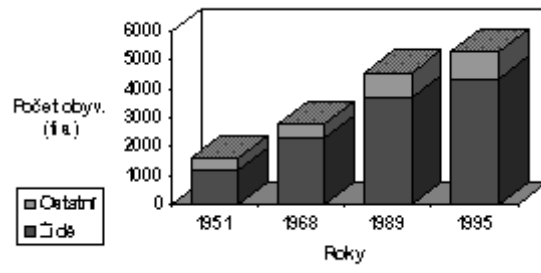
- 1) MALANCZUK, P.: Israel: Status, territory and occupied territories, In *Encyclopedia of Public International Law*, Vol. II, 1995, str. 1468-1508.
- 2) ŠTURMA, P.: Posudek MSD o právních následcích stavby zdi na obsazeném palestinském území, *Právní rozhledy*, 2004, číslo 9, str. 13-17.
- 3) Proposals for a Palestinian state  
[http://en.wikipedia.org/wiki/Proposals\\_for\\_a\\_Palestinian\\_state](http://en.wikipedia.org/wiki/Proposals_for_a_Palestinian_state).

### Grafy :

**Graf č.1 - Vývoj počtu obyvatel a národnostního složení v oblasti historické Palestiny (tj. včetně okupovaných území)**



**Graf č. 2 - Vývoj počtu obyvatel a národnostního složení ve státě Izrael (tj. bez okupovaných území)**

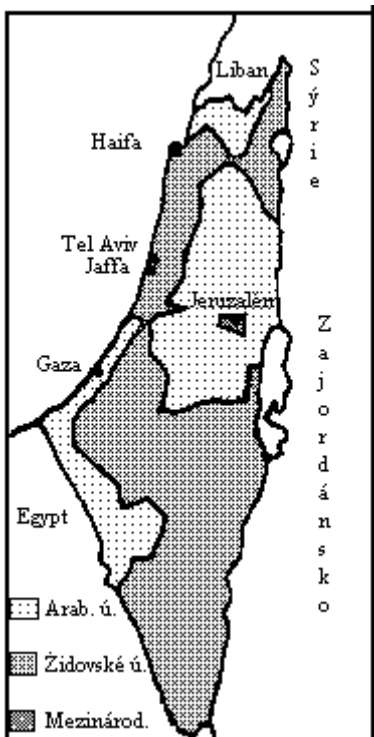


Mapy :

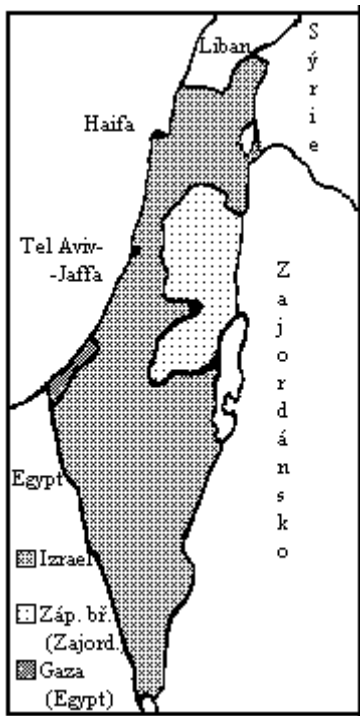
**Mapa č. 1 - Plán rozdělení dle Peelovy komise (1937)**



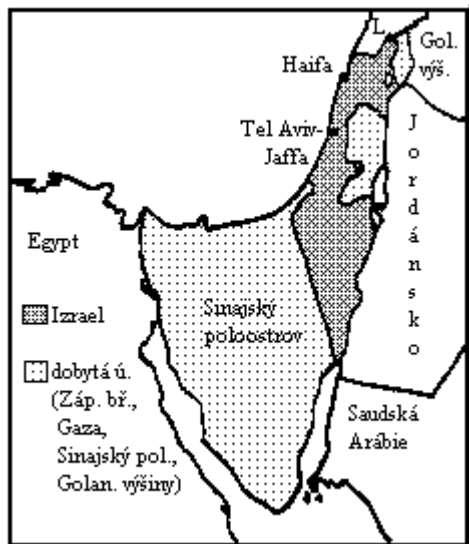
**Mapa č. 2 - Plán rozdělení dle OSN (1947)**



**Mapa č. 3 - Faktický stav po 1. arab. - izr. válce (1949)**



**Mapa č. 4 - Faktický stav po šestidenní válce (1967)**



## Current proposals for a Palestinian State

The current position of the Palestinian Authority as well as Israel is that some portion of the West Bank and the Gaza Strip should form the basis of a future Palestinian state. In the following, the historical background is briefly reviewed and the current dispute analyzed. For additional discussion, see Palestinian territories.

[\[edit\]](#)

### Peace process

A peace process has been in progress in spite of all the differences and conflicts. Milestones along this path have been the Madrid Conference of 1991 and the 1993 Oslo Peace Accords between Palestinians and Israel. The process stalled with the collapse of the Camp David 2000 Summit between Palestinians and Israel. On June 24, 2002, the Road Map for Peace was published as the next step in the peace process. The Road Map has stalled awaiting the implementation of the step required by the first phase of that plan.

[\[edit\]](#)

### Historical views

[\[edit\]](#)

#### Historical Israeli views

The traditional Israeli view has been that there is no such thing as a separate Palestinian people, but only Arabs. They already have several nations, and it is therefore unreasonable to demand that Israel should have any responsibility or part in establishing a nation for them. This is summarized by the famous statement of Israeli Prime Minister (1969-74) Golda Meir: "There was no such thing as Palestinians ... It was not as though there was a Palestinian people in Palestine considering itself as a Palestinian people and we came and threw them out and took their country away from them. They did not exist."

Since then, according to polls, the majority of Israelis have come to accept the likelihood that a Palestinian state will be created.

[\[edit\]](#)

## Historical Arab views

Many Arabs have supported or continue to support the creation of a united Arab state encompassing all Arab peoples including Palestine, so that no independent Palestinian state would exist, but this became a minority view amongst Palestinians during the British Mandate and after 1948 became rare. It is still an opinion expressed regularly in the Arab states outside Palestine (especially Syria due to its attachment to the *Greater Syria Movement* which was launched in 1944 to establish a "Syrian Arab" state that would include Lebanon, Syria, Jordan and Palestine.) However, it is generally recognised that such a development has become implausible under current political realities and even those who might favor it in some circumstances support an independent Palestinian state as the most achievable option.

In 1958, during a period of Pan-Arabism, Syria joined Egypt in founding the United Arab Republic (UAR) as the first step toward the recreation of Pan-Arab state, which disappeared during the weakening and later dissolution of the Caliphate. The UAR was to include, among others, Palestine. The UAR disintegrated into its constituent states in 1961.

From 1948 until 1967, Gaza was held by Egypt, and the West Bank, including East Jerusalem, was held (annexed actually) by Jordan. During those years, there was a growing movement for the creation of a Palestinian state, leading to the creation of the Palestine Liberation Organization (PLO) in 1964.

[edit]

### Modern view

The main discussion during the last fifteen years has focused on turning most or the whole of the Gaza Strip and the West Bank into an independent Palestinian state. This was the basis for the Oslo accords and it is favoured by the U.S. The status of Israel within the pre-1967 borders has not been the subject of international negotiations. Some members of the PLO recognize Israel's right to exist within these borders; others hold that Israel must eventually be destroyed. Consequently, some Israelis hold that Palestinian statehood is impossible with the current PLO as a basis, and needs to be delayed.



The specific points and impediments to the establishment of a Palestinian state are listed below. They are a part of a greater mindset difference. Israel declares that its security demands that a Palestinian entity would not have all attributes of a state, at least initially, so that in case things go wrong, Israel would not have to face a dangerous and nearby enemy. Israel may be therefore said to agree (as of now) not to a complete and independent Palestinian state, but rather to a self-administering entity, with partial but not full sovereignty over its borders and its citizens.

The central Palestinian position is that they have already compromised greatly by accepting a state covering only the areas of the West Bank and Gaza. These areas are significantly less territory than allocated to the Arab state in UN Resolution 181. They feel that it is unacceptable for an agreement to impose additional restrictions (such as level of militarization, see below) which, they declare, makes a viable state impossible. In particular, they are angered by significant increases in the population of Israeli settlements and communities in the West Bank and Gaza Strip during the interim period of the Oslo accords. Palestinians claim that they have already waited long enough, and that Israel's interests do not justify depriving their state of those rights that they consider important. The Palestinians have been unwilling to accept a territorially disjointed state that they refer to as a "Bantustan" (a term given to so-called "self-governing homelands" by the government in apartheid South Africa.)

[[edit](#)]

#### **Impediments to the establishment of a Palestinian state**

Note that the materials in this section are mainly based on the Israeli

- Lack of trust. The violent conflicts and massacres of the period before the founding of the State of Israel and the decades of terrorism or political violence (most of it against civilians) and living as refugees under foreign governments has left both sides with little trust that the other will fulfill any commitments undertaken in an agreement.
- The city of Jerusalem is a site of dispute between Israel and the Palestinians. Israel demands that Jerusalem be recognised as their official capital (the very name "Zionism" is derived from Zion, one of Jerusalem's names), whereas Palestinians demand that East Jerusalem be recognized as their official capital, calling for Jerusalem as a whole to be an open city. A border passing inside the Old City is likely to displease both Jews and Arabs, since in addition to not settling the two sides' claims for the city, it would lead to difficulties in everyday life. Israel agrees to a compromise in Jerusalem, in which Israel has sovereignty over East and West Jerusalem but civil administration of the city's east is in Palestinian hands. Some groups, such as the

Catholic Church, favour giving the city a special international status independent of either Israel or a Palestinian state, as was proposed by the 1947 UN Partition Plan.

- Palestinians insist on contiguous territory which will in turn rupture the existing territorial contiguity of Israel. In the interim agreements reached as part of the Oslo Accords, the Palestinian Authority has received control over cities (Area A) while the surrounding countryside has been placed under Israeli security and Palestinian civil administration (Area B) or complete Israeli control (Area C). Israel has built additional highways to allow Israelis to traverse the area without entering Palestinian cities. The initial areas under Palestinian Authority control are diverse and non-contiguous [5] ([http://www.iris.org.il/oslo\\_2000.htm](http://www.iris.org.il/oslo_2000.htm)). The areas have changed over time because of subsequent negotiations, including Oslo II, Wye River and Sharm el-Sheik. According to Palestinians, the separated areas make it impossible to create a viable nation and fails to address Palestinian security needs; Israel has expressed its agreement to withdrawal from some Areas B, resulting in the a reduction in the division of the Palestinian areas, and the institution of a safe pass system, without Israeli checkpoints, between these parts. Because of increased Palestinian violence, this plan is in abeyance. The number of checkpoints has increased; resulting is a steep decline in suicide bombings since the early summer of 2003. Neither side has publicized a proposal for a final map. (Some maps have been leaked. These are reputed to come from the Israelis [6] (<http://www.mideastweb.org/precmap.htm>) and the Palestinians. [7] (<http://www.mideastweb.org/campdavid%20orient.htm>)).
- In the years following the Six-Day War, and especially in the 1990s during the peace process, Israel re-established communities destroyed in 1929 and 1948 as well as established numerous new settlements on the West Bank. These settlements (which Palestinians and most international observers regard as illegal) are now home to about 350,000 people. Most of the settlements are in the western parts of the West Bank (thus making their retention part of the "safe borders" issue above), while others are deep into Palestinian territory, overlooking Palestinian cities. These settlements have been the site of much intercommunal conflict.
- Israel has grave concerns regarding the welfare of Jewish holy places under possible Palestinian control. When Jerusalem was under Jordanian control, no Jews were allowed to visit the Western Wall. In 2000, Palestinian forces took over Joseph's Tomb, a shrine considered sacred by both Jews and Muslims, destroyed, looted and burned the building, and turned it into a mosque. There are unauthorized Palestinian excavations for construction on the Temple Mount in Jerusalem, which could threaten the stability of the Western Wall. Israel, on the other hand, has seldom blocked access to holy places sacred to other religions, and never permanently. Israeli security agencies routinely monitor and arrest Jewish extremists that plan attacks, resulting in almost no serious incidents for the last twenty years. Moreover, Israel has given almost complete autonomy to the Waqf, the Muslim trust over the Temple Mount, which is a sign of its respect for Muslim holy sites.
- Palestinians have grave concerns regarding the welfare of Christian and Islamic holy places under Israeli control. They point to the several attacks on the Al-Aqsa Mosque (Masjid al Aqsa) since 1967, including a serious fire in 1969, which destroyed the south wing, and the discovery, in 1981, of ancient tunnels under the structure of the mosque which some archaeologists believe have weakened the building structures on

the Temple Mount (*Haram ash-Sharif*). In the ensuing confrontations, more than 70 Palestinians died [8] (<http://www.aqsa.org.uk/flyers/attacks.html>). Some advocates believe that the tunnels were re-opened with the intent of causing the mosque's collapse. The Israeli government claims it treats the Muslim and Christian holy sites with utmost respect (see previous paragraph).

- **Right of Return:** although not directly a land-related issue, the parties have found it difficult to reach a compromise. Palestinian negotiators have so far insisted that refugees, and all their descendents, from the 1948 and 1967 wars have a right to return to the places they were lived in before 1948 and 1967, including INSIDE Israel. They cite international law demanding this, e.g. the Universal Declaration of Human Rights and UN General Assembly Resolution 194. Israel accepts the right of the Palestinian Diaspora to return into the new Palestinian state but claims that their return into Israel would be a great danger for the stability of the Jewish state. Moreover, according to Israel, Palestinian refugees returning to Israel doesn't fit the international law (as about the Benes decree in former Czechoslovakia); however the Israeli government claims that granting all Jews worldwide a "right of return" to Israel does fit international law. Most Israelis hold that the inflow of millions of poor refugees (almost none of whom were properly integrated by the surrounding Arab countries) will simply exceed the region's dwindling resources. The Arab summit of 2002 declared that it proposed the compromise of a "just resolution" of the refugee problem, to include the option of compensation in lieu of return. It is not currently understood what is meant by "just resolution"; a similar concept was offered by the Israeli government, but outright rejected by the Palestinians in the Summer 2000 Camp David negotiations.
- **Who will govern?** Israel declares that the current Palestinian Authority is corrupt to the bottom, enjoys a warm relationship with Hamas and other Islamic militant movements, and seems at times to call in Arabic for the destruction of Israel. This makes it, in Israeli perception, unfit for turning into a Palestinian state or, especially according to the right wing of Israeli politics, even negotiating about the character of such a state. Because of that, a number of organizations, including the ruling Likud party, declared they would not accept a Palestinian state based on the current PA. (Likud's leader, Prime Minister Sharon, has publicly declared that he rejects this position as too radical). A PA Cabinet minister, Saeb Arekat, declared this would mean Israel is waging a "war" against Palestinians to maintain its occupation of the West Bank and Gaza [9] (<http://www.washtimes.com/world/20020513-80315970.htm>). Some international observers argue that negotiations and internal Palestinian reform can be undertaken simultaneously.
- **The question of water.** Israel obtains water from four sources: rainwater collected naturally into the Sea of Galilee and the Jordan River (~36%), the mountain aquifers (~28%), the coastal aquifer (~14%), and water recycling (~23%). A saltwater desalinization plant is under construction in Israel to provide a source of additional water. Almost all the water used in the Palestinian areas other than rainwater is drawn from the underground aquifers (mountain aquifer ~52%, coastal aquifer ~48%). The Palestinian Authority has not developed any significant wastewater treatment facilities. The mountain aquifers lie mostly under the West Bank and the coastal aquifer mostly under the Israeli coastal plain. In recent years, the rate of usage has exceeded the rate of replenishment, leading to depletion of the aquifers and pollution of them by seepage from underlying saline aquifers. Almost 80% of aquifer usage is

by Israel and its settlements. Water usage issues have been part of a number of agreements reached between Israel and the Palestinian Authority. For these reasons, the question of water supply for both Israel and Palestine is a very serious obstacle to a comprehensive agreement.

- The question of airspace - the West Bank and Israel form a strip only up to 80 kilometers wide. Israel has insisted on complete Israeli control of the airspace above the West Bank and Gaza as well as that above Israel itself. A Palestinian compromise of joint control over the combined airspace has been rejected by Israel.
- The question of borders and international status - Israel has demanded control over border crossings between the Palestinian territories and Jordan and Egypt, and the right to set the import and export controls, asserting that Israel and the Palestinian territories are a single economic space.
- The question of an army: Israel does not wish Palestine to build up an army capable of offensive operations, considering that the only party against which such an army could be turned in the near future is Israel itself. Israel, however, has already allowed for the creation of a Palestinian police that can not only conduct police operations, but also carry out limited-scale warfare. Palestinians have argued that the IDF, a large and modern armed force, poses a direct and pressing threat to the sovereignty of any future Palestinian state, making a defensive force for a Palestinian state a matter of necessity. To this, Israelis claim that signing a treaty while building an army is a show of bad intentions.
- Insistence by the Palestinians that all Jewish communities within the territories to be part of a Palestinian state be removed. This includes ancient communities (Hebron), communities destroyed in 1948 and since re-established (Gush Etzion), and settlements established since 1967. The Palestinian position on the Jews of the Old City of Jerusalem is unclear.

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## Plans for a solution



### The West Bank



### The Gaza Strip

There are several plans for a possible Palestinian state. Each one has many variations. Some of the more prominent plans include:

- Create a Palestinian state out of the Gaza Strip and the West Bank, with its capital in East Jerusalem. This would require Israel to return its borders to the Green Line, the borders before the 1967 Six-Day War. The Saudi proposal of 2002 promised in exchange for a retreat a complete recognition of Israel by the Arab world. This long-extant idea forms the basis of a peace plan put forward by Saudi Arabia in March 2002, which was accepted in principle by the Palestinian Authority. However, Israel claims that the plan does not guarantee Israel's security as it returns Israel to its 10-mile strategic depth, not mentioning the issue of refugees or Jerusalem; moreover Israel claims that when it came to negotiations, the Palestinian Authority has rejected

very similar offers made during the Camp David talks. The insistence on a Palestinian "Right of return" to the pre-1967 territory of Israel would effectively result in two Arab states, one of them (pre-1967 Israel) with a significant Jewish minority, and another (the West Bank and Gaza) without Jews.

- Other, more limited, plans for a Palestinian state have also been put forward, which would see parts of Gaza and the West Bank which have been settled by Israelis or are of particular strategic importance remaining in Israeli hands. Areas that are currently part of Israel would be allocated to the Palestinian state in compensation. The status of Jerusalem is particularly contentious.
- A plan proposed by the Israeli tourism minister Binyamin Elon and popular with the Israeli right wing advocates the expansion of Israel up to the Jordan River and the "recognition and development of Jordan as the Palestinian State". Palestinian residents of Gaza and the West Bank would become citizens of Jordan and many would be settled in other countries. Elon claims this would be part of the population exchange initiated by the mass expulsion 1 (<http://www.meforum.org/article/263>) of Jews from Arab states to Israel in the 1950s. See Elon Peace Plan. A September 2004 poll conducted by the Jaffee Center for Strategic Studies reported that 46% of Israelis support transferring the Arab population out of the territories and that 60% of respondents said that they were in favor of encouraging Israeli Arabs to leave the country. [10] (<http://www.haaretz.co.il/hasen/pages/ShArt.jhtml?itemNo=140196&contrassID=2&subContrassID=1&sbSubContrassID=0>).

Several plans have been proposed for a Palestinian state to incorporate all of the pre-1967 territory of Israel, as well as the Gaza Strip and the West Bank. Some possible configurations include:

- A secular Arab state (the PLO National Covenant before the cancellation of the relevant clauses in 1998). According to the PLO Covenant, only those Jews that arrived in the country after 1918 would be forced to emigrate, which ranges at from around 99% (including all people born after that period) to about 50% (including only immigrants themselves) of the Jewish population. This would in effect lead to Israel's destruction.
- A strictly Islamic state (Hamas and the Islamic Movement). Even if Jews would not be removed in the initial shockwave, it would contradict Israel's existence as an independent Jewish state. It would also cause problems for the Palestinian Christians and other minorities.
- A federation of separate Jewish and Arab areas (some Israelis and Palestinians). This arrangement is not adequate from the points of view of natural resources and security.
- A single, bi-national state (advocated by various Israeli and Palestinian groups). Most Palestinians and Israelis are likely to reject this option, out of fear that the new state is likely to give the two sides an asymmetric status (though not necessarily an unequal one). Most Israelis and Palestinians would reject it as both peoples opt for independent nation-states.



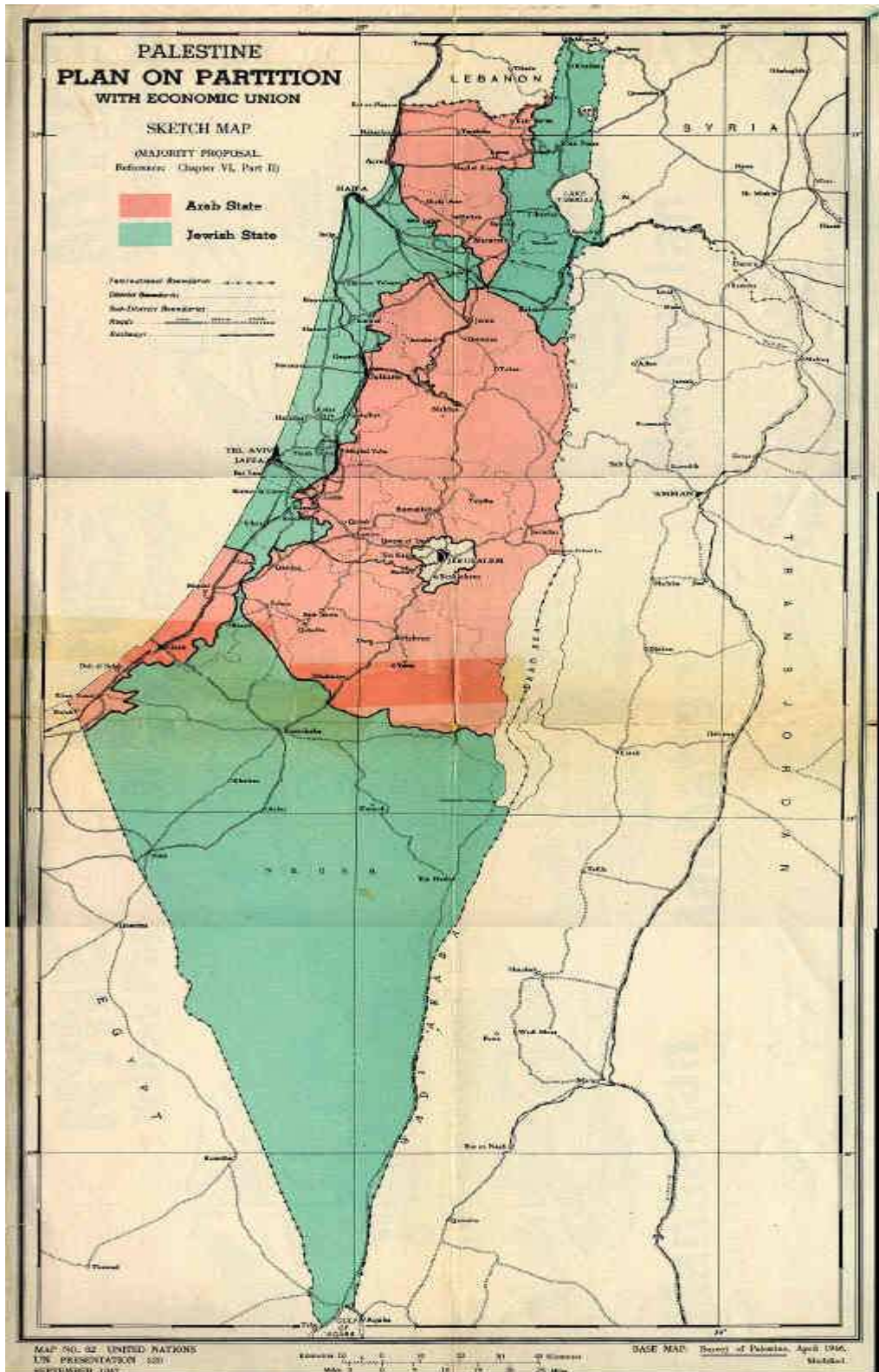
## **United Nations Partition Plan**

**September 1947**

The Jewish state is demarcated by the green shading. The pink indicates the area allotted to the planned Arab state. Jerusalem was to be internationalized and separated from both states.

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## Legal Status of West Bank, Gaza and East Jerusalem

By David Storobin, Esq.

### THE LEAGUE OF NATIONS MANDATE

The League of Nations was entrusted to deal with the future of colonies. The League then

issued Mandates to established countries mandating to them how they should help colonies become independent. In 1922, the League issued a Mandate for Palestine.

According to the United Nations web site, "the Mandate [for Palestine] had as a primary objective the implementation of the 'Balfour Declaration' issued by the British Government in 1917, expressing support for 'the establishment in Palestine of a national home for the Jewish people'." [3]

Article 4 of the Mandate supported the "establishment in Palestine of a national home for the Jewish people," recognized the "historical connection of the Jewish people with Palestine" and entrusted Great Britain with establishing a "Zionist organization" that shall be recognized as a "public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home . . . ."

Article 6 mandated that Britain "facilitate Jewish immigration" and "close settlement by Jews, on the land, including State lands and waste lands not required for public purposes."

Article 5 mandated that no "Palestine territory shall be ceded or leased to, or in any way placed under the control of, the Government of any foreign Power." This means that Britain and others had no right to divide the territory west of the Jordan River and all must be part of the Jewish National Home, including the West Bank and Gaza.

The Arab people are never mentioned in the Mandate. The Mandate does mention that "civil and religious" of "non-Jewish communities" in Palestine shall be protected. However, no mention of political rights is mentioned.

### **BRITISH MANDATE PERIOD**

The British went from mostly supportive of Zionist leadership during WWI to being extraordinarily supportive of Arabs by the end of 1930's. In 1938, the Peel Commission offered a plan that gave Jews only a tiny, 1-3 mile strip of land that could not possibly become the Jewish National Home because it was far too small and included only one major city - Haifa, but not Tel Aviv, Jerusalem, etc. Such actions went totally against Article 5 of the Mandate which explicitly state that the British shall not divide the land.

In 1939, it issued the White Paper of 1939 almost shutting down Jewish immigration, thus violating the League of Nations Mandate which calls on the Brits to promote Jewish immigration. The White Paper also stated that Palestine shall not become a Jewish National Home and instead should be converted into an Arab state.

### **UNITED NATIONS PARTITION PLAN (G.A. RESOLUTION 181)**

With the United Kingdom breaking international legal norms by violating the League of Nations Mandate for Palestine, Zionist leadership decided to put political pressure on Great Britain by getting support for a Jewish state in Palestine. From a legal point of view, UN resolutions were not needed to establish a Jewish state in Palestine because such state could be legally based on the League's Mandate. However, given UK's open disregard for the resolution, politically and practically, Zionists needed international support.

On November 29, 1947, the UN General Assembly passed resolution 181 recommending division of the land given to Jews under the Mandate. Great Britain did not support the resolution. From the legal point of view, the resolution was nothing more than a non-binding recommendation. From a political and practical point of view, the 1947 U.N. partition plan served as reason for Zionists to declare a Jewish State.

## **1. The Question of Jerusalem**

The partition plan calls for temporary internationalization of Jerusalem from 1948 to 1958, whereupon a referendum was to be held. However, future hostilities precluded cooperation between states that was necessary to hold a referendum. No other action acceptable under the partition plan was undertaken during, before or after 1958. Therefore, some argue that in the absence of the referendum, we must look at intent of the partition plan.

Because the resolution calls for a referendum, it is not hard to understand that the intent partition plan was to put Jerusalem under the sovereignty of whatever jurisdiction most Jerusalemites preferred. Indeed, there is no other reasonable explanation of the resolution's intent to hold a referendum. Jerusalem had a Jewish majority in 1948, 1958 and has a Jewish majority today.

Furthermore, in providing for a referendum, resolution 181 followed the same reasoning as UN GA resolution 1514(XV), which stated that "all people have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development." The resolution allows the following method, among others, of self-determination: "A non-self-governing territory can be said to have reached a full measure of self-government by ... integration with an independent State."

Palestine was not a self-governing territory, as it was either under Ottoman colonization, temporary British rule, temporary international jurisdiction or belligerent occupation. Therefore, Jerusalemites had the right to express their right to self-determination.

Few people, including Arabs, would argue that there is a significant number of Jewish Jerusalemites who would vote to place the whole city under Arab sovereignty. This alone would give Israel the required majority in a referendum. Additionally, because Israel has a better track record in human rights and social services than the Palestinian Authority (or any other Arab state), even many Arabs in the holy city prefer that it stay in Israeli hands. Therefore, it is reasonable to assume that the intent of most Jerusalemites is to live under Israeli sovereignty.

However, many oppose looking at the intent of the resolution and instead prefer to look at plain meaning of it. They do not believe that we should make assumptions based on anecdotal evidence, regardless how likely it is to be the truth. Certainly the Palestinian Authority would not foreswear its ambitions on Jerusalem just because in a potential referendum the city would probably remain in Israel's hands.

Furthermore, the above reasoning only applies to the period after 1958. Under the partition plan, until 1958 the legal sovereignty of Jerusalem vested in the international community and no vacuum existed. Because Israel had no right to Jerusalem in 1948, its occupation of west

Jerusalem was at least initially illegal. When in 1958 a referendum was not held, either a vacuum or Israeli sovereignty resulted. If we assume that the majority preferred Israel and the intent of the United Nations was to follow the will of the majority, then the occupation of west Jerusalem and then east Jerusalem becomes legal under 181. However, if we assume that a vacuum resulted because a referendum was never held, then the status of Jerusalem is undecided and should be resolved through negotiations or in a legitimate international body. This would make Israel's current occupation of the holy city illegal.

On the other hand, using resolution 181, Palestinians have a hard time arguing that Jerusalem, east or west, is "occupied Palestinian land." Instead, it is at best disputed. If we look to the intent of 181, the holy city is Israeli. If we look at the plain meaning, the city's status is disputed.

## **2. Legitimacy of Resolution 181/Partition Plan**

Yet even the legitimacy of resolution 181 is disputed. Indeed, from a legal point of view, it has no effect. For one, the United Nations may not have inherited the jurisdiction and powers of the League of Nations vis-à-vis the mandated territories. Attorney Omar al-Taher discussed the issue: "The clear-cut answer came from the League of Nations itself which declared at the end of its last session held on April 18, 1946, that 'on the termination of the League's existence, its functions with respect to the mandated territories will come to an end.' Duncan Hall, in his book published less than a year after the passage of the partition resolution stated: "In the case of mandates, the League died without a testament . . . . There was no transfer of sovereignty to the United Nations.... Sovereignty, wherever it might lie, certainly did not lie in the United Nations." (4)

Ian Brownlie, a legal expert, argues: "It is doubtful if the UN has a capacity to convey title because it cannot assume the role of a territorial sovereign . . . . Thus the resolution of 1947 containing a Partition plan for Palestine was ultra vires, and, if it was not, was not binding on member states in any case." (5)

Since the partition plan is disputed, certainly any land discussed in it is disputed in the absence of other international law. At this point, the only binding law available is still the League's Mandate, giving all of Jerusalem and other lands west of Jordan to Israel.

## **LAW ON ISRAEL'S TAKE-OVER OF 1967 LANDS**

### **1. UNITED NATIONS SECURITY COUNCIL RESOLUTION 242**

On November 22, 1967, the UN Security Council unanimously adopted Resolution 242, establishing the principles that have internationally been accepted as the guide the negotiations for an Arab-Israeli peace settlement. While the UN Security Council can make law (whereas the General Assembly can only make recommendations), this particular resolution (and all other United Nations resolutions dealing with land-division in the holy land) was article 6 recommendation. Article 6 resolutions are non-binding recommendations, and only article 7 resolutions of the UN Security Council count as law. Despite being only a recommendation, it is considered the most authoritative UN resolution on the land dispute, and was later confirmed by resolution 338 of the Security Council.

This resolution was the product of long negotiations and competing proposals. To understand the intent of the resolution, we must look at the language that appears in the resolution and the language that was discarded.

Among the issues addressed by the Security Council is the "inadmissibility of the acquisition of territory by war." Some contend that the case for requiring a total Israeli withdrawal from the territories is, therefore, proven.

Such reasoning is false. The goal of resolution 242, as expressed in paragraph 3, is the achievement of a "peaceful and accepted settlement." This, according to Arthur Goldberg - the American ambassador who led the delegation to the UN in 1967 and a former U.S. Supreme Court Justice - means a negotiated agreement based on the resolution's principles rather than one imposed upon the parties. (6)

Additionally, the clause applies to Arabs just as much as it applies to Israel, meaning that their illegal occupation of 1948 cannot be ratified. Furthermore, Israel did not acquire the territory by war, but merely got possession of it, since it the legal right of the Jewish People to the land was inherent in the League of Nations Mandate for Palestine.

Withdrawal from the occupied territories, the most debated part of the resolution, was stated in the following fashion: "Withdrawal of Israeli armed forces from territories occupied in the recent conflict." This is linked to "termination of all claims or states of belligerency" and the recognition that "every State in the area" has the "right to live in peace within secure and recognized boundaries free from threats or acts of force." The resolution does not make Israeli withdrawal a prerequisite for Arab action, nor does it specify how much territory Israel is required to give up. (7)

It is important to understand that the Security Council did not call on Israel to withdraw from "all the" territories occupied during the 1967 war. This was deliberate. The Soviet representative wanted the inclusion of those words and said that their exclusion meant "that part of these territories can remain in Israeli hands." The Arab states pushed for the word "all" to be included, but this too was rejected. On October 29, 1969, two years after the passage of the resolution, the British Foreign Secretary told the House of Commons the withdrawal envisaged by the resolution would not be from "all the territories." When asked to explain the British position later, Lord Caradon, the British U.N. ambassador in 1967 who drafted resolution 242, said: "It would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial." (8)

Similarly, Amb. Goldberg explained: "The notable omissions - which were not accidental - in regard to withdrawal are the words 'the' or 'all' and 'the June 5, 1967 lines' . . . the resolution speaks of withdrawal from occupied territories without defining the extent of withdrawal." Indeed, Amb. Goldberg said that Israel's return of all territories is "incompatible" with 242. (9)

Resolution 242 clearly calls on the Arab states to make peace with Israel. Since return of land is linked to peace, in the absence of a reasonable effort to make peace with the Jewish state by its Arab neighbors, Israel may (at least temporarily) hold on to the territories for the same reason it was legal for the Allies to occupy Germany during World War II - a nation has the right to defend itself, including by means of occupation.

It is important to understand that not only does 242 make the territories disputed, but it also gives Israel the right to part of them. A clause calling for "secure and recognized boundaries" means "territorial adjustments in their peace settlement encompassing less than a complete withdrawal of Israeli forces from occupied territories, inasmuch as Israel's prior frontiers had proved to be notably insecure," according to Amb. Goldberg. (10)

Similarly, Soviet representative Mr. Vasily Kuznetsov said in discussions that preceded the adoption of Resolution 242 that the current draft of the resolution: "retain for Israel the right to establish new boundaries and to withdraw its troops only as far as the lines which it judges convenient." [11]

Likewise, Jerusalem Center for Public Affairs wrote, "the UN Security Council recognized that Israel was entitled to part of these territories for new defensible borders. Taken together with UN Security Council Resolution 338, it became clear that only negotiations would determine which portion of these territories would eventually become "Israeli territories" or territories to be retained by Israel's Arab counterpart." (12)

Since the resolution calls for the return of only some of the occupied land, it is possible that Israel has already fulfilled its part by withdrawing from 91% of the territories by surrendering Sinai as part of the Camp David Peace Agreement with Egypt. That is not necessarily the case, but since 242 does not define how much land Israel should withdraw from, it may be as little as 0.01% or 99.99% or anything in between. This too makes the territories disputed, rather than occupied.

Judging from the statements made by Soviet, American and British delegates, as well as from the fact that the resolution calling for a withdrawal from "all the territories" was rejected, we can state with confidence that Israel is not necessarily required to withdraw from east Jerusalem or any other specific piece of land. The resolution's intent is for east Jerusalem's fate to be negotiated (and the same is true for all the other territory occupied in 1967).

We must also pay attention to the clause of 242 calling for Israeli withdrawal from territories occupied in the recent conflict." We can see that the resolution does not seek for Israel to return the territories it occupied in 1948, which includes west Jerusalem. Neither the General Assembly nor the Security Council protested Israel's 1950 declaration of western Jerusalem as its capital. The silence on the issue of west Jerusalem in 242 and in during the 1950 declaration shows international acquiescence to give to Israel's actions some implied measure of legal authority. Indeed, that 242 explicitly calls only for the return of some of the territories occupied in 1967, but not 1948 lands provides legal justification for Israel's sovereignty over west Jerusalem and other 1948 lands, especially considering that there are no U.N. Security Council resolutions calling on Israel to withdraw from 1948 lands.

Furthermore, if Resolution 242 called on Israel to withdraw from all the lands, it would've been null and void in the wake of the League's Mandate. Since Israel already got the right to establish a state on the land, the U.N. cannot take Israel's land away anymore than it can take Florida away from the United States by passing a resolution.

## **2. ACQUISITION OF NON-SOVEREIGN LAND IN A DEFENSIVE WAR**

There is a dispute as to whether land that was not legally occupied by a nation may be acquired by another state in a defensive war.

The Government of Israel and its supporters rejected defining 1967 lands as occupied territories on basis of legal admissibility of acquisition of territory in a defensive war where there is no legal sovereign, thus rejecting any effort to bring Israel control of the territories under the Fourth Geneva Convention and other international treaties dealing with military occupation. Former Chief Justice of the Israeli Supreme Court Meir Shamgar wrote that the 1949 Fourth Geneva Convention does not apply to the West Bank and Gaza because it "is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign." (13) Arab occupation of the West Bank, including east Jerusalem, was unlawful. Jordan's 1950 annexation was recognized only by Great Britain and Pakistan, and even the British did not recognize annexation of east Jerusalem.

Some world-renowned jurists also see a distinction between aggressive conquest and acquisition of territories as an act of self-defense. Former head of the International Court of Justice in Hague, who was also U.S. State Department Legal Advisor, Stephen Schwebel wrote regarding Israel's acquisition of land: "Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title." (14)

Israel invaded east Jerusalem after it repealed Jordanian artillery fire and ground movements across the previous armistice lines; additionally, Iraqi forces joined the Jordanian army on the soil of the Hashemite Kingdom and was set to invade Israel. As a result, even the United Nation refused to brand Israel as the aggressor in the Six-Day War. Even if Israel was the aggressor against Egypt - it wasn't because it had the right to defend itself after being surrounded on all sides and told openly that an attack is coming - Jordan still had no right to attack to support Egypt.

Israel won the land legally, coming into possession of land that was owned by nobody as an act of lawful self-defense.

However, there is a conflicting theory that disputes admissibility of acquisition of land under such circumstances. Judge Antonio Cassese listed requirements that he believes need to be fulfilled for a state to acquire territory by force.

First, prior to the use of force, sovereignty over the territory must have belonged to the same state, which used force to expel the unlawful occupant. Second, all peaceful remedies, including recourse to the appropriate United Nations bodies, must have been exhausted and must have failed to expel the unlawful occupant. Third, the use of force must not have exceeded the limited goal of reacquiring the territory.

The first requirement was fulfilled when it comes to the West Bank and Gaza (but not Sinai) because Israel got these lands under the League's Mandate, and Arab occupation of 1948 was not based in law.

As for the second requirement, in the wake of Arab unwillingness to negotiate with Israel, what could and should the Jewish state have done that may have been effective? Should it have gone through the motions of trying to act through the United Nations, knowing that no Arab regime would withdraw from the land?

The third requirement is the most difficult to fulfill. Exactly what is the proper force needed to

re-acquire force, especially in a defensive war, against multiple enemies with far greater military forces, is subject to much debate. There is no international law or UN resolution that deals with the issue, thus leaving it open. This again makes the status of the territories disputed.

### **3. PALESTINIAN SELF-DETERMINATION: SHOULD ISRAEL WITHDRAW?**

The right to self-determination does not mean that a group automatically has the right to independence in the land where they are a majority. Do Chechens have the right to self-determination? Yes. Do they have the right to independence? No. What about Kurds in Kurdistan? South Africa's white Afrikaners in Orania? Indeed, while the right to self-determination is universal, the vast majority of ethnicities in the world cannot get independence. There are various types of self-determination, which may be a mere right to vote or a right to an autonomy. The nations that got independence were nations that already had sovereignty on the land, and in most cases were independent prior to colonization. Palestinians never had legal sovereignty or independence in West Bank and Gaza. As such, they have no right to independence.

### **4. Is the law biased against Palestinians and in favor of Westerners?**

The law is the same for Palestinians as for all others. Basques, who never had sovereignty, also cannot get independence in part of Spain despite being a Western people. Same for the Flemish, who are the majority in northern Belgium.

But let's say the law is biased. Let's say that it's all ineffective. Let's say there is no law. Then what? That just means there are two good-faith claims to the land - one based on history and another on demographics - and there is no law to resolve the dispute. That makes the territories disputed and not occupied.

## **CONCLUSION**

Thus, under no circumstances can one legally argue that the land is occupied. West Bank and Gaza either belong to Israel based on the League's Mandate or past sovereignty of Jews over the land. Or in the alternative, there are two conflicting claims and the status of land is disputed. For this reason, in March 1994, U.S. Ambassador to the UN Madeleine Albright stated: "We simply do not support the description of the territories occupied by Israel in the 1967 War as occupied Palestinian territory." (15)